United States Fair Employment Law in the Transnational Employment Arena: The Case for the Extraterritorial Application of Title VII of the Civil Rights Act of 1964

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With the steady expansion of United States corporate operations abroad in recent years has come a concomitant export of one of America's primary resources, its labor force. The increasing presence of United States employers on foreign soil raises questions regarding such employers' amenability to United States labor laws. In particular, the overseas employment relationship between United States corporations and citizens implicates fair employment laws. Of primary concern is whether Title VII of the Civil Rights Act

1. A 1984 estimate indicated that approximately 21,000 foreign subsidiaries of over 2000 American corporations operate in more than 100 foreign countries. Street, Application of U.S. Fair Employment Laws to Transnational Employers in the United States and Abroad, 19 N.Y.U. INT'L L. & POL. 357, 358 (1987) (citing 1 WORLD TRADE ACADEMY PRESS, DIRECTORY OF AMERICAN FIRMS OPERATING IN FOREIGN COUNTRIES (10th ed. 1984)).


3. The term "fair employment laws" encompasses the following: Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e to e-17 (1988), which prohibits discrimination in employment on the basis of race, color, religion, sex or national origin; the Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. §§ 621-634 (1988), which prohibits discriminatory employment practices undertaken because of an employee's age (over 40); and the Equal Pay Act of 1963, 29 U.S.C. § 206(d) (1988), which guarantees men and women equality in compensation and wages for performing identical or substantially similar duties. This Comment is limited to a discussion of the extraterritorial application of Title VII.

Congress amended the ADEA in 1984 to provide for extraterritorial application to U.S. citizens employed abroad by U.S. employers. Older Americans Act Amendments of 1984, Pub. L. No. 98-459, 98 Stat. 1767, 1792 (current version at 29 U.S.C. §§ 623(h), 630(f) (1988)). As noted by a House Conference report, the amendment broadens the definition of the term "employee" by including any United States citizens "employed by a United States
of 1964 (Title VII) applies to extraterritorial acts of discrimination against United States citizens by their United States employers.

Congress enacted Title VII as part of a comprehensive program to enforce equal protection of the laws guaranteed by the fourteenth amendment to all persons within the jurisdiction of the United States. Most domestic employers with fifteen employees or more are subject to the prohibitions of the Civil Rights Act (the Act). The issue of whether United States corporations may evade the broad guarantees of equal employment opportunity by locating abroad, however, is unclear. Arguably, extraterritorial application of Title VII may frustrate the perceived benefits of overseas operations. Managerial evaluations of the advantages in locating a subsidiary or other operation within a foreign country often center on the benefits derived from the lack of mandatory compliance with United States labor laws. Once a corporation incorporates within this country, however, it should expect to be amenable to the jurisdiction of our courts for violations of the civil rights of our citizens regardless of where the violation occurs.

This Comment examines whether United States corporations may evade the broad proscriptions of Title VII of the Civil Rights Act of 1964 by establishing operations within a foreign country. First, this Comment examines the broad language and the legislative history of Title VII, as well as


Application of the Equal Pay Act is expressly limited to the territorial United States. The Equal Pay Act is an addition to the minimum wage provisions of the Fair Labor Standards Act of 1938, 29 U.S.C. §§ 201-219 (1988), and incorporates section 213(f), which statutorily confines its application to the United States.

5. Id.
7. The preamble to the Civil Rights Act of 1964 illustrates the congressional desire to ensure equal protection of the laws by eliminating all forms of discrimination. The articulated purposes of the act were:

To enforce the constitutional right to vote, to confer jurisdiction upon the district courts of the United States to provide injunctive relief against discrimination in public accommodations, to authorize the Attorney General to institute suits to protect constitutional rights in public facilities and public education, to extend the Commission on Civil Rights, to prevent discrimination in federally assisted programs, to establish a commission on Equal Employment Opportunity, and for other purposes.

11. Specifically, this Comment explores whether United States citizens employed abroad by United States corporations retain both the right to equality in employment opportunities and the protection from discriminatory employment practices.
judicial interpretations of the Act, to discern a congressional intent to apply Title VII extraterritorially. Next, the Comment explores the Equal Employment Opportunity Commission’s administrative interpretations of the extraterritorial application of Title VII. This Comment then analyzes the most recent judicial decision to examine the jurisdictional reach of Title VII, paying particular attention to the dissenting opinion and its alternative framework for evaluating the extraterritorial application of Title VII. Finally, this Comment concludes that an emphasis on judicial deference to administrative interpretations of ambiguous statutory provisions will yield a result consistent with the explicit language and the broad remedial purposes of the statute.

I. TITLE VII OF THE CIVIL RIGHTS ACT OF 1964: THE FEDERAL CODIFICATION OF EQUAL OPPORTUNITIES FOR EMPLOYMENT

A. The Broad Language of The Remedial Legislation

The extensive coverage provided in Title VII is a function of its remedial purposes. Specifically, Congress sought to achieve equal employment opportunities for all persons, regardless of their national origin, sex, religion, race or color, through the elimination of past discriminatory employment practices based on those characteristics. Section 701, the definitional section of Title VII, delineates the pervasive coverage of the Act. The term “person,” as used throughout the Act, pertains to “individuals,” as well as to various governmental entities, both state and local, and their respective agencies, labor organizations, and various business associations. Title VII proscribes unfair employment practices undertaken by “employers,”

12. This section focuses primarily on a policy statement issued by the Equal Employment Opportunity Commission (EEOC) regarding the investigation of charges of overseas discrimination.


16. Id. § 2000e(a).

17. See id. § 2000e(b), which provides in pertinent part:

The term “employer” means a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such a person, but such term does not include (1) the United States, a corporation wholly
ployment agencies,"18 and "labor organizations."19 The Act guarantees protection to "employees," defined as "individual[s] employed by an employer."20

The proscriptions of Title VII apply only to employers "engaged in an industry affecting commerce."21 As evidenced by the language "trade, traffic, commerce, transportation, transmission, or communication . . . between a State and any place outside thereof,"22 the definition of "commerce" includes both interstate and foreign commerce. The definition of an "industry affecting commerce" includes "any activity, business, or industry in commerce or in which a labor dispute would hinder or obstruct commerce or the free flow of commerce."23

The express language of the statute does not evince any attempt by Congress to limit the coverage of the Act to entities within the territorial United States.24 Although Congress expressly exempted certain entities from coverage,25 nowhere in the Act did Congress provide a corresponding exclusion to

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18. See id. § 2000e(c), which provides that "[t]he term 'employment agency' means any person regularly undertaking . . . to procure employees for an employer or to procure for employees opportunities to work for an employer." Id.

19. See id. § 2000e(d), which provides in pertinent part that "[t]he term 'labor organization' means a labor organization engaged in an industry affecting commerce . . . in which employees participate and which exists for the purpose . . . of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours, or other terms or conditions of employment." Id.

20. Id. § 2000e(f).

21. Id. § 2000e(b).

22. Id. § 2000e(g) (emphasis added). The term "State" as used within § 2000e, includes "a State of the United States, the District of Columbia, Puerto Rico, the Virgin Islands, American Samoa, Guam, Wake Island, the Canal Zone, and Outer Continental Shelf lands defined in the Outer Continental Shelf Lands Act." Id. § 2000e(i).

The use of the language "between a State and any place outside thereof" in this definition of commerce leads to a logical inference that Congress anticipated some industries engaged in foreign commerce would be covered by the Civil Rights Act. This language, however, does not reveal whether Congress meant to include those industries located abroad whose business dealings with the United States qualify as foreign commerce. This reference might be interpreted to include only United States corporations which ship interstate or abroad.

23. Id. § 2000e(h).

24. See id. § 2000e.

25. See id. § 2000e-1, which provides in pertinent part:

This subchapter shall not apply to an employer with respect to the employment of aliens outside any State, or to a religious corporation, association, educational institution, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities.
companies incorporated within the United States which operate abroad and which fall within the statutory definition of employer.26

Although Congress' intent to remove racial barriers to employment prompted the enactment of Title VII, the language of the statute indicates that Congress also sought to protect other classes of minorities historically subject to discriminatory employment practices. As a result, Congress provided that certain adverse employment actions, undertaken by a covered employer, would be unlawful if the employer acted because of an individual's "race, color, religion, sex, or national origin."27 Title VII specifies that an employer violates the Act if the employer discharges, refuses to hire, or in some way "discriminate[s] against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of [the individual's protected status]."28

In enacting Title VII, Congress recognized that, in certain limited situations, an employer might be justified in its decision to hire or employ an individual solely on the basis of that person's religion, sex, or national origin.29 In these limited situations, Title VII provides the employer with an affirmative defense to an otherwise unlawful employment practice.30 The "bona fide occupational qualification" (BFOQ) defense allows an employer to base an employment decision on the religion, sex or national origin of an individual when absolutely required by the nature of the employer's busi-

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26. Nor did Congress expressly indicate that Title VII shall apply to such entities.
27. 42 U.S.C. § 2000e-2(a) to (d).
28. Id. § 2000e-2(a) (1).
29. Id. § 2000e-3(a).
30. Id.
ness.\textsuperscript{31} As evidenced by the language of this provision, race or color can never qualify as a BFOQ.\textsuperscript{32}

Congress entrusted the responsibility of ensuring compliance with the mandates of Title VII to the Equal Employment Opportunity Commission (EEOC or Commission).\textsuperscript{33} With respect to charges of employment discrimination in the private sector, the EEOC acts in a prosecutorial capacity.\textsuperscript{34} The enforcement process begins when an individual files a charge with the Commission.\textsuperscript{35} The Commission investigates the charge to determine whether there is reasonable cause to believe that the employer engaged in an unlawful employment practice.\textsuperscript{36} If the Commission finds reasonable cause to believe that a violation of Title VII occurred, it then attempts to reconcile the individual's grievance with the employer.\textsuperscript{37} If conciliation fails, the Commission may decide to litigate the case on behalf of the aggrieved party.\textsuperscript{38} If the Commission decides not to litigate, the aggrieved party may file a civil action in federal court.\textsuperscript{39}

\textbf{B. References in the Legislative History of the Act Supporting Extraterritorial Application of Title VII}

The congressional power to regulate both interstate and foreign commerce supported the enactment of such a sweeping legislative measure as the Civil Rights Act of 1964.\textsuperscript{40} Although Congress did not specifically define commerce in Title VII to include "foreign commerce,"\textsuperscript{41} statements by the sponsors of the bill, made prior to the enactment of the Act, indicate a

\begin{itemize}
\item \textsuperscript{31}42 U.S.C. § 2000e-2(e) provides:
[It shall not be an unlawful employment practice for an employer to hire and employ employees ... on the basis of his religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise ... .]
\item \textsuperscript{32}Id.
\item \textsuperscript{33}Id. § 2000e-4.
\item \textsuperscript{34}Id. § 2000e-5. In this section of the Act, Congress authorized the EEOC to bring lawsuits against violators of the Act on behalf of aggrieved individuals.
\item \textsuperscript{35}Id. § 2000e-5(b).
\item \textsuperscript{36}Id.
\item \textsuperscript{37}Id.
\item \textsuperscript{38}Id. § 2000e-5(f).
\item \textsuperscript{39}Id.
\item \textsuperscript{40}STATUTORY HISTORY OF THE UNITED STATES CIVIL RIGHTS, Part II, 1226 (B. Schwartz ed. 1970) (statement of Senator Humphrey that "[t]he constitutional basis for Title VII is ... the commerce clause"); see also Heart of Atlanta Motel v. United States, 379 U.S. 241 (1964); Katzenbach v. McClung, 379 U.S. 294 (1964).
\item \textsuperscript{41}42 U.S.C. § 2000e(g) (1988).
\end{itemize}
congressional intent to extend coverage of the Act to entities engaged in foreign commerce. A sponsor of the Civil Rights Act of 1964 stated that the Act covers any employer whose business involves interstate or foreign commerce. Similarly, during the House debates on the bill, one congressman indicated that Congress intended Title VII to cover employers in industries engaged in foreign commerce.

Other pronouncements by members of Congress support the application of Title VII to claims of discrimination made by United States citizens against United States corporations operating abroad. The House Report on the bill evinces a primary concern to "protect and provide more effective means to enforce the civil rights of persons within the jurisdiction of the United States.

In this regard, one congressman stated that the provisions of Title VII were necessary to enforce the constitutional guarantees of equality. Similarly, the ranking minority member of the House Judiciary Com-

43. That sponsor was Congressman Emmanuel Celler of New York, the Chairman of the House Judiciary Committee.
44. EEOC, LEGISLATIVE HISTORY OF TITLES VII AND XI OF THE CIVIL RIGHTS ACT OF 1964, at 3091.
45. Congressman Libonati, of Illinois, stated:
[T]he provisions [of Title VII] are necessary "to remove obstructions to the free flow of commerce among the States and with foreign nations" ... Title VII is simply supported by Congress [sic] power to regulate commerce among the States and with foreign nations — Article I, section 8, clause 3.
Title VII covers employers engaged in industries affecting commerce — interstate, and foreign commerce . . . .

Similarly, Senator Humphrey stated that the commerce clause, which supports Title VII, "authorizes Congress to enact legislation to regulate employment relations which affect interstate and foreign commerce." STATUTORY HISTORY OF THE UNITED STATES CIVIL RIGHTS, Part II, 1226 (B. Schwartz ed. 1970).
48. 110 CONG. REC. 2737 (1964) (statement of Rep. Libonati). Congressman Libonati stated that the Act will "insure the complete and free enjoyment by all persons of the rights, privileges, and immunities secured and protected by the Constitution of the United States." Id.
mittee illustrated the broad scope of the legislation by arguing that Congress desired to “secure to all Americans the equal protection of the laws of the United States.” These general pronouncements regarding the applicability of Title VII to industries engaged in foreign commerce, as well as the expressed intent to ensure that all Americans enjoy the protections of the Act, provide a strong indication that Congress did not envision the Act to have any territorial limitations.

