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The Title VII Tug-of-War: Application of U.S. Employment Discrimination Law Extraterritorially

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NOTES

The Title VII Tug-of-War: Application of U.S. Employment Discrimination Law Extraterritorially

ABSTRACT

Companies around the world increasingly are engaging in cross-border business transactions. Globalization is a must if companies want to continue to be competitive in the marketplace—indeed it is an inevitable reality. However, in the midst of this reality is another reality: the legal implications of establishing operations abroad. Transnational expansion introduces companies to an interesting game of tug-of-war in which companies may find themselves torn between compliance with U.S. law and compliance with the laws of the host country. This Note discusses this tug-of-war in the context of Title VII of the Civil Rights Act of 1964. Over 15 years ago, it was debatable whether Title VII applied extraterritorially, but Congress has since answered this question in the affirmative. However, one victory only created more hurdles. These hurdles, for purposes of this Note, are the “employee question” and the “law question.” With respect to the former, the basic question is: What is the proper scope of Title VII’s extraterritorial employee coverage? With respect to the latter, the question is: What constitutes a conflict of “law” sufficient to permit an employer to avoid compliance with Title VII? These are critical questions, the resolution of which is necessary in order to preserve Title VII’s effectiveness. This Note offers suggestions as to how each question should be resolved. Each resolution starts from the basic premise that Title VII can only go so far without sacrificing its effectiveness. The challenge is recognizing Title VII’s limitations and finding alternative resolutions for those

situations to which Title VII realistically cannot apply, and this challenge is precisely the objective of the Note.

TABLE OF CONTENTS

I.	INTRODUCTION.....	834
II.	BACKGROUND	836
	A. <i>The Extraterritoriality Problem: Congress's Approach to the Application of Federal Statutes Outside the United States</i>	836
	B. <i>Title VII of the Civil Rights Act of 1964: An Overview of the Statute</i>	839
	C. <i>The 1991 Act and Its Implications for the Extraterritoriality Problem</i>	841
III.	THE DEBATES: THE PROPER SCOPE AND THE POTENTIAL TO ESCAPE—ONGOING CONCERNS REGARDING TITLE VII'S EXTRATERRITORIAL APPLICATION.....	842
	A. <i>Debate One: The Proper Scope of Title VII's Definition of Employee—The Employee Question</i>	842
	B. <i>Debate Two: The Foreign Compulsion Defense as an Escape Device—The Law Question</i>	850
IV.	MAINTAINING TITLE VII'S EFFECTIVENESS WHILE REMAINING REALISTIC ABOUT ITS REACH: SUGGESTIONS ON HOW TO ADDRESS THE "EMPLOYEE" AND "LAW" QUESTIONS	855
	A. <i>Response to the Employee Question: Expansion of the Definition of Employee to Mimic the Scope of Title VII as Applied in the United States while Remaining Realistic About the Capabilities of Title VII</i>	855
	B. <i>Response to the Law Question: Congress Must Provide More Guidance to Courts and Employers as to When Employers May Legitimately Invoke the Foreign Compulsion Defense</i>	858
V.	CONCLUSION.....	860

I. INTRODUCTION

Walmart's current global operation includes locations in Argentina, Brazil, Canada, China, Germany, Japan, South Korea, Mexico, and the United Kingdom, with a total of 2,229 locations

worldwide.¹ Other companies in the race for international expansion include McDonald's (which currently has almost 18,000 restaurants outside the United States);² Pfizer (which recently opened a \$410 million epilepsy drug factory in Singapore);³ and Johnson & Johnson (which has nearly 38% of its factory space in Europe, up from 23% a decade ago).⁴ These companies reflect only a trivial percentage of companies currently engaging in cross-border business practices. The multinational enterprise (MNE)—a company owning, controlling, and managing products or providing services in more than one country—is a given feature of today's economic market.⁵ Companies' rationales for globalizing their operations include, but are not limited to, the desire to keep up with the competition, inexpensive labor, host government tax breaks, and foreign government giveaways, such as selling property at discounted rates and imposing fewer restrictions on business operations.⁶ For companies with sufficient capital and the desire to expand to the foreign market, these perks counter any reluctance they may have about going global.

From a business and economic perspective, going global may be an inevitable reality, a part of the natural progression for a company looking to maximize profits. However, from a legal standpoint, transnational expansion introduces companies to an interesting game of tug-of-war in which companies may find themselves torn between compliance with U.S. law and compliance with the laws of a host country. At the heart of this game of tug-of-war is the problem of jurisdiction—the jurisdiction of U.S. courts over MNEs engaging in conduct in violation of federal law versus the desire of the host government to control foreign investor business practices.⁷ This Note discusses that jurisdictional war in the context of Title VII of the Civil Rights Act of 1964 (Title VII).⁸ Title VII prohibits the discriminatory treatment of employees on the basis of race, color, sex, religion, or national origin.⁹ The extent to which this prohibition should apply to workers employed abroad by U.S. companies is an issue that has

1. Hoovers, Walmart Stores, Inc. Company Record, available at <http://premium.hoovers.com/subscribe/co/ops.xhtml?ID=ffffrrjffhrshkks> (last visited Mar. 26, 2007).

2. Hoovers, McDonalds Corp. Company Record, available at <http://premium.hoovers.com/subscribe/co/ops.xhtml?ID=ffffrskcferhyctjc> (last visited Mar. 26, 2007).

3. Jim Hopkins, *Drugmakers Shift More Production Outside USA*, USA TODAY, Oct. 19, 2004, at B1, available at http://www.usatoday.com/money/industries/health/drugs/2004-10-19-moving-production_x.htm.

4. *Id.*

5. Elisa Westfield, *Globalization, Governance, and Multinational Enterprise Responsibility: Corporate Codes of Conduct in the 21st Century*, 42 VA. J. INT'L L. 1075, 1077 (2002).

6. Hopkins, *supra* note 3.

7. *See, e.g.*, Westfield, *supra* note 5, at 1086–90.

8. 42 U.S.C. §§ 2000e to e-17 (2006).

9. *Id.* § 2000e-2(a).

sparked an appreciable degree of scholarly debate and judicial scrutiny.¹⁰ Congress has definitively provided that Title VII *does* apply to the foreign operations of U.S.-controlled companies,¹¹ but despite this definitive answer, a number of questions have surfaced pertaining to the precise scope of Title VII's extraterritorial effect.

This Note focuses on two questions regarding this extraterritorial effect: (1) what is the proper scope of Title VII's definition of employee as applied to the foreign operation, and (2) to what extent should employers have the ability to invoke the foreign compulsion defense to avoid Title VII's extraterritorial application? Part II of this Note provides a brief historical overview of how Congress approaches the application of federal statutes outside the United States as a general matter. It then summarizes Title VII's evolution since its inception in 1964 and discusses the extraterritoriality problem specifically in the context of Title VII. Part III discusses the ongoing debate as to the proper scope of Title VII's definition of employee and discusses the foreign compulsion defense as a potential escape device from Title VII's extraterritorial application. Part IV offers suggestions about how the definition of employee might be expanded without sacrificing Title VII's effectiveness and how the foreign compulsion defense might be amended to provide more guidance for when an employer can properly invoke it.

II. BACKGROUND

A. The Extraterritoriality Problem: Congress's Approach to the Application of Federal Statutes Outside the United States

In order to appreciate the tension surrounding the application of Title VII extraterritorially, it is important to understand the evolution of Congress's general approach to the application of federal

10. See, e.g., Olivia P. Dirig & Mahra Sarosky, Note, *The Argument for Making American Judicial Remedies Under Title VII Available to Foreign Nationals Employed by U.S. Companies on Foreign Soil*, 22 HOFSTRA LAB. & EMP. L.J. 709 (2005); Linda Maher, *Drawing Circles in the Sand: Extraterritoriality in Civil Rights Legislation After ARAMCO and the Civil Rights Acts of 1991*, 9 CONN. J. INT'L L. 1 (1993); Mary Claire St. John, Note, *Extraterritorial Application of Title VII: The Foreign Compulsion Defense and Principles of International Comity*, 27 VAND. J. TRANSNAT'L L. 869 (1994).

