# **NOTE: THE EXTRATERRITORIAL APPLICATION OF TITLE VII: DOES THE FOREIGN COMPULSION DEFENSE WORK?**

Winter, 1996

**Reporter**

20 Suffolk Transnat'l L. Rev. 133 \*

**Length:** 12445 words

**Author:** Meredith Poznanski Cook

**Text**

**[\*133]**

I. Introduction

United States companies have increased their presence in foreign markets. [[1]](#footnote-2)1 As these companies expand their overseas operations, they have taken American citizens with them as employees. [[2]](#footnote-3)2 Since 1964, U.S. law has protected employees working in the United States from discrimination based on "race, color, religion, sex, or national origin." [[3]](#footnote-4)3 United States citizens who work for United States companies abroad, however, only received this protection in 1991. [[4]](#footnote-5)4 The amendments to Title VII of the Civil Rights Act of 1964 failed to address many problems, including the proper interpretation of the foreign law defense that employers may use to avoid liability. [[5]](#footnote-6)5

This note examines the proper interpretation of the foreign law defense and questions the prudence of the approach put forth by the Equal Employment Opportunity Commission ("EEOC"). [[6]](#footnote-7)6 Part II of this note describes the history of Title VII, examining both the original provisions and the amendments of 1991. [[7]](#footnote-8)7 Part III specifically **[\*134]** examines the history, rationales, and important terms found in the foreign law defense. [[8]](#footnote-9)8 This section further discusses the problems with the defense as well as suggested solutions to those problems. [[9]](#footnote-10)9 Part IV will then provide an analysis of the foreign law defense. [[10]](#footnote-11)10 This section will discuss the problems with the interpretation of the EEOC and examine each of the solutions. [[11]](#footnote-12)11 Part V of this note concludes that Congress should clarify the statute and compel the EEOC to apply a good faith standard in its decisions. [[12]](#footnote-13)12

II. The History of Title VII

A. The Civil Rights Act of 1964 and its Interpretation

Congress passed Title VII of the Civil Rights Act of 1964 ("the Act") to create equal employment opportunities and to eliminate barriers favoring white employees over other employees. [[13]](#footnote-14)13 The Act created a federal cause of action**[\*135]** against United States employers who discriminate on the basis of race, color, religion, sex, or national origin. [[14]](#footnote-15)14 Through its definitions, the Act casts a wide net. [[15]](#footnote-16)15 For example, the term "person" refers to not only individuals but also governmental entities. [[16]](#footnote-17)16

In enacting Title VII, Congress recognized that in certain instances an employer might be justified in hiring a person solely on the basis of that individual's religion, sex, or national origin. [[17]](#footnote-18)17 In such limited instances, the religion, sex, or national origin of the individual may serve as a "bona fide occupational qualification" ("BFOQ") if the qualification is reasonably necessary to the operation of the business. [[18]](#footnote-19)18 For example, an organization managed by a particular religion may discriminate in hiring against applicants of other faiths. [[19]](#footnote-20)19 Congress included the BFOQ defense within Title VII as an extremely narrow exception to the Act's prohibition against discrimination. [[20]](#footnote-21)20 Further, the BFOQ defense does not apply to discrimination based **[\*136]** on race or color. [[21]](#footnote-22)21

Congress did not indicate, however, if Title VII should apply to U.S. citizens working abroad for American employers. [[22]](#footnote-23)22 As a result, these employees were unsure of their protection under Title VII. [[23]](#footnote-24)23 Absent Congressional intent as to the extraterritorial reach of Title VII, courts struggled over the correct interpretation of the statute. [[24]](#footnote-25)24 **[\*137]** Those courts which applied Title VII extraterritorially relied on a negative inference from a provision which excludes aliens working outside the United States. [[25]](#footnote-26)25 These courts concluded that Congress would not have exempted aliens employed abroad unless citizens employed abroad were protected. [[26]](#footnote-27)26 The EEOC agreed and published a regulation in 1988 stating that Title VII applied extraterritorially. [[27]](#footnote-28)27 Most courts which denied the extraterritorial reach of Title VII focused on the absence of statutory language as well as nationality and sovereignty concerns. [[28]](#footnote-29)28

In 1991, the United States Supreme Court held in EEOC v. Arabian American ***Oil*** Co. [[29]](#footnote-30)29 ("Aramco") that Title VII does not apply extraterritorially. [[30]](#footnote-31)30 The EEOC argued that **[\*138]** the broad definitions in Title VII and the alien exemption clause are evidence of congressional intent to apply the statute extraterritorially. [[31]](#footnote-32)31 The EEOC also argued that the Supreme Court should defer to the interpretation of Title VII put forth by the EEOC. [[32]](#footnote-33)32 The Supreme Court rejected the argument that the broad definitions encompass extraterritorial application and stated that the ambiguous language of **[\*139]** the statute does not directly address the issue of this case. [[33]](#footnote-34)33 The Court rejected the alien exemption argument, citing its unwillingness to infer extraterritorial application from a negative inference. [[34]](#footnote-35)34 Finally, the Court refused to defer to the EEOC's interpretation of Title VII because Congress did not grant the EEOC the authority to promulgate rules or regulations. [[35]](#footnote-36)35 This decision represented a marked departure from the deference usually accorded to an administrative agency's interpretation of its rules. [[36]](#footnote-37)36 Without **[\*140]** affirmative evidence that Congress intended Title VII to apply abroad, the Supreme Court would not infer its extraterritorial application. [[37]](#footnote-38)37 The Court stated that Congress had amended other statutes in order to apply them abroad and therefore could have amended Title VII if it so desired. [[38]](#footnote-39)38

