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EXTRATERRITORIAL EMPLOYMENT PROTECTION AMENDMENTS OF 1991: CONGRESS PROTECTS U.S. CITIZENS WHO WORK FOR U.S. COMPANIES ABROAD

I. INTRODUCTION

On November 21, 1991, President Bush signed the Civil Rights Act of 1991 into law.¹ The new Act is the most extensive civil rights legislation since the Civil Rights Act of 1964.² The new Act's goal is to "amend the Civil Rights Act of 1964, to strengthen and improve Federal civil rights laws, to provide for damages in cases of intentional employment discrimination, to clarify provisions regarding disparate impact actions, and for other purposes."³

The Civil Rights Act of 1991 reverses seven United States Supreme Court decisions.⁴ One Supreme Court decision that the Act

1. Pub. L. No. 102-166, 105 Stat. 1071 (1991)

2. 42 U.S.C. § 1981 (1988).

3. Pub. L. No. 102-166 (1991). More specifically, the Act lists the following purposes:

(1) to provide appropriate remedies for intentional discrimination and unlawful harassment in the workplace; (2) to codify the concepts of "business necessity" and "job related" enunciated by the Supreme Court in *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), and in the other Supreme Court decisions prior to *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989); (3) to confirm statutory authority and provide statutory guidelines for the adjudication of disparate impact suits under title VII of the Civil Rights Act of 1964 [citation omitted]; and (4) to respond to recent decisions of the Supreme Court by expanding the scope of relevant civil rights statutes in order to provide adequate protection to victims of discrimination.

Id. § 3.

4. The Civil Rights Act of 1991 reversed the following cases: *EEOC v. Arabian Oil Co.*, 111 S. Ct. 1227 (1991) (*see infra* notes 5-7 and accompanying text); *West Virginia Univ. Hosps., Inc. v. Casey*, 111 S. Ct. 1138 (1991) (prevailing party can not recover fees for expert services in civil rights litigation); *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989) (§ 1981 which prohibits race discrimination in the "making and enforcement of contracts," is limited to hiring and promotion cases); *Lorance v. AT&T*, 490 U.S. 900 (1989) (the time period to challenge a seniority policy as discriminatory begins when the employer approves the policy); *Martin v. Wilks*, 490 U.S. 755 (1989) (white firefighters can challenge a consent decree entered into years earlier mandating minority hiring); *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989) (once the plaintiff establishes a prima facie case that a *specific* employment policy or practice resulted in a disparate impact, the employer only has the burden to explain how the disparate practice or policy serves a legitimate goal); *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989) (even if the employer took plaintiff's protected class into account, the employer can avoid liability by proving that it would have treated the

reverses is *EEOC v. Arabian American Oil Co. (Aramco)*,⁵ which held that Title VII of the 1964 Civil Rights Act does not apply to American citizens who work for American companies abroad.⁶ In *Aramco*, the Supreme Court held that based on the presumption against extraterritoriality, Congress did not provide the clear and expressed intent to apply Title VII extraterritorially.⁷ By adding a new section entitled "Protection of Extraterritorial Employment" to the 1964 Civil Rights Act, Congress has now provided the clear and expressed intent to apply Title VII extraterritorially.⁸

This comment analyzes the 1991 extraterritorial amendments to the 1964 Civil Rights Act. Part II discusses the development of the rule of statutory construction that requires federal courts to presume against applying a federal statute extraterritorially. In addition, Part II discusses how the Supreme Court applied the presumption against extraterritoriality in *Aramco*. Part III discusses the "Extraterritorial Employment Protection Amendments." Specifically, this part examines the legislative history and the language of the extraterritorial amendments that Congress added to the 1964 Civil Rights Act. Finally, Part IV suggests the potential consequences of the extraterritorial amendments.

II. BACKGROUND: THE EXTRATERRITORIAL APPLICATION OF THE 1964 CIVIL RIGHTS ACT

A. *Presumption Against Extraterritoriality*

Traditionally, a rule of construction for ambiguous statutes required a presumption against applying a federal statute extraterritorially.⁹ Courts presumed that a federal statute applied only in the United States unless Congress clearly intended the statute to have extraterritorial application.¹⁰

*American Banana Co. v. United Fruit Co.*¹¹ was the first case that required the Supreme Court to determine if a federal statute could be

plaintiff in the same manner if it did not take the plaintiff's protected class into account).

5. 111 S. Ct. 1227 (1991).

6. *Id.* at 1229.

7. *Id.* at 1230-36.

8. See Pub. L. No. 102-166, § 109, 105 Stat. 1071 (1991).

9. See Jonathan Turley, *Transnational Discrimination and the Economics of Extraterritorial Regulation*, 70 B.U. L. REV. 339, 344 (1990).

10. See *id.*

11. 213 U.S. 347 (1909).

applied extraterritorially.¹² *American Banana Co.* involved a monopoly formed by the defendant, United Fruit Co., over the banana trade in Costa Rica.¹³ Writing for the majority, Justice Holmes held that the Sherman Anti-Trust Act did not apply to monopolies outside of the United States even though both parties were American corporations.¹⁴ Holmes reasoned that "the general and almost universal rule is that the character of an act as lawful or unlawful must be determined wholly by the law of the country where the act is done."¹⁵ The strict rule of construction set forth by Holmes required that courts construe statutes to be "confined in [their] operation and effect to the territorial limits over which the lawmaker has general and legitimate power."¹⁶ Otherwise, according to Holmes, the court's action of extending a statute extraterritorially would violate the international law principle of sovereign power.¹⁷

Holmes's rigid canon of construction remained precedent until the early 1930s when courts began to allow some statutes to apply beyond the territory of the United States.¹⁸ Instead of a strict presumption against applying a statute extraterritorially, courts began to form a rule that created a rebuttable presumption against applying a statute extraterritorially.¹⁹ For example, in *Blackmer v. United States*,²⁰ the Supreme Court had to determine whether the Walsh Act²¹ rebutted the presumption that the Act could not be applied extraterritorially.²² Be-

12. See Jonathan Turley, "When in Rome": *Multinational Misconduct and the Presumption Against Extraterritoriality*, 84 Nw. U. L. REV. 598, 603 (1990) [hereinafter Turley].

13. *American Banana Co.*, 213 U.S. at 354.

14. *Id.* at 357.

15. *Id.* at 356.

16. *Id.* at 357.

17. See *id.* at 356; see also Turley, *supra* note 12, at 607.

18. Turley, *supra* note 12, at 604-05.

19. *Id.* at 605.

20. 284 U.S. 421 (1932).

