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The Development of Title VII Protection for American Citizens Employed Abroad by American Employers: Yesterday, Today and Tomorrow

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THE DEVELOPMENT OF TITLE VII PROTECTION FOR AMERICAN CITIZENS EMPLOYED ABROAD BY AMERICAN EMPLOYERS: YESTERDAY, TODAY AND TOMORROW

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I. INTRODUCTION

Congress labored for twenty years to create a civil rights bill to protect people from the evils of discrimination and bigotry.[1] That long struggle produced the Civil Rights Act of 1964.[2] In the spring of 1991, however, the United States Supreme Court severely restrained the scope of the Act. In *Equal Employment Opportunity Commission v. Arabian American Oil Co.*,[3] the Court held, without precedent, that Title VII of the Civil Rights Act of 1964 did not protect Ameri-

1. *See generally* CHARLES WHALEN & BARBARA WHALEN, THE LONGEST DEBATE: A LEGISLATIVE HISTORY OF THE 1964 CIVIL RIGHTS ACT (1985).
2. 42 U.S.C. § 2000 (1988), *amended by* Civil Rights Act of 1991, Pub. L. No. 102-66, § 109, 105 Stat. 1071 (1991).
3. 111 S. Ct. 1227 (1991).

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can citizens who work abroad for American companies.[4] In the Fall of 1991, Congress reversed the *Arabian* decision by enacting section 109 of the Civil Rights Act of 1991, which extended Title VII coverage to American citizens employed in foreign countries.[5]

This Note discusses the development of the extraterritorial application of Title VII and the historical protections afforded American citizens employed abroad by United States employers.[6] This Note will examine the purpose of Title VII, the history of extraterritorial application of Title VII, and the future of Title VII as amended by the Civil Rights Act of 1991. This Note concludes that Congress correctly overruled the *Arabian* decision by extending Title VII coverage abroad because "the language, history, and administrative interpretations of the statute all support application of Title VII to U.S. companies employing American citizens abroad."[7]

II. Yesterday: A Historical Analysis of the Extraterritorial Application of Title VII of the Civil Rights Act of 1964

The Civil Rights Act of 1964 is widely accepted as the most important civil rights legislation enacted in the twentieth century.[8] Title

4. *Id.* at 1236.

5. Civil Rights Act of 1991, Pub. L. No. 102-66, § 109, 105 Stat. 1071 (1991).

As of 1970, over 680,000 U.S. citizens were privately employed abroad. Debra L.W. Cohn, Note, *Equal Employment Opportunity for Americans Abroad*, 62 N.Y.U. L. Rev. 1288, 1288 n.5 (1987) (citing Social & Economic Statistics Admin., U.S. Dep't of Commerce, Americans Living Abroad (1973)). By 1987, over 35,000 Americans were working in Saudi Arabia alone. *Id.* (citing Youssef M. Ibrahim, *Saudis Impose an Income Tax on Foreigners*, N.Y. Times, Jan. 5, 1988, at A1)). *Cf.* Jonathon Turley, *Transnational Discrimination and the Economics of Extraterritorial Regulation*, 70 B.U. L. Rev. 339, 389 n.289 (noting the difficulty of accurately estimating the number of United States citizens living and working abroad).

6. For the purposes of this Note, employer means any employer that is organized under the laws of one of the several states. A company's "organization" includes the place of its incorporation, control or ownership. *See also* Restatement (Third) of Foreign Relations Law § 213 (1987) [hereinafter Restatement] ("For purposes of international law, a corporation has the nationality of the state under the laws of which the corporation is organized.").

This Note focuses primarily on American companies doing business abroad and the rights of the American citizens who work for such companies. For an analysis of foreign companies doing business in the United States and alien employment in the United States, see Charles A. Edwards, *International Law and Employment Discrimination*, 8 Okla. City U. L. Rev. 1, 1-13 (1983). *See also* Gregory G. Sarno, Annotation, *Actionability, Under Federal and State Antidiscrimination Legislation, of Foreign Employer's Discriminating in Favor of Foreign Workers in Hiring and Other Employment Matters*, 84 A.L.R. Fed. 114 (1987).

7. *Arabian*, 111 S. Ct. at 1246.

8. 4 Joseph G. Cook & John L. Sobieski, Jr., Civil Rights Actions ¶¶ 21.01, 21-4 to 21-5 (1991).

VII is the most important part of the Act[9] because it is the first congressional attempt to eliminate discrimination in employment.[10] Specifically, Title VII is aimed at eliminating discrimination "against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin."[11]

In *Griggs v. Duke Power Co.*,[12] the United States Supreme Court best explained the goal of Title VII as "the removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification."[13] The extraterritorial application of Title VII enhances this goal by prohibiting American employers from violating Title VII in their foreign operations.

A. Congressional Intent and the Extraterritorial Application of Title VII Prior to the Arabian *Decision*

Congress has the undisputed power to apply the force of its laws beyond America's geographical borders.[14] But, prior to the *Arabian* decision it was uncertain whether Title VII applied to U.S. employers outside the United States. The long-standing position of the courts,[15] the EEOC,[16] and the Department of Justice[17] was that Title

9. *Id.*

10. 2 BERNARD SCHWARTZ, STATUTORY HISTORY OF THE UNITED STATES: CIVIL RIGHTS 1020 (1970).

11. 42 U.S.C. § 2000e-2(a)(1) (1988). Ironically, the inclusion of "sex" in Title VII was not in the original bill. *See* HUGH D. GRAHAM, THE CIVIL RIGHTS ERA 136 (1990). Representative Howard Smith (Democrat, Va.) moved to add the word "sex" to the list of protected classes. Representative Smith and the other opponents of the Act supported this addition as a strategy to sink the bill. However, this tactic proved detrimental to their cause as their colleagues sought to give white women the same protections as the bill allocated to African Americans. *Id.* at 136-38.

12. 401 U.S. 424 (1971).

13. *Id.* at 431. *See also* COOK & SOBIESKI, *supra* note 8, ¶ 21.01 n.24.

14. Steele v. Bulova Watch Co., 344 U.S. 280, 282 (1952).

15. *See* Akgun v. Boeing Co., 53 Empl. Prac. Dec. (CCH) ¶ 40,011 (W.D. Wash. 1990); Seville v. Martin Marietta Corp., 638 F. Supp. 590 (D. Md. 1986); Bryant v. International Sch. 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); *see also supra* notes 41-52 and accompanying text.

16. *See* 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 (Sept. 2, 1988); *see also supra* notes 34-40 and accompanying text.

17. *See Foreign Investment and Arab Boycott Legislation: Hearings Before the Subcomm. on International Finance of the Senate Comm. on Banking, Housing and Urban Affairs*, 94th Cong., 1st Sess., 165 (1975) (testimony of Assistant Attorney General stating that Title VII applied abroad); Equal Empl. Comm. Dec. No. 90-1, 52 Fair Empl. Prac. Cas. (BNA) 1893 (Apr. 10, 1990).