11. 42 U.S.C. § 2000e(f). This definitive answer is much more than what Congress has provided with respect to other federal statutes, so to a certain extent Title VII is "ahead of the game" on cross-border application of federal statutes. For example, Congress has yet to provide explicitly for the extraterritorial application of the National Labor Relations Act. See generally Todd Keithley, Note, *Does the National Labor Relations Act Extend to Americans Who Are Temporarily Abroad?*, 105 COLUM. L. REV. 2135 (2005) (discussing whether the National Labor Relations Act should apply to U.S. citizens employed abroad).

statutes beyond the borders of the United States. Courts have grappled with the question of extraterritorially applying federal law for over two centuries.¹² Although acknowledging Congress's authority to apply and enforce federal laws abroad,¹³ courts historically were hesitant to rule on the basis of this authority.¹⁴ In an effort to "protect against unintended clashes between our laws and those of other nations which could result in international discord," courts established a presumption that U.S. law applies only within U.S. boundaries.¹⁵ This governing principle, referred to as the "presumption against extraterritoriality,"¹⁶ became and remains a longstanding principle of U.S. law¹⁷ and, at least theoretically, continues to be the backdrop against which courts examine the application of all U.S. statutes in foreign territories. The presumption may be overcome by a clear statement from Congress that a statute was intended to apply abroad.¹⁸

Justifications for the presumption include international law limitations, the desire to maintain consistency with domestic conflict of law rules, the need to protect against international discord, the need to maintain separation of judicial and legislative powers, and the predictability value of the presumption.¹⁹ However, despite the justifications for and the longstanding nature of the presumption, courts have applied it in a variety of ways. From its inception through the early part of the twentieth century, courts applied the presumption reflexively to almost all federal statutes.²⁰ In the early twentieth century, courts began recognizing exceptions to the rule.²¹ The earliest exception was on the basis of the *effect* that the foreign conduct was having in the United States—the "effects exception."²²

12. Randall S. Abate, *Dawn of a New Era in the Extraterritorial Application of U.S. Environmental Statutes: A Proposal for an Integrated Judicial Standard Based on the Continuum of Context*, 31 COLUM. J. ENVTL. L. 87, 91 (2006).

13. See *EEOC v. Arabian. Am. Oil Co. (Aramco)*, 499 U.S. 244, 248 (1991) (citing *Foley Bros., Inc. v. Filardo*, 336 U.S. 281, 284–85 (1949)); see also *Benz v. Compania Naviera Hidalgo, S.A.*, 353 U.S. 138, 147 (1957).

14. See Abate, *supra* note 12, at 92.

15. *Aramco*, 499 U.S. at 248.

16. *Id.* (citing *Foley Bros.*, 336 U.S. at 285).

17. The application of the presumption against extraterritoriality dates back to 1906 in the case of *American Banana Co. v. United Fruit Co.*, 213 U.S. 347, 357 (1909). According to the American Banana court, "construction of any statute [sic] [is] intended to be confined in its operation and effect to the territorial limits over which the lawmaker has general and legitimate power. 'All legislation is prima facie territorial.'" *Id.* at 357 (quoting *Ex parte Blain, In re Sawers*, 12 Ch. Div. 522, 528; *State v. Carter*, 27 N.J.L. 499 (1859); *People v. Merrill, 2 Parker, Crim. Rep. 590, 596*).

18. See *Aramco*, 499 U.S. at 248.

19. William S. Dodge, *Understanding the Presumption Against Extraterritoriality*, 16 BERKELEY J. INT'L L. 85, 90 (1998).

20. Abate, *supra* note 12, at 91–93.

21. *Id.* at 93.

22. *Id.* at 93–94.

Under this exception, federal law could be applied abroad where one could demonstrate that the extraterritorial conduct had substantial domestic effects.²³ The “effects exception” had the practical effect of providing employers with a legitimate way to escape the presumption against extraterritoriality.²⁴ Indeed, it may be partially responsible for the presumption’s decline in significance by the 1980s.²⁵

By the early 1990s, courts were applying the presumption inconsistently and subjecting it to many exceptions.²⁶ It was not until the 1990s that the presumption resurfaced as a strict bar to extraterritorial application. Since then, it has continued to arise across legal disciplines including securities law,²⁷ environmental law,²⁸ antitrust law,²⁹ bankruptcy law,³⁰ copyright law,³¹ and employment law.³² In certain of these disciplines, courts have found the requisite clear statement from Congress that the applicable statute was intended to apply abroad; in other instances, courts have refused to do so.³³ Fortunately, with respect to Title VII, Congress explicitly stated the law applies to U.S. employers operating abroad, a

23. See *id.* These “effects” were generally economic in nature. *Id.*

24. *Id.* at 94–95.

25. *Id.* at 95.

26. *Id.* at 91.

27. See, e.g., Corinne A. Falencki, *Sarbanes-Oxley: Ignoring the Presumption Against Extraterritoriality*, 36 GEO. WASH. INT’L L. REV. 1211 (2004).

28. See, e.g., Abate, *supra* note 12.

29. See, e.g., Michael G. McKinnon, Comment, *Federal Judicial and Legislative Jurisdiction Over Entities Abroad: The Long-Arm of U.S. Antitrust Law and Viable Solutions Beyond the Timberlane/Restatement Comity Approach*, 21 PEPP. L. REV. 1219 (1994) (discussing the presumption against extraterritoriality in the antitrust law context).

30. See, e.g., David B. Stratton, *Reflections on the Extraterritorial Application of the Bankruptcy Code*, 24-7 AM. BANKR. INST. J. 44 (2005).

31. See, e.g., Christopher R. Perry, *Exporting American Copyright Law*, 37 GONZ. L. REV. 451 (2002); Nathan R. Wollman, *Maneuvering Through the Landmines of Multiterritorial Copyright Litigation: How to Avoid the Presumption Against Extraterritoriality When Attempting to Recover for the Foreign Exploitation of U.S. Copyrighted Works*, 104 W. VA. L. REV. 343 (2002).

32. See, e.g., Dirig & Sarosfky, *supra* note 10; Mary M. Madden, *Strengthening Protection of Employees at Home and Abroad: The Extraterritorial Application of Title VII of the Civil Rights Act of 1964 and the Age Discrimination in Employment Act*, 20 HAMLINE L. REV. 739 (1996–97); Maher, *supra* note 10; St. John, *supra* note 10.

33. For example, courts have been willing to find a clear statement in the employment context but have been reluctant to do so in the bankruptcy and environmental law contexts. Compare 42 U.S.C. § 2000e(f) (2006) (providing a clear statement that Title VII applies to U.S. citizens working abroad), and *Iwata v. Stryker Corp.*, 59 F. Supp. 2d 600, 603–04 (N.D. Tex. 1999) (discussing that Title VII does apply to U.S. citizens abroad based on Congress’s clear statement), with David M. Green & Walter Benzija, *Spanning the Globe: The Intended Extraterritorial Reach of the Bankruptcy Code*, 10 AM. BANKR. INST. L. REV. 85, 85–87 (2002) (“The question of the Bankruptcy Code’s intended extraterritorial reach has not yet been addressed by the Supreme Court. . . . The lower courts that have grappled with the issue of the Bankruptcy Code’s intended extraterritorial reach have been decidedly inconsistent in their analysis.”).

statement which courts have since acknowledged and applied.³⁴ Having cleared the “presumption hurdle,” it is possible to move on to examining the implications of Title VII’s application abroad. The purpose of this Note is to engage in such an examination. However, before doing so, it is first necessary to provide general background on Title VII’s “journey” to extraterritorial application.

B. Title VII of the Civil Rights Act of 1964: An Overview of the Statute

Title VII was enacted in 1964 “to assure equality of employment opportunities and to eliminate those discriminatory practices and devices which have fostered racially stratified job environments to the disadvantage of minority citizens.”³⁵ Despite this race-focused “statement of purpose,”³⁶ the actual language of the statute suggests it was intended to extend beyond the racial context:

It shall be an unlawful employment practice for an employer . . . to fail or refuse to hire or to discharge *any* individual, or otherwise to discriminate 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*.³⁷

This comprehensive language readily suggests that Congress intended the protection afforded by Title VII to be far-reaching.³⁸ Thus, the extraterritorial application of the Title VII might indeed be in the purview of the statute. However, as will be discussed in Part III, commentators disagree on just how extensive Title VII’s reach should be in light of the realities of transnational business operation and the complex nature of doing business internationally.³⁹ Before discussing these differences of opinion, it is first helpful to provide a brief overview of the events leading up to Congress’s decision to apply Title VII extraterritorially.

Title VII was enacted at a time when courts were routinely applying U.S. law extraterritorially. Both courts and the Equal Employment Opportunity Commission (EEOC) agreed that companies with operations abroad were required to comply with Title VII in the two decades following its enactment.⁴⁰ During this period, lower federal courts held in several cases that “United States

34. See 42 U.S.C. § 2000e(f); see, e.g., *Iwata*, 59 F. Supp. 2d at 603–04 (acknowledging and applying Congress’s clear statement).

35. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 800 (1973).

36. The statute itself does not provide its purpose. See generally Civil Rights Act of 1964, 42 U.S.C. §§ 2000e to e-17. Rather, this purpose is based on the Supreme Court’s articulation in *McDonnell Douglas*, 411 U.S. at 800.

37. 42 U.S.C. § 2000e-2(a)(1) (emphasis added).