21. 28 U.S.C. §§ 1783-1784 (1988). The Walsh Act applies to citizens who are required to give testimony in a criminal trial but neglect to do so. In 1932, the Act explicitly stated that:

Whenever the attendance at the trial of any criminal action of a witness, being a citizen of the United States or domiciled therein, who is beyond the jurisdiction of the United States, is desired by the Attorney General . . . the judge of the court before which such action is pending . . . may . . . order that a subpoena issue . . . commanding such witness to appear before the said court at a time and place therein designated.

Blackmer, 284 U.S. at 433 n.1.

22. *Blackmer*, 284 U.S. at 437.

cause Congress explicitly authorized the application of the statute in a foreign country, the Court held that the statute could be applied extraterritorially.²³ In *Blackmer*, the Court focused on Congressional intent to rebut the presumption that a statute could not be applied extraterritorially.²⁴

In *Foley Bros., Inc. v. Filardo*,²⁵ however, the Supreme Court once again applied the rigid presumption against applying a federal statute extraterritorially. In *Foley Bros.*, the Court had to determine whether the Federal Eight Hour Law²⁶ could be applied extraterritorially.²⁷ The defendant, Foley Bros., entered into a contract with the United States to build certain public works in Iraq and Iran.²⁸ The defendant hired the plaintiff, Filardo, as a cook on the construction site.²⁹ The contract between the parties contained no provision regarding overtime hours.³⁰ Filardo often worked more than eight hours a day, but Foley Bros. refused his request for overtime pay.³¹ As a result, Filardo filed suit against Foley Bros. claiming that the Eight Hour Law entitled him to overtime pay.³² The jury found for Filardo and the New York Court of Appeals affirmed.³³ The Supreme Court granted certiorari in order to determine the scope of the Eight Hour Law.³⁴

In *Foley Bros.*, the Supreme Court recognized that Congress had the power to extend a federal act extraterritorially.³⁵ The Court had to determine, however, whether Congress actually intended for the Eight Hour Law to apply extraterritorially.³⁶ To reach its conclusion, the Court set forth two basic premises. Adopting the first premise from *Blackmer*, the Court noted "the canon of construction which teaches

23. *Id.*

24. See Turley, *supra* note 12, at 606. *Contra American Banana Co. v. United Fruit Co.*, 213 U.S. 347, 356 (1909) (strict presumption against extraterritoriality).

25. 336 U.S. 281 (1949).

26. 40 U.S.C. §§ 321-326. The Eight Hour Law provided that "[e]very contract made to which the United States . . . is a party . . . shall contain a provision that no laborer or mechanic doing any part of the work contemplated by the contract . . . shall be required or permitted to work more than eight hours in any one calendar day upon such work" *Id.* § 324. Congress repealed this law on August 13, 1962.

27. *Foley Bros.*, 336 U.S. at 282.

28. *Id.* at 283.

29. *Id.*

30. *Id.*

31. *Id.*

32. *Id.*

33. *Id.*

34. *Id.* at 280.

35. *Id.* at 284.

36. *Id.* at 285.

that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States."³⁷ In support of this first premise, the second premise provided that "Congress is primarily concerned with domestic conditions."³⁸ Upon applying these standards to the Eight Hour Law, the Court concluded that Congress did not intend for the Act to apply extraterritorially.³⁹

Foley Bros. set the precedent that the presumption against applying a statute extraterritorially was the canon of statutory construction that a court must apply when faced with an extraterritorial question. The reasoning behind *Foley Bros.*' presumption against extraterritoriality, however, was not the same as that in *American Banana Co.*⁴⁰ As stated above, in *American Banana Co.*, the Court reasoned that applying American law extraterritorially would result in a violation of international law.⁴¹ In *Foley Bros.*, however, the Court did not hold that extending American law extraterritorially would result in such a violation.⁴² Instead, *Foley Bros.* merely created a rule of statutory construction.⁴³

In *McCulloch v. Sociedad Nacional de Marineros de Honduras*,⁴⁴ the Supreme Court once again explicitly addressed the potential for violation of international law if courts applied American law extraterritorially.⁴⁵ In *McCulloch*, the Court had to determine if the National Labor Relations Act (NLRA)⁴⁶ extended beyond the territories of the

37. *Id.*

38. *Id.*

39. *Id.* The Court found no language in the Eight Hour Law that showed any congressional intent to extend the Act extraterritorially. *Id.* The Court also found no congressional intent in the legislative history of the Act. *Id.* at 286. Instead, the Court noted that Congress passed the Act because of its concern for domestic labor conditions. *Id.*

40. See Turley, *supra* note 12, at 607.

41. *American Banana Co. v. United Fruit Co.*, 213 U.S. 347, 356 (1909).

42. See Turley, *supra* note 12, at 607. Turley indicates, however, that the presumption set forth in *Foley Bros.* seems to be as strict as the one set forth in *American Banana Co.*

43. *Id.*

44. 372 U.S. 10 (1963).

45. *Id.* at 21-22; see also Turley, *supra* note 12 at 607 n.66.

46. 29 U.S.C. § 151. The purpose of the NLRA is to prevent "the inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract" because this inequality "substantially burdens and affects the flow of commerce, and tends to aggravate recurrent business depressions, by depressing wage rates and the purchasing powers of wage earners in industry and by preventing the stabilization of competitive wage rates and working conditions within and between industries." *Id.*

United States.⁴⁷ The Court held that the NLRA does not extend to the maritime duties of alien seamen employed by foreign-flag vessels.⁴⁸ The Court first recognized that Congress has the power to extend the NLRA beyond the United States territories.⁴⁹ The Court, however, had to determine if Congress actually exercised this power.⁵⁰ In making its determination, the Court addressed the international rule that "the flag state ordinarily governs the internal affairs of a ship."⁵¹ The Court held, therefore, that before it extended an American law extraterritorially and disturbed the "delicate field of international relations," the Court required "an affirmative intention of Congress clearly expressed."⁵²

B. EEOC v. Aramco: No Extraterritorial Application of Title VII of the 1964 Civil Rights Act

Before the Supreme Court decided *Aramco*, most of the federal district courts applied Title VII extraterritorially.⁵³ In addition, commentators analyzed the language of Title VII as permitting the statute to apply extraterritorially.⁵⁴ In *Aramco*, however, the Supreme Court held that Title VII did *not* apply extraterritorially to American citizens

47. *McCulloch*, 372 U.S. at 12. This case involved foreign subsidiaries owned by United Fruit Company, an American company. *Id.* The foreign subsidiaries each owned sea vessels that carried a foreign crew and flew a foreign flag. *Id.* The National Maritime Union of American represented unlicensed seamen employed by Honduran-flagged vessels. *Id.* at 13. The union filed a petition with the National Labor Relations Board (NLRB) on behalf of the seamen. *Id.* The NLRB claimed that the NLRA extended to these foreign seamen. *Id.* at 12.