VII applied abroad. Although Congress did not explicitly state its intent to apply Title VII abroad in the Civil Rights Act of 1964,[18] provisions of the Act suggest that it was meant to transgress U.S. borders.

First, under the definitional provisions of Title VII the words "employee," "employer" and "commerce" were defined very broadly.[19] "Employee" was defined as "an individual employed by an employer."[20] "Employer" was defined as "a person engaged in an industry affecting commerce."[21] "Commerce" was defined as "trade, traffic, commerce, transportation . . . among the several States; or between a State *and any place outside thereof.*"[22] Nowhere in the statute did Congress express a territorial limit to the application of Title VII.[23] The definition of "commerce" indicated that geography should not limit the scope of Title VII. By expressly stating that "commerce" included activity between a state and "any place outside thereof," the statute strongly suggests that Congress intended Title VII to be applied abroad.[24]

Second, the alien exemption clause[25] implicitly showed congressional intent to apply Title VII abroad. Congress specifically excluded resident *aliens* working outside of the United States.[26] The negative implication of this provision indicates that Congress in-

18. *See generally* 42 U.S.C. § 2000e (1988).

19. *See id.* § 2000e(a)-(k).

20. *Id.* § 2000e(f).

21. *Id.* § 2000e(b). The term "industry affecting commerce" meant any activity, business, or industry in which a labor dispute would interfere with commerce or the free flow of commerce. *Id.* § 2000(e)(h). "Industry affecting commerce" also included any activity or industry affecting commerce within the meaning of the Labor-Management Reporting and Disclosure Act of 1959, 29 U.S.C. § 401, and any governmental industry, business or activity, 42 U.S.C. § 2000(e)(h).

22. 42 U.S.C. § 2000e(g) (1988) (emphasis added).

23. *See generally id.* § 2000e. The Fair Labor Standards Act, by comparison, distinctly excludes from coverage "any employee" who performs services in a foreign country. 29 U.S.C. § 213(f) (1990). The canons of statutory construction require that every part of a statute be considered, including subheadings, in order to arrive at the statute's clear and total meaning. House v. Commissioner, 453 F.2d 982, 987 (5th Cir. 1972); *see also* Reiter v. Sonotone Corp., 442 U.S. 330, 339 (1979).

24. As stated above, see *supra* note 21, "industry affecting commerce" is described as also being within the meaning of the Labor-Management Reporting and Disclosure Act of 1959 (LMRD). 42 U.S.C. § 2000e(h) (1988). The LMRD defined "industry affecting commerce" within the scope of the Labor Management Relations Act (LMRA). *See* 42 U.S.C. § 402(c) (1988). Although the Court, in Benz v. Compania Naviera Hidalgo, S.A., 353 U.S. 138 (1958), held that the LMRA does not apply abroad, the language of the LMRD limits itself to "the commerce of the Nation," thereby distinguishing itself from Title VII, where no explicit mention of boundaries exists. *See* 29 U.S.C. § 401(a) (1988).

25. 42 U.S.C. § 2000e-1 (1988) ("This subchapter shall not apply to an employer with respect to the employment of aliens outside any State.").

26. *Id.*

tended to provide Title VII protection to non-aliens (American citizens) employed abroad. Had Congress intended to exclude these employees, it would have placed a complete exemption clause in Title VII, not a clause exclusively exempting aliens.[27] Therefore, the most plausible explanation for the alien exemption clause was that Congress, by specifically excluding coverage to aliens abroad, intended to protect American citizens abroad.

Third, an examination of legislative history supports the conclusion that the statute applied extraterritorially. Legislative history is particularly relevant because an examination beyond the plain language of the law is necessary when the language of a statute is not clear.[28] The Chairman of the House Judiciary Committee stated that "Title VII covers employers engaged in . . . interstate and foreign commerce."[29] After congressional debates on Title VII, the ranking minority member of the House Judiciary Committee opined that Congress intended to "secure to all Americans the equal protection of the laws of the United States."[30] Still another congressman stated that "the provisions [of Title VII] are necessary 'to remove obstructions to the free flow of commerce among the States and with *foreign nations*'. . . . Title VII covers employers engaged in industries affecting commerce—interstate, and *foreign commerce* . . . ."[31]

With respect to the alien exemption clause, Representative Powell explained, "The intent of [the] 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

27. Additionally, if Congress had included this clause in Title VII only to indicate that aliens were covered in the United States, it would have rendered the clause superfluous. *See* Beisler v. Commissioner, 814 F.2d 1304, 1307 (9th Cir. 1987) ("We should avoid an interpretation of the statute that renders any part of it superfluous and does not give effect to all of the words used by Congress."). Furthermore, the term "employee" also was defined broadly ("an individual"), with no limiting language, and sufficiently encompasses aliens. *See* Espinoza v. Farah Mfg. Co., 414 U.S. 86, 95 (1973). An alien, even without the clause, was thus covered if working within the United States. *Id.* To provide otherwise would violate the Fifth Amendment. Boureslan v. Arabian Am. Oil Co., 892 F.2d 1271, 1276 (5th Cir. 1990) (King, J., dissenting), *aff'd sub nom.*, EEOC v. Arabian Am. Oil Co., 111 S. Ct. 1227 (1991).

28. *See* EEOC v. Arabian, 111 S. Ct. 1227, 1237 (1991) (Marshall, J., dissenting).

29. Janelle M. Diller, Comment, *Title VII of the Civil Rights Act of 1964 and the Multinational Enterprise*, 73 GEO. L.J. 1465, 1469 (1985) (quoting Rep. Emmanuel Celler EEOC, LEGISLATIVE HISTORY OF TITLE VII & XI OF THE CIVIL RIGHTS ACT OF 1964 3094).

30. Adam M. Mycyk, Comment, *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*, 39 CATH. U. L. REV. 1109, 1115 (1990) (citing H.R. REP. No. 914, 88th Cong., 1st Sess. (1963), 1964 U.S.C.C.A.N. 2391, 2488 (statement of Rep. McCulloch)).