B. The Civil Rights Act of 1991

In Aramco, the Court stated that a clear expression of Congressional intent was necessary in order to apply Title VII abroad. [[39]](#footnote-40)39 When the Supreme Court handed down the decision on March 26, 1991, Congress was already considering the Civil Rights Act of 1991 ("the 1991 Act"). [[40]](#footnote-41)40 In fact, Congress intended that the Act would reverse several**[\*141]** recent Supreme Court decisions. [[41]](#footnote-42)41 Once the Court decided Aramco, Congress utilized the Civil Rights Act of 1991 as a vehicle to provide a clear expression of intent to apply Title VII extraterritorially. [[42]](#footnote-43)42

Section 109 of the 1991 Act amended Title VII to include "Protection of Extraterritorial Employment." [[43]](#footnote-44)43 As a result of this amendment, the definition of "employee" broadened so that "with respect to employment in a foreign country, such term includes an individual who is a citizen of the United States." [[44]](#footnote-45)44 Section 109 provides Title VII protection to United States citizens working abroad who are employed by an American company or a foreign corporation controlled by an American company. [[45]](#footnote-46)45 Congress refused to apply Title VII to foreign employers not controlled by an American company. [[46]](#footnote-47)46 As a defense to compliance, **[\*142]** the Act permits an employer to engage in discrimination that would normally violate Title VII if compliance with Title VII would violate the law of the foreign country where the company is located. [[47]](#footnote-48)47

Section 109 of the Civil Rights Act of 1991 was included late in the deliberation process, and Congress engaged in very little discussion of the provision. [[48]](#footnote-49)48 It is clear, however, that Congress intended to provide for the protection of American citizens working for American employers abroad. [[49]](#footnote-50)49 Further, Congress clearly did not intend to require employers to take actions that would violate the law of a foreign country. [[50]](#footnote-51)50 Since the legislative history of Section 109 is sparse and the intent of Congress unclear, the EEOC possesses great flexibility in interpreting the provision. [[51]](#footnote-52)51 **[\*143]**

III. The Foreign Law Defense

A. The History and the Rationales Behind the Defense

The 1991 Act provides a foreign law defense to otherwise discriminatory actions. [[52]](#footnote-53)52 This defense exempts American employers from Title VII liability when following Title VII would cause the employer to violate foreign law. [[53]](#footnote-54)53 The foreign law defense originally arose as a defense to antitrust liability. [[54]](#footnote-55)54 By using the BFOQ, however, some decisions before the 1991 Amendment also had the effect of applying a foreign law defense to Title VII. [[55]](#footnote-56)55

Courts and commentators have advanced several rationales for the antitrust foreign law defense. [[56]](#footnote-57)56 The EEOC and the courts have applied three rationales for the antitrust foreign law defense in the employment law arena. [[57]](#footnote-58)57 The act of **[\*144]** state doctrine supports a foreign law defense in order to avoid judicial inquiry into the policies underlying the actions of another country. [[58]](#footnote-59)58 Under the principles of international comity, a court confronted with punishing an action which a foreign nation requires, encourages, or permits should analyze the interests of the two countries in light of neutral criteria and apply the more reasonable law. [[59]](#footnote-60)59 The third justification for the foreign law defense examines the fairness to the defendant. [[60]](#footnote-61)60 Since courts and commentators **[\*145]** have advanced all three justifications for the defense, its application has been inconsistent. [[61]](#footnote-62)61

B. Determining What Constitutes a Foreign Law and the Cause of a Violation

Due to the limited legislative history of Section 109 of the Civil Rights Act of 1991, the EEOC issued a policy statement to define important terms, including terms that relate to the foreign law defense. [[62]](#footnote-63)62 The EEOC cited several cases it will use to determine what constitutes a foreign law. [[63]](#footnote-64)63 For example, the EEOC cited one case in which an American employer located in Germany terminated U.S. citizens based on a union contract that mandated retirement at age sixty-five. [[64]](#footnote-65)64 The court held that the **[\*146]** provision in the union contract was not "law" for the purposes of the Age Discrimination in Employment Act's foreign law defense. [[65]](#footnote-66)65 Even though nearly all German employers followed the mandatory retirement age, the court found that the practice falls short of a legislative mandate from the German government. [[66]](#footnote-67)66

The cases cited by the EEOC require an actual mandate from the foreign government in order for employers to shield themselves from Title VII; social customs, preferences, and religious practices are not justifications for discrimination against U.S. citizens. [[67]](#footnote-68)67 The employer who raises the foreign law defense bears the burden of proving that the company must comply with the law of a foreign nation, not merely a guideline preferred by that nation. [[68]](#footnote-69)68 By limiting the application of the foreign law defense to conflicts between Title VII and the law of another country, the defense excludes many other influencing factors. [[69]](#footnote-70)69 For example, the EEOC definition of what constitutes a law denies the defense to companies attempting to comply with Muslim law in Islamic countries. [[70]](#footnote-71)70 The principles of Muslim law so strongly influence the Muslim way of life that the civil codes in many Islamic countries instruct judges to fill in any gaps in the code with Muslim ideals. [[71]](#footnote-72)71 **[\*147]** Traditional Muslim law severely restricts the access of women to the workplace, especially where they come into contact with men; but not all Islamic countries have incorporated this provision into their civil codes. [[72]](#footnote-73)72 Even though the religious influence permeates Islamic society, a company cannot use Muslim law as a defense to discrimination against women. [[73]](#footnote-74)73