48. *Id.* at 13.

49. *Id.* at 17.

50. *Id.*

51. *Id.* at 21.

52. *Id.* at 21-22 (quoting *Benz v. Compania Naviera Hidalgo*, 353 U.S. 138, 147 (1957)).

53. See, e.g., *Seville v. Martin Marietta Corp.*, 638 F. Supp. 590 (D. Md. 1986) (Title VII applies extraterritorially); *Bryrant v. Int'l Servs., Inc.*, 502 F. Supp. 472 (D.N.J. 1982) (Title VII applies extraterritorially); *Love v. Pullman Co.*, 13 F.E.P. 423 (D. Colo. 1976) (Congress intended Title VII to apply extraterritorially). *But see* *Boureslan v. Aramco*, 653 F. Supp. 629 (S.D. Tex. 1987) (no clear congressional intent to apply Title VII extraterritorially), *aff'd* 857 F.2d 1014 (5th Cir. 1988), *aff'd*, 892 F.2d 1271 (5th Cir. 1990)(en banc), *aff'd sub nom.* *EEOC v. Arabian Am. Oil Co.*, 111 S. Ct. 1227 (1991).

54. See Laird M. Street, *Application of U.S. Fair Employment Laws to Transnational Employees in the United States and Abroad*, 19 N.Y.U. J. INT'L L. & POL., 357, 363 (1987) [hereinafter Street].

who work for American companies abroad.⁵⁵

1. Facts of *EEOC v. Aramco*

The plaintiff, Ali Boureslan, was born in Lebanon and became a naturalized United States citizen.⁵⁶ The defendants, Arabian American Oil Company (Aramco) and its subsidiary, Aramco Service Company (ASC), were Delaware corporations.⁵⁷ Aramco and ASC's principal place of business was Dhahran, Saudi Arabia and Houston, Texas respectively. Aramco was also licensed to do business in Texas.⁵⁸

In 1979, ASC hired Boureslan as a cost engineer in its Houston office.⁵⁹ In 1980, ASC transferred Boureslan, upon his request, to work with Aramco in Saudi Arabia.⁶⁰ While working for Aramco, Boureslan and his superior engaged in numerous arguments that ultimately led to Boureslan's termination.⁶¹ According to Boureslan, the arguments resulted from his employer's continued harassment, which included racial, religious and ethnic slurs.⁶²

As a result of his discharge, Boureslan filed a discrimination charge against Aramco with the Equal Employment Opportunity Commission (EEOC).⁶³ Boureslan also filed suit against Aramco and ASC in the United States District Court for the Southern District of Texas based on the alleged discriminatory treatment that he received while working for Aramco in Saudi Arabia.⁶⁴ Boureslan sought relief under Title VII of the Civil Rights Act of 1964 as well as under state law.⁶⁵

Aramco and ASC both filed summary judgment motions to dismiss Boureslan's suit for lack of subject matter jurisdiction.⁶⁶ The defendants claimed that the district court did not have subject matter jurisdiction because Title VII does not apply to United States citizens who work for United States companies abroad.⁶⁷ The district court

55. *Aramco*, 111 S. Ct. at 1229.

56. *Id.* at 1229-30.

57. *Id.* at 1230.

58. *Id.*

59. *Id.*

60. *Id.*

61. *Boureslan v. Aramco*, 857 F.2d 1014, 1016 (5th Cir. 1988), *aff'd* 892 F.2d 1271 (5th Cir. 1990) (en banc), *aff'd sub nom. EEOC v. Arabian Am. Oil Co.*, 111 S. Ct. 1227 (1991).

62. *Id.*

63. *Id.*

64. *Id.*

65. *Id.*

66. *Id.*

67. *EEOC v. Aramco*, 111 S. Ct. 1227, 1230 (1991).

granted Aramco and ASC's motions and a panel of the United States Court of Appeals for the Fifth Circuit affirmed the district court's decision.⁶⁸ The Fifth Circuit subsequently vacated the panel's decision and reheard the case en banc.⁶⁹ Upon its rehearing, the Fifth Circuit affirmed the district court's dismissal of Boureslan's claim.⁷⁰ The Supreme Court granted certiorari to both Boureslan and the EEOC in order to resolve the issue of whether Title VII protects United States citizens who work for United States companies abroad.⁷¹

2. Supreme Court's Reasoning

Writing for the majority, Chief Justice Rehnquist first recognized that "Congress has the authority to enforce its laws beyond the territorial boundaries of the United States."⁷² Thus, the Court's objective was to determine through statutory construction whether Congress intended to apply Title VII extraterritorially.⁷³ Rehnquist adopted the strict rule of statutory construction from *Foley Bros.* that "legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States."⁷⁴ According to Rehnquist, this rule "serves to protect against unintended clashes between our laws and those of other nations which could result in international discord."⁷⁵ Rehnquist determined that the Court must look at the express language of Title VII to determine whether Congress intended Title VII to apply extraterritorially.⁷⁶ In making its determination, the Court must "assume that Congress legislates against the backdrop of the presumption against extraterritoriality."⁷⁷ In addition, the Court must assume that Congress is predominately concerned with domestic conditions, unless Congress clearly expresses a contrary intent.⁷⁸

The majority applied this strict canon of construction to two parts of the statute. First, the majority determined whether the statute de-

68. *Boureslan*, 857 F.2d at 1015.

69. *Boureslan v. Aramco*, 892 F.2d 1271 (5th Cir. 1990), *aff'd sub nom.* EEOC v. Arabian Am. Oil Co., 111 S. Ct. 1227 (1991).

70. *Id.* at 1272.

71. *Aramco*, 111 S. Ct. at 1230.

72. *Id.*; see also *Foley Bros., Inc. v. Filardo*, 336 U.S. 281, 284-85 (1949).

73. *Aramco*, 111 S. Ct. at 1230.

74. *Id.* (quoting *Foley Bros.*, 336 U.S. at 285).

75. *Id.*; see also *McCulloch v. Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10, 20-22 (1963).

76. *Aramco*, 111 S. Ct. at 1230.