31. 110 CONG. REC. H2737 (1964) (emphasis added) (statement of Rep. Libonati).

an American enterprise."[32] The alien exemption clause was therefore aimed at mitigating the encroachment of Title VII into the laws of other countries.[33]

B. *Equal Employment Opportunity Commission and the Extraterritorial Application of Title VII Prior to* Arabian

The EEOC, as Title VII's enforcer,[34] executes Title VII's proscriptions[35] and consistently issues policy guidance statements. Thus, when an ambiguity concerning the enforcement of Title VII exists, it is useful to look to Equal Employment Opportunity Commission opinions on the issue. Since 1975, the EEOC has pronounced that Title VII applies extraterritorially.[36] As recently as 1988, the EEOC reiterated this position by issuing a policy guideline stating that Title VII applies to American citizens employed abroad.[37]

The EEOC also has construed Title VII this way in its adjudications.[38] While Chairman of the EEOC, Supreme Court Justice Clarence Thomas testified before Congress that Title VII applied abroad because of the negative implication of the alien exemption clause.[39]

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32. H.R. REP. No. 570, 88th Cong., 1st Sess. 4 (1963), *reprinted in Civil Rights: Hearings on H.R. 7152 Before Subcomm. No. 5 of the House Comm. on the Judiciary*, 88th Cong., 1st Sess. 2303 (1963) [hereinafter *Civil Rights Hearings*]; *see also* S. REP. No. 867, 88th Cong., 2d Sess., 11 (1964) ("Exempted from the bill are . . . United States employers employing citizens of foreign countries *in foreign lands*.").

33. Mycyk, *supra* note 30, at 1116-17.

34. 42 U.S.C. § 2000e-4 (1988).

35. *See* 42 U.S.C. § 2000e-5 (1988). The EEOC is charged with preventing unlawful employment practices. It may hold proceedings and initiate or intervene in civil actions to enforce Title VII. *Id.*

36. *See* EEOC v. Arabian Am. Oil Co., 111 S. Ct. 1227, 1245 (1991) (Marshall, J., dissenting). Justice Marshall quoted a letter dated March 14, 1975 from William Carey, EEOC General Counsel, to Senator Frank Church which reads as follows: "[I]t is necessary to construe [the alien exemption clause] as expressing a Congressional intent to extend the coverage of Title VII to include . . . citizens in overseas operations of domestic corporations." *Id.*

37. 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 (Sept. 2, 1988); *see also id.* at Part III. Part III assigns three factors in evaluating whether Title VII should apply when international issues exist. These factors are the status of the individual filing the charge, the status of the employer, and the status of the country. *Id.*

38. EEOC Dec. No. 90-1, 52 Fair Empl. Prac. Cas. (BNA) 1893 (Apr. 10, 1990); EEOC Dec. No. 85-16, 1985 EEOC Lexis, (Sept. 16, 1985); *see also* EEOC Dec. 84-2, 33 Fair Empl. Prac. Cas. (BNA) 1983 (Dec. 2, 1983) (holding Japanese company within the scope of Title VII even though it did no business with the United States).

39. *Age Discrimination and Overseas Americans, 1983: Hearing Before the Subcomm. on Aging of the Senate Comm. on Labor and Human Resources*, 98th Cong., 1st Sess. 4 (1983) (statement of Clarence Thomas, EEOC Chairman). Chairman Thomas stated that "the alien exemption provision indicates, by implication, that Congress intended Ti-

This statement informed Congress of the EEOC's position that the general interpretation of Title VII included extraterritorial application.[40] Congress' failure to legislate against the EEOC interpretation suggests that it implicitly accepted this interpretation.

C. *Judicial Interpretation of the Extraterritorial Application Prior to the* Arabian *Decision*

Prior to 1991, the Supreme Court had not ruled on the issue of extraterritorial application of Title VII.[41] Indeed, few lower courts had addressed whether it applied abroad.[42] Those courts generally concluded that Congress did intend Title VII to apply to American employees working abroad for American companies.[43]

The primary reason courts upheld extraterritorial application of Title VII was the negative implication of the alien exemption clause.[44] The alien exemption clause stated that employers[45] who employed aliens outside the United States were exempt from Title

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tle VII to protect American employees working for American employers outside the United States." *Id.*

40. Prior to the adoption of the Civil Rights Act of 1991, the Bush Administration had also declared that Title VII should apply abroad. *See Multinationals: Bush Administration Asks Supreme Court to Apply Title VII to Americans Overseas*, 8 Int'l Trade Rep. (BNA) 110 (Jan. 23, 1991); *Foreign Investment and Arab Boycott Legislation: Hearings Before the Subcomm. on International Finance of the Senate Comm. on Banking, Housing and Urban Affairs*, 94th Cong., 1st Sess., 165 (1975) (testimony of Antonin Scalia, Assistant Attorney General).

41. The Court, however, had addressed extraterritorial application of other acts of Congress. *See, e.g.*, McCulloch v. Sociedad Nacional de Marineros de Honduras, 372 U.S. 10 (1963); Benz v. Compania Naviera Hidalgo, S.A., 353 U.S. 138 (1957); Steele v. Bulova Watch Co., 344 U.S. 280 (1952); New York Cent. R.R. v. Chisholm, 268 U.S. 29 (1925).

42. *See, e.g.*, Akgun v. Boeing Co., 53 Empl. Prac. Dec. (CCH) ¶ 41,011 (W.D. Wash. 1990); Seville v. Martin Marietta Corp., 638 F. Supp. 590 (D. Md. 1986); Bryant v. International Sch. 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); *see also* EEOC v. Institute of Gas Tech., 23 Fair Empl. Prac. Cas. (BNA) 825 (N.D. Ill. 1980) (discussing issue of extraterritoriality without deciding its application); Fernandez v. Wynn Oil Co., 20 Fair Empl. Prac. Cas. (BNA) 1162 (C.D. Cal. 1979) (considering social customs and mores in Latin America and Southeast Asia in applying Title VII).

43. *See Akgun*, 53 Empl. Prac. Dec. (CCH) at ¶ 40,011; *Seville*, 638 F. Supp. at 592; *Bryant*, 502 F. Supp. at 481-83; *Love*, 13 Fair Empl. Prac. Cas. (BNA) at 426.

44. *See Akgun*, 53 Empl. Prac. Dec. (CCH) at ¶ 40,011; *Seville*, 638 F. Supp. at 592; *Bryant*, 502 F. Supp. at 482; *Love*, 13 Fair Empl. Prac. Cas. (BNA) at 426 n.4.

45. "The term 'employer' means a person engaged in an industry affecting commerce who has fifteen or more employees . . . and any agent of such a person." 42 U.S.C. § 2000e(b) (1988). The term does not include the United States, a corporation wholly owned by the United States, an Indian tribe, the District of Columbia, or any bona fide private membership club. *Id.*

VII restrictions.[46] The negative implication was that "[s]ince Congress explicitly excluded *aliens* employed outside [the United States], it must have intended to provide relief to American citizens employed outside of any state . . . by an employer otherwise covered."[47]

Courts also had considered whether the limitation of Title VII to United States borders could be supported by analogies to other acts of Congress that either specifically stated jurisdiction or were judicially interpreted not to apply outside the United States.[48] The courts generally have held these analogies irrelevent.[49] At least one court determined that the negative implication of the alien exemption clause outweighs the presumption against extraterritoriality of domestic laws.[50] The presumption against extraterritoriality is a common-law doctrine which presumes that Congress intended a law to apply only domestically unless Congress has made a "clear statement" to the contrary.[51] The court found that the negative implication doctrine overcame the presumption against extraterritoriality.[52]

D. Equal Employment Opportunity Commission v. Arabian American Oil Co.

1. The Majority Opinion

The United States Supreme Court, in *Equal Employment Opportunity Commission v. Arabian American Oil Co.*, held that Title VII did not protect American citizens working abroad for American employers.[53]

46. *Id.* § 2000e-1.