To satisfy the foreign law defense, the employer must demonstrate that compliance with Title VII would result in a violation of the laws of the host country. [[74]](#footnote-75)74 In its 1993 policy statement, the EEOC interpreted this provision to require the employer to prove that simultaneous compliance with both Title VII and the law of the host country would be impossible. [[75]](#footnote-76)75 For example, under Saudi Arabian law, beheading awaits a non-Muslim who flies over Mecca. [[76]](#footnote-77)76 A company hired by the Saudi Arabian government to fly over Muslims making their annual pilgrimage to Mecca must choose between hiring only Muslims or complying with Title VII and risking the lives of its non-Muslim pilots. [[77]](#footnote-78)77 Under these facts, a court found it impossible for the employer to comply with Title VII and the Saudi law mandating Muslim pilots. [[78]](#footnote-79)78 Outside these extreme facts, there has been little judicial interpretation of what would **[\*148]** cause an employer to violate the laws of a foreign country. [[79]](#footnote-80)79 In 1993, the Supreme Court of the United States addressed "cause" in a case involving the extraterritorial application of the Sherman Antitrust Act. [[80]](#footnote-81)80 The Court held that no conflict exists between the laws of the United States and the host country if the person subject to regulation by the two countries can comply with both laws. [[81]](#footnote-82)81 Although this decision concerns the extraterritorial application of the Sherman Antitrust Act, courts will likely apply its reasoning to other areas where Congress has provided for extraterritorial application. [[82]](#footnote-83)82

C. Problems Created by the Foreign Law Defense

The EEOC's interpretation of the foreign law defense has created a number of problems. [[83]](#footnote-84)83 By limiting the definition of "law," the EEOC's interpretation lacks cultural sensitivity. [[84]](#footnote-85)84 Further, the foreign law defense puts American companies operating abroad at a competitive disadvantage. [[85]](#footnote-86)85 The EEOC interpreted the defense narrowly so as to avoid discrimination, but ironically the defense still permits intentional discrimination. [[86]](#footnote-87)86 The foreign law defense may also create conflicts between the host country and the American company as well as between the host country and the United States. [[87]](#footnote-88)87 Finally, the EEOC interpretation strives for **[\*149]** universal application but fails. [[88]](#footnote-89)88

Commentators have attacked the foreign law defense as "culturally insensitive, if not imperialistic." [[89]](#footnote-90)89 Under the EEOC interpretation, an American company must comply with Title VII unless compliance with Title VII would cause the employer to violate an actual mandate from the host country. [[90]](#footnote-91)90 In some countries, however, governments have not codified cultural values deeply ingrained in daily life or reflected in religious beliefs. [[91]](#footnote-92)91 The mechanisms for conducting employment relationships may be found in a strong belief system that does not rise to the level of a law. [[92]](#footnote-93)92 By limiting the foreign law defense to mandates from a foreign government, the EEOC's interpretation fails to recognize the importance of non-legal influences

regarding employment issues in foreign countries. [[93]](#footnote-94)93

The foreign law defense may also place American companies operating abroad at a competitive disadvantage. [[94]](#footnote-95)94 By their nature, many provisions of Title VII require application to an entire overseas operation and not exclusively to the U.S. employees. [[95]](#footnote-96)95 American employers operating **[\*150]** abroad may be placed at a competitive disadvantage as compared to their overseas competitors who are not subject to United States laws. [[96]](#footnote-97)96

Even if the employer could find a way to apply Title VII protection only to its U.S. employees, such disparate protective treatment could cause tension between American and non-American citizens. [[97]](#footnote-98)97 For example, Title VII requires employers to grant parental leave for the care of a newborn child. [[98]](#footnote-99)98 Under the extraterritorial application provision, an American company operating abroad must provide Title VII protection to its employees who are United States citizens; Title VII affords no such protection to foreign citizens employed by American companies operating abroad. [[99]](#footnote-100)99 Accordingly, an American employer operating abroad must grant parental leave to its employees who are U.S. citizens but can deny parental leave to all other employees. [[100]](#footnote-101)100 This unequal treatment could create hostility within the company that would not be present in foreign companies. [[101]](#footnote-102)101

Even though the extraterritorial application of Title VII sets out to prevent employment discrimination, the foreign law defense may still permit intentional discrimination. [[102]](#footnote-103)102 **[\*151]** A U.S. employer may be able to transfer an employee to a foreign division of the company in order to fire the employee. [[103]](#footnote-104)103 In this situation, the employer would send an employee to a foreign division of the company for the sole purpose of terminating the employee for a reason prohibited by U.S. law, but compelled in the host country. [[104]](#footnote-105)104 The foreign law defense fails to take into consideration intentional acts of discrimination that may meet the requirements of the defense. [[105]](#footnote-106)105