77. *Id.*

78. *Id.* (quoting *Foley Bros.*, 336 U.S. at 285).

fined the jurisdictional terms "employer" and "commerce" broad enough to include United States companies that hire United States citizens abroad.⁷⁹ Second, the majority determined whether the statute's "alien exemption" clause demonstrated that Congress intended to protect U.S. citizens who worked for U.S. companies abroad.⁸⁰

The Court rejected both Boureslan's and Aramco's interpretations of Title VII's definitions of "employer," "affecting commerce" and "commerce."⁸¹ Instead, the Court held that by using the same language in Title VII to define "commerce" as Congress used in other statutes that did not apply extraterritorially, Congress did not intend Title VII to extend extraterritorially.⁸² Furthermore, the Court found no evidence in case law that broad definitions of "commerce," includ-

79. *Id.*, 111 S. Ct. at 1230-31. Title VII defines employer as "a person engaged in industry affecting commerce who has fifteen or more employees." 42 U.S.C. § 2000(e)(b). The statute defines an industry affecting commerce as:

[A]ny activity, business, or industry in commerce or in which a labor dispute would hinder or obstruct commerce or the free flow of commerce and includes any activity or industry 'affecting commerce' with-in the meaning of the Labor-Management Reporting and Disclosure Act of 1959, and further includes any governmental industry, business or activity.

Id. § 2000(e)(h). Finally, Title VII defines commerce as "trade, traffic, commerce, transportation, transmission, or communication among the several States; or between a State and any place outside thereof; or within the District of Columbia, or a possession of the United States; or between points in the same State but through a point outside thereof." *Id.* § 2000(e)(g).

80. *Aramco*, 111 S. Ct. at 1231. The "alien exemption" states: "[T]his subchapter shall not apply to an employer with respect to the employment of aliens outside any state." *Id.* § 2000(e-1).

81. Petitioners asserted that Title VII's "broad jurisdictional language" illustrated Congress' intent to apply the statute extraterritorially. Reply Brief for Petitioner at 3, *EEOC v. Aramco*, 111 S. Ct. 1227 (1991) (Nos. 89-1838, 89-1845) [hereinafter Petitioner's Brief]. More specifically, petitioners asserted that Congress intended for the clause "between a State and any place thereof" to refer to areas outside of the territorial limits of the United States. *Id.* Respondents, however, argued that the clause "or between a State and any place outside thereof" "provide[s] the jurisdictional nexus required to regulate commerce that is not wholly within a single state, presumably as it affects both interstate and foreign commerce" instead of regulating "conduct exclusively *within* a foreign country." *Id.* at 21 n.14 (emphasis in original). Respondents also argued that none of the statute's definitions refer to "commerce with foreign nations." *Id.* Lastly, respondents contended that because the Senate deleted the terms "foreign commerce" and "foreign nations" before it passed the Act, Congress clearly intended that Title VII *not* extend to protect U.S. citizens that worked for U.S. companies abroad. *Id.*

82. *EEOC v. Aramco*, 111 S. Ct. 1227, 1232 (1991); *see, e.g.*, Consumer Product Safety Act, 15 U.S.C. § 2052(a)(12); Federal Food, Drug, and Cosmetic Act, 21 U.S.C. § 321(b); Transportation Safety Act of 1974, 49 U.S.C. § 1802(1).

ing those that mention "foreign commerce," have ever been held to apply extraterritorially.⁸³ Finally, the Court stated that "if we were to permit possible, or even plausible interpretations of language such as that involved here to override the presumption against extraterritorial application, there would be little left of the presumption."⁸⁴ The Court, therefore, affirmed its prior holding that the strict rule of construction for determining whether a federal statute applies extraterritorially requires a presumption against extraterritoriality.

The Court also rejected Boureslan's argument that the alien exemption provision⁸⁵ "clearly manifests an intention" by Congress to apply Title VII extraterritorially.⁸⁶ Boureslan had argued that by drawing a negative inference from the language of the "alien exemption provision," Congress clearly intended Title VII to be applied extraterritorially.⁸⁷ The Court held, however, that Boureslan's interpretation of the "alien exemption provision" offered no means to distinguish between United States employers and foreign employers.⁸⁸ The Court reasoned that Boureslan's interpretation would absurdly result in subjecting a foreign employer of a United States citizen in a foreign country to Title VII.⁸⁹ Because this result could potentially cause international discord, the Court required a clearer indication that Congress intended to subject Title VII to foreign companies in foreign countries than that pro-

83. *Aramco*, 111 S. Ct. at 1232; see, e.g., *New York Cent. R.R. v. Chisholm*, 268 U.S. 29 (1925) (no specific language indicated congressional intent to apply the Federal Employers Liability Act extraterritorially even though the statute conferred jurisdiction for cases involving foreign commerce); *McCulloch v. Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10 (1963) (no specific language indicating congressional intent to apply the National Labor Relations Act overseas even though the statute broadly defines "commerce").

84. *Aramco*, 111 S. Ct. at 1233.

85. 42 U.S.C. § 2000(e-1).

86. Petitioner's Brief, *supra* note 81; at 12-13.

87. *Aramco*, 111 S. Ct. at 1233. In his brief, Boureslan stated that there is "[no] other plausible explanation [that] the alien exemption exists [I]f Congress believed that the statute did not apply extraterritorially, it would have had no reason to include an exemption for a certain category of individuals employed outside the United States." Petitioner's Brief, *supra* note 81, at 12-13. Boureslan further argued that "Congress could not rationally have enacted an exemption for the employment of aliens abroad if it intended to foreclose *all* potential extraterritorial applications of the statute." *Id.* On the other hand, *Aramco* argued that Congress intended the provision to exempt aliens from the areas outside of the United States but still within the United States control. Brief for Respondents at 27, *EEOC v. Aramco*, 111 S. Ct. 1227 (1991). *Aramco* also argued that drawing a negative inference from the "alien exemption provision" only "confirm[s] the coverage of aliens in the United States." *Id.* at 26.

88. *Aramco*, 111 S. Ct. at 1234.

89. *Id.*

vided by the "alien exemption provision."⁹⁰ In support of its holding, the Court presented further evidence that the alien exemption provision did not provide a clear intent by Congress to apply Title VII extraterritorially. The Court indicated that Title VII primarily had a domestic focus.⁹¹ The Court also indicated that the statute did not set forth the method by which Title VII would be enforced abroad.⁹² Finally, the Court reasoned that, if Congress intended Title VII to protect U.S. employees abroad, "it would have addressed the subject of conflicts with foreign laws and procedures."⁹³

In its final point, the Court acknowledged that "[w]hen it desires to do so, Congress knows how to place the high seas within the jurisdictional reach of a statute."⁹⁴ Congress' understanding of extraterritorial application of U.S. statutes is evidenced in various provisions that expressly extend jurisdictional reach extraterritorially.⁹⁵ The Court, therefore, stated that "Congress, should it wish to do so, may . . . amend Title VII and in doing so will be able to calibrate its provisions in a way that we cannot."⁹⁶

3. Justice Marshall's Dissent

In his dissent, Justice Marshall disagreed with the majority's interpretation of the rule of statutory construction for determining

90. *Id.*

91. *Id.* The Court noted various provisions that the statute should not unreasonably interfere with state sovereignty or state laws. *Id.* Furthermore, the Court indicated that Title VII constantly referred to "States," but never mentioned foreign nations or foreign procedures. *Id.*

92. *Id.* The Court used Title VII's venue provisions, 42 U.S.C. § 2000e-5(f)(3), and the limited enforcement power of the EEOC to demonstrate that the statute did not provide any means to enforce the statute overseas. *Id.*

93. *Id.*

94. *Id.* at 1235 (quoting *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 440 (1989)).