47. *Love*, 13 Fair. Empl. Prac. Cas. (BNA) at 426 n.4.

48. *See* Bryant v. International Sch. Servs., Inc., 502 F. Supp. 472, 481-83 (D.N.J. 1980).

49. *Id.*

50. Seville v. Martin Marietta Co., 638 F. Supp. 590, 592 (D. Md. 1986); *see also* Love v. Pullman Co., 13 Fair Empl. Prac. Cas. (BNA) 423 (D. Colo. 1976).

51. *See* EEOC v. Arabian Am. Oil Co., 111 S. Ct. 1227, 1237 (1991) (Marshall, J., dissenting).

52. *Seville*, 638 F. Supp. at 592. However, this presumption was found to be valid if a possibility of international discord results from a court following U.S. law in a case involving international issues. *See* Benz v. Compania Naviera Hidalgo, S.A., 353 U.S. 138, 146-47 (1957).

53. 111 S. Ct. 1227 (1991). In *Arabian*, the plaintiff, Ali Boureslan, was a naturalized U.S. citizen. *Id.* at 1227. In 1979, Aramco Service Company (ASC), a subsidiary of Arabian American Oil, hired Mr. Boureslan. In November 1980, he transfered to Aramco in Saudi Arabia. *Id.* at 1229-30. In September 1982, Mr. Boureslan's supervisor allegedly began harassing Mr. Boureslan on account of his national origin, race and religion. Mr. Boureslan alleged that this discrimination ultimately led to his discharge in June 1984. *Id.* at 1230. Mr. Boureslan, after filing a discrimination charge with the EEOC against Aramco and ASC, initiated suit against both companies alleging Title VII violations due to harassment and termination based on his race, religion and national origin. *Id.*

For an informative discussion of the EEOC Title VII procedures, see Mycyk, *supra* note 30, at 1114.

The Court arrived at this decision by analyzing the four arguments made by the EEOC. First, the Court found that the presumption against extraterritorial application of U.S. laws had not been overcome.[54] Second, the Court held that the definitions of the words "employer," "commerce," "states" and the corresponding commerce clause "between a State and any place outside thereof" did not indicate congressional intent to apply Title VII extraterritorially because this language is also found in other Acts of Congress previously held not to apply beyond United States borders.[55] Third, the Court refused to find that the negative implication of the alien exemption clause clearly indicated congressional intent because it was unwilling to decide such delicate issues of international law.[56] Fourth, the Court determined that the EEOC guidelines had been inconsistent over the years and were therefore of limited persuasiveness.[57] The Court concluded by stating that Congress knows how to place a statute within its jurisdictional realm and may amend a statute accordingly.[58]

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54. *Arabian*, 111 S. Ct. at 1236. The Court stated that unless clear congressional intent of extraterritorial application exists, "we must presume [Congress] is 'primarily concerned with domestic conditions.'" *Id.* at 1230 (quoting Benz v. Compania Naviera Hidalgo, S.A., 353 U.S. 138, 147 (1957)).

55. *Id.* at 1231-33. The Court reasoned that such an interpretation would allow an American citizen to bring suit against a foreign employer, as there was no distinction in Title VII between "American employer" and "employer." *Id.* at 1234.

The Court also rejected the petitioner's argument based on prior case law. *Id.* The EEOC vigorously argued that the Court's decision in *Steele v. Bulova Watch Co.*, 344 U.S. 280 (1952), controlled the outcome of *Arabian*. In *Steele*, the Court held the Lanham Act applied extraterritorially. *Id.* at 286. Since the Lanham Act and Title VII both contain broad jurisdictional language, the EEOC argued that both Acts should be given like treatment. The Court rejected this argument as well. The Court explained that the Lanham Act, by its terms, regulates "all commerce which may lawfully be regulated by Congress," including Congress' constitutional right to regulate commerce "with foreign Nations." *Arabian*, 111 S. Ct. at 1232 (citing 15 U.S.C. § 1127 (1988)). The Court stated that the boilerplate language of Title VII "does not support such an expansive construction of congressional intent." *Id.* at 1233. Thus, the Court found that the jurisdictional language of Title VII and prior case law supported the presumption against extraterritorial application.

56. *Arabian*, 111 S. Ct. at 1234.

57. *Id.* The Court held that the proper deference to the guidelines depended upon several factors, including consistency with prior and later pronouncements. *Id.* Factors that determine the level of deference given to the EEOC include: "(1) the thoroughness evident in its consideration; (2) the validity of its reasoning; (3) consistency with earlier and later pronouncements, and (4) all those factors which give it power to persuade, if lacking power to control." *Id.* (quoting General Electric Co. v. Gilbert, 429 U.S. 125, 140-46 (1976)).

58. *Arabian*, 111 S. Ct. at 1235-36. The Court indicated that Congress amended other Acts to include application abroad and "should it wish to do so, may similarly amend Title VII." *Id.*

2. *The Dissent*

Justice Marshall's vigorous dissent focused on the presumption against extraterritoriality.[59] He stated that the presumption is not a "clear statement rule," as the majority concluded, but rather a method which invokes "the entire range of conventional sources 'whereby *unexpressed* congressional intent may be ascertained.' "[60] In contrast, the "clear statement rule" is to be applied only when "the extraterritorial application of a statute would 'implicat[e] sensitive issues of the authority of the Executive over relations with foreign nations.' "[61] Justice Marshall asserted that because the application of Title VII to American nationals abroad would not disturb international relations, a weak presumption doctrine applied, not the "clear statement rule."[62]

The dissent also addressed the alien exemption clause of Title VII.[63] Justice Marshall explained that the negative implication derived from the alien exemption clause is "more than sufficient to rebut the presumption against extraterritoriality."[64] He characterized

59. *Id.* at 1237 (Marshall, J., dissenting).

60. *Id.* at 1238 (emphasis in original) (quoting Foley Bros., Inc. v. Filardo, 336 U.S. 281, 285 (1949). Chief Justice Marshall, in the seminal case of Murray v. The Schooner Charming Betsy, 2 Cranch 64, 6 U.S. 64 (1804), set forth the foundation for extraterritorial application of congressional acts. In *Betsy*, Marshall stated, "an act of Congress ought never to be construed to violate the law of nations, if any other possible construction remains." *Id.* at 118. From this statement evolved the struggle between whether a "clear statement rule" or a "last resort standard" governs situations involving foreign application of United States law.