The EEOC's interpretation of the foreign law defense may also create tension between the United States and the host country. [[106]](#footnote-107)106 The EEOC's interpretation fails to consider**[\*152]** informal foreign compulsion even though an employer's breach of customs, religion, or preferences may result in sanctions to the employer or harm relations between the host government and the United States. [[107]](#footnote-108)107 The application of United States law overseas also creates a potential conflict between different forms of jurisdiction. [[108]](#footnote-109)108 Territorial jurisdiction permits a state to regulate activity that takes place within its borders. [[109]](#footnote-110)109 A state may also exert its right to jurisdiction based on nationality and regulate the activities and interests of its nationals regardless of where that activity takes place. [[110]](#footnote-111)110 When one state exerts territorial jurisdiction over employment within its borders and the United States extends its jurisdiction based on the nationality of the employer and employee, an imminent potential for conflict of laws exists. [[111]](#footnote-112)111

Finally, the foreign law defense attempts to apply a rigid formula to a number of complex issues. [[112]](#footnote-113)112 Since the policies of each country are not likely to be the same, conflicts over extraterritorial application of United States law to each country may require different resolutions. [[113]](#footnote-114)113 In some **[\*153]** countries, the preferences of the government may not compel action or inaction by employers. [[114]](#footnote-115)114 Other foreign governments, however, impose sanctions or even deportation for breach of informal policies and customs. [[115]](#footnote-116)115 The EEOC's interpretation of the foreign law defense strives for universality, but in the process ignores the fact that not all governments treat employment standards in the same manner. [[116]](#footnote-117)116

D. Suggested Solutions

Commentators have proposed a number of solutions to the problems created by the foreign law defense. [[117]](#footnote-118)117 First, Congress could clarify the meaning of the word "law" as used in the foreign law defense. [[118]](#footnote-119)118 The defense passed by Congress in 1991 permits otherwise discriminatory conduct if compliance with Title VII would "violate the law" of a foreign country. [[119]](#footnote-120)119 The EEOC issued its own interpretation because Congress failed to define what constitutes a law for the purposes of the foreign law defense. [[120]](#footnote-121)120 The EEOC definition, however, fails to consider strong influences in the host country that the government has not codified. [[121]](#footnote-122)121 Commentators have suggested that Congress should define the term "law" and take into consideration that not all countries codify the mechanisms governing employment **[\*154]** law. [[122]](#footnote-123)122

Other commentators have argued that an employer should not be liable if the violation of Title VII resulted from a good faith attempt to comply with the law of the host country. [[123]](#footnote-124)123 The Uniform Commercial Code ("UCC") provides a precedent to the good faith standard in that it excuses nonperformance of a contract if a party proves that it attempted to comply with foreign law regardless of whether the compliance later proves to be invalid. [[124]](#footnote-125)124 The EEOC immunized one company from Title VII liability where the corporation in good faith relied upon the custom of a nation, established only by a letter from a government official. [[125]](#footnote-126)125 The EEOC stated that the good faith standard applies where the employer has a "current, authoritative, and factual basis for its belief" that the host country compels the conduct and the employer must rely on that belief in good faith. [[126]](#footnote-127)126

Proponents argue that the good faith standard provides relief to deserving defendants, but stops short of permitting intentional discrimination. [[127]](#footnote-128)127 They further contend that the good faith standard considers influencing factors such as religion and customs and takes statements by the host government into consideration. [[128]](#footnote-129)128 A potential problem with the **[\*155]** good faith standard, however, is that it may exceed the scope intended by Congress. [[129]](#footnote-130)129

Commentators have also suggested that problems with the foreign law defense could be solved through judicial interpretation. [[130]](#footnote-131)130 Although the EEOC presented its definition of "law," the court need not defer to it because Congress did not grant the EEOC the authority to promulgate rules or regulations. [[131]](#footnote-132)131 The courts may interpret law differently than the EEOC because Congress has provided little guidance on the definition of "law." [[132]](#footnote-133)132 Specifically, courts could give a broader reach to the term and encompass nonlegal employment standards found in the host country. [[133]](#footnote-134)133

Another suggested solution to the problems created by the foreign law defense looks specifically to the principles of international comity. [[134]](#footnote-135)134 International comity consists of a body of rules which nations observe towards each other out of mutual convenience or courtesy, though they are not considered part of international law. [[135]](#footnote-136)135 Under a comity analysis, courts balance the contacts and interests of the United States and the host country and apply the law of the state whose interest is clearly greater. [[136]](#footnote-137)136 Under this **[\*156]** analysis, Title VII would apply to the overseas operation of a United States employer only when extraterritorial application is reasonable. [[137]](#footnote-138)137 Since the principles of international comity consider factors short of codification, courts may use comity to limit the application of Title VII in cases of informal compulsion by a host country. [[138]](#footnote-139)138 Two main arguments against the comity approach have been advanced. [[139]](#footnote-140)139 First, some argue that the factors considered in the balancing test raise complex issues that the courts are incapable of addressing. [[140]](#footnote-141)140 Second, a balancing approach may lead to unpredictability, because results may vary when applied to different countries. [[141]](#footnote-142)141