38. See Madden, *supra* note 32, at 744.

39. See *infra* Part III.A-B.

40. See Madden, *supra* note 32, at 745.

companies outside the United States had to comply with Title VII."⁴¹ The EEOC issued a policy statement in which it explicitly stated that Title VII applied extraterritorially.⁴² Still, the language of Title VII, particularly the definitional provisions, left sufficient room for courts to question its cross-border application. Despite the lower courts' history of routine application of Title VII to foreign operations and the EEOC's policy statement, the U.S. Supreme Court was not easily convinced that Title VII should apply extraterritorially.

In the 1991 case *EEOC v. Arabian American Oil Co. (Aramco)*, the Supreme Court squarely addressed the issue.⁴³ This case involved a naturalized U.S. citizen working in Saudi Arabia for an U.S. subsidiary of a foreign parent company, Aramco.⁴⁴ Upon discharge, the employee alleged discrimination on the basis of race, religion, and national origin.⁴⁵ The Court, invoking the clear statement rule, held that Title VII did not apply extraterritorially to regulate the employment practices of U.S. employers who employed U.S. citizens abroad.⁴⁶ The Court based its holding on the lack of "sufficient *affirmative* evidence that Congress intended Title VII to apply abroad."⁴⁷ Drawing on the longstanding principle that there is a presumption against applying U.S. legislation beyond the territorial United States,⁴⁸ the Court interpreted the statute to have a "purely domestic focus."⁴⁹ Despite reaching this conclusion, the Court expressly invited Congress to amend Title VII to apply abroad.⁵⁰ It was this invitation that ultimately led to a critical turning point in the extraterritorial application of Title VII abroad, a turning point which originated with the Civil Rights Act of 1991.⁵¹

41. *Id.*

42. *Id.*

43. *See EEOC v. Arabian Am. Oil Co. (Aramco)*, 499 U.S. 244, 246 (1991) (stating the question presented in the case as "whether Title VII applies extraterritorially to regulate the employment practices of United States employers who employ United States citizens abroad").

44. *Id.* at 247.

45. *Id.*

46. *Id.* at 258-59.

47. *Id.* at 259 (emphasis added).

48. *Id.* at 248.

49. *Id.* at 255-56.

50. *Id.*; *see also* Age Discrimination in Employment Act, 29 U.S.C. §§ 621, 630(f) (2006) ("The term 'employee' includes any individual who is a citizen of the United States employed by an employer in a workplace in a foreign country."); St. John, *supra* note 10, at 882 (stating that Congress accepted the Aramco Court's invitation to amend Title VII by enacting the Civil Rights Act of 1991).

51. *See* Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (1991).

C. *The 1991 Act and Its Implications for the Extraterritoriality Problem*

The Civil Rights Act of 1991 (the 1991 Act) purported to solve the extraterritoriality problem by expressly extending Title VII protection to employees of U.S.-controlled operations working abroad.⁵² One of the stated purposes of the 1991 Act was “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.”⁵³ One of the ways in which Congress effected this purpose was by expanding the definition of “employee” to cover employees working abroad.⁵⁴ Congress revised the definition of employee by simply adding to the existing language.⁵⁵ Prior to the 1991 Act, the definition of “employee” read as follows:

The term “employee” means *an individual employed by an employer*, except that the term employee shall not include any person elected to public office in any state or political subdivision of any State by the qualified voters thereof, or any person chosen by such officer to be on such officer’s personal staff, or an appointee on the policy making level or an immediate adviser with respect to the exercise of the constitutional or legal power of the office. The exemption set forth in the preceding sentence shall not include employees subject to the civil service laws of a State government, governmental agency or political subdivision.⁵⁶

Thus, the basic definition of employee required only that the individual be employed by an employer in order to qualify for protection. Notably, the original definition made no reference to the individual’s *place of employment*. Nor did it make reference to the individual’s *nationality*. The 1991 Act, however, added the following language to the end of this definition:

With respect to *employment in a foreign country*, such term includes an individual who is a citizen of the United States.⁵⁷

Presumably, this addition is the clear statement that was lacking at the time of the *Aramco* decision.⁵⁸ It essentially makes U.S. employers more susceptible to Title VII claims. As some commentators have put it, the expansion of the definition

52. See *id.* at sec. 109.

53. *Id.* at sec. 3(4), § 1981 note, 105 Stat. at 1071. As the 1991 Act became effective in November 1991, only six months after the *Aramco* decision, *Aramco* is recognized as one of the key judicial decisions which called Congress to action on this issue. See, e.g., St. John, *supra* note 10, at 882 (stating that Congress accepted the *Aramco* Court’s invitation to amend Title VII by enacting the Civil Rights Act of 1991).

54. See sec. 109(a), § 2000e, 105 Stat. at 1077.

55. See 42 U.S.C. § 2000e(f) (2006).

56. *Id.*

57. See *id.*

58. See Dirig & Sarofsky, *supra* note 10, at 718–19.

“mandate[d] the *worldwide* application of [U.S.] federal employment laws.”⁵⁹ Compliance with respect to employees working in the United States is no longer sufficient; employers now have to ensure compliance with respect to employees working at their overseas operations as well. Part III will demonstrate that disagreement exists as to the proper degree of this compliance.

III. THE DEBATES: THE PROPER SCOPE AND THE POTENTIAL TO ESCAPE—ONGOING CONCERNS REGARDING TITLE VII'S EXTRATERRITORIAL APPLICATION

The primary impetus for the enactment of the 1991 Act was Congress's desire to correct several court decisions that it believed to be contrary to the intent of Title VII and to clarify its position on the statute's extraterritorial application.⁶⁰ After the 1991 amendments, Congress's position was clear—Title VII *did* apply extraterritorially. This definitive answer is much more than what Congress has provided with respect to other federal statutes,⁶¹ so to a certain extent Title VII is ahead of the game of cross-border application. Still, despite Congress having directly addressed the extraterritoriality question, considerable debate exists as to the proper scope of Title VII's definition of employee. Section III(A) examines the perspectives offered by those on the different sides of this debate. Beyond this debate is the question of an employer's ability to avoid Title VII's requirements by invoking the foreign compulsion defense. Section III(B) tackles this question.

A. *Debate One: The Proper Scope of Title VII's Definition of Employee—The Employee Question*

Whether or not an individual is an employee is important for at least two reasons: (1) one must be an employee in order to invoke Title VII protection,⁶² and (2) only those considered employees may be included when determining if an employer meets Title VII's minimum-employee threshold.⁶³ The issue at the crux of the

59. Scott Smith, Comment, *Extraterritorial Application of Title VII and the Americans with Disabilities Act: Have Statute, Will Travel*, 36 S. TEX. L. REV. 191, 192 (1995) (emphasis added).

60. Robert Belton, Professor, In-class Lecture at Vanderbilt University Law School on Employment Discrimination (Feb. 1, 2006).

61. See, e.g., Keithley, *supra* note 11, at 2135–37.

62. See 42 U.S.C. § 2000e-2(a) (discussing unlawful conduct of “an employer”).

63. See *id.* § 2000e(b) (requiring that an employer have fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year); see also *Wildridge v. IER, Inc.*, 65 F. Supp. 2d 429, 431 (N.D. Tex. 1999) (holding that employees of a French company could be counted for

employee debate is whether Title VII's current definition of employee is underinclusive in that it appears to extend extraterritorial coverage only to U.S. citizens. Presumably, it is based on this specific inclusion that courts have refused to extend Title VII's substantive protections to legal permanent residents and foreign nationals employed abroad.⁶⁴ Considering the substantial number of noncitizens employed by MNEs, the question becomes whether Title VII's extraterritorial coverage sufficiently protects the vast majority of the employees of these companies, or whether it protects only a minority of them. Of course *some* coverage is better than *no* coverage, but if the reasons for denying full protection to certain groups are not sound, then one must question if this denial is necessary at all and, on a larger scale, whether it supports the end Title VII seeks to achieve—comprehensive protection against employment discrimination. Thus, the main issue addressed in this section is the adequacy of Title VII's current employee coverage with respect to extraterritorial employees of U.S.-controlled companies; *this* is the "employee question."

Despite Congress's purported clear statement of extraterritorial application, certain commentators believe that the Title's current employee coverage is too limited in scope. According to these commentators, "general agreement exists that Congress intended Title VII to provide very broad protection to United States employees."⁶⁵ Those in this camp suggest that Title VII should cover *all* employees of the foreign operations, whether they are U.S. citizens, legal permanent residents, or foreign nationals.⁶⁶ The identity of the individual is irrelevant to the larger task—effective protection against discriminatory employment practices.⁶⁷ Without this extensive coverage, these commentators are concerned that U.S. employers will establish operations abroad and then, to avoid the proscriptions of Title VII, hire only legal permanent residents and foreign nationals instead of hiring U.S. citizens.⁶⁸ To prevent employers from engaging in such unscrupulous practices, "we must

meeting Title VII's minimum-employee threshold); *Russell v. Midwest-Werner & Pfeleiderer, Inc.*, 955 F. Supp. 114, 115 (D. Kan. 1997) (holding that foreign employees cannot be counted toward the employer's minimum-employee threshold).