C. The Alien Exemption Provision

Congress explicitly exempted certain organizations from the broad coverage of Title VII. One of these exemptions, the alien exemption provision of section 702, which exempts overseas employers from coverage in their employment relationship with aliens abroad, lends support to the proposition that Title VII applies extraterritorially. In section 702, the only provision that specifically concerns employment abroad, Congress chose not to exempt corporations incorporated within the United States and operating abroad, or United States citizens employed by such corporations. Arguably, the statutory definitions of “employer” and “employee” are broad enough to encompass United States corporations and United States citizens abroad within the coverage of the Act.

The legislative history of Title VII indicates that Congress inserted the alien exemption provision within the Act as a self-executing measure to avert conflicts between United States and foreign law that would otherwise arise if the Act applied to aliens employed abroad by United States corporations. Careful consideration of this legislative purpose leads to the logical inference

49. House Report on Civil Rights Act of 1964, H.R. Rep. No. 914, 88th Cong., 1st Sess. (1964), reprinted in 1964 U.S. Code Cong. & Admin. News 2391, 2488 (statement of Rep. McCulloch). The minority report also states that “[t]he rights of citizenship mean little if an individual is unable to gain the economic wherewithal to enjoy or properly utilize them.” Id. at 2516. This statement lends support to the proposition that Congress intended Title VII to have far reaching effects. Moreover, it demonstrates the broad remedial purposes behind the legislation.

50. See supra notes 43-49 and accompanying text.
52. 42 U.S.C. § 2000e-1. This provision exempts an employer from coverage “with respect to the employment of aliens outside any State.” Id.
54. 42 U.S.C. §§ 2000e(b), 2000e(f); see also supra notes 17, 20 and accompanying text.
that a United States employer, operating overseas and otherwise covered by
the Act, may be engaged in an "industry affecting commerce." If the em-
ployer employed the statutory minimum number of employees, that em-
ployer would fall within the statutory definition of "employer" and would be
prohibited from violating the Act. Otherwise, Congress would not have spe-
cifically exempted this employment relationship from the proscriptions of
the Act. The reason for this inference is clear: by expressly exempting
aliens employed abroad from protection against employment discrimination
because of the potential for conflicts between United States and foreign law,
Congress implicitly recognized that certain United States corporations oper-
ating abroad might be engaged in an industry affecting commerce. There
would be no logical reason to consider the possibility of conflicts of law
problems with respect to aliens employed by United States employers abroad
unless Congress realized that the broad definition of "employer" encom-
passed these overseas employers. Because an act of Congress that might
apply to citizens of foreign countries would affront traditional notions of
sovereignty and comity, Congress wisely legislated around this problem by
explicitly exempting overseas United States employers from coverage with

In section 4 of the Act, limited exception is provided for employers with respect to
employment of aliens outside of any state . . . . The intent of [this] exemption is to
remove conflicts of law which might otherwise exist between the United States and a
foreign nation in the employment of aliens outside the United States by an American
enterprise.

Id.

Possible conflicts of law arise if the laws regarding employment of the foreign country in
which the United States corporation operates are diametrically opposed to the provisions of
Title VII. For example, in Saudi Arabia, it is against the law for women to work side-by-side
with men and foreigners. See Note, United States Corporations Operating in Saudi Arabia and
& COMP. L.J. 135, 144 n.75 (1985) (citing D. PIPES, IN THE PATH OF GOD: ISLAM AND
POLITICAL POWER 234 (1983)).

56. EEOC Policy Guidance: Application of Title VII to American Companies Overseas,
Their Subsidiaries, and to Foreign Companies, No. N-915.033, EEOC Release No. 880P-15,
reprinted in EEOC Compl. Man. (CCH) 2391, 2392, § 605, Appendix 605-M (¶ 2187) (Sept. 2,
1988) [hereinafter The Policy Guidance].

57. Id.

58. Id.

59. Skiriotes v. Florida, 313 U.S. 69, 73 (1941) (legislation that regulates actions of U.S.
citizens and corporations should not infringe upon the sovereignty of another nation); see So-
ciée Nationale Industrielle Aerospatiale v. United States Dist. Court, 482 U.S. 522, 543 n.27
(1987) (in resolving disputes in which the interests of both the U.S. and a foreign nation are
involved, a domestic court should be constrained by notions of comity and respect); Laker
Airways, Ltd. v. Sabena, Belgian World Airlines, 731 F.2d 909, 937 (D.C. Cir. 1984) ("the
obligation of comity expires when the strong public policies of the forum are vitiated by the
foreign act").
respect to employment discrimination against the citizen-employees in the host nation.

The clear import of the alien exemption provision is that, but for the provision, Title VII would cover instances of employment discrimination by overseas United States employers against their non-United States citizen-employees. Because Congress did not attempt to exempt acts of discrimination against United States citizens employed overseas by these same United States employers within any provision of Title VII, a negative inference exists regarding the alien exemption provision: by exempting employers abroad from coverage with respect to their alien employees, Congress intended that United States citizens employed in such situations should be covered by the Act.

The United States Supreme Court, in Espinoza v. Farah Manufacturing Co., discussed another possible interpretation of the alien exemption provision. In Espinoza, the plaintiff, a Mexican citizen, argued that her United States employer discriminated against her on the basis of her national origin because the employer required United States citizenship of all his employees. Specifically, the Court, in holding that aliens employed within the United States had standing to bring discrimination suits under Title VII, stated that Congress intended the Act to apply to aliens employed within the United States, thus eliminating any distinction between aliens and citizens within the territorial jurisdiction of United States courts. The Espinoza Court noted that the exclusion of aliens employed outside the United States indicates Congress' clear intent to protect aliens employed within the United States.

II. THE EXERCISE OF EXTRATERRITORIAL JURISDICTION: AN EXAMINATION OF JUDICIAL DETERMINATIONS REGARDING THE JURISDICTIONAL REACH OF TITLE VII

Only a handful of federal courts have considered whether Title VII applies to acts of discrimination in the employment relationship between United

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60. The Policy Guidance, supra note 56, at 2392.


63. Id. at 87.

64. Id. at 95.

65. Id.
States citizens and their foreign United States employers. The United States District Court for the District of Colorado first considered the extraterritorial application of Title VII in *Love v. Pullman Co.* In *Love,* a class of Black employees brought suit against the Pullman railroad company. Pullman, a United States company, operated out of Montreal, Canada. The plaintiffs claimed that they were discriminatorily refused promotion to the position of “conductor,” a position traditionally dominated by white employees. Their claim centered on the fact that, while both groups of employees performed essentially similar duties, the predominantly white conductors received substantially higher wages. The class of plaintiffs included both United States and Canadian citizens who worked routes in both countries.

The district court relied primarily on the alien exemption provision in determining the relief due to the Canadian porters who worked part of their time in the United States. Noting that the express terms of the provision do not protect aliens from acts of discrimination occurring outside of the United States, the court determined that under the Supreme Court’s interpretation of the provision in *Espinoza,* aliens employed within the United States in industries affecting commerce were entitled to rely on the protections of Title VII. The district court determined that the Canadian porters should receive backpay based on the salary of a conductor calculated to reflect the amount of time they actually worked within the United States.

As for citizens of the United States, the district court determined that they would be entitled to full relief for both the time they worked in the United

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67. 13 Fair Empl. Prac. Cas. (BNA) 423 (D. Colo. 1976), *aff’d on other grounds,* 569 F.2d 1074 (10th Cir. 1978).

68. *Id.* at 425.

69. *Id.* at 426.

70. *Love,* 569 F.2d at 1076.

71. *Id.* Pullman designated the class of plaintiffs, a group of porters, as “porters-in-charge.” *Id.* The only duty distinguishing the porters-in-charge from the conductors was their supervisory role over the porters; otherwise, once an employee qualified for the porter position, no further training was required for promotion to conductor. *Id.*


73. *Id.* at 426.


76. *Id.*
States and in Canada. The district court based this conclusion on the negative inference accorded the alien exemption provision. The district court stated that Title VII must be construed to protect United States citizens employed abroad by United States corporations engaged in an industry affecting commerce. The district court relied on section 702 of Title VII's explicit exclusion of aliens employed abroad to justify this conclusion. While noting that the legislative history of the Act did not expressly support this position, the court strongly relied on the absence of any contradictory language as sufficient evidence of congressional intent to protect United States citizens employed by United States employers overseas.

The United States District Court for the District of New Jersey explicitly adopted the Love court's interpretation of the alien exemption provision in *Bryant v. International School Services, Inc.* In *Bryant*, two married female employees sued ISS claiming that its practice of awarding employment contracts with fewer benefits to women married to employees of ISS in Iran constituted unlawful sex discrimination. The district court denied the defendant's motion to dismiss the case for lack of subject matter jurisdiction. The defendant claimed that the provisions of Title VII should not be given extraterritorial effect. In rejecting the arguments advanced by ISS, the court emphatically stated that not only did Congress clearly intend Title VII to apply extraterritorially, but also the plain language of the statute supported such a conclusion. Relying on the premise that Congress is empowered to adopt legislation that could reach the acts of American citizens abroad, the court determined that the express exclusion of aliens employed outside the United States mandated the conclusion that Americans employed by a covered employer abroad are protected by Title VII. Next, the court addressed ISS' argument that Title VII should be denied extraterrito-

77. *Id.* at n.4.
78. See *id*.
79. *Id*.
80. *Id*.
81. *Id.* The court supported this conclusion with cases applying the antitrust laws extraterritorially. *Id.* (citing Continental Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690 (1962)).
83. *Id.* at 479.
84. *Id.* at 481.
85. *Id*.
86. *Id.* at 482.
87. *Id*.
89. *Bryant*, 502 F. Supp. at 482.
rrial effect because other labor laws are limited to the territorial United States. The court noted that such limited statutes do not contain language similar to the alien exemption provision of Title VII. Therefore, the district court asserted that ISS misplaced its reliance on those statutes.

In Seville v. Martin Marietta Corp., the United States District Court for the District of Maryland denied the defendant's jurisdictional challenge to the extraterritorial reach of Title VII by explicitly adopting the Love and Bryant courts' construction of the alien exemption provision. The defendant, Martin Marietta, was a United States corporation operating a facility in Frankfurt, West Germany. The plaintiffs, four females who were locally hired to work at the Frankfurt facility as clerical employees, challenged the defendant's policy of awarding greater fringe benefits to "technical" employees than to "clerical" employees on the basis of sex discrimination. The evidence indicated that clerical employees were mostly women, while technical employees were both men and women. The court granted summary judgment to the defendant on the grounds that the company had established reasonable nondiscriminatory reasons for distinguishing between the two classes of employees.

A few federal courts decided the merits of Title VII claims, which clearly involved extraterritorial implications of the Act, without addressing the jurisdictional reach of the Act. In these cases, the extraterritorial nature of the employment practice in some way impacted upon the employee's terms and conditions of employment within the United States. In Fernandez v. Wynn Oil Co., Wynn Oil denied Fernandez, a female employee, a promo-

90. Id. at 483.
91. Id.
92. Id. The Court of Appeals for the Third Circuit, in reversing the district court's finding that the plaintiffs had demonstrated both disparate impact and treatment, noted that "[o]ur holding in no way answers the questions raised by appellee's jurisdictional challenge. No court has decided the extraterritorial applicability of Title VII and we find it unnecessary to do so to decide this case." 675 F.2d 562, 577 n.23 (1982).
94. Id. at 592.
95. Id. at 591.
96. Id.
97. Id. at 593.
98. Id. at 595.
100. 20 Fair Empl. Prac. Cas. (BNA) 1162 (C.D. Cal. 1979), aff'd, 653 F.2d 1273 (9th Cir. 1981).
tion to a position as Director of International Operations because the corporate officers believed that their Latin American clientele would not respond favorably to a woman executive. The position involved cultivation of clients and new business within Latin America, and would have required Fernandez to spend time in Latin America during business trips. In holding that the alleged preferences of Wynn’s Latin American clientele did not qualify as a “bona fide occupational qualification” for the position sought by the plaintiff, the United States Court of Appeals for the Ninth Circuit did not consider whether Title VII would reach the extraterritorial nature of the claim. The plaintiff did not prevail on the merits of her Title VII claim, however, because the court found that she was not qualified for the position. Presumably, if she had been qualified, the discriminatory refusal to promote her into the position would have adversely impacted upon her employment opportunities abroad, thereby presenting a viable issue of Title VII’s extraterritorial reach.

In Kern v. Dynalectron Corp., the defendant, an American corporation operating a helicopter service in Saudi Arabia, required all of its pilots flying over the Islamic holy city of Mecca to convert to the Islamic faith. The plaintiff, Kern, sued Dynalectron when the corporation terminated him after he refused to convert. The corporation justified its policy as mandated by Saudi law, which prohibited non-Muslims from entering Mecca under penalty of death. The United States District Court for the Northern District of Texas held that, although Kern established a prima facie case of religious discrimination, the discrimination was lawful. The district court based its decision on a valid religious BFOQ exception, reasoning that being Muslim was an “absolute prerequisite” for performing the job. The situation presented in Kern was similar to the facts in Fernandez, not only because the alleged unfair employment practice of the employer would have effected the

101. Id. at 1165. Two employees of Wynn testified that employing the plaintiff in this position would have had an adverse effect on the company’s Latin American business. Id.
102. Id. at 1163.
103. 653 F.2d at 1275-77; see supra notes 29-32 and accompanying text.
104. Id. at 1276.
107. Id. at 1198.
108. Id.
109. Id. at 1203.
110. Id. at 1202.
plaintiff's opportunities for employment abroad, but also because the court did not discuss the issue of the extraterritorial reach of Title VII.