95. *Id.*; see, e.g., *Export Administration Act of 1979*, 50 U.S.C. App. § 2415(2) (defining "United States person" as "any domestic establishment of any domestic concern (including any permanent domestic establishment of any foreign concern) and any foreign subsidiary or affiliate (including any permanent foreign establishment) of any domestic concern which is controlled in fact by such domestic concern"); *Logan Act*, 18 U.S.C. § 953 (applies the Act to "[a]ny citizen of the United States, wherever he may be . . .").

96. *Aramco*, 111 S. Ct. at 1236. The Court stated that if Congress wanted Title VII to apply extraterritorially, Congress should amend the Act as it did in 1984 for the *Age Discrimination in Employment Act (ADEA)*, 29 U.S.C. § 621. *Id.* For a discussion on the extraterritorial amendment to the ADEA, see *infra* notes 116-42 and accompanying text.

whether a statute has extraterritorial reach.⁹⁷ According to Marshall, the rule “is *not* a ‘clear statement’ rule . . . [r]ather, as our case law applying the presumption against extraterritoriality well illustrates, a court may properly rely on this presumption only after exhausting all of the traditional tools ‘whereby unexpressed congressional intent may be ascertained.’ ”⁹⁸ By applying this canon of construction to Title VII, Marshall concluded that Congress *did* intend to apply Title VII protection to American citizens who work for American companies abroad.⁹⁹

Marshall analyzed the same provisions of Title VII as those analyzed by the majority.¹⁰⁰ First, Marshall reasoned that the statute defined the terms “employer” and “commerce” broadly enough to include United States employers abroad.¹⁰¹ Second, Marshall reasoned that by negative inference, the “alien-exemption provision” indicated Congress’ intent to apply Title VII extraterritorially.¹⁰²

Following his analysis of these two provisions, Marshall discussed the other points addressed by the majority. Marshall argued that during the hearings for the alien exemption provision, Congress *did* address the issue of conflicts with foreign law.¹⁰³ Marshall also argued that Title VII’s venue provisions, which state that “an action may be brought within the judicial district in which the [employer] has his principal office,” would extend to any United States employer doing

97. *Aramco*, 111 S. Ct. at 1237 (Marshall, J., dissenting).

98. *Id.*; see also *Foley Bros., Inc. v. Filardo*, 336 U.S. 281, 285 (1949) (a court cannot apply the presumption against extraterritoriality until it has used all other factors that determine Congressional intent).

99. *Aramco*, 111 S. Ct. at 1237 (Marshall, J., dissenting).

100. *Id.* at 1240.

101. *Id.* As Justice Marshall stated:

Nothing in the text of the statute indicates that the protection of an “individual” from employment discrimination depends on the location of that individual’s workplace; nor does anything in the statute indicate that employers whose businesses affect commerce “between a State and any other place outside thereof” are exempted when their discriminatory conduct occurs beyond the Nation’s borders.

Id.

102. *Id.* at 1240-41. Justice Marshall based his conclusion on the legislative history of the alien exemption provision, which states:

In section 4 of the Act, a 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. (quoting H.R. Rep. No. 570, 88th Cong., 1st Sess. 4 (1963)) (emphasis added).

103. *Id.* at 1243. For an explanation of the legislative history of the “alien exemption provision,” see *supra* note 102.

business abroad.¹⁰⁴ Finally, although not addressed by the majority, Marshall argued that the extraterritorial application of Title VII is supported by various administrative interpretations such as those by the EEOC and the Justice Department.¹⁰⁵

4. Consequences of the Majority's Decision

The majority's decision in *Aramco* produced many troublesome consequences and left many questions unanswered. For instance, can an American company avoid a lawsuit in America by transferring a female American employee who asked for maternity leave to its foreign office and then fire her? What if she goes on a business trip abroad and is sexually harassed? What about other federal statutes that do not expressly apply extraterritorially? Will these statutes also fail to protect American citizens overseas?

After the Supreme Court rendered its decision in *Aramco*, commentators quickly reacted to the decision's impact on American workers abroad.¹⁰⁶ The main criticism focused on the unprotected two million Americans who work overseas for American companies.¹⁰⁷ Fortunately, Congress quickly reacted to the *Aramco* decision and provided clear answers to the questions that the Court raised in its decision.

III. THE EXTRATERRITORIAL EMPLOYMENT PROTECTION AMENDMENTS OF 1991

As stated above, on November 21, 1991, President Bush signed the 1991 Civil Rights Act into law. Section 109 of the Act contains the "Extraterritorial Employment Protection Amendments."¹⁰⁸ These amendments clearly and expressly extend the protection of Title VII to United States citizens who work for United States companies abroad. Congress followed the Supreme Court's suggestion and demonstrated clear and expressed intent to apply the Act extraterritorially. In so doing, Congress reversed *Aramco*.

104. *Aramco*, 111 S. Ct. at 1243 (quoting 42 U.S.C. § 2000e-5(f)(3)).

105. *Id.* at 1244-45.

106. See generally Joy Cherian, *Losing Job Protection Abroad*, J. OF COM., Apr. 5, 1991, at 4A; Gary Born & W. Hardy Callcott, *When Basic Rights Stop at the Border*, LEGAL TIMES, Mar. 27, 1991, at 26-27 [hereinafter Born & Callcott]. David Barbash, *International Decisions: Equal Employment Opportunity Comm. v. Arabian American Oil Co.*, 85 AM. J. INT'L L. 552 (1991) [hereinafter Barbash].