64. See, e.g., *Shekoyan v. Sibley Int'l Corp.*, 217 F. Supp. 2d 59, 61 (D.D.C. 2002), *aff'd*, 409 F.3d 414 (D.C. Cir. 2005) (holding that the plaintiff, an Armenian-born U.S. permanent resident, was not protected by Title VII because he was not a U.S. citizen); *Iwata v. Stryker Corp.*, 59 F. Supp.2d 600, 604 (N.D. Tex. 1999) (holding that the plaintiff, a Japanese citizen and U.S. permanent resident, was not protected by Title VII because he was not a U.S. citizen).

65. See *Madden*, *supra* note 32, at 744. The phrase "United States employee," as used by *Madden*, appears to encompass those employed by U.S. controlled companies abroad, as opposed to referring to the actual location of the employee.

66. See, e.g., *Dirig & Sarofsky*, *supra* note 10, at 709–11, 749.

67. *Id.* at 710–11.

68. *Id.*

make [employers] liable for the discriminatory actions they are responsible for, regardless of *who* those actions are taken against.”⁶⁹ Otherwise, employers will “shirk the laws of the United States by transferring non-citizen employees to foreign offices or by simply hiring foreign workers.”⁷⁰

Commentators are not alone in questioning Title VII’s current employee coverage. Case law involving the “employee” question indicates that courts have grappled with this issue since Title VII’s enactment.⁷¹ As a general matter, courts have interpreted Title VII’s employee coverage in a more restrictive manner where the individual is employed *outside* the United States by a U.S.-controlled company compared to where the individual is employed *in* the United States. Where the individual is employed in the United States, he or she is considered an employee for Title VII purpose if he or she is a U.S. citizen, a legal permanent resident,⁷² or legally employed in the U.S. by a foreign-controlled company.⁷³ This inclusive practice was accepted even prior to the 1991 Act,⁷⁴ and in cases following the 1991 Act, courts have continued to grant protection to both citizens and noncitizens working in the United States.⁷⁵ However, where the individual is employed outside the United States, courts have not adopted so generous an interpretation of Title VII’s extraterritorial coverage. Taking a much more restrictive approach, courts have generally extended protection outside the United States only where the employee is a U.S. citizen.⁷⁶

69. *Id.* at 727 (emphasis added).

70. *Id.* at 749.

71. *See, e.g.,* Shekoyan v. Sibley Int’l Corp., 217 F. Supp. 2d 59 (D.D.C. 2002), *aff’d*, 409 F.3d 414 (D.C. Cir. 2005); *Iwata v. Stryker Corp.*, 59 F. Supp. 2d 600 (N.D. Tex. 1999).

72. *See* Paul Frantz, *International Employment: Antidiscrimination Law Should Follow Employees Abroad*, 14 MINN. J. GLOBAL TRADE 227, 234 (2005) (“With respect to most provisions of federal employment and labor laws, the Supreme Court has ruled that these laws apply . . . to those noncitizens legally in the U.S.”).

73. *See, e.g.,* Morelli v. Cedel, 141 F.3d 39, 43 (2d Cir. 1998) (stating that Title VII’s plain language provides for the application of Title VII to a foreign company’s domestic operations).

74. In *Aramco*, the Court limited Title VII protection domestically to U.S. citizens and aliens working in the United States. *See* EEOC v. Arabian. Am. Oil Co. (Aramco), 499 U.S. 244, 248–59 (1991).

75. *See, e.g.,* Egbuna v. Time-Life Libraries, Inc., 153 F.3d 184, 187 (4th Cir. 1998) (holding that a foreign national who applies for a job in the United States is protected by Title VII, assuming the individual is qualified).

76. *See Iwata*, 59 F. Supp. 2d at 604; *see also* Russell v. Midwest-Werner & Pflediderer, Inc., 955 F. Supp. 114, 115 (D. Kan. 1997) (“[T]he general rule is that with respect to foreign employment, Title VII applies only to American citizens employed abroad by American companies or their foreign subsidiaries.”). This Note focuses only on the former requirement—that the employee is a citizen; however, the latter requirement—that the corporation is controlled by an U.S. employer—has generated its own unique debate. *See, e.g.,* Frantz, *supra* note 72, at 234. The test for Title VII protection outside the United States is actually two-pronged. *Iwata*, 59 F. Supp. 2d at

This inside-outside dichotomy is aptly demonstrated in the following two cases involving U.S. legal permanent residents denied Title VII protection due to their status.⁷⁷ In *Iwata v. Stryker Corporation*, a Japanese citizen and U.S. permanent resident working for the foreign subsidiary of a U.S. parent company brought an action against the parent company and its Japanese subsidiary alleging race and national origin discrimination.⁷⁸ The court held that the employee was not protected by Title VII.⁷⁹ According to the court, “[n]on-citizens working outside the United States are not protected because they are not considered employees. The general rule is that with respect to foreign employment, Title VII applies only to *American citizens* employed abroad by American companies or their foreign subsidiaries.”⁸⁰ In the more recent case of *Shekoyan v. Sibley International Corporation*,⁸¹ the plaintiff was an Armenian-born permanent legal resident of the United States hired pursuant to a twenty-one-month employment contract by Sibley International Corporation (Sibley), a consulting firm headquartered in Washington, D.C.⁸² Sibley hired the plaintiff as a training advisor for a project that would be performed in the Republic of Georgia.⁸³ The plaintiff brought a Title VII claim against Sibley alleging national origin discrimination.⁸⁴ The court held that Title VII protection did not extend to him as a legal permanent resident with a primary workstation in the Republic of Georgia.⁸⁵

The plaintiff in *Shekoyan* contended that he was entitled to Title VII protection by virtue of being a U.S. national, even if not a U.S. citizen.⁸⁶ He relied on Title VII’s alien exemption provision and the Immigration and Nationality Act’s (INA) definition of alien to support his position. The alien exemption provision provides that Title VII “shall not apply to an employer with respect to the employment of *aliens* outside any State.”⁸⁷ The plaintiff argued that he was not an alien based on the INA’s definition, which states that an alien is “any

603. The individual must be (1) a U.S. citizen and (2) employed by a U.S.-controlled company. *Id.* This Note focuses only on the first prong of this test.

77. See also *Mota v. Univ. of Tex. Houston Health Sci. Ctr.*, 261 F.3d 512 (5th Cir. 2001); *Hu v. Skadden*, 76 F. Supp. 2d 476 (S.D.N.Y. 1999). *Hu* is an ADEA case, but the ADEA’s language also provides extraterritorial coverage of citizens only.

78. *Iwata*, 59 F.Supp. 2d at 602.

79. *Id.* at 604.

80. *Id.* (emphasis added).

81. 217 F.Supp. 2d 59 (D.D.C. 2002), *aff’d*, 409 F.3d 414 (D.C. Cir. 2005).

82. *Id.* at 62.

83. *Id.*

84. *Id.*

85. *Id.* at 68–69.

86. *Id.* at 66.

87. 42 U.S.C. § 2000e-1(a) (2006) (emphasis added).

person not a citizen *or national* of the United States.”⁸⁸ Because he was a national, he could not be an alien,⁸⁹ because he was not an alien, he did not fall under the alien exemption provision,⁹⁰ and because he did not fall under the alien exemption provision, he could not be excluded from Title VII’s protection. Responding to the plaintiff’s assertions, the court cited the INA’s definition of national, which states that a national is “a citizen of the United States, or a person, who, though not a citizen of the United States, owes permanent allegiance to the United States.”⁹¹ The court determined that the plaintiff was not a national because he had not provided sufficient evidence that he “owe[d] permanent allegiance to the United States.”⁹² This conclusion, however, seems to suggest that he may have been considered a national had he provided satisfactory evidence of allegiance. Based on this suggestion, the court might have extended Title VII protection to a noncitizen where that noncitizen had provided sufficient proof of allegiance. Nevertheless, both this case and *Iwata* stand for the proposition that a legal permanent resident employed by a U.S.-controlled company abroad is not entitled to Title VII protection.⁹³

These two cases illustrate how the employee question arises in practice. If it is the case that Title VII’s employee coverage is more extensive in the United States than it is outside the country’s borders, there is a troubling double standard at work. Under this double standard, noncitizens receive treatment similar to citizens in some instances (in the United States), but are denied such treatment in other instances (outside the United States). The question becomes whether this differential treatment can be justified.