The standard of review depends upon the particular factual setting of an international issue. If the application of U.S. law abroad would tend to conflict with international issues, then the "clear statement rule" is the appropriate standard. *See* McCulloch v. Sociedad Nacional de Marineros de Hondurus, 372 U.S. 10 (1962); Benz v. Compania Naviera Hidalgo, S.A., 353 U.S. 138 (1956). When the issues do not involve "highly charged international circumstances," however, the "last resort standard" is proper. *McCulloch*, 372 U.S. at 21; *see also* Foley Bros., Inc., v. Filardo, 336 U.S. 281 (1948).

The application of Title VII abroad to protect U.S. nationals working for American enterprises does not agitate any sensitive international issues. This is especially true in light of the foreign compulsion defense available to such American companies abroad and the general international consensus against discrimination. Therefore, the "last resort standard" is more germane in the determination of whether Title VII applied abroad than was the "clear statement rule."

61. The dissent relied on McCulloch v. Sociedad Nacional de Marineros de Honduras, 372 U.S. 10 (1963) and Benz v. Compania Naviera Hidalgo, S.A., 353 U.S. 138 (1957) for its formulation of the "clear-statement rule." *Arabian*, 111 S. Ct. at 1239 (Marshall, J., dissenting).

62. *Id.* at 1240.

63. *Id.*

64. *Id.* The dissent argued that the legislative history of the alien exemption clause also signified congressional intent to apply Title VII extraterritorially. *Id.* at 1241. Justice Marshall cited Senate and House reports which strongly suggest that

the majority's claim that Congress disregarded the subject of foreign law conflicts as "simply incorrect."[65] Justice Marshall argued that the alien exemption provision addresses foreign law concerns and Congress intended it "*to remove conflicts of law,* . . . between the United States and a foreign nation" which may arise if an American company employs an alien abroad.[66]

Addressing the problem of international comity and the possibility of U.S. law interfering with foreign law, Justice Marshall asserted that two distinct statutory interpretations may be necessary.[67] Depending on the nationality of the regulated party, "the *same* statute might be construed to apply extraterritorially to United States nationals but *not* to foreign nationals."[68] Thus, the dissent argued, the appropriate statutory interpretation based upon the facts of each case could reduce the apprehension created by concerns of potential interna-

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Congress had extraterritorial application in mind when crafting the alien exemption clause. These reports indicated that the intent of the exemption was to avoid "*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.* (alteration in original) (quoting H.R. REP. No. 570, 88th Cong., 1st Sess. 4 (1963), *reprinted in* CIVIL RIGHTS, HEARINGS ON H.R. 7152).

Additionally, Justice Marshall noted that the majority did not provide an alternative explanation for the existence of the alien exemption clause consistent with its position that Title VII has only a domestic scope. The majority, he explained, adopted two *raisons d'etre* for the language of the alien exemption clause. Justice Marshall found that the first is illogical and that the second "corroborates the conclusion that Congress expected Title VII to apply extraterritorially." *Arabian*, 111 S. Ct. at 1242 (Marshall, J., dissenting). He concluded that the history of the alien exemption clause solidifies the argument that Congress intended Title VII to apply extraterritorially. *Id.*

65. *Id.* at 1243.

66. *Id.* (emphasis in original) (quoting H.R. REP. No. 570, 88th Cong., 1st Sess. 4, *reprinted in Civil Rights Hearings*, at 2303). Additionally, Justice Marshall noted that the venue provision allows the charging party to file a claim in the district where the discrimination occurred or where the employer has its principal office. *Arabian*, 111 S. Ct. at 1243 (Marshall, J., dissenting). The implication is that if an employer was not found in any district, it must be outside the borders of the United States. Thus, if venue extended to extraterritorial locations, then Title VII must also apply abroad.

Justice Marshall also mentioned that the EEOC has broad investigatory powers which are without geographic limitation. He noted that the EEOC can investigate charges in its principal office or "*at any other place.*" *Id.* (emphasis in original) (quoting 42 U.S.C. § 2000e-4(f)). In addition, he stated that although the subpoena power of the EEOC is limited under Title VII, this limitation has no effect on the extraterritorial reach of Title VII. *Id.*

67. *Id.* at 1244.

68. *Id.* As authority for this proposition, Justice Marshall cited two Lanham Act cases: Steele v. Bulova Watch Co., 344 U.S. 280, 285-87 (1952), and Vanity Fair Mills, Inc. v. T. Eaton Co., 234 F.2d 633, 642-43 (2d Cir. 1956). *Id.* In *Steele*, the Court applied the Lanham Act to a U.S. national for conduct abroad. *Steele*, 344 U.S. at 285-87. However, in *Vanity Fair Mills*, the court declined to apply the Lanham Act to a foreign national for conduct abroad. *Vanity Fair Mills*, 234 F.2d at 642-43.

tional discord.[69]

Finally, Justice Marshall addressed the majority's attack on the EEOC's interpretation that Title VII applied abroad.[70] The dissent argued that the extraterritorial application of Title VII is supported not only by its language and legislative history, but also by pertinent administrative interpretations. Justice Marshall explained that since 1975, the EEOC has supported extraterritorial application of Title VII[71] and the majority erroneously used a 1970 regulation to contradict EEOC policy.[72]

Justice Marshall concluded his dissent by stating that the majority misused the presumption against extraterritoriality to bar consideration of congressional intent which indicated Title VII was meant to apply abroad.[73]

III. Today: The Civil Rights Act of 1991 and the Extraterritorial Application of Title VII

Congress was swift in its response to the *Arabian* decision. The Court decided *Arabian* on March 26, 1991.[74] Two representatives introduced bills to reverse the Court's decision on April 10 and 11.[75] Additionally, Senator Edward Kennedy, stated that he intended to

69. *Arabian*, 111 S. Ct. at 1244 (Marshall, J., dissenting). Justice Marshall argued that the legislative history of Title VII supports just such an interpretation. *Id.*

70. *Id.* at 1244-45.