107. Born & Callcott, *supra* note 106, at 27; Barbash, *supra* note 106, at 557.

108. Pub. L. No. 102-166 § 109 (1991).

A. Legislative History of the Extraterritorial Amendments to Title VII

On May 29, 1991, Representative Kweisi Mfume of Maryland testified in front of the House of Representative's Committee on Rules.¹⁰⁹ In his testimony, Mfume expressed his concern over the Supreme Court's decision in *Aramco*.¹¹⁰ Mfume testified that he "d[id] not believe that Congress intended to leave a whole category of American workers unprotected."¹¹¹ Consequently, Mfume drafted the extraterritorial amendments to the Civil Rights Act.¹¹² Arguing for his proposed amendments, Mfume stated:

[I]nformation I have obtained estimated that there are 2.2 million private sector employees and about 140,514 federal government employees abroad. This is clearly too large of a number to leave unprotected by [T]itle VII and I earnestly hope that we can make haste and close the issue of whether Congress intended for [T]itle VII to apply extraterritorially.¹¹³

The legislative history of Title VII's extraterritorial amendments is based largely on the legislative history of the Age Discrimination in Employment Act's (ADEA)¹¹⁴ extraterritorial amendments. Originally, the ADEA's language did not explicitly express Congress' intent to apply the statute extraterritorially.¹¹⁵ The Older American Act Amendments of 1984, however, amended the ADEA to allow extraterritorial protection for older workers abroad.¹¹⁶ In order to understand the legislative history behind Title VII's extraterritorial amendments, therefore, an examination of the legislative history of the ADEA's extraterritorial amendments is necessary.

The circuit court decisions in *Cleary v. United States Lines, Inc.*¹¹⁷ and *Zahourek v. Arthur Young & Co.*¹¹⁸ motivated Congress to extend

109. *Extraterritorial Employment Protection Amendment of 1991: Hearing Before the House Committee on Rules*, 102nd Cong., 1st Sess. (1991) (statement of Rep. Mfume).

110. *Id.*

111. *Id.* at 2.

112. *Id.* at 3.

113. *Id.* at 4.

114. 29 U.S.C. § 621.

115. *See id.*

116. *Id.*

117. 728 F.2d 607 (3rd Cir. 1984).

118. 750 F.2d 827 (10th Cir. 1984).

the ADEA extraterritorially. In *Cleary*, United States Lines, an American company, employed Cleary for thirty-three years.¹¹⁹ Beginning in 1967, and until his termination in June 1967, Cleary worked for the company in London, England.¹²⁰ United States Lines first claimed that it fired Cleary because of structural reorganization, but later claimed that Cleary's job performance was unsatisfactory.¹²¹ As a result of his termination, Cleary filed an age discrimination claim with the EEOC and filed suit in the United States District Court for the District of New Jersey. The district court held that because the ADEA utilizes the enforcement provisions of the Fair Labor Standards Act (FLSA) and because the FLSA explicitly does not extend extraterritorially, the ADEA also does not apply extraterritorially.¹²² The Third Circuit Court of Appeals affirmed the district court's decision.¹²³

In *Zahourek*, Arthur Young & Co. (Arthur Young) employed Zahourek, an American citizen, as a certified public accountant in its South Vietnam office.¹²⁴ In 1978, Arthur Young transferred Zahourek to Honduras where it ultimately fired him in 1981.¹²⁵ Zahourek filed suit in the United States District Court for the District of Colorado alleging that Arthur Young terminated his employment because of his age.¹²⁶ The district court held, however, that the ADEA does not apply extraterritorially.¹²⁷ The Tenth Circuit Court of Appeals affirmed the district court's decision.¹²⁸

On September 23, 1983, the Subcommittee on Aging of the Committee on Labor and Human Resources of the United States Senate held a hearing regarding age discrimination and overseas Americans.¹²⁹ Senator Charles Grassley (R-Iowa), chairperson of the Subcommittee, opened the hearing by stating:

119. *Cleary*, 728 F.2d at 607.

120. *Id.* at 608.

121. *Id.*

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

123. *Cleary*, 728 F.2d at 610.

124. *Zahourek v. Arthur Young & Co.*, 750 F.2d 827, 828 (10th Cir. 1984).

125. *Id.*

126. *Id.* When Arthur Young fired him, Zahourek was 43 years old. *Id.*

127. *Zahourek v. Arthur Young & Co.*, 567 F. Supp. 1453 (D. Colo. 1983), *aff'd*, 750 F.2d 827 (10th Cir. 1984).

128. *Zahourek*, 750 F.2d at 829.

129. *Age Discrimination and Overseas, 1983: Hearing before the Subcomm. on Aging of the Senate Comm. on Labor and Human Resources*, 98th Cong., 1st Sess. 1 (1983).

This year, the U.S. district courts of New Jersey and Colorado have opened up a major loophole which I believe could seriously threaten the protection under the Age Discrimination in Employment Act of 1967 . . . While I congratulate the judges for judicial restraint uncharacteristic of many of their colleagues, I cannot agree that Congress would ever have intended either to leave out a whole class of American employees or to leave such a large loophole . . . [W]ithout action by this committee and by Congress many more older American workers will find themselves out in the cold with the shelter provided by the Age Discrimination in Employment Act.¹³⁰

The remainder of the hearing consisted of comments from various speakers who expressed their professional opinions regarding the statute's extraterritorial amendment.¹³¹

Justice Clarence Thomas, then chairperson of the EEOC, provided the subcommittee with the EEOC's position on the extraterritorial amendment.¹³² The EEOC agreed with the two district courts' reasoning that the ADEA, as written, did not apply extraterritorially.¹³³ The EEOC supported its conclusion by comparing the language of the ADEA with that of Title VII of the 1964 Civil Rights Act.¹³⁴ Accord-

130. *Id.* (opening statement of Senator Grassley, Chairman of the Subcomm.).

131. *Id.* at 2-48. Hon. Clarence Thomas, Chairperson of EEOC, testified on EEOC's position regarding the extraterritorial application of ADEA. *See infra* notes 132-37 and accompanying text. Steven Kartzman, attorney for Mr. Cleary, *see supra* notes 118-22 and accompanying text, testified that although he felt that the ADEA did have extraterritorial reach, "[C]ongress clearly has the ability to give a statute extraterritorial reach." *Age Discrimination and Overseas, 1983: Hearing before the Subcomm. on Aging of the Senate Comm. on Labor and Human Resources, 98th Cong., 1st Sess. 8 (1983)* (statement of Mr. Steven Kartzman). Eugene Goodman, author and business executive, testified that Congress should extend Title VII extraterritorially, but he also advocated for extending the time of the filing period at least one year from the time of the alleged violation or from the time the American returns to the United States. *Id.* at 18 (statement of Mr. Eugene Goodman). William Yoffe, Executive Director of American Citizens Abroad, testified regarding the need for legislation to assure that Title VII will protect American citizens abroad. *Id.* at 23 (statement of Mr. William Yoffe). Thomas Shea, general counsel for United States Lines, *see supra* notes 123-127 and accompanying text, testified that an extraterritorial amendment to Title VII would be "impossible to implement and to perform." *Id.* at 40 (statement of Mr. Thomas Shea). In addition, letters were submitted from William F. Cagney, Director of Industrial Relations and Management Resources, Dennis Dowdell, Jr., American Lane, and Paul J. Ostling, Associate General Counsel of Arthur Young & Co.