III. THE INTERPRETATIONS OF THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION REGARDING THE EXTRATERRITORIAL APPLICATION OF TITLE VII

A. The Commission Expands the Scope of Title VII

Generally, courts accord great deference to the interpretation of a statute by an administrative agency entrusted with the enforcement of that statute.\(^{111}\) Courts have recognized an exception to this general rule, however, when the application of agency guidelines or regulations contravenes the obvious congressional intent, or when compelling indications demonstrate that the agency’s interpretation is incorrect.\(^{112}\) Courts ordinarily defer to the opinions of the EEOC,\(^{113}\) the administrative agency authorized to bring enforcement proceedings to prevent unlawful employment practices.\(^{114}\) This concept of judicial deference applies to both formal regulations promulgated under the Act as well as informal interpretations of the Act by the agency.\(^{115}\)

Over the years, the Commission has consistently expressed the opinion that Title VII applies to extraterritorial acts of discrimination. In an opinion letter regarding the application of the Act, the Commission General Counsel stressed that the alien exemption provision of Title VII indicates a congressional intent supporting extraterritorial application.\(^{116}\) Underscoring that Congress did not intend Title VII to apply to aliens employed outside of any state, the General Counsel opined that the obvious and meaningful interpretation of the provision is that Congress meant to provide coverage for citizens employed by United States corporations operating overseas.\(^{117}\)

\(^{111}\) Aluminum Co. of America v. Central Lincoln Peoples' Util. Dist., 467 U.S. 380, 389 (1984) (the interpretation of a statute by the administering agency is entitled to a substantial degree of deference).


\(^{115}\) See Albemarle Paper Co. v. Moody, 422 U.S. 405, 430-31 (1975). The Supreme Court, in considering the deference to be given a set of guidelines issued by the EEOC regarding the method of determining the job-relatedness of employment tests, held that even though the guidelines were not formal administrative regulations, the guidelines were "'[t]he administrative interpretation of the Act by the enforcing agency,' and consequently they [were] 'entitled to great deference.'" (quoting Griggs, 401 U.S. at 433-34).

\(^{116}\) See Note, Civil Rights in Employment and the Multinational Corporations, 10 CORNELL INT’L L.J. 87, 104 (1976) (quoting Opinion letter from William Carey, EEOC General Counsel, to Sen. Frank Church (Mar. 14, 1975)).

\(^{117}\) Id. The pertinent text of this letter follows in part:
Other important agency officials have offered similar opinions on the jurisdictional reach of Title VII. During the congressional hearings on the 1984 amendments to the Age Discrimination in Employment Act (ADEA), the Chairman of the EEOC argued that Congress should amend the ADEA to provide extraterritorial coverage for acts of age discrimination occurring overseas.\(^{118}\) The Chairman pointed out that the need for an express amendment followed from the ADEA's lack of a provision similar to the alien exemption provision of Title VII which, he argued, applies extraterritorially.\(^{119}\) One author has commented that because Congress subsequently amended the ADEA to provide extraterritorial application and did not similarly amend Title VII, a permissible inference may be drawn that Congress already considered Title VII to have extraterritorial effect.\(^{120}\)

In addition to comments of various agency officials, the Commission has asserted jurisdiction in a number of cases involving extraterritorial discrimi-

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Giving Section 702 [the alien exemption provision] its normal meaning would indicate a Congressional intent to exclude from the coverage of the statute aliens employed by covered employers working in the employers' operations outside of the United States.

The reason for such exclusion is obvious; employment conditions in foreign countries are beyond the control of Congress. The section does not similarly exempt from the provision of the Act, U.S. Citizens [sic] employed abroad by U.S. employers. If Section 702 is to have any meaning at all, therefore, it is necessary to construe it as expressing a Congressional intent to extend coverage of Title VII to include employment conditions of citizens in overseas operations of domestic corporations at the same time it excludes aliens of the domestic corporation from the operation of the statute.


119. *Id.* The relevant portions of Chairman Thomas' statements are as follows:

In contrast [to the ADEA], [T]itle VII of the Civil Rights Act of 1964, as amended, which EEOC also enforces, does apply extraterritorially because [of] section 702 of [T]itle VII [the alien exemption provision]

This provision indicates, by implication, that Congress intended [T]itle VII to protect American employees working for American employers outside the United States. The lack of any similar language in the ADEA further supports the conclusion that the ADEA cannot be applied to acts that occur outside this country.

It can be argued that the ADEA should be amended to provide extraterritorial coverage to Americans working in foreign countries for American companies. This is underscored by [T]itle VII's extraterritorial application and the long-recognized fact that the purposes and goals of the two statutes are parallel, that is, to eliminate discrimination in employment.

Id. 120. *See Street,* supra note 1, at 371.
natory employment practices. In EEOC Commission Decision 84-2, the Commission determined that a Japanese corporation came under the purview of the Act even though it did not do any business within the United States. The corporation recruited some of its employees through a University placement office in the United States to work at facilities in Japan. The University arranged for a female applicant to interview with the corporation on campus. The applicant, however, had car trouble and informed the University that she could not keep the appointment. When she later attempted to obtain an interview at another time and place, the corporation refused to grant her request or accept her resume. The applicant argued that, because of this action, the University and the corporation discriminated against her on the basis of sex. The Commission held, however, that reasonable cause did not exist from the evidence to believe that either the corporation or the University engaged in an unfair employment practice. The Commission based this conclusion on the lack of evidence that the employer would have accepted a resume or granted an interview to a male who similarly failed to attend a scheduled interview. If evidence existed to warrant a reasonable cause finding, the Commission stated that it would not hesitate to apply Title VII. Although the recruitment activity at issue in this decision occurred within the territory of the United States, if either the University or the corporation had engaged in discriminatory policies with respect to recruitment, the actions would have impacted upon the applicant's employment opportunities abroad.

The Commission shortly thereafter confronted the question of Title VII's extraterritorial application. Commission Decision 85-16 involved a situation factually similar to Bryant. The Charging Party filed charges against Respondent A, a United States corporation operating abroad, and

122. Id. at 1894-95.
123. Id.
124. Id. at 1894.
125. Id.
126. Id.
127. Id. at 1896.
128. Id.
129. Id. The Commission noted that it had jurisdiction over both the Japanese corporation and the University placement office, which it determined acted as an employment agency. Id.
132. The term "Charging Party" refers to the individual filing a charge of discrimination with the EEOC.
133. EEOC Decision 85-16, Empl. Prac. Guide (CCH) ¶ 6856, at 7071. Respondent A maintained an office in the United States solely for the purpose of communicating with the

The Charging Party challenged the system utilized by Respondent A to classify its United States employees. Employees were either termed "regular expatriate", which connoted that they were hired in the United States through Respondent B's services, or "casual employees," wives of the expatriate employees. Accordingly, neither males nor nationals of the country could be classed as casual employees. Only nationals and expatriate employees were given the opportunity to participate in the savings and pension plans offered by Respondent A. The Charging Party, a casual employee, alleged that the practice of excluding casual employees from Respondent A's benefit plan constituted discrimination on the basis of sex and national origin.

As a preliminary matter, the Commission noted that discriminatory employment practices against United States citizens occurring in overseas employment by United States employers are not excluded from the coverage of the Act. The Commission adopted the negative inference of the alien exemption provision, and determined that United States citizens are protected from acts of discrimination by covered employers abroad.

Although advocating extraterritorial application of the Act, the Commission proceeded cautiously to determine whether the particular facts justified application of the Act. Specifically, the Commission addressed Respondent A's contention of improper jurisdiction because Respondent A was not "doing business" within the United States. The Commission noted that the paucity of reference to "doing business" as a criteria in the statutory definition of "employer" rendered Respondent A's argument deficient. The Commission...
mission then stated that the proper analysis in this situation involved a
determination of whether the exercise of jurisdiction offends the principles of
due process.\textsuperscript{145}

Employing an amalgam of the tests utilized by the Supreme Court to de-
termine whether jurisdiction over a nonresident defendant violates due pro-
cess,\textsuperscript{146} the Commission established a paradigm for cases involving Title VII
charges of extraterritorial discrimination.\textsuperscript{147} The Commission's test scruti-
nized the relationship between the employer, the claimed discriminatory em-
ployment practice and the United States.\textsuperscript{148} In analyzing the relationship
between the discriminatory act and the United States, the Commission pro-
ceeded from the premise that Congress prohibited extraterritorial acts of dis-
crimination in Title VII.\textsuperscript{149} The Commission's determination that
Respondent A satisfied Title VII's definition of employer and that the em-
ployer's action constituted a form of employment discrimination proscribed
by the statute established the nexus between the alleged discriminatory act
and the United States.\textsuperscript{150}

In determining whether the requisite connection existed between Respon-
dent A and the forum, the Commission enumerated the various contacts
between Respondent A and the United States,\textsuperscript{151} and found that these con-
tacts were sufficient to support an exercise of jurisdiction within the stric-
tures of due process.\textsuperscript{152} The Commission refrained from reaching the merits
of the charges, however, because the possibility that Respondent A's actions
were mandated by foreign law had not been thoroughly investigated.\textsuperscript{153}

\textsuperscript{145} Id. at 7072-73.
\textsuperscript{146} Shaffer v. Heitner, 433 U.S. 186, 204 (1977) (the critical element in determining per-
sonal jurisdiction over a nonresident defendant entails an inquiry into the relationship among
the defendant, the forum, and the issue in litigation); Hanson v. Denckla, 357 U.S. 235, 253
(1958) (for due process to be satisfied the defendant must have "purposefully avail[ed] itself of
the privilege of conducting activities within the forum State, thus invoking the benefits and
protections of its laws"); International Shoe Co. v. Washington, 326 U.S. 310, 316 (1945) (a
non-resident defendant must have some "minimum contacts with [the forum] such that the
maintenance of the suit does not offend "traditional notions of fair play and substantial jus-
tice" inherent in due process).

\textsuperscript{147} EEOC Decision 85-16, Empl. Prac. Guide (CCH) \S 6856, at 7073.
\textsuperscript{148} Id.
\textsuperscript{149} Id.
\textsuperscript{150} Id.
\textsuperscript{151} Id. at 7074.
\textsuperscript{152} Id.
\textsuperscript{153} Id.
B. The EEOC Policy Statement Regarding the Extraterritorial Application of Title VII

On September 2, 1988, the EEOC issued a position statement regarding the extraterritorial application of Title VII.\textsuperscript{154} The primary purpose of this “policy guidance” was to clarify the situations in which Title VII applies to employment discrimination by both United States and foreign corporations, against United States citizens and aliens, in the United States and abroad.\textsuperscript{155}

1. The Extraterritorial Application of Title VII: The EEOC’s Legislative Analysis

Cognizant of the congressional power to enact legislation prescribing the acts of United States citizens abroad\textsuperscript{156} and the concomitant requirement that congressional intent supporting extraterritoriality must be prevalent for legislation to be given extraterritorial effect,\textsuperscript{157} the Commission proceeded to analyze relevant excerpts of the legislative history of Title VII to discern whether such an intent exists.\textsuperscript{158} The examination focused on congressional statements indicating that the commerce power supported the enactment of Title VII as an effort to abolish existing barriers to the free flow of both

\textsuperscript{154} The Policy Guidance, \textit{supra} note 56, at 2391.

\textsuperscript{155} \textit{Id.} The Commission’s statement also provides guidance as to the application of Title VII to aliens employed in the United States, whether residing in the United States and whether all or part of their work is done in the United States. \textit{Id.}


\textsuperscript{156} The Policy Guidance, \textit{supra} note 56, at 2391 (citing United States v. Bowman, 260 U.S. 94 (1922)).

\textsuperscript{157} \textit{Foley Bros., Inc. v. Filardo,} 336 U.S. 281, 285 (1949) (as a canon of construction, courts will presume that legislation only applies to acts occurring within the territorial jurisdiction of the U.S. unless a contrary legislative intent appears within the statute).