71. *Id.* at 1245. In 1975, the General Counsel to the EEOC stated, in pertinent part, "[t]he [alien exemption clause] does not similarly exempt from the provisions of the Act, U.S. Citizens employed abroad by U.S. employers." *Id.* (quoting Letter from W. Carey, EEOC General Counsel, to Senator Frank Church (Mar. 14, 1975)). Additionally, Justice Marshall pointed out that the EEOC continually upheld this belief in its decisions and policy guidelines. *Id.*

72. *Id.* at 1246. Interpreted correctly, Justice Marshall contended, neither residency nor citizenship controlled the enforcement of Title VII, and thus, the EEOC did not contradict itself. *Id.* Additionally, Justice Marshall argued that the Department of Justice also propounded its view that Title VII applies abroad, to which he noted the majority had no response. *Id.* Specifically, the Department stated, "[o]nce again the [statute] contains an exemption 'with respect to the employment of aliens outside any State,' which implies that it is applicable to the employment of United States citizens" by American companies abroad. *Id.* (quoting *Foreign Investment and Arab Boycott Legislation: Hearings Before the Subcomm. on International Finance of the Senate Comm. on Banking, Housing and Urban Affairs*, 94th Cong., 1st Sess., 165 (1975) [testimony of Assistant Attorney General Antonin Scalia]).

73. *Id.*

74. *Id.*

75. Representative William J. Jefferson, (Democrat, La.), and Representative Kweisi Mfume, (Democrat, Md.), both introduced bills to counter the decision of the *Arabian* Court. Both bills proposed an amendment to Title VII that extended Title VII protection to American citizens when employed overseas by U.S. companies. *See* H.R. 1694, 102d Cong., 1st Sess. (1991) (introduced by Rep. Jefferson); H.R. 1741, 102d Cong., 1st Sess. (1991) (introduced by Rep. Mfume).

add a clause into a forthcoming version of the 1991 civil rights bill that would mandate the extraterritorial application of Title VII.[76]

Congress enacted the Civil Rights Act of 1991 to amend the Civil Rights Act of 1964.[77] The primary impetus behind the Act was to "strengthen and improve Federal civil rights laws,"[78] in order to provide adequate remedies for discrimination and harassment in the workplace.[79]

In direct response to the *Arabian* decision, Congress included within the Civil Rights Act of 1991 a provision that concisely and succinctly amended Title VII to apply extraterritorially.[80] The amendment's definition of "employee" reads: "With respect to employment in a foreign country, such term includes an individual who is a citizen of the United States."[81]

While the amendment clearly extends the application of Title VII abroad, the determination of what or who is an "American employer" is not as clear.[82] Additionally, it is unclear to what extent the foreign compulsion defense will release U.S. employers.[83]

IV. TOMORROW: LITIGATION TO FURTHER DEFINE TITLE VII

Three issues will likely claim court attention as a result of the Civil Rights Act of 1991. The first is what type of companies are included in the definition of "American employer." The second issue is whether resident aliens travelling abroad for their American employers are entitled to Title VII protection. The last issue is the extent to which courts will allow corporations to use the foreign compulsion defense to avoid compliance with Title VII.

A. *The American Employer*

The issue of whether an employer is an "American employer" arises when, for example, a company has operations in the United States and also has an affiliate in another country. If an American employee works abroad for an affiliate and discrimination occurs

76. *See Civil Rights That Stop at Water's Edge*, L.A. TIMES, Mar. 31, 1991, at M4.

77. Civil Rights Act of 1991, Pub. L. No. 102-66, 105 Stat. 1071 Pmbl. (1991).

78. *Id.*

79. *Id.* §§ 3(1), (4). This Note will address only § 109 of the Act, which concerns the protection of extraterritorial employment.

80. 137 CONG. REC. H3922 (daily ed. June 5, 1991). The proposed amendment received little debate; opposition was limited to a desire for hearings and debate on the issue before passing it into law. *Id.* (statements of Rep. Goodling, (Republican, Pa.), ranking member of the Committee on Education and Labor, and Rep. Stenholm, (Democrat, Tex.)).

81. The Civil Rights Act of 1991, Pub. L. No. 102-66, § 109(a), 105 Stat. 1071, 1077 (1991).

82. *Id.* § 109(b), 105 Stat. at 1077.

83. *See infra* notes 99-107 and accompanying text.

against that employee, the employee must sue the American company. However, a court, for purposes of Title VII, will have jurisdiction only if the American employer and the foreign affiliate are so closely related to be perceived as a single American employer.[84]

Whether a foreign affiliate is an "American employer" is determined by an evaluation of the following four factors: (1) interrelation of operations, (2) common management, (3) centralized control of labor relations, and (4) common ownership or financial control.[85] These factors were originally promulgated by the National Labor Relations Board[86] and have been incorporated into the Civil Rights Act of 1991.[87] Courts, in previous Title VII litigation, have considered control over labor operations to be the most important factor in determining whether related companies can be recognized as one employer.[88]

It remains uncertain whether courts will strictly or leniantly construe the definition of "American employer" when determining the extraterritorial application of Title VII. Presumably, the liberal stance courts have taken in applying Title VII should influence the application of Title VII abroad.[89] Courts have indicated that the term "employer" should be given a liberal construction, enabling Title VII to accomplish its goals.[90] However, the courts may tighten their traditionally liberal view of Title VII when applying it abroad since it would be easy to implicate international issues in such a situation. In light of the international context, courts, to provide a fair and logical framework for determining whether a company is an "American employer," must therefore balance the interest of international comity and the employee's Title VII rights.

84. *See* McKenzie v. Davenport-Harris Funeral Home, 834 F.2d 930, 933-34 (11th Cir. 1987).

85. Civil Rights Act of 1991, Pub. L. No. 102-66, § 109(c)(3), 105 Stat. 1071, 1077 (1991).

86. *See, e.g.*, Radio & Television Broadcast Technicians Local 1264 v. Broadcast Serv. of Mobile, Inc., 380 U.S. 255, 256 (1965); Evans v. McDonald's Corp., 936 F.2d 1087, 1089 (10th Cir. 1991); McKenzie v. Davenport-Harris Funeral Home, 834 F.2d 930, 933 (11th Cir. 1987); Baker v. Stuart Broadcasting Co., 560 F.2d 389, 392 (8th Cir. 1977); Marques v. Digital Equip. Corp., 490 F. Supp. 56, 58 (D. Mass.), *aff'd*, 637 F.2d 24 (1st Cir. 1980).

87. The Civil Rights Act of 1991, Pub. L. No. 102-66, § 109(c)(3), 105 Stat. 1071, 1077 (1991).

88. *See Evans*, 936 F.2d at 1090 (citing Wheeler v. Hurdman, 825 F.2d 257, 270 (10th Cir.), *cert. denied*, 484 U.S. 986 (1987)).

89. *See* Daniels v. Essex Group, Inc., 937 F.2d 1264, 1270 (7th Cir. 1991); Clayton v. White Hall Sch. Dist., 875 F.2d 676, 679 (8th Cir. 1989); *see also* American Tobacco Co. v. Patterson, 456 U.S. 63, 80-81 (1982) (Brennan, J., dissenting); Hazelwood Sch. Dist. v. United States, 433 U.S. 299, 313 (1977) (Brennan, J., concurring).