132. *Id.* at 2-4 (statement of Clarence Thomas, Chairperson, EEOC).

133. *Id.* at 3.

134. *Id.*

ing to the EEOC, the "alien exemption provision" extended Title VII beyond the territorial borders of the United States.¹³⁵ However, the ADEA contained no such language.¹³⁶ Arguing that the ADEA should have extraterritorial reach, Thomas stated:

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. The only way to make the two laws consistent and insure that other individual's do not find themselves in Mr. Cleary's situation in the future is to enact legislation such as that proposed by Chairman Grassley to close the existing loophole.¹³⁷

Thomas' testimony demonstrated EEOC's long-standing opinion that the original Title VII had extraterritorial application.¹³⁸ Ironically, the Court in *Aramco* could have used Thomas' reasoning when deciding whether to extend Title VII extraterritorially, i.e., because the amended ADEA has extraterritorial application and because the "purpose and goals of the two statutes are parallel," Title VII also should have extraterritorial application.

The ADEA's extraterritorial amendment, therefore, provided the background for Title VII's extraterritorial amendment. Congress held no additional hearings to assess the advantages and disadvantages of extending Title VII extraterritorially. During the debate on the 1991 Civil Rights Act, Representative William Goodling (R-Pa.) expressed his concern for the lack of hearings on the extraterritorial issue.¹³⁹ Goodling stated that the amendment:

is consistent with the position of the administration before the Supreme Court, but once again, a far-reaching change in employment discrimination law is being undertaken with no pretense of substantive consideration in the legislative process . . . hearings on an issue of this importance - extension of an Ameri-

135. *Id.*

136. *Id.*

137. *Id.*

138. See Petitioner's Brief, *supra* note 81, at 22.

139. 137 CONG. REC. 85, H3934 (daily ed. June 5, 1991) (statement of Rep. Goodling).

can law to other countries and all the potential problems that may entail - would have been useful.¹⁴⁰

B. Language of the Extraterritorial Amendment

In his amendments, Mfume used the same language that Congress used to amend the ADEA.¹⁴¹ As stated above, the Older Americans Act of 1984 contained the amendments to the ADEA. The Senate Committee on Labor and Human Resources' report on the Older Americans Act Amendments of 1984 explained the reasoning behind the language of the ADEA's extraterritorial amendment:¹⁴²

When considering this amendment, the Committee was cognizant of the well-established principle of sovereignty, that no nation has the right to impose its labor standards on another country. That is why the amendment is carefully worded to apply only to citizens of the United States who are working for U.S. corporations or their subsidiaries. It does not apply to foreign nationals working for such corporations in a foreign workplace and it does not apply to foreign companies which are not controlled by U.S. firms. Moreover, it is the intent of the committee that this amendment not be enforced where the compliance with its prohibitions would place a U.S. company or its subsidiary in violation of the laws of the host country.¹⁴³

Section 109 of the 1991 Civil Rights Act contains the "Protection of Extraterritorial Employments Amendments."¹⁴⁴ Section 109(a) adds to the end of the definition of employee, "with respect to employment in a foreign country, such term includes an individual who is a citizen of the United States."¹⁴⁵ Section 109(b) sets forth the employers that

140. *Id.* Representative Goodling recognized the fact that Congress amended the ADEA in 1984 to allow the Act extraterritorial reach. He also noted that the House widely supported the amendment. *Id.*

141. 29 U.S.C. § 621.

142. S. REP. NO. 98-467, 98th Cong., 2nd Sess. 1 (1984). The report stated that, "the purpose behind the amendment is to insure that the citizens of the United States who are employed in a foreign workplace by U.S. corporations or their subsidiaries enjoy the protection of the Age Discrimination in Employment Act." *Id.* at 27.

143. *Id.* at 27-28.

144. Pub. L. No. 102-166, § 109 (1991).

145. *Id.* § 109(a). This section also adds the same language to the definition of employee in the Americans with Disabilities Act of 1990, 42 U.S.C. § 12111(4).

are exempt from the amendment. If complying with Title VII would cause an employer to violate the laws of the foreign country, the employer will be exempt from Title VII's penalties.¹⁴⁶ Specifically, section 109(b) provides that:

It shall not be unlawful under § 703 or 704 for an employer (or a corporation controlled by an employer), labor organization, employment agency, or joint labor management committee controlling apprenticeship or other training or retraining (including on-the-job training programs) to take any action otherwise prohibited by such section, with respect to an employee in a workplace in a foreign country if compliance with such section would cause such employer (or such corporation), such organization, such agency, or such committee to violate the law of the foreign country in which such workplace is located.¹⁴⁷

Finally, section 109 provides that, "if an employer controls a corporation whose place of incorporation is a foreign country, any practice prohibited by [the Act] engaged in by such corporation shall be presumed to be engaged in by such employer."¹⁴⁸ This section determines whether an employer controls a corporation based on "the interrelations of operations, the common management, the centralized control of labor relations, and the common ownership or financial control."¹⁴⁹

IV. CONSEQUENCES OF THE EXTRATERRITORIAL AMENDMENTS TO TITLE VII

The "Protection of Extraterritorial Employment Amendments" provide the clear and expressed Congressional intent that the *Aramco* court required from Congress. By enacting the extraterritorial amendments, Congress has provided the answers to many of the questions that the Supreme Court generated in *Aramco*. Thus, the American female employee who is sexually harassed overseas now can bring suit in the United States against her American employer. *Aramco*, however, still seems to require that federal courts apply the strict rule of construction — the presumption against extraterritoriality — to other Congressional statutes. Consequently, federal courts cannot hold that a

146. Pub. L. No. 102-166, § 109(b)(1)(B) (1991).

147. *Id.*

148. *Id.* § 109(c)(1).

149. *Id.* § 3(A), (B), (C), (D). These factors are common law agency requirements. See Street, *supra* note 54, at 380-81.

federal statute extends extraterritorially, unless Congress explicitly authorizes such reach.