\textsuperscript{158} The Policy Guidance, \textit{supra} note 56, at 2391. The Commission noted that even where such intent exists, jurisdiction cannot be exercised where it offends notions of due process. \textit{Id.} at n.1.
interstate and foreign commerce\textsuperscript{159} as well as to ensure to all persons within the United States equal protection and enjoyment of the laws.\textsuperscript{160}

Turning to principles of statutory construction, the Commission noted that, generally, statutory exemptions are narrowly construed\textsuperscript{161} to ensure that the exemption is interpreted in a manner that directly correlates with the purposes of the statute.\textsuperscript{162} Applying this rule of construction to the alien exemption provision, the Commission acknowledged the susceptibility of the provision to a negative implication.\textsuperscript{163} Specifically, the EEOC noted that, by offering no protection from discriminatory employment practices of United States employers to aliens employed abroad, Congress implied that the overseas operations of certain United States corporations may be extensive enough to bring their operations within Title VII's definition of an "industry affecting commerce" and, therefore, within the statutory definition of employer.\textsuperscript{164} Accordingly, the Commission concluded that the alien exemption provision indicates Congress' intent to ensure United States citizens working for such employers protection under the Act.\textsuperscript{165}

The Commission also observed that Title VII does not expressly exempt United States employers abroad from coverage even though various provisions of Title VII exempt certain specified entities.\textsuperscript{166} In the Commission's view, an interpretation favoring the extraterritorial application of the Act is consistent with the congressional goal of diminishing the deleterious effects of discrimination on the national economy.\textsuperscript{167} The Commission noted that congressional concern over adverse economic effects is applicable to overseas employment because the cumulative effect of discrimination abroad on foreign commerce is similar to that wrought by domestic discrimination on interstate commerce.\textsuperscript{168} Moreover, the EEOC asserted that an interpretation of the alien exemption provision as evidence of congressional intent to apply

\begin{itemize}
\item \textsuperscript{159} \textit{Id.}; see also supra note 45 and accompanying text.
\item \textsuperscript{160} The Policy Guidance, supra note 56, at 2391 n.1; see also supra note 48 and accompanying text.
\item \textsuperscript{161} The Policy Guidance, supra note 56, at 2392.
\item \textsuperscript{162} \textit{Id.} The Commission stated that exemptions are construed "narrowly so as to give full force and effect to the basic thrust of any statutory scheme." \textit{Id.}
\item \textsuperscript{163} \textit{Id.}
\item \textsuperscript{164} \textit{Id.}
\item \textsuperscript{165} \textit{Id.} (citing 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); Love v. Pullman Co., 13 Fair Empl. Prac. Cas. (BNA) 423 (D. Colo. 1976), aff'd on other grounds, 569 F.2d 1074 (10th Cir. 1978)).
\item \textsuperscript{166} \textit{Id.} at 2393.
\item \textsuperscript{167} \textit{Id.}
\item \textsuperscript{168} \textit{Id.} The Commission argues that "discrimination taking place here and in some instances discrimination taking place abroad can have a significant effect" on commerce. \textit{Id.}
Title VII to covered entities abroad gives meaning to the provision and ensures that the broad remedial purposes of the legislation are adequately fulfilled.169

2. The EEOC’s Investigation of Charges Involving Extraterritorial Discrimination

An investigation by the EEOC into a charge of discrimination occurring overseas involves an evaluation of the potential conflicts of law, as well as a determination of whether the investigation itself would interfere with valid foreign policy concerns.170 For this type of investigation, the Policy Guidance advocates coordination with the Department of State.171 Thus, enforcement of the extraterritorial application of Title VII is fraught with complex policy issues involving more than simply an investigation of the charge of employment discrimination to determine whether there is reasonable cause to believe that the employer violated the statutory proscriptions of the Act.172

With these complex issues in mind, the Commission listed three factors to consider when investigating a charge requiring application of Title VII to extraterritorial acts of discrimination: The status of the Charging Party, the employer, and the country involved.173 With respect to the status of the Charging Party, the Commission noted that Title VII applies to United States citizens employed overseas by otherwise covered employers and, in most cases, applies to citizens and aliens working in the United States.174 As for discriminatory employment practices occurring abroad, an investigation of the charge hinges on the status of the employer as either an American or a foreign corporation.175 Two relevant factors regarding employer status are:

169. Id. The Supreme Court, in Vermilya-Brown Co. v. Connell, 335 U.S. 377, 389-90 (1948), decided that in construing the extraterritorial application of a statute, the court must arrive at an interpretation of the statute which is consistent with the legislative purposes behind its enactment.

170. This section focuses on Part III of the Policy Guidance, entitled “Investigating Cases Involving the Extraterritorial Application of Title VII and its Application to Foreign Owned or Controlled Companies Operating in the U.S.” The Policy Guidance, supra note 56, at 2396. Further, this material is only concerned with the criteria for investigating charges involving extraterritorial discrimination.

171. Id. Part II of the Policy Guidance discusses the limitations on applying Title VII to U.S. companies abroad. The only pertinent limitations on the extraterritorial application of Title VII involve international and foreign law. Id.

172. Id. The Commission states that its “decision to process a case against a particular employer might trigger a chain of actions and inquiries that could go beyond the notion of the traditional employee-employer situation.” Id.

173. Id. at 2396.

174. Id.

175. Id. at 2397.
(1) corporate identity or nationality, and (2) the extent of corporate activity within the United States. In the context of discrimination overseas, the status of the country will be relevant only when foreign policy concerns are raised as a defense. The possibility may exist that foreign law mandates the discriminatory employment practice involved. In these situations, the Commission advocates coordination with the State Department.

a. Situations in Which Corporate Activities Will Subject the Corporation to United States Law

Drawing on general principles of corporate law, the Policy Guidance sets forth an analysis of the jurisdictional reach of Title VII over acts of discrimination occurring extraterritorially by both United States and foreign corporations. The Commission asserts that liability for proscribed unfair employment practices may be imposed upon a United States employer outside the country only if it conducts "some further business here." This "further business" requirement ensures that traditional notions of fair play and justice are not disregarded, because an employer conducting business within the United States is on notice that any of its employment practices which violate Title VII might subject it to the administrative process of the EEOC. As for a foreign corporation, the Commission posits that the acts of incorporating within the United States and conducting business here will not be sufficient to subject the foreign corporation to the proscriptions of

176. Id. The Commission lists six factors to be considered when determining corporate nationality:

(a) nationality of control, i.e., nationality of the individual or company that controls the business; (b) principal place of business, i.e., place where primary factories and offices are located; (c) place of incorporation; (d) voting control nationality, i.e., identity of persons holding voting stock; (e) dominant shareholders' nationality; and (f) nationality of the management, i.e., of the officers and directors.

Id.

177. Id. "Incorporation in the U.S. is relevant in that incorporation is itself a form of business." Id.

178. Id. at 2399-406.

179. Id. at 2397. The Commission set forth general principles of corporate law which apply on a national level:

In U.S. corporate law there is no inherent right to conduct business as a corporation; it is a right given to persons by the state. By incorporating within a state, the company invokes the benefits, privileges, and protections of that state's laws. However, this in turn subjects the company to those laws — by incorporating within a state, the company becomes a "person" under, and subject to, all the state's laws and all applicable federal laws as well.

Id.

180. Id.

181. Id.

182. Id.
Title VII. The Commission will only assert its jurisdiction to investigate a charge of overseas discrimination by a foreign corporation, incorporated in the United States and doing further business here, when the discriminatory act is in some way connected to the business that the corporation conducts within the United States. In the case of a foreign corporation, the additional requirement of substantial contact with the United States evinces an attempt to comport with the due process notion of "minimum contacts" with the forum state. By requiring this additional connection, the Commission ensures that the traditional concerns regarding the exercise of jurisdiction over a nonresident defendant will not be subverted.

b. The Case of an American Employer and its Foreign Subsidiary Where the Discrimination Happens Overseas

The Commission will investigate charges of overseas discrimination brought by a United States citizen against a United States corporation when the corporation is incorporated, and involved in further business activities, within the United States. To illustrate situations in which jurisdiction under Title VII applies, the Policy Guidance provides two examples. First, the Commission will assert jurisdiction in the following situation: An employee, working for a United States corporation, is sent abroad to work for the corporation's overseas operations; while there, the employee is subjected to unfair employment practices. Second, the Commission will assert jurisdiction if a discrimination charge is filed by a person who sought employment with a United States corporation's overseas operations and was denied employment because the corporation decided that the person's immutable characteristics would prevent the successful conduct of business with the nationals of the foreign country.

183. Id.
184. Id.
186. See supra note 183 and accompanying text.
187. The Policy Guidance, supra note 56, at 2398. The text of Example 1 is as follows:

Carl works for an American company with its headquarters in Texas. His company sends him to Cairo, Egypt to run a temporary housing project for its Houston, Texas road camp now operating in Egypt for two years. While living and working in Egypt, Carl files a race and national origin discrimination charge against his supervisor who also lives and works in Egypt. Title VII covers an American citizen working overseas for an American employer.

Id. This situation is similar to Boureslan v. Aramco, 857 F.2d 1014 (1988), cert. granted sub nom. EEOC v. Arabian American Oil Co., 111 S. Ct. 40 (1990), in which the Fifth Circuit refused to apply Title VII extraterritorially. Id. at 1018. See infra notes 204-309 and accompanying text for a complete discussion of the Boureslan opinion.
188. The Policy Guidance, supra note 56, at 2398. The text of Example 2 is as follows:
The Commission asserts that a corporation will be subject to the jurisdiction of the Act if the corporation, although incorporated abroad, is either a subsidiary of a United States corporation, or, in some way, is controlled by that corporation.\cite{189} The Commission argues that both the foreign company owned or controlled by an American corporation, and the American corporation, are liable for acts of overseas employment discrimination against a United States citizen if the two corporations either operate as an "integrated enterprise" or maintain a "joint employer" relationship.\cite{190} Liability rests on the theory that the two corporations maintain such a high degree of integrated operations that, in the eyes of an aggrieved employee, the normal perception of the parent and subsidiary as separate entities is blurred.\cite{191} The aggrieved employee expects that the acts of his immediate employer are

\begin{itemize}
\item A female applied for the directorship of an American oil company's international marketing section. The oil company has offices in Peoria; CP [Charging Party] applied for a job with R's [Respondent's] Venezuelan [sic] operations. She was denied the position because of the company's policy against hiring women for this position. Management believes that the cultural customs and mores prevalent in Latin America would prevent a woman from performing the job and attracting customers while doing business there. The applicant filed a sex discrimination charge against the American oil corporation. Jurisdiction should be asserted.
\end{itemize}

\textit{Id.} This scenario is identical to the situation in Fernandez v. Wynn Oil Co., 653 F.2d 1273 (9th Cir. 1981). See supra notes 100-05 and accompanying text.

\begin{itemize}
\item 189. The Policy Guidance, supra note 56, at 2398. The relevant portion of the example is as follows:
\end{itemize}

While living in France, CP submits an application to TYZ, a foreign-incorporated corporation controlled and wholly owned by an American parent corporation, TELL-CON, Inc. TYZ is TELL-CON's agent in the field of polymer science. TYZ has never recruited, interviewed, or hired a female applicant for the position of polymer science engineer, despite having received hundreds of applications from qualified American female applicants each year. TYZ automatically rejects all applications from females because, pursuant to TELL-CON instructions, it has an unwritten policy of maintaining an all male polymer science department. A foreign company owned or controlled by an American employer must also follow the provisions of Title VII. Failure to do so in a situation such as this may result in liability for both the controlling company and its foreign subsidiary.

\textit{Id.} (emphasis in original).

\begin{itemize}
\item 190. \textit{Id.}
\item 191. \textit{Id.} at 2398-99. The United States Court of Appeals for the Sixth Circuit, in Armbruster v. Quinn, 711 F.2d 1332 (6th Cir. 1983), noted, in determining whether to hold a parent corporation liable for the acts of its subsidiary, that:
\end{itemize}

\begin{itemize}
\item [T]he most important requirement is that there be sufficient indicia of an interrelationship between the immediate corporate employer and the affiliated corporation to justify the belief on the part of an aggrieved employee that the affiliated corporation is jointly responsible for the acts of the immediate employer. When such a degree of interrelatedness is present, we consider the departure from the "normal" separate existence between entities an adequate reason to view the subsidiary's conduct as that of both.
\end{itemize}

\textit{Id.}
attributable to the affiliated employer. The Commission notes in the Policy Guidance, however, that the liability of both corporations for the acts of the immediate employer depends upon the degree of control exercised by the parent over the subsidiary. In particular, the Commission has identified four factors relevant to a determination of single employer status: "[t]he degree of (1) interrelated operations, (2) common management, (3) centralized control of labor relations, and (4) common ownership or financial control."

**c. Amenability of a Foreign Employer to Title VII Where the Discriminatory Practice Happens Overseas**

To establish liability under Title VII for an overseas foreign-owned corporation which is incorporated and doing business in the United States, the unfair employment practice must be connected to the business conducted by the corporation within the United States. Two examples illustrate situations in which the Commission would, because of the connection between the discriminatory act and the business conducted within the United States, pursue a remedy under Title VII for acts of discrimination perpetrated by these companies. The first situation concerns a discriminatory act impacting

192. *Armbruster*, 711 F.2d at 1337.
193. The Policy Guidance, *supra* note 56, at 2399. The Commission states that "[t]he ultimate question is whether the parent exercises a greater than usual degree of control over the operations of the subsidiary." *Id.*
194. *Id.* Armbruster v. Quinn, 711 F.2d 1332, 1337 (6th Cir. 1983). The *Armbruster* court adopted this four part test from Radio Union v. Broadcast Service, 380 U.S. 255 (1965). The NLRB originally formulated this test to determine liability under the NLRA. The *Armbruster* court stated that no one factor is determinative, and that the presence of all four factors is unnecessary. *Armbruster*, 711 F.2d at 1337-38.