One might more confidently answer this question in the negative after considering a further paradox: some jurisdictions have held that noncitizen employees may count toward Title VII’s minimum-employee threshold requirement,⁹⁴ but that these *same* employees may not be entitled to *substantive* protection under the statute.⁹⁵ The Ninth Circuit case *Kang v. U. Lim* provides one jurisdiction’s

88. See *Shekoyan v. Sibley Int’l Corp.*, 409 F.3d 414, 421 (D.C. Cir. 2005), *aff’d* 217 F.Supp. 2d 59 (D.D.C. 2002); see also 8 U.S.C. § 1101(a)(3) (2000) (emphasis added).

89. See *Shekoyan*, 409 F.3d at 421.

90. See *id.*

91. 8 U.S.C. § 1101(a)(22).

92. *Shekoyan v. Sibley Int’l Corp.*, 217 F. Supp. 2d 59, 67 (D.D.C. 2002), *aff’d*, 409 F.3d 414 (D.C. Cir. 2005).

93. *Id.* at 68–69.

94. Title VII’s minimum threshold requirement states that Title VII applies to an employer “engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year.” 42 U.S.C. § 2000e(b) (2006).

95. See, e.g., *Kang v. U. Lim*, 296 F.3d 810 (9th Cir. 2002); *Morelli v. Cedel*, 141 F.3d 39 (2d Cir. 1998).

approach to this phenomenon.⁹⁶ In that case, all of the employees of the Mexican subsidiary of a U.S. company were noncitizens, yet the court was willing to count the noncitizen employees in order to reach the threshold requirement.⁹⁷ Basing its decision on the fact that the two enterprises were sufficiently integrated,⁹⁸ the court held that the employer could meet the minimum-employee threshold by including in its count the non-citizen employees of its Mexican subsidiary.⁹⁹ According to the court “the fact that some of the employees of the integrated enterprise are not themselves covered by federal antidiscrimination law does not preclude counting them as employees for the purposes of determining Title VII coverage.”¹⁰⁰ Notably, the court, responding to the plaintiff’s claim that Title VII’s definition of employee prohibited counting foreign employees, stated: “The statutory definition is inclusive rather than restrictive. The term ‘employee’ is defined to *include* U.S. citizens employed by U.S. companies in foreign countries rather than to prohibit counting non-U.S. citizens.”¹⁰¹ Thus, the *Kang* court was willing to read the definition of employee broadly, but only in the context of meeting the minimum threshold requirement.¹⁰²

Other jurisdictions, recognizing the controversial nature of the *Kang* decision, have held instead that noncitizens working abroad neither reap the benefits of Title VII protection, nor count toward an employer’s minimum-employee threshold.¹⁰³ These courts have based

96. 296 F.3d 810.

97. *Id.* at 815–16.

98. *Id.*

99. *Id.* at 816.

100. *Id.*

101. *Id.*

102. This position was also adopted by the Second Circuit in *Morelli v. Cedel*, where the court stated, “The nose count of employees relates to the scale of the employer rather than to the extent of protection.” 141 F.3d 39, 45 (2d Cir. 1998). *Morelli* was an ADEA case; however, the ADEA and Title VII contain identical provisions on the definition of “employee.” See *Anderson v. Pac. Mar. Ass’n*, 336 F.3d 924 (9th Cir. 2003) (applying the “integrated enterprise test” to determine if an employer met the minimum-threshold requirement, ignoring the status of the employees); *Hirsbrunner v. Ramirez*, 438 F. Supp. 2d 10 (D.P.R. 2006) (same); *Wildridge v. IER, Inc.*, 65 F. Supp. 2d 429, 431 (N.D. Tex. 1999) (distinguishing between the substantive and procedural provisions of Title VII and stating that since the minimum-threshold requirement is procedural, then non-citizen employees abroad may be included in the count).

103. See, e.g., *Mousa v. Lauda Air Luftfahrt*, 258 F.Supp. 2d 1329, 1337 (S.D. Fla. 2003); *Russell v. Midwest-Werner & Pfleiderer, Inc.*, 955 F. Supp. 114, 115 (D. Kan. 1997) (“Unless an American citizen, a person employed abroad is not an ‘employee’ under Title VII.”); *Minutillo v. Aqua Signal Corp.*, 1997 U.S. Dist. LEXIS 3960, No. 96 C 3529, 1997 WL 156495, *2 (N.D. Ill. Mar. 31, 1997) (“[O]nly a foreign corporation’s United States employees may count towards the jurisdictional minimum.”); *Kim v. Dial Serv. Int’l, Inc.*, 1997 WL 5902, *3 (S.D.N.Y. Jan. 8, 1997) (“[T]he foreign employees of a foreign corporation do not count towards the statutory minimum [T]he relevant group is the number of employees in the United

their conclusions on inferences drawn from the statutory language. For instance, in *Mousa v. Lauda Air Lufthardt*, where a non-citizen employed by an Austrian airline sued for religious discrimination under Title VII, the court held that foreign citizens based abroad who work exclusively outside the United States are not included in the jurisdictional count.¹⁰⁴ Making an inference from the language of Title VII, the court stated, "even though Title VII does not explicitly state that employees of foreign corporations must work in the United States to be included in the jurisdictional count, the 1991 Act and the statutory language of Title VII strongly support this proposition."¹⁰⁵ Still, the court acknowledged that there is a marked split among the jurisdictions on this issue.¹⁰⁶

This paradox provides one basis for extending Title VII protection beyond U.S. citizens to others employed abroad, but other bases also exist. Focusing specifically on legal permanent residents, both the intent and the origin of the alien exemption clause lend additional support to the argument that Title VII should apply to legal permanent residents employed by U.S. companies abroad. The documented intent of the alien exemption clause, as evidenced by its legislative history, suggests that its purpose was not to exclude legal permanent residents from protection under Title VII. According to certain commentators, "[t]he legislative history of the Title VII alien exemption clause . . . illustrates that Congress included the clause to prevent conflicts with the laws of other nations."¹⁰⁷ Justice Thurgood Marshall expounded on this point in his dissenting opinion in *Aramco* wherein he asserted: "[T]he specific history surrounding the alien-exemption provision makes clear that Congress had the situation of U.S. employers employing *citizens of foreign countries in foreign lands*' firmly in mind when it enacted that provision."¹⁰⁸ This assertion seems to refer to those who are citizens and residents of the foreign country in which the U.S. company has established operations

States."); *Robins v. Max Mara, U.S.A., Inc.*, 914 F. Supp. 1006, 1009 (S.D.N.Y. 1996) ("Only those employees . . . who work in the United States for twenty or more calendar weeks per year are to be counted for purposes of determining whether the enterprise is covered by . . . Title VII."); *Rao v. Kenya Airways, Ltd.*, 1995 U.S. Dist. LEXIS 8416, No. 94 Civ. 6103 (CSH), 1995 WL 366305, *2 (S.D.N.Y. June 20, 1995) ("[F]oreign employees of a foreign corporation are not considered employees for purposes of the statute.").

104. *Mousa*, 258 F. Supp. 2d at 1337.

105. *Id.* at 1335.

106. *Id.* at 1336 (stating that several district courts have "found that only those 'employees' that are potentially affected by discriminatory policies may be counted to determine whether an employer is subject to Title VII").

107. See Marcus Pinney, *A Constitutional Dilemma: The Conflict of Title VII Alien Exemption Clause with the Civil Rights Acts of 1991*, 26 HOUS. J. INT'L L. 707, 727 (2004).

108. *EEOC v. Arabian. Am. Oil. Co. (Aramco)*, 499 U.S. 244, 271 (1991) (Marshall, J., dissenting).

and not to those who are U.S. legal permanent residents working abroad. Thus, the alien exemption provision may not have been intended to limit protection of legal permanent residents, such as the plaintiffs in *Iwata* and *Shekoyan*. Rather, it may have been intended to limit protection of *foreign citizens* without valid U.S. immigration status who are working abroad.¹⁰⁹

The origin of the alien exemption clause, however, suggests that Title VII's extraterritorial application *should* only cover citizens. Title VII included this provision *prior* to the 1991 Act—i.e., prior to when Title VII applied abroad.¹¹⁰ Congress's decision to retain it after the 1991 amendments has led some courts to conclude that this retention reflects Congress's continued opposition to Title VII's application to noncitizens.¹¹¹ After all, the 1991 Act explicitly extended protection to U.S. citizens in the face of a provision that prohibited application to aliens.¹¹² Arguably, to give the alien exemption clause effect requires that one exclude those who are noncitizens.

Thus, the intent and the origin of the alien exemption clause lead to two different to conclusions. The intent suggests Title VII should reach beyond U.S. citizens, while the origin suggests otherwise. These differing conclusions have led some commentators to question the wisdom of Congress's verbatim retention of the alien exemption clause after the 1991 Act. As one commentator has suggested, instead of classifying people by alienage, "Congress could have easily included a provision stating that foreign law applies to any foreign national working for a U.S. company outside [the] States."¹¹³ By doing so, there would have been less risk of discriminating against legal permanent residents of the U.S.¹¹⁴ If Congress's true reason for including the alien exemption provision was to avoid subjecting foreign nationals to U.S. employment laws, and not to exclude legal permanent residents from protection, then Congress could have made that purpose clearer.