Finally, some commentators have argued that Title VII should not extend overseas. [[142]](#footnote-143)142 Proponents of the limited application of Title VII admit that the suggestion appears draconian, but they argue that Title VII does not apply to many situations within the borders of the United States. [[143]](#footnote-144)143 The application of employment laws abroad creates a number of problems including the clash of cultural differences and conflicts of law. [[144]](#footnote-145)144 Further, the elimination of the extraterritorial**[\*157]** reach of Title VII would lift a burden that places United States companies at a competitive disadvantage in the international arena. [[145]](#footnote-146)145 A variation of this approach suggests that Title VII apply to discriminatory decisions made in the United States in order to prevent intentional discrimination. [[146]](#footnote-147)146 Accordingly, a United States employer could not send employees overseas for the sole purpose of firing them for reasons not permitted in the United States but compelled in another country. [[147]](#footnote-148)147

IV. Analysis of the Foreign Law Defense

The 1991 Amendment to the Civil Rights Act of 1964 hastily granted extraterritorial application of Title VII. [[148]](#footnote-149)148 The lack of legislative history and the subsequent gap-filling by the EEOC have led to a number of problems. [[149]](#footnote-150)149 Specifically, the EEOC issued a policy statement to define important terms in Section 109 of the 1991 Act, including terms that relate to the foreign law defense. [[150]](#footnote-151)150 Under this defense, Congress exempts American employers from Title VII liability when compliance with Title VII would cause the employer to violate foreign law. [[151]](#footnote-152)151 The EEOC interpretation of Section 109 requires an actual mandate from the foreign government before employers may shield themselves from liability. [[152]](#footnote-153)152 Commentators have criticized **[\*158]** this interpretation because it excludes factors that influence a United States employer but lack codification by the foreign country. [[153]](#footnote-154)153

Commentators have questioned the prudence of the extraterritorial application of Title VII. [[154]](#footnote-155)154 They argue that the problems created by the EEOC's interpretation of the foreign law defense could be alleviated by not applying Title VII extraterritorially. [[155]](#footnote-156)155 But, the elimination of the extraterritorial application of Title VII would deny protection to United States citizens employed by United States companies operating abroad. [[156]](#footnote-157)156 The defense should not permit a United States company to discriminate against United States citizens simply because it operates abroad. [[157]](#footnote-158)157 Accordingly, the United States should continue to apply Title VII extraterritorially because the denial of overseas application would permit United States employers to discriminate against United States citizens on the basis of race, color, religion, sex, or national origin. [[158]](#footnote-159)158 **[\*159]**

If Congress continues to apply Title VII extraterritorially, it must address a number of problems with the provision. [[159]](#footnote-160)159 The provision, as interpreted by the EEOC, lacks cultural sensitivity, places American companies operating abroad at a disadvantage, permits intentional discrimination, creates conflict between the United States and foreign countries, and fails to provide a solution that applies to all circumstances. [[160]](#footnote-161)160 Therefore, any solution to the problems created by the EEOC interpretation of the 1991 Act must address all of these concerns. [[161]](#footnote-162)161

Some commentators have encouraged the courts to give a broader meaning to the word "law" as used in the 1991 Act. [[162]](#footnote-163)162 Similarly, other commentators have suggested that the courts use a comity analysis. [[163]](#footnote-164)163 By utilizing a comity analysis, courts would balance the contacts and interests of the United States and the foreign country where the United States employer operates, and apply the law of the state whose interest is clearly greater. [[164]](#footnote-165)164 Both solutions could potentially alleviate problems with cultural insensitivity. [[165]](#footnote-166)165 Under judicial interpretation, the courts could broaden the definition of "law," thereby encompassing influences on **[\*160]** United States companies that do not rise to the level of codification. [[166]](#footnote-167)166 A comity analysis could also reduce cultural insensitivity by considering nonlegal factors in the balancing text. [[167]](#footnote-168)167 Since both approaches have the potential to consider influences that do not rise to the level of codification, the risk of conflict between the United States and the host country should be reduced. [[168]](#footnote-169)168 Further, since both solutions operate on a case-by-case basis, the courts can determine different resolutions for different countries, thereby averting the singular approach promoted by the EEOC. [[169]](#footnote-170)169 Similarly, the courts could consider intentional acts of discrimination when rendering judgments. [[170]](#footnote-171)170

While judicial interpretation and the comity analysis both address a number of the problems with the EEOC approach, they create new problems of their own. [[171]](#footnote-172)171 Both approaches may lead to varied results since the courts will analyze each situation individually. [[172]](#footnote-173)172 Accordingly, if the outcome of each case varies, United States employers operating abroad would be unsure of the appropriate actions they should take. [[173]](#footnote-174)173 Also, the factors considered in the balancing test of the comity analysis may be too complex for the courts to address. [[174]](#footnote-175)174 Congress holds the responsibility for determining the sovereignty of foreign nations and regulating international business; the courts should not **[\*161]** be expected to do this. [[175]](#footnote-176)175 Further, solutions that involve the courts take too long as the courts must wait for cases on which to pass judgment. [[176]](#footnote-177)176 Therefore, even though these court-based solutions address the problems of the EEOC definition, they present inappropriate responses because they take too long, produce varied results, and ask courts to do more than they can. [[177]](#footnote-178)177

Commentators have also argued that Congress could solve the problems created by the EEOC approach by defining the term "law" as used in the foreign law defense. [[178]](#footnote-179)178 The EEOC interpretation fails to consider that not all countries codify employment standards. [[179]](#footnote-180)179 The broadening of the definition could alleviate problems of cultural insensitivity because it would take into consideration strong influences in foreign countries that fail to rise to the level of codification. [[180]](#footnote-181)180 Congress could also refine the foreign law defense so as to exclude acts of intentional discrimination. [[181]](#footnote-182)181 Congressional clarification could also reduce conflict between the United States and the host country since the defense could consider customs and religious beliefs which influence employment standards but fail to rise to the level of codification. [[182]](#footnote-183)182