In this section, the Commission relies heavily on Lavrov v. NCR Corp., 600 F. Supp. 923 (S.D. Ohio 1984), a case in which the district court considered the liability under Title VII of a foreign subsidiary of an American corporation. The plaintiff in this case was employed by NCR, a United States corporation. *Id.* at 924. She sought a transfer to NCR GmbH, a German corporation and wholly owned subsidiary of NCR, located in Augsburg, West Germany. *Id.* When her repeated requests for transfer were denied, the plaintiff brought charges against both companies under Title VII, relying on the joint employer theory. *Id.* at 925. The court, in applying the four part test, refused to grant summary judgment to the defendants on this issue, finding that a genuine issue of fact existed as to whether the two entities could be held liable under the joint employer theory. *Id.* at 928. Cf. *Mas Marques* v. Digital Equip. Corp., 637 F.2d 24 (1st Cir. 1980) (Title VII plaintiff failed to satisfy the four part NLRB test regarding the single employer liability of the defendant corporation and its German subsidiary for the latter's allegedly discriminatory hiring practices); see also *Williams* v. Evangelical Retirement Homes, 594 F.2d 701, 703 (8th Cir. 1979); *Baker* v. Stuart Broadcasting Co., 560 F.2d 389, 392 (8th Cir. 1977) (applying NLRB test); *Linskey* v. Heidelberg Eastern, Inc., 470 F. Supp. 1181, 1183-84 (E.D.N.Y. 1979) (same); *EEOC* v. Upjohn Corp., 445 F. Supp. 635, 638 (N.D. Ga. 1977) (same).

upon a term or condition of employment dealing directly with employment in the United States: For example, when an employer discriminatorily denies a promotion to an employee which would entail transferring the employee to the United States, the Commission would pursue a remedy under Title VII.\textsuperscript{196} In the Policy Guidance, the Commission argues that in this situation, Title VII applies extraterritorially because of the employer's incorporation within the United States, the employer's conduct of business within the jurisdiction, and the close connection between the alleged discriminatory act and the forum.\textsuperscript{197}

A second situation in which the Commission will assert jurisdiction arises when the discriminatory employment practice concerns an aspect of the employee's duties that involves contact with the United States. The example offered by the Commission concerns an employer who discriminatorily discharges an employee based on a determination that the employee's performance is deficient in terms of the filling of orders received from the United States for the employer's product.\textsuperscript{198} Because the employee claims that the employer based the unfavorable performance rating on racial considerations, and that the adverse rating is connected to the corporation's United States business, the Commission argues in the Policy Guidance that Title VII is applicable.\textsuperscript{199}

\textsuperscript{196} \textit{Id.} The text of Example 1 is as follows:

\begin{quote}
X is a foreign company incorporated in Kansas; X employs Americans to sell its products there. John Doe, an American citizen and Junior Supervisor works for X in Paris, France where he receives and fills sales orders from the Kansas office. He applies to the headquarters office in Paris for a Senior Supervisor's position that would have allowed him to move back to his home state of Kansas. After he is rejected, he files a charge of discrimination against X. He alleges that he was not promoted to the Senior Supervisory position because he is an Asian. There is Title VII coverage.
\end{quote}

\textit{Id.}

\textsuperscript{197} "[H]ad he been chosen for the position, he would have been promoted to a position that would have allowed him to relocate to [State X]." \textit{Id.}

\textsuperscript{198} \textit{Id.} The text of the example follows:

\begin{quote}
CP, an American citizen, was living and working in Mexico for a Mexican corporation, which was incorporated in the United States; this company has a catalog service at three locations in Mobile, Alabama. Every year a Quality Control Inspector comes from one of the Mexican company's Alabama offices to do an on-site inspection of the Mexican plants. CP is fired because of unfavorable and racially-related remarks made by the White Inspector at the job site. These remarks concerned, among other things, his performance in filling orders placed in the U.S. CP claims that the Inspector's comments were racially motivated and that the American Inspector never says anything favorable about Blacks because he does not like them. There is Title VII coverage.
\end{quote}

\textit{Id.}

\textsuperscript{199} \textit{Id.} at 2399-403. The Commission offers a series of questions which assist in determining whether the commercial activities of the foreign corporation within the United States are
The final analysis of the possible situations in which Title VII applies to extraterritorial acts of discrimination focuses on foreign corporations not incorporated within the United States. The Commission takes the position that, in this situation, a foreign owned and incorporated employer is not covered by Title VII because an accepted basis for exercising jurisdiction does not exist. The examples offered by the Commission to illustrate this point contemplate corporations which, in all respects, represent foreign entities independent of any influence or control by United States corporations. Application of Title VII in these situations would be unwarranted, even if the corporation conducts business within the United States.

IV. BOURESLAN v. ARAMCO: THE POLICY GUIDANCE UNHEEDED

A. Background

Within weeks of the issuance of the Policy Guidance, the United States Court of Appeals for the Fifth Circuit, in Boureslan v. Aramco, rejected the principles advocated by the EEOC regarding the extraterritorial application of Title VII. Contrary to the opinions of the federal district courts which have supported the extraterritorial application of Title VII, the Boureslan court decision represents the first time a circuit court of appeals refused to extend the Act’s proscriptions overseas. Because the United States Supreme Court has not decided the extraterritorial reach of Title VII, and because this decision constitutes the most comprehensive analysis of the issue to date, the case merits extensive examination.

connected to the discriminatory employment practice. These questions concern: (1) The location of the office in which the violation occurred; (2) the state of incorporation; (3) the nature of the company (for example, a subsidiary of a U.S. corporation); (4) whether a joint employer relationship exists between the employer and an American corporation; (5) if the violation involves recruiting or hiring, where and how did the recruiting occur; (6) if the violation involves terms or conditions of employment, the location of employee’s position and the “connection between the challenged action and the employer’s business with the United States”; and (7) whether the employer’s operations, agents or facilities are located within the U.S. Id. at 2399-404.

200. Id. at 2399-404.
201. Id. Incorporation within a state is an accepted basis for exercising jurisdiction.
202. Id.
203. Id.
205. A full panel of the Fifth Circuit affirmed the panel majority opinion, 892 F.2d 1271 (1990) (nine judges affirming, five dissenting). The en banc opinion, both majority and dissent, substantially followed the reasoning of the previous panel opinion, and, therefore, will not be reviewed in this article.
In Boureslan, a naturalized citizen of the United States, Ali Boureslan, worked as an engineer with Aramco Services Company (ASC) in Houston, Texas. Soon after beginning employment with ASC, Boureslan transferred to Arabian American Oil Company (Aramco), ASC's parent corporation in Dhahran, Saudi Arabia. Within a few months after his transfer, Boureslan experienced problems with his supervisor which, Boureslan alleged, resulted from racial, religious, and ethnic harassment aimed at his Lebanese national origin. Aramco later terminated Boureslan's employment.

After seeking administrative relief from the EEOC, Boureslan filed suit against ASC and Aramco in the United States District Court for the Southern District of Texas. Boureslan sought relief under Title VII as well as state law for the alleged discriminatory treatment suffered while in Dhahran. Both ASC and Aramco sought dismissal of the case. ASC questioned the propriety of its inclusion as a defendant, and Aramco argued that Title VII should not be applied extraterritorially. Boureslan maintained that congressional intent to extend the protections of Title VII to United States citizens working for American companies abroad is clear and express. Boureslan stressed that the negative inference implicit in the alien exemption provision sufficiently expressed a congressional intent to overcome the presumption against extraterritorial application of domestic legislation. He argued that the provision is meaningless unless Title VII applies extraterritorially. Without this provision, Boureslan contended, Title VII protects neither United States citizens nor aliens employed by United States companies abroad. Boureslan averred that, by including the alien exemption provision, Congress intended to protect United States citizens.

206. Id. at 1016.
207. ASC is incorporated in Delaware and operates principally in Houston, Texas. Id.
208. Id. Aramco is incorporated in the United States and has its principal place of business in Dhahran, Saudi Arabia. Id.
209. Id.
210. Id.
211. Id.
212. Id.
213. Id.
214. Id.
215. Id. ASC argued that it could not be liable because Boureslan transferred to Aramco, thus terminating the employment relationship once existing between ASC and Boureslan and that Boureslan further failed to exhaust his administrative remedies under Title VII. Id.
216. Id.
217. Id.
218. Id.
219. Id.
220. Id.
citizens employed abroad. Because the majority in Boureslan determined that Title VII does not apply to American companies operating overseas and dismissed the case, Boureslan and the EEOC as party intervenor filed a petition with the Fifth Circuit for a rehearing en banc.

B. The Majority Opinion: A Step Backward for Civil Rights

In its statutory analysis of the extraterritorial reach of Title VII, the Boureslan majority considered the rules governing Congress' intent to extend the territorial reach of domestic legislation beyond the borders of the United States. Placing primary reliance on Supreme Court precedent, the court concluded that a presumption exists against the extraterritorial application of United States laws. Further, the court stated that this presumption against extraterritorial application is effectively rebutted only by "a clear congressional expression of intent to the contrary."

The majority discounted Boureslan's reliance on the express language of the alien exemption provision to overcome the presumption against extraterritoriality. The court summarily rejected Boureslan's argument that the provision serves no purpose unless upheld as evidence of congressional support

221. Id.
222. Id. at 1021.
224. Boureslan, 857 F.2d at 1016-17.
226. Boureslan, 857 F.2d at 1017. In Foley Bros., the Court considered the application of a federal law which prohibited more than an eight hour work day without the payment of overtime for work performed overseas pursuant to a contract between a private contractor and the federal government. The Court stated that:
   "The canon on 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 whereby unexpressed congressional intent may be ascertained. It is based on the assumption that Congress is primarily concerned with domestic conditions. We find nothing in the Act itself, as amended, nor in the legislative history, which would lead to the belief that Congress entertained any intention other than the normal one in this case."
   Id. (quoting Foley Bros., 336 U.S. at 285) (citation omitted); see also McCulloch v. Sociedad Nacional de Marineros de Honduras, 372 U.S. 10, 21-22 (1963) (Court requires clear congressional intent to construe legislation beyond domestic jurisdiction).
227. Boureslan, 857 F.2d at 1017 (citing Pfeiffer v. Wm. Wrigley, Jr. Co., 755 F.2d 554 (7th Cir. 1985) (rejecting extraterritorial application of ADEA without affirmative congressional intent); Cleary v. United States Lines, Inc., 728 F.2d 607 (3d Cir. 1984) (same); United States v. Mitchell, 553 F.2d 996 (5th Cir. 1977) (rejecting extraterritorial application of the Marine Mammal Protection Act)). The court then cited a number of cases which have denied extraterritorial application of the Railway Labor Act as support for its position that absent a clear expression of contrary congressional intent, the presumption against extraterritoriality is not rebutted. Id. at 1017.
for extraterritoriality.\textsuperscript{228} In a forceful retort, the court stated that it was not faced with the choice of either accepting Boureslan's interpretation of the provision or depriving the provision of any purpose.\textsuperscript{229} Rather, the majority stated that the purpose of the alien exemption provision is to protect aliens employed within the United States.\textsuperscript{230} The majority buttressed this position by relying on the Supreme Court's interpretation of the alien exemption provision in Espinoza v. Farah Manufacturing Co. as an expression of congressional intent to protect aliens employed within the United States from acts of discrimination.\textsuperscript{231}

Finding that the express language of the Act did not contain any references or expressions which would overcome the presumption against extraterritoriality, the court examined the legislative history of the Act for an expressed legislative intent to the contrary.\textsuperscript{232} The court also briefly addressed three specific references to the Act's legislative history contained in an \textit{amicus curiae} brief submitted by the EEOC on behalf of Boureslan:\textsuperscript{233} First, the power of Congress to regulate foreign commerce as a basis for the exercise of jurisdiction to prescribe extraterritorial acts of discrimination;\textsuperscript{234} second, the purpose of ensuring equal protection and the full enjoyment of Constitutional rights by all;\textsuperscript{235} and third, the economic barrier to the achievement of these constitutionally guaranteed rights, perpetuated by discrimination in employment opportunities.\textsuperscript{236} The EEOC urged that these statements, along with the conspicuous omission of any express language denying extraterritorial application, advance an interpretation of the Act which permits extraterritorial application.\textsuperscript{237}

Although noting that an opinion of the EEOC with respect to Title VII is generally entitled to great deference, the court dismissed these passing references to the legislative history as "general policy statements," insufficient to

\begin{footnotes}
\item[228] Boureslan, 857 F.2d at 1018.
\item[229] Id.
\item[230] Id.
\item[231] Id. (citing Espinoza v. Farah Mfg. Co., 414 U.S. 86, 95 (1973)).
\item[232] Boureslan, 857 F.2d at 1018. The court cautioned that any examination of legislative history to determine legislative intent should proceed cautiously because "[l]egislative history is relegated to a secondary source behind the language of the statute." \textit{Id} (citing United States v. Smith, 795 F.2d 841 (9th Cir. 1986), \textit{cert. denied}, 481 U.S. 1032 (1987)).
\item[233] Id. at 1019; see also supra notes 43-50 and accompanying text.
\item[235] Id.
\item[236] Id.
\item[237] Id.
\end{footnotes}
successfully rebut the presumption against extraterritoriality. The court determined that Boureslan and the EEOC did not meet its test of a "clear" expression of contrary intent by introducing what the court deemed statements as equivocal as the statutory language itself. The court justified its conclusion by pointing to a number of references in the legislative history which support territorial limitations on the jurisdiction of Title VII. The court noted that the statutory definition of "state" in Title VII focuses on areas within the territorial jurisdiction of the United States and does not mention foreign countries. Also, the court referenced various statements in the legislative history which indicate that, at the time of enactment, Congress primarily concerned itself with domestic problems of discrimination. The court admitted that, although similarly vague and inconclusive, the persuasive value of these references was equivalent to those statements offered by the EEOC.