Besides the origin and intent arguments regarding the alien exemption clause, one commentator has taken a different approach to questioning the alien exemption clause as a bar to noncitizen

109. See Dirig & Sarofsky, *supra* note 10, at 718. Justice Blackmun also questioned the logic of distinguishing between citizens and legal permanent residents: "[F]or most legislative purposes there simply are no meaningful differences between legal residents and citizens . . ." *Toll v. Moreno*, 458 U.S. 1, 20 (1982) (Blackmun, J., concurring).

110. See Dirig & Sarofsky, *supra* note 10, at 718.

111. See, e.g., *Shekoyan v. Sibley Int'l*, 409 F.3d 414, 421 (D.C. Cir. 2005), *aff'g* 217 F. Supp. 2d 59 (D.D.C. 2002).

112. See 42 U.S.C. § 2000e(f) (2006).

113. Pinney, *supra* note 107, at 728.

114. See *id.*

protection by questioning the constitutionality of the clause.¹¹⁵ According to this commentator, "the current interpretation of the alien exemption clause creates an unconstitutional denial of equal protection, or, in the alternative, . . . is ambiguous."¹¹⁶ It is not the aim of this Note to engage in an intensive examination of the constitutionality of the alien exemption clause. Rather, this Note simply raises the constitutionality question to show further that there are doubts as to the legitimacy of denying legal permanent residents protection from extraterritorial employment discrimination.

As the discussion in this section demonstrates, the distinctions made between citizens and noncitizens for purposes of determining employee coverage may rest on dubious grounds. This doubt becomes more apparent when one takes into account the double standards and paradoxes that currently exist. It becomes even more imperative that the employee question be resolved as the employment market becomes increasingly globalized. As one commentator put it, "U.S. citizens cannot account for the entire overseas workforce."¹¹⁷ With this reality in mind, protection of *all* employees, not just some, must be the objective.

B. *Debate Two: The Foreign Compulsion Defense as an Escape Device—The Law Question*

Even if an individual qualifies as an employee and the employer meets all of Title VII's requirements, an employer may still have an "out"—the foreign compulsion defense. The 1991 Act not only affected the definition of employee, but it also added the foreign compulsion defense to an employer's repertoire of available defenses.¹¹⁸ The foreign compulsion defense provides:

It shall not be unlawful . . . for an employer (or a corporation controlled by an employer) . . . 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.¹¹⁹

The foreign compulsion defense essentially functions as a check on Title VII's reach. An employer may be required to comply with Title VII in its operations abroad but only to the extent that the employer

115. See, e.g., *id.*

116. See *id.* at 710–11.

117. Dirig & Sarofsky, *supra* note 10, at 727.

118. See 42 U.S.C. § 2000e-1(b). The Act does not expressly refer to this section as the "foreign compulsion defense," but it has come to be known as the provision that provides for this defense.

119. *Id.* (emphasis added).

cannot successfully invoke the foreign compulsion defense. In this sense, it can serve as a sort of escape device for employers. Viewed as an escape device, the potential for abuse by employers is one of the key sources of controversy regarding the defense,¹²⁰ especially in light of that fact that Title VII provides no definition of the types of laws which may legitimately permit an employer to invoke it.¹²¹ Thus, the critical question with respect to the foreign compulsion defense is: What constitutes “law” sufficient to evade Title VII compliance?

Prior to the addition of the foreign compulsion defense, employers torn between compliance with Title VII and compliance with the host country’s laws, practices, and customs, relied on the “bona fide occupational qualification” (BFOQ)¹²² defense to justify hiring decisions made in violation of Title VII.¹²³ The BFOQ defense permits an employer to discriminate on the basis of sex, religion, or national origin where these criteria are “reasonably necessary to the normal operation of that particular business or enterprise.”¹²⁴ Like the BFOQ defense, the foreign compulsion defense is based on the premise that there are instances in which U.S. employers have to violate Title VII in order to comply with laws of the host country.¹²⁵ However, the foreign compulsion defense is independent of the BFOQ defense—an employer may raise the foreign compulsion defense even

120. See Meredith Poznanski Cook, Note, *The Extraterritorial Application of Title VII: Does the Foreign Compulsion Defense Work?*, 20 SUFFOLK TRANSNAT’L L. REV. 133, 145–53 (1996); see also Madden, *supra* note 32, at 763 (“[N]o guidance exists as to what constitutes ‘compulsion’ sufficient to invoke the [foreign compulsion] defense.”); St. John, *supra* note 10, at 884–88.

121. See 42 U.S.C. § 2000e-1(b).

122. *Id.* § 2000e-2(e).

123. See Cook, *supra* note 120, at 135. Note that the BFOQ defense was not available to employers to justify discrimination on the basis of race or color. See 42 U.S.C. § 2000e-2(e). Rather, employers could only raise it to justify discriminatory treatment on the basis of religion, sex, or national origin. *Id.* Also, the BFOQ generally does not give employers the right to base their decisions on stereotypes. See Madden, *supra* note 32, at 755.

124. 42 U.S.C. § 2000e-2. Even though employers *could* invoke the BFOQ defense to block Title VII liability, courts did not readily recognize it as a bar to liability for unlawful employment practices, insisting that the defense was to be used sparingly. See, e.g., *Int’l Union, United Auto v. Johnson Controls*, 499 U.S. 187, 201 (1991) (“The BFOQ defense is written narrowly, and this Court has read it narrowly.”); *Dothard v. Rawlinson*, 433 U.S. 321, 334 (1977) (“We are persuaded—by the restrictive language of § 703 (e), the relevant legislative history, and the consistent interpretation of the Equal Employment Opportunity Commission—that the [BFOQ] exception was in fact meant to be an extremely narrow exception to the general prohibition of discrimination . . .”). According to the Supreme Court, Congress intended the BFOQ defense to be construed narrowly. See *Int’l Union, United Auto*, 499 U.S. at 201; *Dothard*, 433 U.S. at 334.

125. Madden, *supra* note 32, at 755.

if it has no valid BFOQ defense.¹²⁶ Still, the foreign compulsion defense is more frequently invoked than the BFOQ defense.¹²⁷

The frequency with which employers invoke the foreign compulsion defense may be related directly to Congress's failure to define "law" as provided in § 2000e-1(b).¹²⁸ As a general matter, the more imprecise the language of a statute, the more manipulable it is. The imprecise definition of law invites flexibility in determining whether the defense applies to a given situation. The EEOC, recognizing the need for further guidance on the law question, made a modest attempt to shed light on what constitutes law sufficient to invoke the defense. In a policy statement issued on the matter, the EEOC, after articulating the three statutory elements that must be satisfied to establish the defense,¹²⁹ added that the employer "must initially demonstrate that the *source of authority* on which it relies constitutes a foreign 'law'."¹³⁰ The statement did not elaborate on how an employer makes such a demonstration. Notably, the EEOC admitted that "the parameters of [the law] element of the defense are uncertain."¹³¹ Commentators have criticized the EEOC's "clarification" of what constitutes foreign law, contending that the EEOC's test "ignores the practical realities of companies operating outside Europe and North America."¹³²

The law question has attracted a range of perspectives, from those in favor of a broad interpretation to those in favor of a more restrictive interpretation. Commentators favoring a broad interpretation reject the idea that a precise line should be drawn between the law that is sufficient to invoke the defense and the law

126. See Maher, *supra* note 10, at 40.

127. Certain commentators now refer to the "foreign compulsion defense" as "the principal provision employers can use to defend against claims of discrimination abroad." Smith, *supra* note 59, at 205.

128. 42 U.S.C. § 2000e-1(b).

129. The three statutory elements, as articulated by the EEOC, are as follows:

- (1) The action is taken with respect to any employee in a workplace in a foreign country, where
- (2) compliance with Title VII . . . would cause the respondent to violate the law of the foreign country,
- (3) in which the workplace is located.

EEOC, ENFORCEMENT GUIDANCE ON APPLICATION OF TITLE VII AND ADA TO CONDUCT OVERSEAS AND TO FOREIGN EMPLOYERS IN THE UNITED STATES (1993), available at <http://www.eeoc.gov/policy/docs/extraterritorial-vii-ada.html> (emphasis added) [hereinafter EEOC 1993 GUIDELINES].