If Congress replaces the term "law" with a list of accepted**[\*162]** influences, the resulting law will still face universality problems. [[183]](#footnote-184)183 The current EEOC definition of "law" applies a rigid formula to differing countries. [[184]](#footnote-185)184 If Congress instead provides a list of accepted influences on employers operating abroad, it will ignore the differing conflicts over application of Title VII which require different solutions. [[185]](#footnote-186)185 All foreign governments do not treat employment standards in the same manner. [[186]](#footnote-187)186 For example, religious beliefs may create a mere preference in one country but cause sanctions or deportation in another country. [[187]](#footnote-188)187 Therefore, Congressional interpretation of "law" should consider the various situations to which this provision will apply. [[188]](#footnote-189)188

Instead of providing a list of approved influences on United States employers operating abroad, Congress could compel the EEOC to apply a good faith standard. [[189]](#footnote-190)189 Commentators have argued that employers should be protected from Title VII liability if the violation resulted from a good faith attempt to comply with the law of the host country. [[190]](#footnote-191)190 The EEOC has applied a good faith standard in one case where an employer argued informal compulsion and established the influence by a letter from a government official. [[191]](#footnote-192)191 The good faith standard provides relief to defendants**[\*163]** who make a good faith attempt to comply with conduct compelled by the host country. [[192]](#footnote-193)192 At the same time, the good faith standard prevents intentional discrimination since employers cannot perform such conduct in good faith. [[193]](#footnote-194)193 The good faith standard could potentially go beyond the scope intended by Congress but if Congress sets the boundaries of the reach of the defense, this should not be a concern. [[194]](#footnote-195)194 Accordingly, Congress should broaden the definition of law and compel the EEOC to apply a good faith standard in its decisions. [[195]](#footnote-196)195

V. Conclusion

Congress hastily added the extraterritorial application of Title VII to the Civil Rights Act of 1991. [[196]](#footnote-197)196 Since Congress added the amendment so quickly, little legislative history of the provision exists. [[197]](#footnote-198)197 The interpretation advanced by the EEOC is culturally insensitive, places United States companies at a competitive disadvantage, permits intentional discrimination, creates conflict between the United States and other countries, and lacks universality of application. [[198]](#footnote-199)198 A new interpretation of the provision is necessary to allow companies to use the defense without creating the numerous problems associated with the EEOC interpretation. [[199]](#footnote-200)199 Congress should clarify the defense and **[\*164]** broaden the definition of "law" as used in the provision so as to encompass employment standards that are not codified. [[200]](#footnote-201)200 Further, Congress could compel the EEOC to utilize a good faith standard in its decisions, thereby protecting employers who make good faith attempts to comply with the law of the host country. [[201]](#footnote-202)201