The court similarly dismissed one final reference to the legislative history offered by the EEOC as too vague to overcome the presumption against extraterritoriality. The EEOC asserted that a statement made during the hearings on an early House version of the bill elucidated the purpose behind the alien exemption provision as an attempt to eliminate the possible conflicts of law which might arise from the extraterritorial application of Title VII. The EEOC referenced this portion of the legislative history to demonstrate conclusive support for the negative implication that the alien exemption provision indicates a congressional intent to protect Americans employed abroad by American employers. In the court's opinion, however, this statement of legislative history proved too inconclusive to over-

238. Id.
239. Id.
240. Id.
242. Boureslan, 857 F.2d at 1019 (citing 110 CONG. REC. 6550 (1964) (statements of Sen. Hubert Humphrey concerning problems among the various states with employment discrimination); 110 CONG. REC. 14301 (1964) (statements of Sen. Richard Russell comparing "the effect of Title VII on southern states versus other states"); 110 CONG. REC. 1521 (1964) (statements of Rep. Emanuel Celler regarding deferral to state fair employment legislation)).
243. Id. at 1020.
244. Id.
245. Id. (citing Civil Rights: Hearings on H.R. 7152, as amended by Subcommittee No. 5 before the House Committee on the Judiciary, 88th Cong., 1st Sess. 2303 (1963)); see also supra note 55 and accompanying text.
246. Boureslan, 857 F.2d at 1020.
come the presumption against extraterritorial application of domestic legislation.247 Balancing its own requirement of a clear expression of congressional intent against Boureslan and the EEOC's argument that the negative inference of the alien exemption provision is such a clear expression, the court tipped the scale in favor of requiring an affirmative expression of intent to overcome the presumption against extraterritorial application of domestic legislation.248

Concluding that Boureslan, and the EEOC as amicus, had failed to demonstrate a clear expression of congressional intent to protect Americans employed abroad, the court addressed the plaintiff's final arguments regarding the policy reasons supporting his interpretation of Title VII.249 These arguments focused on the potential for injustice implicit in the court's refusal to apply Title VII to acts of discrimination occurring abroad.250 Although acknowledging the significance of the policy considerations expressed by Boureslan and the EEOC, the court determined that these concerns could not override the powerful policy arguments against the extraterritorial application of the Act.251 The court asserted that the legislature, and not the courtroom, was the proper forum for striking a balance between these competing interests.252

C. The Dissent: An Alternative Framework for Analyzing the Issue of Extraterritorial Application of United States Laws

1. "The Presumption Against Extraterritoriality"

In a well reasoned dissent, Judge King characterized the majority opinion as a misapplication of the concepts of statutory construction used to determine the level of congressional intent necessary to overcome the presumption against extraterritoriality.253 Specifically, Judge King took issue with the majority's "misguided" determination that only an express congressional

247. Id.
248. Id. The Court stated that the "EEOC still must argue a negative inference . . . that Congress spoke by not speaking. This silence will not reverse the presumption that this legislation applies only to employees employed in the United States." Id.
249. Id.
250. Id. Boureslan and the EEOC argued that the inequitable result of allowing a plaintiff to recover for an unfair employment practice occurring within the United States, while denying another United States citizen redress for a similar act of discrimination by his United States employer overseas, would be highly deleterious to the remedial purposes of the Act.
251. Id. The only countervailing policy reasons mentioned by the court, which counseled against extraterritorial application of Title VII, were that the religious and social customs of foreign nations may conflict with those prevalent in the United States, complicating the ability of American employers abroad to comply with Title VII fair employment standards. Id.
252. Id. at 1020-21.
253. Id. at 1021-22 (King, J., dissenting).
evocation of intent to apply Title VII extraterritorially is sufficient to overcome the threshold presumption against extraterritorial application of domestic legislation.\textsuperscript{254}

Relying on the same principles of statutory construction employed by the majority,\textsuperscript{255} Judge King agreed with the majority's "clear expression" requirement, but argued that "clear" does not necessarily mean explicit.\textsuperscript{256} Rather, the dissent asserted that, under the general rules of statutory construction, where the statutory language is vague, the application of a statute to a given set of facts depends upon a determination of the purpose behind the legislation as found within the legislative history.\textsuperscript{257}

Both the rule regarding the construction of vague statutory language and the rule regarding the presumption against extraterritoriality are applicable when the territorial scope of a statute is less than clear from the statutory language.\textsuperscript{258} Drawing on these rules of statutory construction, Judge King noted that in order to resolve the unclear scope, or in this case the uncertain jurisdictional reach of a statute, a court must determine the unexpressed congressional intent behind the statute.\textsuperscript{259} To determine the scope of this intent, Judge King asserted that the court must be informed by the legislative history of the statute, particularly the purposes behind the legislation.\textsuperscript{260}

\begin{itemize}
\item \textsuperscript{254} Id. at 1022.
\item \textsuperscript{255} Id.; see supra notes 224-27 and accompanying text.
\item \textsuperscript{256} \textit{Boureslan}, 857 F.2d at 1022 \& n.3, 4 (King, J., dissenting). Here, Judge King noted that the presumption against extraterritoriality, which was formulated in \textit{United States v. Mitchell} and was binding on the court, was based on two prior cases, neither of which themselves required a "clear" expression of "contrary intent." \textit{United States v. Mitchell}, 553 F.2d 996, 1002 (5th Cir. 1977) (citing \textit{Steele v. Bulova Watch Co.}, 344 U.S. 280, 285 (1952) and \textit{Foley Bros., Inc. v. Filardo}, 336 U.S. 281, 285 (1949)). In \textit{Mitchell}, however, the Fifth Circuit held that "[t]o overcome the presumption and to apply the statute beyond the territory of the United States, the Government must show a clear expression of congressional intent." \textit{Mitchell}, 553 F.2d at 1002 (emphasis added). Notwithstanding this binding precedent, Judge King argued that "'clear' does not mean 'express,' and there is no reason why a 'clear' intent to apply a statute extraterritorially may not be determined with reference to the rules of statutory construction, informed by legislative history." \textit{Boureslan}, 857 F.2d at 1022 (King, J., dissenting).
\item \textsuperscript{257} \textit{Boureslan}, 857 F.2d at 1022 (King, J., dissenting); see also \textit{United States v. James}, 478 U.S. 597 (1986) (legislative history can be a legitimate guide to a statutory purpose obscured by ambiguity); \textit{Blum v. Stenson}, 465 U.S. 886 (1984) (the courts will look first to the statutory language and then to the legislative history if the statutory language is unclear); \textit{Tidewater Oil Co. v. United States}, 409 U.S. 151, 157 (1972) ("while the clear meaning of statutory language is not to be ignored, 'words are inexact tools at best,' and hence it is essential that we place the words of a statute in their proper context by resort to the legislative history." (citation omitted) (quoting \textit{Harrison v. Northern Trust Co.}, 317 U.S. 476, 479 (1943)).
\item \textsuperscript{258} \textit{Boureslan}, 857 F.2d at 1022 (King, J., dissenting); see also supra note 226 and accompanying text.
\item \textsuperscript{259} \textit{Boureslan}, 857 F.2d at 1022 (King, J., dissenting); see also \textit{Foley Bros., Inc. v. Filardo}, 336 U.S. 281, 285 (1949).
\item \textsuperscript{260} \textit{Boureslan}, 857 F.2d at 1022 (King, J., dissenting).
\end{itemize}
The central inquiry, as noted by Judge King, is not whether this examination reveals an affirmative, a clear, or an unexpressed intention. Rather, the purpose behind the statute should supply the dispositive evidence of the intended statutory scope: the scope given to the statute should correlate to the statutory purpose.\(^2\) If the articulated purpose of the legislation is broad, the intended reach of the statute should be given similar effect.\(^2\)

Regarding the presumption against extraterritoriality, Judge King argued that the majority misconstrued the purpose behind the presumption\(^2\) by requiring an extremely burdensome showing of congressional intent to overcome the presumption.\(^2\) Judge King argued that the majority believed the presumption should operate as a method of evaluating "potential conflicts of jurisdiction."\(^2\) The explicit showing of congressional intent reflected the majority's belief that, where the policy considerations involved in applying a statute overseas are potentially volatile, a heightened showing of congressional intent would be necessary to overcome the presumption.\(^2\) Judge King asserted that a threshold showing of congressional intent to overcome the presumption against extraterritorial application of domestic laws would have the practical effect of eliminating any conflicts of law.\(^2\) Thus, Judge King stated that the court will resolve any conflicts of law only after the threshold showing is established.\(^2\)

Judge King, however, did not completely disparage the majority's theory that when the implications of applying a statute extraterritorially are so great, a more explicit showing of congressional intent is necessary to over-

\(\text{261. See id.}\)
\(\text{262. Id.; see Steele v. Bulova Watch Co., 344 U.S. 280, 286-87 (1952). The Lanham Act, at issue in Steele, provides a trademark registrant with a civil cause of action against "[a]ny person who shall, in commerce, . . . use . . . [a] colorable imitation of any registered mark in connection with the sale" or distribution of goods. Id. at 284, n.8 (quoting 15 U.S.C. § 1114(1)(a)). 'Commerce' is defined as 'all commerce which may lawfully be regulated by Congress.' " Id. at 284 (quoting 15 U.S.C. § 1127). The Court held that the broad purposes of the Lanham Act create a sufficient indication that Congress intended the Act to reach the extraterritorial conduct of U.S. nationals. Steele, 344 U.S. at 286-87.}\)
\(\text{263. Boureslan, 857 F.2d at 1022 (King, J., dissenting).}\)
\(\text{264. Id.}\)
\(\text{265. Id. (footnote omitted).}\)
\(\text{266. Id. at 1022-23. Here, Judge King argued that the majority, through its evaluation of the policy implications in applying Title VII extraterritorially, was making policy, a function best left for the legislature. Id. at 1023. As Judge King noted, the purposes behind the alien exemption provision evince a congressional intent to avoid the conflicts of law which arise when applying Title VII to citizens of foreign countries. Id. Judge King found it logical to believe that, by this statement, Congress concluded no such corresponding obstacles would be present in exercising jurisdiction abroad over acts of discrimination perpetrated by United States corporations against their United States employees. Id.}\)
\(\text{267. Id. at 1022 n.5.}\)
\(\text{268. Id.}\)
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2. The Dissent's Alternative Framework for Evaluating the Extraterritorial Application of Title VII

Recognizing the majority's misguided analysis of whether Title VII applies extraterritorially, Judge King proposed an alternative framework for resolution of this issue. Judge King's framework incorporated the "reasonableness" test of the Restatement (Third) of Foreign Relations Law of the United States section 403 (Restatement) which provides that, as a matter of international law, a state may exercise its jurisdiction beyond its borders only if doing so would be reasonable. From an analytical standpoint,

269. Id. at 1023.

270. Id. The courts will not presume that Congress intended to violate international law. Restatement (Third) of the Foreign Relations Law of the United States §§ 114, 115 comment a (1987) ("It is generally assumed that Congress does not intend to repudiate an international obligation of the United States by nullifying a rule of international law or an international agreement as domestic law . . . ."). Therefore, an act of Congress will not be presumed to conflict with principles of international law unless Congress has expressly affirmed that intent. Boureslan, 857 F.2d at 1023 (King, J., dissenting) (citing Weinberger v. Rossi, 456 U.S. 25, 32 (1982); McCulloch v. Sociedad Nacional de Marineros de Honduras, 372 U.S. 10, 20-21 (1963); Murray v. The Schooner Charming Betsy, 6 U.S. (2 Cranch) 64, 118 (1804)).

271. Boureslan, 857 F.2d at 1023 (King, J., dissenting). Judge King noted the majority's confusion of the two separate presumptions, stating that:

By requiring a more explicit showing of congressional intent to apply Title VII extraterritorially — without discussing whether extraterritorial application of Title VII would violate international law — the majority has implicitly conflated the two standards and has therefore defeated congressional intent without sufficient justification.

Id. at 1023-24.

272. Id. at 1023.

273. Id. at 1024.

274. Id. (quoting Restatement (Third) of the Foreign Relations Law of the United States § 403(1)). Restatement section 402 notes that jurisdiction to prescribe legislation is generally based on principles of territoriality or nationality. Restatement (Third)
Judge King's alternative framework involved a two-step inquiry. First, the court must ascertain whether the extraterritorial application of Title VII is unreasonable under international law. If such application is unreasonable, the court should not apply Title VII extraterritorially unless Congress affirmatively required such application. On the other hand, Judge King argued that if the application of Title VII beyond our borders is reasonable, only a threshold showing of congressional intent to support the exercise of extraterritorial jurisdiction is necessary.

To properly assess the first prong of this analysis, whether extraterritorial application of Title VII abroad would be unreasonable, Judge King relied on the factors enumerated in Restatement section 403. The first factor enunciated by the Restatement is the effect of the regulated activity on the United

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**Of the Foreign Relations Law of the United States § 402 comment a.** § 402 provides that:

[A] state has jurisdiction to prescribe law with respect to

1. (a) conduct that, wholly or in substantial part, takes place within its territory;
   (b) the status of persons, or interests in things, present within its territory;
   (c) conduct outside its territory that has or is intended to have substantial effect within its territory;
2. the activities, interests, status, or relations of its nationals outside as well as within its territory;
3. certain conduct outside its territory by persons not its nationals that is directed against the security of the state or against a limited class of other state interests.

*Id.*

Because exercises of jurisdiction are normally based on territoriality, nationality being the exceptional basis, situations will sometimes arise when both the state of territoriality and the state of nationality, where they differ, will attempt to exercise jurisdiction. In such a situation, if a potential or actual conflict exists, the Restatement advocates resort to an “evaluation of the competing interests by a standard of reasonableness, as set forth in § 403 (3).” *Restatement (Third) of the Foreign Relations Law of the United States* § 402 comment b.

275. *Boureslan*, 857 F.2d at 1024 (King, J., dissenting).

276. *Id.*

277. This is consistent with the principle that Congress does not intend to violate international law unless such an intent is affirmatively expressed. *Restatement (Third) of the Foreign Relations Law of the United States* § 114.