130. See *id.* (emphasis added).

131. *Id.*

132. See, e.g., Smith, *supra* note 59, at 212.

that is not.¹³³ Advocates of this approach argue that Title VII places employers in the untenable position of choosing between compliance with Title VII and violating the laws of the host country.¹³⁴ In light of this position, U.S. companies should be shielded from Title VII sanctions, not only with respect to the host country's *formal* laws, but also with respect to its *informal* laws.¹³⁵ These commentators object to the EEOC's requirement that the employer identify the source of authority of the law, arguing, *inter alia*, that such an interpretation "excludes many other influencing factors."¹³⁶ These influencing factors include, but are not limited to, social customs, preferences, and religious practices.¹³⁷ Furthermore, according to these commentators, the EEOC's interpretation is flawed because (1) it is insensitive to the culture and tradition of the host country, (2) it puts employers at a competitive disadvantage, (3) it creates hostility between U.S. and non-U.S. employees, (4) it may still allow employers to discriminate intentionally, and (5) it results in tension between the United States and the host country.¹³⁸

Opposite this more generous perspective are commentators adopting the restrictive position captured by the Restatement of Foreign Relations Law, which provides: "The defense of foreign government compulsion is in general available only when the other state's requirements are embodied in *binding laws or regulations subject to penal or other severe sanction*; it is not available when the second state's orders are given in the form of 'guidance,' informal communications, or the like."¹³⁹ The EEOC's position appears to coincide with that of the Restatement, as it recommends the identification of a specific source of the law invoked.¹⁴⁰ Those falling into this camp advocate for a clearer articulation of the foreign compulsion defense to "avoid allowing employers to broadly invoke the . . . defense."¹⁴¹ They call on Congress to "specifically delineate the kinds of situations that will support the defense."¹⁴² As the defense stands, these commentators contend that it is too vague and

133. See, e.g., St. John, *supra* note 10, at 890–91 (arguing that a "good faith standard" should be applied to determine whether the defendant's conduct was compelled).

134. See generally Smith, *supra* note 59; St. John, *supra* note 10.

135. See Smith, *supra* note 59, at 869.

136. Cook, *supra* note 120, at 146.

137. See *id.*

138. See *id.* at 148–53.

139. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 441 cmt. c (1987) (emphasis added).

140. See EEOC 1993 GUIDELINES, *supra* note 129.

141. See Madden, *supra* note 32, at 763.

142. *Id.*

too unpredictable, leaving plaintiffs and employers at the mercy of the particular court hearing the case.¹⁴³

There are other commentators who question the wisdom of the foreign compulsion defense and, more generally, the prudence of applying Title VII abroad at all. To these commentators, the law question brings to bear precisely why Title VII's extraterritorial application is complicated and even unnecessary.¹⁴⁴ According to these commentators, applying Title VII abroad "creates a myriad of problems relating to issues of sovereignty, cultural difference, and conflict between the United States and foreign laws . . . [and] hampers the ability of United States corporations to compete on a worldwide scale."¹⁴⁵ From the perspective of these commentators, Title VII requires employers to choose between, for example, violating cultural norms of the host country and complying with U.S. employment laws.¹⁴⁶ However, according to them, the choice is not so straightforward. To bolster their positions further, these commentators claim that U.S. employees are often already protected under the employment discrimination laws of the host country.¹⁴⁷

The complexity of the law question is demonstrated aptly by cases arising in Islamic countries, in Japan, and in other countries that subscribe to firm cultural traditions that might be the equivalent of law in the United States.¹⁴⁸ For instance, in the case of Japanese culture, the traditional rules of the *giri* govern many forms of social interaction, including the employer-employee relationship, and are commonly referred to as "rules of conduct."¹⁴⁹ The *giri* are not considered a part of Japan's formal legal structure, yet individuals still abide by them "in order to function successfully" in Japanese society.¹⁵⁰ A similar dilemma arises in Islamic countries where the strictures of the Muslim faith are essentially the equivalent of law "on the books."¹⁵¹ In determining whether an employer may properly raise the foreign compulsion defense, it may be difficult, if not

143. *Id.* at 763 ("Guided by no precise rule or definition, these case-by-case rulings suggest that a plaintiff bringing a discrimination suit against an employer operating abroad may never be certain whether some conflicting host country policy will defeat his claim.").

144. *See Smith, supra* note 59, at 193.

145. *Id.* at 193-94.

146. *See id.*

147. *Id.*

148. *Id.* at 208 ("Japanese culture and the practices of Islamic countries provide a good example of an American employer's difficulty in attempting to comply with both Title VII and the cultural factors which govern employment, yet do not rise to the level of law.").

149. *See id.* at 208-10.

150. *See id.* at 208-09.

151. *See id.* at 211.

impossible, for example, to distinguish between the Islamic law and religious commandments.¹⁵²

These two examples illustrate why some commentators insist that the issue is not as black and white as the 1993 EEOC Guidelines seem to suggest. They would argue that the EEOC's test is ignorant to the realities facing companies with operations abroad.¹⁵³ Still, these commentators are willing to concede certain exceptions to this rule, i.e., situations in which Title VII *should* still be applicable.¹⁵⁴ These exceptions include, for instance, where the discriminatory decision is made in the United States instead of on location in the host country,¹⁵⁵ where an employer sends an employee overseas for the *sole purpose* of firing the employee,¹⁵⁶ and where the foreign company is nothing more than the alter-ego of the U.S.-based parent company.¹⁵⁷

IV. MAINTAINING TITLE VII'S EFFECTIVENESS WHILE REMAINING REALISTIC ABOUT ITS REACH: SUGGESTIONS ON HOW TO ADDRESS THE "EMPLOYEE" AND "LAW" QUESTIONS

Title VII has had an undeniable, ground-breaking effect on discriminatory employment practices.¹⁵⁸ The 1991 Act further enhanced the statute by extending protection to employees working abroad for U.S.-based companies. However, if the statute's extraterritorial application is to remain meaningful, Congress cannot ignore the problems identified in this Note. Both the employee question and the law question indicate that flaws exist in Title VII's implementation. Each question presents its own challenges that cannot continue to go unaddressed if Congress is to seriously undertake ending discriminatory employment practices.

A. *Response to the Employee Question: Expansion of the Definition of Employee to Mimic the Scope of Title VII as Applied in the United States while Remaining Realistic About the Capabilities of Title VII*

In responding to the employee question, it is important to note at the outset that Title VII should be given the most extensive reach possible in order to ensure optimal deterrence of discriminatory

152. *See id.*

153. *See id.* at 212.

154. *See id.* at 193.

155. *See id.* at 221.

156. *See id.*

157. *See id.*

158. *See, e.g.,* Dirig & Sarofsky, *supra* note 10, at 726–27, 734–35.

behavior by employers. Still, one must be practical about Title VII's capabilities and recognize its limitations. Forcing Title VII to cover situations best remedied by other means may gradually detract from Title VII's value as a vehicle to combat discriminatory employment practices. It is with these points in mind that one must determine how to resolve the employee question. As this discussion will demonstrate, the resolution will necessarily differ with respect to legal permanent residents and foreign nationals.

As the above discussion indicated, Title VII's current application within the United States covers U.S. citizens, legal permanent residents, and others legally working in the United States, but it only covers U.S. citizens when applied extraterritorially. The research conducted in connection with this Note revealed no specific source for this inconsistency. Furthermore, those who have commented on this inconsistency find no rational basis for it and question its fundamental fairness, its consistency with public policy, and its conformity to the true intent of the statute.¹⁵⁹ In the absence of any compelling reason for Congress to do otherwise, this Note suggests that Congress amend the definition to be more inclusive. Then the question is: How inclusive should it be? For reasons stated below, Title VII's coverage should be expanded to reach legal permanent residents of the United States working abroad, just as it reaches these individuals territorially, thus mimicking its application in the United States. With respect to foreign nationals, an approach outside of Title VII might be more prudent and also more realistic.

Amending Title VII to cover legal permanent residents can realistically be accomplished by Congress. It would require only a change to the existing language to include both citizens and legal permanent residents.¹⁶⁰ Unlike expansion to cover foreign nationals, expanding Title VII to cover legal permanent residents is less likely to raise international comity issues. Legal permanent residents may not enjoy all of the rights a citizen enjoys,¹⁶¹ but they do enjoy, *inter alia*, the right "[t]o be protected by all of the laws of the United States, [their] state of residence and local jurisdictions."¹⁶² Thus,

159. See, e.g., *id.*

160. Some scholars have suggested that the language be amended to cover "legal residents," which would cover citizens, legal permanent residents, and foreign nationals working for U.S. companies abroad. See *id.* at 726. The approach offered by this Note is that Title VII should be used to protect citizens and legal permanent residents and that a more collaborative approach needs to be taken with respect to foreign nationals.

161. Legal permanent residents do not enjoy the right to vote in elections. U.S. Citizenship & Immigration Servs., Now that You Are a Permanent Resident, <http://www.uscis.gov/> (follow "Permanent Residence (green card)" hyperlink under "More Information"; then follow "Now That You Are a Permanent Resident" hyperlink under "Related Links") (last visited Apr. 14, 2007).