Suffolk Transnational Law Review

Copyright (c) 1996 Suffolk Transnational Law Review

**End of Document**

1. 1 See 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, 1109 n.1 (1990) (presenting statistics on subsidiaries of American companies that operate abroad). [↑](#footnote-ref-2)
2. 2 See Conly J. Schulte, Case Note, Americans Employed Abroad by United States Firms are Denied Protection, 25 Creighton L. Rev. 351, 351 n.2 (1991) (tracing increase in number of U.S. citizens employed abroad). [↑](#footnote-ref-3)
3. 3 See infra notes 13-14 and accompanying text (relating history of Title VII of Civil Rights Act of 1964). [↑](#footnote-ref-4)
4. 4 See infra note 45 and accompanying text (discussing Title VII of Civil Rights Act of 1991). [↑](#footnote-ref-5)
5. 5 See infra part IIIC (explaining problems with ambiguous language in amendments). [↑](#footnote-ref-6)
6. 6 See discussion infra part IV (analyzing the foreign law defense). [↑](#footnote-ref-7)
7. 7 See infra notes 13-51 and accompanying text (relating history of Title VII). [↑](#footnote-ref-8)
8. 8 See infra notes 52-82 and accompanying text (tracing history and rationales behind the defense then exploring its language). [↑](#footnote-ref-9)
9. 9 See infra notes 83-147 and accompanying text (describing problems with defense and suggested solutions). [↑](#footnote-ref-10)
10. 10 See infra text accompanying notes 148-94 (analyzing foreign law defense). [↑](#footnote-ref-11)
11. 11 See infra text accompanying notes 148-94 (criticizing EEOC approach). [↑](#footnote-ref-12)
12. 12 See infra text accompanying notes 195-200 (concluding Congress should broaden definition of "law" and compel good faith standard). [↑](#footnote-ref-13)
13. 13 See Griggs v. Duke Power Co., 401 U.S. 424, 429-30 (1971) (describing the intent of Congress with respect to the Civil Rights Act of 1964); McDonnell Douglas Corp. v. Green, 411 U.S. 792, 800-01 (1973) (discussing Congress' intent in passing Title VII). One court described 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." Id. at 801. Congressman William McCulloch of the House Judiciary Committee described the purpose of the pending Civil Right Act of 1964 as "securing to all Americans the equal protection of the laws of the United States and of the several states." House Report on the Civil Rights Act of 1964, H.R. Rep. No. 914, 88th Cong., 1st Sess., pt. 1, reprinted in 1964 U.S.C.C.A.N. 2391, 2488. Congress enacted Title VII "to remove obstructions to the free flow of interstate and foreign commerce and to insure the complete and full enjoyment by all persons of the rights, privileges, and immunities secured and protected by the Constitution." Id. at 2402. See generally Charles & Barbara Whalen, The Longest Debate (1985) (tracing legislative history of the Civil Rights Act of 1964). [↑](#footnote-ref-14)
14. 14 42 U.S.C. § 2000e-2(a) (1994). It is unlawful for an employer to discriminate with respect to hiring, firing, "compensation, terms, conditions, or privileges of employment." Id. at § 2000e-2(a)(1). Further, employers must not "limit, segregate, or classify . . . employees or applicants for employment in any way which would deprive . . . individuals of employment opportunities or otherwise adversely affect their status as . . . employees . . . [on the basis of] race, color, religion, sex, or national origin." Id. at § 2000e-2(a)(2). It is also unlawful for employment agencies, labor organizations, and training programs to discriminate against individuals on the basis of race, color, religion, sex, or national origin. Id. at § 2000e-2(b)-(d). [↑](#footnote-ref-15)
15. 15 See Mycyk, supra note 1, at 1111-12 nn.13-23 and accompanying text (arguing broad definitions allowed Congress to increase application of provision). [↑](#footnote-ref-16)
16. 16 42 U.S.C. § 2000e(a)(g) (1994). Since Title VII only applies to employers engaged in industry affecting commerce, Congress defined commerce as "trade, traffic, commerce, transportation, transmission, or communication." Id. The definition of commerce includes both foreign and interstate commerce. Id. [↑](#footnote-ref-17)
17. 17 42 U.S.C. § 2000e-2(e) (1994). [↑](#footnote-ref-18)
18. 18 Id. at (e)(1). [↑](#footnote-ref-19)
19. 19 Id. at (e)(2). [↑](#footnote-ref-20)
20. 20 Dothard v. Rawlinson, 433 U.S. 321, 334 (1977) (concluding Alabama cannot prohibit women from correctional counselor's position based on the BFOQ exception). [↑](#footnote-ref-21)
21. 21 See 42 U.S.C. § 2000e-2(e) (1994) (omitting race and color from the BFOQ defense). [↑](#footnote-ref-22)
22. 22 See James Michael Zimmerman, Extraterritorial Employment Standards of the United States: The Regulation of the Overseas Workplace 136 (1992) (discussing failure of Congress to indicate whether Title VII applied abroad). America applies its laws extraterritorially when it exercises regulatory authority over activities occurring or persons located outside the United States. See Derek G. Barella, Note, Checking the "Trigger-Happy" Congress: The Extraterritorial Extension of Federal Employment Laws Requires Prudence, 69 Ind. L.J. 889, 889-90 n.6 (1994) (explaining extraterritorial application of laws). The foreign state hosting the activity or person sought to be regulated will have laws of its own that may conflict with the extraterritorial application of American laws. See id. at 890 (discussing problems with extraterritorial application of laws). The United States has most frequently applied its antitrust and securities laws extraterritorially; more recently, however, American employment laws have also been applied abroad. See id. at 890-91, n.8-9 (describing history of application of U.S. laws abroad). Other countries refuse to apply their employment discrimination laws to their citizens employed abroad. See Wm. Scott Smith, Comment, Extraterritorial Application of Title VII and the Americans with Disabilities Act: Have Statute, Will Travel, 36 S. Tex. L. Rev. 191, 193 n.12 (1995) (explaining not all countries apply laws extraterritorially). Many foreign governments disapprove of the extraterritorial application of American laws, and some demonstrate their disdain by retaliating against the United States. See Barella, supra, at 890 n.8 (discussing foreign countries' disapproval of extraterritorial application of U.S. laws). The forms of retaliation range from diplomatic protest to economic coercion to the adoption of legislation designed to thwart the extraterritorial application of the American law. See id. (listing types of retaliation). [↑](#footnote-ref-23)