278. *Boureslan*, 857 F.2d at 1024 (King, J., dissenting). Judge King found support for this two-pronged approach from the language in Steele v. Bulova Watch Co., 344 U.S. 280, 285-86 (1952): “[T]he United States is not debarred by any rule of international law from governing the conduct of its own citizens upon the high seas or even in foreign countries when the rights of other nations or their nationals are not infringed.” As Judge King noted, the “reasonableness” test of the Restatement offers a method of determining “whether foreign rights or interests would be infringed such that extraterritorial application of a statute would be inapplicable.” *Boureslan*, 857 F.2d at 1024 n.9 (King, J., dissenting).

279. *Boureslan*, 857 F.2d at 1025 (King, J., dissenting). The relevant factors necessary to determine whether an exercise of extraterritorial jurisdiction would be reasonable are:
States. Judge King determined that the aggregation of the economic effects of discrimination in the United States, particularly in the context of international employment, indicates that application of Title VII to acts of employment discrimination abroad would be reasonable. Judge King noted that these effects on commerce supported Congress' exercise of the commerce power to reach acts of discrimination in the private sector. According to Judge King, there is no reason to distinguish between the effects on the economy from acts of discrimination occurring within the United States and similar acts of discrimination occurring abroad. To make such a distinction, Judge King asserted, establishes an inequity in the enforcement

(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 regulation is generally accepted;
(d) the existence of justified expectations that 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.

Restatement (Third) of the Foreign Relations Law of the United States § 403(2) (1987). All of these factors should be considered, but only where appropriate. Id. 280. Id. § 403(2)(a).

281. Bourestan, 857 F.2d at 1027 (King, J., dissenting). Judge King noted that "Congress and the courts have long recognized that apart from the personal injuries of discrimination, the cumulative effects of discrimination are pervasive." Id.; see Note, supra note 2, at 1288. The student author noted that:

[M]any companies frequently advertise opportunities for foreign employment, accept applications, screen and interview applicants, and ultimately hire individuals within the territorial United States for foreign employment. Similarly, because foreign service may be a prerequisite to promotion within the hierarchy of American multinational enterprises, allowing companies to discriminate on the basis of race, religion, sex, or national origin in the assignment of employees abroad will often lead to discriminatory promotional practices at home. Id. at 1295-96 (footnotes omitted).

282. Bourestan, 857 F.2d at 1026 (King, J., dissenting); see Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964) (upholding Title II of the Civil Rights Act of 1964 as applied to a place of public accommodation serving interstate travelers); Katzenbach v. McClung, 379 U.S. 294 (1964) (upholding Title II of the Civil Rights Act of 1964 as exercise of Congress' power under the Commerce Clause).

283. Bourestan, 857 F.2d at 1027 (King, J., dissenting).
of the guarantees of equal employment opportunity, thus causing an anomalous result when evaluated in light of the remedial purposes of Title VII. Moreover, citing the EEOC's observation that in multinational corporations the future of an employee's career is often determined by his acceptance of or promotion to a position in the corporate foreign office, Judge King argued that, without the protections of Title VII during their foreign assignment, the future advancement of employees of such corporations, particularly women and minorities, in the corporation's United States offices might be severely limited. Therefore, the requisite "effect" on the United States of any discriminatory employment practices occurring abroad renders application of Title VII to such situations reasonable.

Judge King also considered another factor from Restatement section 403, the protection of the justified expectations of those who would be affected by the extraterritorial application of the legislation. Judge King determined that United States citizens reasonably expect access to judicial recourse for acts of discrimination occurring during their assignment to a foreign post with their United States employer. Similarly, Judge King further demonstrating the reasonableness of applying Title VII abroad by noting that the parties to be regulated and benefitted by the extraterritorial application of Title VII are United States nationals, and not nationals of a foreign country. In assessing the reasonableness of applying a statute extraterritorially, the Restatement section 403 requires that both the entity regulated by the statute and the class of persons for whose benefit the legislature enacted the statute have sufficient contact with the regulating forum to satisfy traditional requirements for exercising jurisdiction.

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284. Id. Judge King noted that although the Civil Rights Act was based upon the power of Congress to regulate commerce as determined by the cumulative adverse economic effects of discrimination, the main purpose of Congress was to grant equal rights to all persons within the scope of the fourteenth amendment: "[The Civil Rights Act of 1964] was intended not only to remedy domestic economic ills, but to protect individuals from 'the injustices and humiliations' of discrimination." Id. at 1026 (quoting H.R. REP. NO. 914, 88th Cong., 1st Sess. 2018 (1963)); see Heart of Atlanta Motel, 379 U.S. at 284.

285. Boureslan, 857 F.2d at 1027 (King, J., dissenting).

286. Id.

287. Id.; RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 403(2)(d).

288. Boureslan, 857 F.2d at 1027 (King, J., dissenting).

289. Id.; see RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 403(2)(b).

290. Boureslan, 857 F.2d at n.17 (King, J., dissenting) ("Regulating the activities of businesses incorporated within a state is one of the oldest and most established examples of prescriptive jurisdiction.") (quoting Laker Airways, Ltd. v. Sabena, Belgian World Airlines, 731 F.2d 909, 926 (D.C. Cir. 1984)). As for the factors enumerated in RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 403(2)(c), (e) & (f), see supra note
Based on this analysis of the Restatement section 403 criteria, Judge King concluded that the extraterritorial application of Title VII is reasonable unless such application offends the interests of sovereign nations. The dissent asserted that the extraterritorial application of Title VII not only furthers strong United States interests, but also complies with articulated international concerns regarding the elimination of all forms of discrimination. Judge King dismissed the majority's argument that the exercise of jurisdiction over United States corporations abroad may conflict with concurrent attempts by the host nation to regulate the same activities. The mere fact that concurrent jurisdiction might exist, Judge King asserted, does not render the exercise of Title VII jurisdiction unreasonable. Judge King argued that the likelihood of arousing international tensions when applying Title VII to acts of discrimination within a foreign country would be re-

279. Judge King noted that one of the underlying purposes of Title VII was to ameliorate the unfavorable international perceptions of our domestic racial situation at a time when our own neglect at remedying the effects of domestic discrimination undermined our push for human rights abroad. *Boureslan*, 857 F.2d at 1027-28 (King, J., dissenting) (quoting H.R. REP. NO. 1370, 87th Cong., 2d Sess. 2156 (1962)). Therefore, this strong national commitment to the elimination of employment discrimination, and to the stabilization of labor relations in general, demonstrates that the character and importance of the regulated activity to the U.S. justifies applying Title VII extraterritorially. *ReSTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES* § 403(2)(c). Moreover, “[s]ince Title VII expands on antidiscrimination principles that have been the subject of international concern, there can be no doubt that the desirability of the regulation is generally accepted, and that the regulation is important to the international community and consistent with the traditions of the international system.” *Id.* § 403(2)(c), (e) & (f); *Boureslan*, 857 F.2d at 1028 (King, J., dissenting).

291. *Boureslan*, 857 F.2d at 1028 (King, J., dissenting). This part of Judge King's argument addressed *ReSTATEMENT § 403(2) factors (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"). *ReSTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES* § 403(2). Judge King sought to rebut Aramco's arguments that application of Title VII extraterritorially would offend concepts of sovereignty because "labor laws are of particularly local concern," and would "produce inevitable conflicts of law." *Boureslan*, 857 F.2d at 1028 (King, J., dissenting).

292. *Boureslan*, 857 F.2d at 1028 (King, J., dissenting); see, e.g., Note, supra note 2, at 1298 nn.66-69.

293. *Boureslan*, 857 F.2d at 1028 (King, J., dissenting). Aramco argued that the reasonableness inquiry should be used to prevent an exercise of jurisdiction over U.S. companies when the host nation would seek to exercise concurrent jurisdiction. Judge King noted that such a scheme had the potential for creating a "jurisdictional vacuum," the extent to which foreign countries might attempt to regulate the employment relationship between U.S. citizens and their U.S. employers within their country is highly speculative. *Id.* Moreover, the availability of the judicial and administrative machinery of those countries to aggrieved U.S. citizens seeking relief for discriminatory employment practices is unknown. *Id.* Judge King further stated that the courts of a foreign nation might evaluate the Restatement factors in such a manner as to preclude their own exercise of jurisdiction in such situations. *Id.* at 1028-29.

294. *Id.* at 1028.
duced because United States courts would seek to adjudicate claims involving their own nationals and not those of the foreign nation.295

Judge King also analyzed the rationales underlying other labor laws that have been held not to apply extraterritorially, and determined that those rationales do not impinge upon the reasonableness of applying Title VII abroad.296 As primary support for her assertion that Title VII applies extraterritorially, Judge King specifically relied on the reasoning behind the Supreme Court's refusal to apply the eight hour work day297 extraterritorially to violations of the act by American employers in Foley Bros. v. Filardo.298 In Foley Bros., the broad scope of the law troubled the Supreme Court because it contained no provision that distinguished between aliens and United States citizens working abroad.299 The possibility existed, therefore, that extending extraterritorial application of the law to United States citizens abroad might allow foreign citizens to challenge an employer's violation of the law, thereby intruding into the labor relations of a foreign country.300 Because the Court determined that extraterritorial application of the law would affect both citizens and aliens abroad, and because such an exercise of jurisdiction over foreign nationals would impinge upon the sovereignty of that nation, such an exercise of jurisdiction would be unreasonable.301

As the Boureslan dissent noted, however, Title VII contains an alien exemption provision that expressly distinguishes between aliens and United States citizens employed abroad.302 The alien exemption provision, therefore, remedies the deficiency of other labor laws which lack similar statutory

295. Id. at 1029 (citing Timberlane Lumber Co. v. Bank of America, 549 F.2d 597, 612 (9th Cir. 1976) ("applying American laws to American citizens raises fewer problems than application to foreigners.").)

296. Id.


299. Id. at 286.

300. Boureslan, 857 F.2d at 1029 (King, J., dissenting) (quoting Foley Bros., 336 U.S. at 286.)

301. Id.; Foley Bros., 336 U.S. at 286. Judge King then discussed other labor laws that do not distinguish between citizens and aliens in their application. In McCulloch v. Sociedad Nacional de Marineros de Honduras, 372 U.S. 10, 21 (1963) (National Labor Relations Act) and Benz v. Compania Naviera Hidalgo, 353 U.S. 138, 147 (1957) (Labor Management Relations Act), the Supreme Court stated that it would not "run interference in . . . a delicate field of international relations" by applying U.S. labor laws to benefit foreign seamen on foreign flag vessels. Boureslan, 857 F.2d at 1030 (King, J., dissenting) (quoting Benz, 353 U.S. at 147).

language and have thus been denied extraterritorial application.\textsuperscript{303} Because the alien exemption provision explicitly exempts aliens employed abroad by otherwise covered employers, there is no possibility that the extraterritorial application of Title VII would intrude upon the specific labor relations of foreign nations.\textsuperscript{304} Moreover, Judge King argued that the BFOQ exception in Title VII\textsuperscript{305} provides a built-in mechanism which minimizes potential conflicts with foreign law,\textsuperscript{306} thus further demonstrating the reasonableness of applying Title VII extraterritorially.\textsuperscript{307}

In concluding that the extraterritorial application of Title VII to United States corporations employing United States citizens would be reasonable under principles of international law, Judge King examined the language and legislative history of Title VII to determine whether Boureslan demonstrated a threshold showing of a clear congressional intent to overcome the presumption against extraterritoriality.\textsuperscript{308} Judge King’s analysis, which focused primarily on the alien exemption provision, demonstrated that Congress, by expressly exempting aliens employed abroad, fully intended to

\textsuperscript{303} Boureslan, 857 F.2d at 1030 (King, J., dissenting). Judge King mentioned that the labor laws, relied upon by the majority, which have been held not to apply extraterritorially were distinguishable from Title VII on the following grounds: the Railway Labor Act (RLA) “incorporates a provision of the Interstate Commerce Act which explicitly restricts its application to carriers engaged in transportation within the United States.” Id. at n.21. The Age Discrimination in Employment Act (ADEA) is devoid of a provision similar to the alien exemption provision of Title VII. Id. Congress amended the ADEA, however, in 1984 to explicitly provide for extraterritorial application. Older Americans Act Amendments of 1984, Pub. L. No. 98-459, 98 Stat. 1767, 1792 (codified as amended at 29 U.S.C. §§ 623(h), 630(f) (1988)).

\textsuperscript{304} Boureslan, 857 F.2d at 1030 (King, J., dissenting). In Foley Bros., the Supreme Court argued that the lack of a distinction between citizens and aliens in the statute indicated that it “was intended to apply only to those places where the labor conditions of both citizen and alien employees are a probable concern of Congress. Such places do not include foreign countries . . . .” 336 U.S. at 286. Basically, the Supreme Court argued that if Congress intended to apply the Eight Hour Law extraterritorially, it should have made clear that it intended the statute to apply to aliens within the United States (“where the labor conditions of both citizens and alien employees are a probable concern of Congress”) and not to foreign citizens in foreign countries. By exempting coverage of aliens employed abroad by U.S. employers under Title VII, it seems that Congress adhered to the Supreme Court’s guidance in Foley Bros. and narrowly tailored Title VII to reach U.S. citizens employed in foreign countries.

\textsuperscript{305} 42 U.S.C. § 2000e-2(e) (198); see supra notes 29-32 and accompanying text.

\textsuperscript{306} Boureslan, 857 F.2d at 1030 (King, J., dissenting).

\textsuperscript{307} Id.; see RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 403(2)(h) (“the likelihood of conflict with regulation by another state.”). As noted in Kern v. Dynalectron Corp., 577 F. Supp. 1196 (N.D. Tex. 1983), aff’d mem., 746 F.2d 810 (5th Cir. 1984), actions mandated by foreign law will be recognized as an affirmative defense to a Title VII claim.