The extraterritorial amendments do not protect all Americans who work for American companies abroad. The amendments expressly exempt those employers that would violate a foreign country's law by complying with Title VII's prohibitions.¹⁵⁰ As stated above, in its committee report on the Older Americans Act Amendments of 1984, the Senate Committee on Labor and Human Resources explained that the policy behind such an exemption was to avoid conflicts with a foreign country's laws.¹⁵¹ Moreover, this exemption is consistent with federal court decisions that have deferred to foreign law when the enforcement of U.S. discrimination law caused a direct conflict with a foreign law.¹⁵²

This international policy has the unfortunate effect of leaving some American workers who work for American companies overseas without Title VII protection. For example, if Kuwait prohibits women from working in certain occupational fields, American employers that are based in Kuwait could refuse to hire a woman in that particular field simply because she is a woman. Of course, if that employer dared to engage in such behavior in the United States, the woman would have a strong Title VII suit against the employer. Another example is a black American employee whose company transfers him to South Africa. If South Africa prohibits blacks from working in the company's particular field, the company could fire him simply because of his race.¹⁵³ What would happen if the company transfers the employee to South Africa *knowing* that it could fire him in South Africa without being subject to a Title VII suit? According to the amendments, the em-

150. Pub. L. No. 102-166, § 109(b) (1991).

151. See *supra* notes 141-42 and accompanying text.

152. See *Kern v. Dynalectron Corp.*, 577 F. Supp. 1196 (N.D. Tex. 1983) (Saudi Arabian law that prohibited non-Moslem pilots from flying into Mecca justified Dynalectron's requirement that American pilots must convert to the Moslem religion), *aff'd*, 746 F.2d 810 (5th Cir. 1981); see also David M. Barbash, Note, *Same Boss, Different Rules: An Argument for Extraterritorial Extension of Title VII to Protect U.S. Citizens Employed Abroad by U.S. Multinational Corporations*, 30 VA. J. INT'L L. 479, 509 (1990) (advocating for the extraterritorial extension of Title VII).

153. For example, the Bantu Building Workers Act prohibits blacks from performing skilled work in the building trade and makes it a criminal offense to employ blacks in such work. 1951 Stat. S. Afr. No 27 § 14, 15. For a further discussion on South African law, see Brian J. F. Clark, Note, *United States Labor Practices In South Africa: Will A Mandatory Fair Employment Code Succeed Where Sullivan Principles Have Failed?*, 7 *FORDHAM INT'L L.J.* 358, 376-77 (1984) [hereinafter Clark].

ployee would have no remedy under Title VII.¹⁵⁴ The American company, however, may be subject to the foreign country's employment discrimination laws. If so, the employee may have a remedy against the American company in the court system of the foreign country.¹⁵⁵

Overall, the extraterritorial amendments provide significant Title VII protection to a great number of American citizens who work overseas for American companies. Unfortunately, because the amendments only protect conduct that occurs after the Act's enactment,¹⁵⁶ people such as Bourseslan still have no Title VII remedy for their employer's alleged discriminatory acts.

In order to avoid being sued in American courts, American companies that operate abroad and employ American citizens will have to conform their employment policies to adhere to Title VII. Because the extraterritorial amendments do not apply to foreign employees who work for American companies abroad,¹⁵⁷ American companies can lawfully apply discriminatory policies against these foreign employees. An American company will have to decide if it will, in fact, adhere to its discriminatory policies against its foreign employees or if the company will treat the foreign employees as it now must treat its American employees. As stated above, however, the foreign country may protect the foreign employee with its own employment discrimination laws.¹⁵⁸

Finally, the extraterritorial amendments may potentially cause an increase in civil rights litigation. In general, Congress designed the 1991 Civil Rights Act to increase litigation.¹⁵⁹ The 1991 Act allows for jury trials, compensatory and punitive damages, and relaxes the plaintiff's burden of proof in disparate-impact cases.¹⁶⁰ An increase in civil

154. The employee, however, may have other remedies in American courts such as breach of contract. In the past, Congress has attempted to pass legislation that would sanction American companies who discriminated against blacks in South Africa. *Id.* at 358-60. For example, in 1983, Rep. Stephen Solarz (D-N.Y.) introduced the Labor Standards Act, H.R. 3231, 98th Cong. 1st Sess. (1983), which would have required American companies doing business in South Africa to adhere to fair labor standards. *See also* Clark, *supra* note 153, at 358-60.

155. For example, Italy prohibits employment discrimination based on race, religion, nationality, sex, marital status, political activities, and union activities. ITALIAN CONST. art. 4 (1948); *see also* 4 SEYFARTH, SHAW, FAIRWEATHER & GERALDSON, LABOR RELATIONS AND THE LAW IN ITALY AND THE UNITED STATES 360 (1970).

156. Pub. L. No 102-166, § 109(c) (1991).

157. *See* S. REP. No. 98-467, 98th Cong., 2nd Sess. 27-28 (1984).

158. *See supra* note 154 and accompanying text.

159. *See* Deborah Martin-Norcross & Pamela S. Poff, *1991 Civil Rights Act Makes Sweeping Shifts*, N.J. L. J. Dec. 7, 1991, at 7.

160. *Id.* Disparate impact results when an employment practice or policy is neutral on its face, but disproportionately or adversely affects minorities or women. *Id.*

rights litigation due to the extraterritorial amendments, therefore, would seem consistent with the overall effect of the 1991 Civil Rights Act. The increase in extraterritorial claims, however, will probably be lower than the increase in other civil rights claims. Before the amendments, the federal courts did not adjudicate many claims that required extraterritorial application of Title VII.¹⁶¹ In addition, since Congress amended the ADEA in 1984, federal courts have not reported any cases that apply the extraterritorial amendments.¹⁶²

V. CONCLUSION

In its decisions denying the extraterritorial reach of the ADEA and Title VII, the federal courts have twice warned Congress that if it does not explicitly state whether a federal statute is to apply extraterritorially, the courts will apply a presumption against the statute's extraterritorial reach. In response to these decisions, Congress enacted Title VII's extraterritorial amendments. In so doing, Congress expanded Title VII protection to a significant number of American citizens who work overseas for American companies. Because the federal courts have yet to apply the new extraterritorial amendments, it is difficult to predict exactly how the amendments will impact civil rights litigation. It is clear, however, that many American citizens who work overseas for American companies can now be confident that Title VII will protect them against employer discrimination.

Renée S. Orleans

161. See generally *Bryrant v. Int'l Servs., Inc.*, 502 F. Supp. 472 (D.N.J. 1982); *Love v. Pullman Co.*, 13 F.E.P. 423 (D. Colo. 1976); *Seville v. Martin Marietta Corp.*, 638 F. Supp. 590 (D. Md. 1986); *Boureslan v. Aramco*, 653 F. Supp. 629 (S.D. Tex. 1987), *aff'd* 857 F.2d 1014 (5th Cir. 1988), *aff'd* 892 F.2d 1271 (5th Cir. 1990)(en banc), *aff'd sub nom.* *EEOC v. Arabian Am. Oil Co.*, 111 S. Ct. 1227 (1991).

162. As of this writing, the author has found no such cases through any LEXIS searches.