90. *See McKenzie*, 834 F.2d at 933; Trevino v. Celanese Corp., 701 F.2d 397, 403 (5th Cir. 1983); *Baker*, 560 F.2d at 391.

B. Resident Aliens

A second area of potential litigation is the alien exemption clause.[91] Although the alien exemption clause clearly removes aliens from the reach of Title VII if they are employed abroad, it is unclear whether a resident alien of the United States is covered by Title VII while temporarily or permanently out of the country on assignment.[92] The conflict arises when considering whether resident aliens, although not citizens, are entitled to the same rights abroad as when they legally reside within the United States.[93]

Resident aliens, if substantial voluntary connections with the United States have been lawfully established,[94] are afforded the protections of the Bill of Rights and the Fourteenth Amendment.[95] Resident aliens, who have established these connections, should not be deprived of constitutional protection when assigned overseas by American employers.[96] It would be inequitable to forcefully require resident-aliens to relinquish their constitutional rights because the

91. 42 U.S.C. § 2000e-1 (1988). See *supra* note 25 for the text of this clause.

92. For example, may an employee who is a U.S. resident of German alienage bring a Title VII action against her American employer if the workplace is located in Spain?

93. In Espinoza v. Farah Mfg. Co., 414 U.S. 86 (1973), the Court held that Congress intended the alien exemption clause of Title VII to protect aliens within the United States from employment discrimination. *Id.* at 95. Aliens are therefore considered "persons" within the meaning of the Fourteenth Amendment and are thus already protected against discriminatory state action by the equal protection clause. U.S. CONST. amend. XIV, § 1; Foley v. Connelie, 419 F. Supp. 889, 891 (S.D.N.Y. 1976), *aff'd,* 435 U.S. 291 (1978) (citing Yick Wo v. Hopkins, 118 U.S. 356 (1886)). It is thus reasonable to conclude that the clause excludes aliens, not resident-aliens, from Title VII protection abroad.

94. To invoke protection, "the resident-alien must first come within the territory of the United States and [develop] substantial connections with this country." United States v. Verdugo-Urquidez, 494 U.S. 259, 271 (1990).

95. *See* Kwong Hai Chew v. Colding, 344 U.S. 590, 596 n.5 (1953); *Yick Wo,* 118 U.S. at 369 (holding that Fourteenth Amendment protects resident aliens).

96. Case law suggests that resident aliens are entitled to constitutional protection while assigned overseas. However, the extent of their constitutional rights depends upon the individual circumstances. For example, a resident alien who is actively planning to become a naturalized American citizen should be guaranteed more rights than a resident alien who remains abroad for an extended period of time without intending to become an American citizen. *See, e.g.*, Landon v. Plasencia, 459 U.S. 21, 32-33 (1982) (noting that once an alien initiates steps toward establishing residency, her constitutional rights change accordingly); Johnson v. Eisentrager, 339 U.S. 763, 770 (1950) (holding that rights "become more extensive and secure when [the alien] makes preliminary declaration of intention to become a citizen").

In any case, brief trips abroad should not divest authorized resident aliens from previously attached American rights. *Landon,* 459 U.S. at 34 (holding that a resident-alien who has left the country for only a few days is entitled to due process).

For procedures on becoming a naturalized U.S. citizen, see 8 U.S.C. § 1443 (1988) and 8 C.F.R. §§ 332.11, 337, 343a (1991).

geographic location of their workplace has been temporarily or permanently changed.[97]

C. *Defenses to Title VII*

A third area of potential litigation arises when an American employer seeks exemption from Title VII because compliance would violate the laws of the host nation. This defense, namely the foreign compulsion defense, was accepted by courts to avoid the collision of U.S. laws and the laws of foreign nations.[98] Congress has incorporated the foreign compulsion defense into the provisions of the Civil Rights Act of 1991.[99]

The foreign compulsion defense protects U.S. businesses by eliminating domestic liability for a violation of Title VII where the illegal acts are compelled by the laws of the host country.[100] The defense has traditionally been invoked in antitrust disputes[101] but may be a viable strategy in litigating the extraterritoriality of Title VII.[102] Courts, to avoid deciding issues of foreign diplomacy, may permit prohibited activities to continue in accordance with foreign laws.[103]

To successfully invoke the foreign compulsion doctrine, an American corporation must be required to comply with a host state's bind-

97. Although Title VII protection is not a constitutional right, the resident alien has a due process right to be heard on the basis of a Title VII claim. *See supra* note 93.

98. *See, e.g.*, McCulloch v. Sociedad Nacional de Marineros de Hondurus, 372 U.S. 10, 11-22 (1963); Steele v. Bulova Watch Co., 344 U.S. 280 (1952); United States v. General Elec. Co., 115 F. Supp. 835, 878 (D.N.J. 1953).

99. Civil Rights Act of 1991, Pub. L. No. 102-66, § 109(b)(1)(B), 105 Stat. 1071, 1077 (1991).

100. *See* Cohn, *supra* note 5, at 1311-13. The defense "is a corollary to the act of state doctrine, which prohibits United States courts from adjudicating the validity of acts of another sovereign nation." *Id.* at 1313; *see also* Williams v. Curtiss-Wright Corp., 694 F.2d 300, 303 (3rd Cir. 1982). Generally, the foreign compulsion defense is available only when the host country has required compliance through laws or regulations subject to penal or other severe sanctions. RESTATEMENT, *supra* note 6, § 441 cmt. c. The defense may protect against threats to existing valuable business arrangements but probably will not cover the solicitation of new business ventures. *Id.*

101. McGhee v. Arabian Am. Oil Co., 871 F.2d 1412, 1419 n.4 (9th Cir. 1989); Phoenix Canada Oil Co., Ltd. v. Texaco, Inc., 78 F.R.D. 445, 458 (D. Del. 1978); Interamerican Refining Corp. v. Texaco Maracaibo, Inc., 307 F. Supp. 1291, 1296 (D. Del. 1970); *see also* Pierre Vogelenzang, Note, *Foreign Sovereign Compulsion in American Antitrust Law*, 33 STAN. L. REV. 131 (1980).

102. See Cohn, *supra* note 5, at 1312 for a discussion of the foreign compulsion defense and Title VII.

103. RESTATEMENT, *supra* note 6, § 441(1); *cf. id.* § 402(2) (stating that state may control the activities of its nationals outside its borders). The defendant has the burden of proving that the laws of the host country compelled the violation of U.S. laws. Mannington Mills, Inc. v. Congoleum Corp., 595 F.2d 1287, 1293 (3d Cir. 1979).

ing laws, not guidelines, and noncompliance must be threatening to existing valuable business arrangements.[104] For example, a threat by the host country to revoke a license required to remain in business may be severe enough to sustain the foreign compulsion defense. However, possibility of civil liability or a loss of customers will probably be insufficient to support the defense.[105] In sum, an American employer abroad must comply with Title VII unless it can prove that it also must comply with the foreign law or face severe penalty.[106]

V. CONCLUSION

The Civil Rights Act of 1964 signaled a giant step forward in the effort to eradicate the moral and economic indignation experienced by many Americans. The objectives of Title VII are especially sacrosanct because they protect equal access to the labor market, and ultimately preserve the dignity of self-sufficiency. Even today, the United States is only grudgingly becoming a part of the international movement to eliminate all forms of discrimination. The *Arabian* decision temporarily stalled domestic efforts to establish fair employment practices and briefly signalled to the rest of the world that the United States does not follow the same policies it advocates.