\textsuperscript{308} Boureslan, 857 F.2d at 1031-34 (King, J., dissenting).
provide protection to United States citizens, wherever employed, who are otherwise covered by the Act.\textsuperscript{309}

V. AN ALTERNATIVE TO THE ALTERNATIVE FRAMEWORK: THE CONCEPT OF DEFERENCE TO ADMINISTRATIVE CONSTRUCTIONS OF AMBIGUOUS STATUTORY PROVISIONS

The Boureslan opinion is significant to an analysis of the extraterritorial application of Title VII, and transnational employment rights in general, because it represents the courts’ reluctance to interfere with the internal management decisions of multinational corporations operating overseas.\textsuperscript{310} A number of reasons may justify this hesitation to proscribe intracorporate employment policies of companies located far from the territorial jurisdiction of the United States.\textsuperscript{311} Typically, multinational corporations operating abroad draw upon the local labor force to satisfy a portion of their employment needs. Imposing the requirement of compliance with United States fair employment laws respecting Americans employed by these companies, while not similarly guaranteeing to the local labor force these equal opportunities for employment, creates a dilemma for United States corporations abroad.\textsuperscript{312} A corporation’s more favorable treatment of American employees could involve assertions of favoritism and weaken the morale of the local workforce. If the labor laws of the foreign country are comparable to our own, then these problems may not exist; in that case, American employees may be protected by similarly favorable foreign laws. Practically, however, the latter instance may not arise because the main motivation for corporations locating abroad, the less restrictive nature of the particular foreign country’s national labor policy, may be defeated.\textsuperscript{313}

A typical argument advanced to demonstrate the reasonableness of applying United States labor laws to corporations abroad is that, where the corpo-

\textsuperscript{309} Id.

\textsuperscript{310} The court noted that “[r]equiring American employers to comply with Title VII in such a country could well leave American corporations the difficult choice of either refusing to employ United States citizens in the country or discontinuing business.” Id. at 1020 (Davis, J., majority).

\textsuperscript{311} Note, The Domestic and Extraterritorial Application of United States Employment Discrimination to Multinational Corporations, 4 Conn. J. Int’l L. 145, 181 (“corporations assert that application of Title VII and the ADEA to their operations abroad will blunt their competitive edge.”) (citing Cleary v. United States Lines, Inc., 555 F. Supp. 1251, 1263 (D.N.J. 1983), aff’d, 728 F.2d 607 (3d Cir. 1984)).

\textsuperscript{312} Boureslan, 857 F.2d at 1020; see supra note 314.

\textsuperscript{313} P. Lindert, INTERNATIONAL ECONOMICS 571 (8th ed. 1986) (“The freedom to replace source-country production and jobs with production and jobs in other countries is particularly exercised by firms faced with strong labor organizations in the source country.”).
ration is not subject to a conflicting requirement of foreign law, such application will not force employers to discriminate between their foreign and American employees.\textsuperscript{314} Guaranteeing both groups of employees similar rights and benefits, guided by the principles embodied in our own employment laws, would eliminate any disparity in treatment and serve both domestic and international goals of human rights.\textsuperscript{315} This argument, however, ignores the fact that, in many situations, overseas United States employers find it necessary to guarantee greater benefits to Americans to make the prospects of a foreign assignment more attractive. Moreover, such an argument tends to defeat the purpose in locating abroad in the first place: the availability of cost-effective sources of labor less hampered by the requirements of United States labor laws.\textsuperscript{316}

The majority opinion in \textit{Boureslan} may have tacitly acknowledged these considerations as part of their refusal to apply Title VII to Boureslan's claim of discrimination. In any event, the \textit{Boureslan} opinion remains significant in two respects. First, as the first circuit court of appeals to consider explicitly the issue of Title VII's extraterritorial reach, the court's decision represents a crushing blow to the previous successful efforts of the EEOC to extend the jurisdictional reach of the Act to an emerging area of interest in United States fair employment law: transnational employment.\textsuperscript{317} Moreover, as Judge King's dissent in \textit{Boureslan} recognized, the eventual resolution of this issue will involve more than the mere application of principles of statutory construction.\textsuperscript{318} Successful implementation of Title VII to acts of employment discrimination abroad requires a case by case analysis in which considerations of foreign policy, international conflicts of laws, and adherence to international norms play a significant role.\textsuperscript{319} The principal legacy of the \textit{Boureslan} opinion is the alternative analytical framework, provided by Judge King, for evaluating the issue of the extraterritorial application of any statute, and ultimately Judge King's analysis of the reasonableness in applying Title VII to acts of employment discrimination abroad.\textsuperscript{320}

Finally, in evaluating the issue of the extraterritorial application of Title VII, no analysis would be complete without consideration of the concept of judicial deference to the administrative agency interpretations of ambiguous

\textsuperscript{314} See Note, supra note 311, at 183.
\textsuperscript{315} See Note, supra note 2, at 1330.
\textsuperscript{316} See LINDERT, supra note 313.
\textsuperscript{319} Id. at 1021-35.
\textsuperscript{320} Id. at 1024-31.
statutory provisions. Because the courts usually give great deference to the EEOC's interpretation of Title VII, the Commission's interpretation of the alien exemption provision should similarly be given the deference it deserves. If one takes the position that the language of the provision is ambiguous, a further reason for supporting the EEOC's interpretation of the exemption emerges. In EEOC v. Commercial Office Products Co., the Supreme Court held that the courts will defer to the EEOC's interpretation of ambiguous language appearing within Title VII, as long as the interpretation is reasonable. The Court specified that a determination of the reasonableness of the interpretation requires support from the language of the Act, as well as the articulated purposes of the Act found within its legislative history. Because the references in the legislative history of the Act, the purposes behind the alien exemption provision, and the definitional sections of the Act support the EEOC's interpretation of the provision, courts should grant due deference to the Commission's opinion.

The federal courts have construed the alien exemption provision in two different fashions. Some courts interpreting the provision have held that the express exclusion of aliens employed abroad indicates a congressional intent to provide aliens employed within the United States judicial and administrative recourse for acts of employment discrimination. Other courts have held that the provision evinces a congressional intent to cover American citizens employed outside the United States by covered employers. Although the two interpretations are not wholly inconsistent, the perception that this provision is ambiguous remains. The provision's susceptibility to two different meanings supports its equivocality. The inherent compatibility of the interpretations does not require the exclusion of one interpretation while favoring the other. The interpretation of the provision advanced by the EEOC, that the alien exemption provision indicates Congress' intent to apply the Act abroad, however, is the more reasonable of the two interpretations.

Judge King, in her Boureslan dissent, noted that Congress would have violated the equal protection clause of the fourteenth amendment to the United States Constitution if it had excluded resident aliens from the protec-

321. See supra notes 111-15 and accompanying text.
324. Id. at 115-16.
325. Id.
326. See supra notes 51-65 and accompanying text.
327. See supra notes 62-65 and accompanying text.
328. See supra notes 60-61 and accompanying text.
tions of Title VII without sufficiently justifying such a distinction between aliens and citizens. Aliens, as well as citizens, are entitled to equal protection under the laws of the United States, including Title VII, by the fourteenth amendment. Because employers would be covered by Title VII when employing aliens within the United States regardless of the alien exemption provision, interpreting the provision to protect aliens within the United States is superfluous and, thus, violates principles of statutory construction.

As Judge King noted, a violation of statutory construction occurs when an interpretation of a provision renders that provision meaningless. When one possible construction of a statutory provision produces an unreasonable result or deprives the provision of substance, another interpretation should be favored. Because the law favors rational and sensible constructions of statutory provisions and presumes that the legislature does not act futilely, an interpretation of the alien exemption provision as evidence of congressional intent to cover aliens employed within the United States would emasculate the effectiveness of the provision.

Interpreting the provision to protect United States citizens employed abroad, however, produces a logical and just result which is clearly consistent with the purposes and policies of the Act. An analysis of the factors

329. Boureslan v. Aramco, 857 F.2d 1014, 1033 (King, J., dissenting), cert. granted sub nom. EEOC v. Arabian American Oil Co., 111 S. Ct. 40 (1990). Relying on the opinion of the Supreme Court in Espinoza v. Farah Mfg. Co., 414 U.S. 86, 95 (1983), Judge King noted that "the use of the term 'individual' in defining 'employee' is sufficient to bring aliens within the statute's coverage." Boureslan, 857 F.2d at 1033. Moreover, for the purposes of the fifth and fourteenth amendments, aliens are considered persons "entitled to the equal protection of the laws of the United States." Id. (citing Yick Wo v. Hopkins, 118 U.S. 356 (1886); Truax v. Raich, 239 U.S. 33 (1915)).

330. Boureslan, 857 F.2d at 1033 (King, J., dissenting).

331. Id. at 1032. Judge King stated that superfluous interpretations of statutory provisions violate the "established rule of statutory construction which obliges a court 'to give effect, if possible, to every word Congress used.'" Id. (quoting Reiter v. Sonotone Corp., 442 U.S. 330, 339 (1979)).

332. See Rosado v. Wyman, 397 U.S. 397 (1970); Commissioner of Internal Revenue v. Brown, 380 U.S. 563 (1965); United States v. Reeves, 752 F.2d 995, 998 (5th Cir.) ("a statute should be read to avoid rendering its language redundant if reasonably possible"), cert. denied, 474 U.S. 834 (1985); Goff v. Taylor, 706 F.2d 574, 587 n.34 (5th Cir. 1983) ("[i]t is well established that a statute should be construed so that each of its provisions is given full effect; interpretations which render parts of a statute inoperable or superfluous are to be avoided"); Marsano v. Laird, 412 F.2d 65 (2d Cir. 1969) ("an interpretation which emasculates a provision of a statute is not to be preferred 


335. See supra notes 13-14, 46-50 and accompanying text.
enumerated in *Commercial Office Products Co.*\(^{336}\) to determine the reasonableness of an agency's interpretation of an ambiguous statutory provision indicates that the EEOC's interpretation of the alien exemption provision is amply supported by the language of the other sections of Title VII, specifically the statutory definitions of "employer"\(^{337}\), "employee"\(^{338}\), and "commerce"\(^{339}\). The extreme breadth of these definitions indicates their capability of including an overseas United States corporation and its United States employees. Also, scattered throughout the legislative history of the Act are numerous references which indicate a congressional intent to cover entities engaged in foreign commerce and to protect all individuals capable of being covered by the Act from discriminatory employment practices.\(^{340}\)

Moreover, nowhere in the Act are United States corporations operating abroad expressly excluded from Title VII coverage.

The reasonableness of the EEOC's interpretation of the alien exemption provision becomes self-evident in light of the articulated congressional purpose behind the alien exemption provision. The legislative history indicates that Congress included this exemption within Title VII to prevent possible conflicts with the laws of other nations which might otherwise arise if Title VII applied to foreign nationals employed by United States employers abroad.\(^{341}\) As Judge King noted, this congressional statement of purpose indicates that the elimination of conflicts of laws with respect to aliens abroad abolishes "any obstacles to protecting [United States] citizens employed abroad by [United States] corporations."\(^{342}\) Thus, the legislative history of the alien exemption provision, the purpose behind the provision, and the language of other sections in Title VII adequately support the EEOC's interpretation of the provision as an affirmative expression of congressional intent to cover United States citizens employed abroad by United States corporations. Because this interpretation is reasonable in light of the *Commercial Office Products Co.* factors, the courts should defer to the EEOC's position and apply Title VII extraterritorially.

\(^{337}\) 42 U.S.C. § 2000e(b) (1988); see *supra* note 17.
\(^{338}\) 42 U.S.C. § 2000e(f) (1988); see *supra* note 20 and accompanying text.
\(^{339}\) 42 U.S.C. § 2000e(g) (1988); see *supra* note 22 and accompanying text.
\(^{340}\) *See supra* notes 40-50 and accompanying text.
\(^{341}\) *See supra* note 55 and accompanying text.
VI. CONCLUSION

The civil rights laws enacted by Congress are intended to eliminate the debilitating barriers that discrimination presents to the full enjoyment of the rights and privileges guaranteed to individuals within our country. In particular, by ensuring equality in employment opportunities, Title VII of the Civil Rights Act of 1964 represents a concerted effort by Congress to remove the severe economic hurdle that discrimination imposes on social advancement. Yet the relics of discriminatory employment practices remain, and now, with the steady export of United States corporations and American employees, these vestigial practices may yet find a haven on foreign soil. Surely, the rights of United States citizens are not restrained by the borders they cross as they seek employment opportunities abroad. Such a proposition is anomalous in light of the broad remedial purposes of Title VII.

What may seem a foregone conclusion regarding the extraterritorial application of Title VII in actuality, however, represents a quagmire in the field of United States fair employment law. This confusion is attributable in part to the recent Fifth Circuit evaluation of the issue in Boureslan v. Aramco. The majority opinion in Boureslan not only affronts the equality of Americans, but also defeats the successful efforts of the Equal Employment Opportunity Commission to extend the broad remedial protections of Title VII to an emerging area of concern for the United States. The express language of the statute, as well as the historical legislative references to the purposes underlying the Act, evince Congress’ intent that Title VII reach American employers engaged in foreign commerce. Moreover, a meaningful interpretation of the alien exemption provision commands the inference that Americans employed by such corporations be fully protected from acts of employment discrimination during their tenure of employment abroad. In the absence of actual conflicts with foreign law, application of Title VII extraterritorially is reasonable under the principles of international law. American employees should not be expected to leave their civil rights behind them when accepting a foreign post with a United States employer, neither should such employers seek to shirk their responsibilities under the laws of the United States by locating abroad.

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