162. *Id.*

providing Title VII coverage to legal permanent resident seems less intrusive since they elected to be protected by U.S. law.

Expanding Title VII to cover extraterritorial legal permanent residents may also alleviate some of the tension surrounding the treatment of noncitizens for purposes of the minimum-employee threshold. As was articulated in *Mousa*, "Title VII's coverage and definition of 'employee' appear co-extensive."¹⁶³ This being the case, those who are not substantively protected by Title VII also should not count toward the employer's minimum-threshold requirement.¹⁶⁴ The contrary position, taken by the *Morelli* court, creates a situation in which noncitizen employees would be "used" to get over the statutory hurdle but then ignored with respect to their own Title VII claims. Under the *Morelli* rule, the mere presence of foreign nationals on a U.S. company's payroll would help protected employees reap the benefits of Title VII, while the foreign nationals would reap nothing. This situation is paradoxical in light of Title VII's fundamental goal of ensuring *equal* treatment in employment. It is not likely that Congress intended such an absurdity. Therefore, Congress should also amend Title VII to require that any employee who may be counted in the minimum-employee threshold also be entitled to the substantive protections of the statute.

Although strong arguments can be made for extending Title VII to legal permanent residents, extension to foreign nationals is more complicated. Title VII may be ill-suited to reach beyond legal permanent residents to foreign nationals working for U.S.-controlled companies. The more prudent approach to protecting foreign nationals would be through international agreements with host countries. International organizations, such as the International Labor Organization (ILO),¹⁶⁵ and international agreements, such as the Universal Declaration on Human Rights and the ILO's Convention Concerning Discrimination in Respect of Employment and Occupation, already exist to deal with employment rights.¹⁶⁶ The question, of course, becomes whether these agreements work in practice. Furthermore, what parties would enter into these agreements? The U.S. government and the government of the host

163. *Mousa v. Lauda Air Luftahrt, A.G.*, 258 F. Supp. 2d 1329, 1337 (S.D. Fl. 2003).

164. *Id.*

165. The ILO was created in 1919 "for the purpose of adopting international standards to cope with the problem of labour conditions involving 'injustice, hardship, and privation.'" Amnesty International, Fact Sheet on the International Labour Organization (ILO), <http://www.web.amnesty.org/library/print/ENGIOR420042002> (last visited Apr. 14, 2007).

166. See Frantz, *supra* note 72, at 252-55; see also ILO Convention No. 111 Concerning Discrimination in Respect of Employment and Occupation, June 25, 1958, available at <http://www.ilo.org/ilolex/english/convdisp1.htm> (follow hyperlink to No. 111) [hereinafter ILO Convention No. 111].

country? The host country government and the U.S. company operating therein? As a general matter, international agreements tend to be complex instruments, the realistic enforceability of which is often called into question.¹⁶⁷ However, it is questionable whether the enforceability of a Title VII claim by a foreign national employed by a U.S. company abroad is a more sound approach. Certain commentators have already noted the difficulty of enforcing Title VII with respect to foreign nationals.¹⁶⁸ The point here is not to suggest that Title VII is completely inadequate in the context of foreign nationals suing U.S. employer abroad (indeed, Title VII could serve as an excellent model for the international agreement). Rather, the point is to raise the question of whether U.S. federal legislation is the *proper mechanism* by which to accomplish this end and to motivate the U.S. government and international bodies to address this issue.

B. *Response to the Law Question: Congress Must Provide More Guidance to Courts and Employers as to When Employers May Legitimately Invoke the Foreign Compulsion Defense*

Working to expand Title VII's reach to U.S. citizens and legal permanent residents may be a pointless exercise if employers have the ability to invoke the foreign compulsion defense in order to skirt Title VII's requirements. Without a more precise definition of "law," or at least advice about how to approach the law question when it arises, the foreign compulsion defense may serve as more of a check on the scope of Title VII than the drafters intended, and it may ultimately work *against* the overall goals of Title VII.¹⁶⁹ Therefore, Congress must provide courts and employers with more guidance as to when an employer can successfully invoke the defense.

One of the main dilemmas with respect to the foreign compulsion defense is that it is difficult to devise a straightforward way to take into account the traditions, customs, and rules of conduct of the host country. As this Note has indicated, these cultural formalities often function as law under the standards of foreign countries even though they are not necessarily considered law under U.S. standards.¹⁷⁰ Petitioning Congress to provide a concrete rule as to what constitutes law may not be a realistic request because law is an amorphous concept when considered from a global perspective. The varying perspectives around the world on what constitutes law are not conducive to producing a single rule covering all situations. It is not just a matter of Congress adding two or three words to the current

167. See Dirig & Sarofsky, *supra* note 10, at 726-48.

168. *Id.*

169. Recall from above that the purpose of Title VII was broadly articulated by the Supreme Court.

170. See St. John, *supra* note 10, at 889-90.

statutory provision. It would be virtually impossible for Congress to provide a bright-line rule delineating what constitutes law and what does not constitute law in nearly 200 countries around the world. In light of this complexity, the first step to attacking the law question is acknowledging the impossibility of devising a concrete, generally applicable rule. The next step is to consider a more pragmatic approach.

Reciprocity agreements between the United States and foreign governments, under which each country would agree to apply the other's employment laws either through a treaty or through some other form of international agreement, may be one pragmatic way to approach the question.¹⁷¹ By reaching such an agreement, some of the issues regarding sovereignty might be avoided.¹⁷² Of course, U.S. employment laws and those of the host country may not be identical, but these inconsistencies could be addressed in the agreement. The inconsistencies may even be overstated because some countries already have prohibitions on discriminatory employment practices similar to Title VII's prohibitions in place.¹⁷³ The feasibility of reciprocity agreements is even more promising if one considers that 165 countries have ratified ILO Convention No. 111.¹⁷⁴ This convention was adopted in 1958 and has been well-received by a majority of countries around the world.¹⁷⁵ Interestingly, the United States has not ratified this convention and stands out from those countries that have ratified it. As a starting point, the United States needs to reconsider its position on ratification because the ideas expressed in this Convention echo those expressed in Title VII.¹⁷⁶ Importantly, the stamp of approval from the countries which have ratified the Convention suggests that they would be open to reciprocity agreements. Reciprocity agreements, therefore, are one viable option for resolving the law question.

As stated earlier, it is impractical to ask Congress to provide a universal definition of law. Still, Congress will have to amend the language of the foreign compulsion defense to reflect this new approach. It should amend it by adding the following statement:

"Law" sufficient to permit an employer to raise this defense must consist of an actual mandate by the foreign government which can be furnished in writing in an official document; alternatively, employers

171. See Smith, *supra* note 59, at 221.

172. See *id.*

173. See Dirig & Sarofsky, *supra* note 10, at 734.

174. International Labour Organization Homepage, Ratifications of Convention No. 111, <http://www.ilo.org/ilolex/cgi-lex/ratifce.pl?C111> (last visited Apr. 14, 2007).

175. See ILO Convention No. 111, *supra* note 166.

176. Convention No. 111 defines discrimination as "any distinction, exclusion or preference made on the basis of race, colour, sex, religion, political opinion, national extraction or social origin, which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation." *Id.* at art. 1.

may rely upon a treaty or other international agreement signed by all relevant parties which specifies the traditions, customs, or rules of conduct that function as the equivalent of "law" in the host country.

Such a clause would provide necessary guidance and would also make recognition of the defense more predictable.

V. CONCLUSION

It took Congress twenty-seven years to extend Title VII extraterritorially. Congress likely thought it was sounding the death knell on the question when it enacted the 1991 Act. As it turns out, clearing one hurdle has led to additional ones. Title VII continues to be instrumental legislation in the fight against discriminatory employment practices, but Congress must address the issues raised in this Note with respect to the definition of employee and the definition of law if it wants to maintain the statute's effectiveness. Without addressing these two issues, courts will be forced to fill in the gaps with their own potentially erroneous interpretations, and commentators will continue to add to the confusion by offering varying perspectives on what the interpretation should be. When Congress *does* decide to amend the statute—undoubtedly, it will have to be done—it will be necessary to keep in mind that Title VII can only go so far without sacrificing its effectiveness. Of course, Title VII *could* cover citizens, legal permanent residents, and foreign nationals, but the question is, should it? What works in theory may not work in practice. From a practical standpoint, protection should only be extended to citizens and legal permanent residents; protection of foreign nationals may be best accomplished by international agreement. Also from a practical standpoint, the law question cannot be resolved by calling on Congress to provide one unitary definition of law to apply in all situations. The more prudent approach to the law question would be, again, to recognize the limitations of Title VII and to pursue other means to achieve protection.

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