The 102d Congress passed the Civil Rights Act of 1991 in order to further the cause against discrimination, especially in the workplace. In so doing, Congress has recognized the importance of a wholesale ban on employment discrimination, a ban that does not turn its back on our citizens abroad.

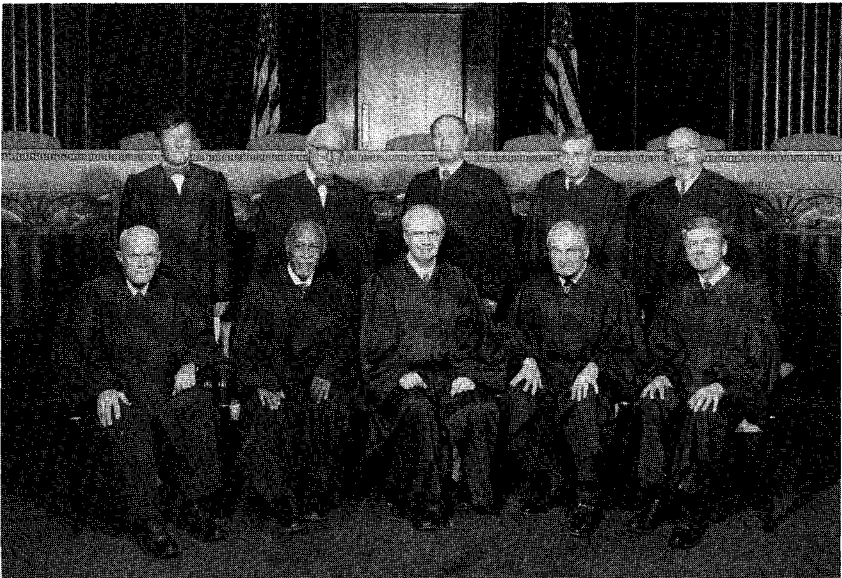
Mark R. Azman

104. RESTATEMENT, *supra* note 6, § 441 cmt. c.

105. *Id.*

106. It is important to note, however, that even in a situation where the foreign compulsion defense has not been sufficiently proven, a U.S. court may nevertheless decline to exercise jurisdiction because it is unreasonable or because the law of the foreign country more appropriately redresses the grievance. *See* RESTATEMENT, *supra* note 6, § 441 reporter's note 3.

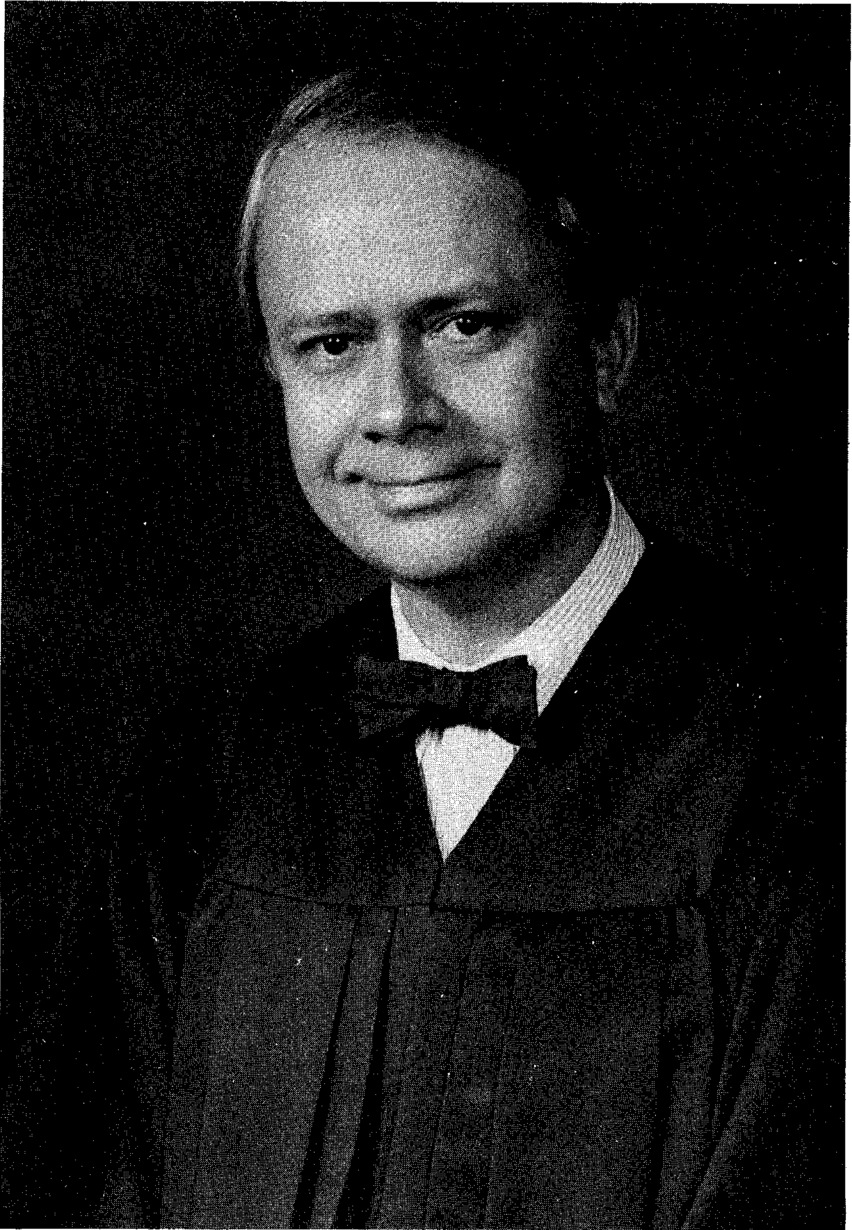
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT



Standing (left to right): James B. Loken, Frank J. Magill, Roger L. Wollman, C. Arlen Beam, and David R. Hansen.

Seated (left to right): George G. Fagg, Theodore McMillian, Richard S. Arnold, John R. Gibson, and Pasco M. Bowman.

Not Pictured: Morris S. Arnold.



RICHARD S. ARNOLD
Chief Judge, Eighth Circuit Court of Appeals