23. 23 See generally Jonathan Turley, "When in Rome": Multinational Misconduct and the Presumption Against Extraterritoriality, 84 Nw. U. L. Rev. 598, 599 (1990) (describing various employees denied right to bring suit for misconduct that occurred abroad); Michelle J. Ledina, Comment, The Multinational Enterprise and Title VII: Equal Employment Opportunities for Americans at Home and Abroad, 4 Emory Int'l L. Rev. 373 (1990) (outlining approaches to determine whether Title VII applied abroad before Civil Rights Act of 1991); Mycyk, supra note 1 (arguing for judicial deference to the EEOC's interpretation of Title VII before the 1991 Act). [↑](#footnote-ref-24)
24. 24 See Zimmerman, supra note 22, at 136. Love v. Pullman first addressed the application of Title VII abroad. See Love v. Pullman, 13 Fair Empl. Prac. Cas. (BNA) 423 (1976) (addressing Congressional intent regarding extraterritorial application), aff'd on other grounds, 569 F.2d 1074 (10th Cir. 1978); Zimmerman, supra note 22, at 136 (stating Love v. Pullman first to address extraterritorial application of Title VII). Based on a negative inference from the alien exemption provision of Title VII, the court held that Title VII protected U.S. citizens working in Canada for an American railroad company. Love v. Pullman, 13 Fair Employment Prac. Cas. (BNA) 423 (1976). After Love v. Pullman, other courts also held that Congress intended for Title VII to apply abroad. See Bryant v. Int'l Sch. Serv., 502 F. Supp. 472, 482-83 (D.N.J. 1980), rev'd on other grounds, 675 F.2d 562 (3d Cir. 1982) (holding alien exemption evidences Congressional intent to apply Title VII abroad). Other courts, however, refused to apply Title VII extraterritorially without the express intent of Congress. See Boureslan v. Arabian Am. ***Oil*** Co., 857 F.2d 1014, 1019-21 (5th Cir. 1988) (refusing to apply Title VII to employment discrimination in Saudi Arabia). [↑](#footnote-ref-25)
25. 25 See Zimmerman, supra note 22, at 136 (describing alien exemption provision and its negative inference); Bryant v. Int'l Sch. Serv., 502 F. Supp. 472, 482-83 (D.N.J. 1980) (using negative inference as evidence of Congressional intent to apply Title VII abroad); see also 42 U.S.C. § 2000e-1(a) (1994) (defining alien exemption). [↑](#footnote-ref-26)
26. 26 See Zimmerman, supra note 22, at 136 (explaining alien exemption argument). [↑](#footnote-ref-27)
27. 27 Equal Employment Opportunity Commission, Policy Statement, Notice 915.0333, EEOC Compl. Man. (CCH) P2164 (Sept. 2, 1988). Congress created the EEOC to enforce Title VII and prevent unlawful employment practices. 42 U.S.C. § 2000e-5(a) (1994). Once an employee files a complaint with the EEOC, the Commission investigates whether there is reasonable cause to believe that the charge is true. Id. at § 2000e-5(b). If the EEOC finds reasonable cause to believe that the charge is true, it first attempts to rectify the situation with the employer through informal methods. Id. If the EEOC is unable to secure a conciliation agreement, it may bring a civil action on behalf of the employee. Id. at § 2000e-5(f)(1). If the EEOC fails to file suit, the aggrieved employee may still bring a civil action against the employer. Id. [↑](#footnote-ref-28)
28. 28 Boureslan v. Arabian Am. ***Oil*** Co., 653 F. Supp. 629, 631 (S.D. Tex. 1987); Bryant v. Int'l Sch. Serv., 675 F.2d 562, 577 and n. 23 (3d Cir. 1982). [↑](#footnote-ref-29)
29. 29 499 U.S. 244 (1991). [↑](#footnote-ref-30)
30. 30 Id. at 258-59. In this case, Ali Boureslan, a naturalized United States citizen born in Lebanon, worked for Aramco Service Company (ASC) as a cost engineer. Id. at 247. ASC transferred Boureslan to Saudi Arabia to work for its parent company, Arabian American ***Oil*** Company (Aramco). Id. Boureslan remained with Aramco in Saudi Arabia for four years until he was discharged. Id. He filed suit against ASC and Aramco, alleging that he was harassed and ultimately discharged on the basis of his race, religion, and national origin. Boureslan v. Arabian Am. ***Oil*** Co., 653 F. Supp. 629 (S.D. Tex. 1987). The companies urged the United States District Court for the Southern District of Texas to dismiss the case on the grounds that Title VII does not apply extraterritorially. See id. (relating the companies' argument). The District Court dismissed the suit, holding that the language of Title VII did not support extraterritorial application. Id. at 631. The United States Court of Appeals for the Fifth Circuit affirmed the decision of the District Court. Boureslan v. Arabian Am. ***Oil*** Co., 857 F.2d 1014, 1020 (5th Cir. 1988). Boureslan and the EEOC appealed the dismissal to the United States Supreme Court. EEOC v. Arabian Am. ***Oil*** Co., 499 U.S. 244 (1991). [↑](#footnote-ref-31)
31. 31 See id. at 248-49 (relating EEOC arguments); supra notes 25-26 and accompanying text (describing alien exemption argument). The EEOC argued that the alien exemption provision clearly demonstrated Congressional intent to apply U.S. discrimination laws extraterritorially. See Brief for the Equal Employment Opportunity Commission at 12, EEOC v. Arabian Am. ***Oil*** Co., 499 U.S. 244 (1991) [hereinafter EEOC Brief] (arguing negative Congressional inference via alien exemption provision). The EEOC reasoned that no other explanation of the alien exemption language exists. See id. (arguing alien exemption must mean citizens protected).

    If Congress believed that the statute did not apply extraterritorially, it would have had no reason to include an exemption for a certain category of individuals employed outside the United States. Alternatively, if Congress believed that the statute would (or might) be interpreted to apply overseas but wished to withhold protection from both Americans and aliens employed abroad, the only sensible way to express that intention would have been to include an exemption encompassing the employment of all individuals abroad.

    Id. at 12-13. The EEOC also argued that the definitions provided in Title VII evidence congressional intent to apply the discrimination laws abroad. See id. at 11 (listing definitions in Title VII). The EEOC pointed out that the law lacks any language limiting protection to citizens located in the United States. See id. at 12 (pointing out that Congress failed to exclude Americans abroad). [↑](#footnote-ref-32)
32. 32 See EEOC v. Arabian Am. ***Oil*** Co., 499 U.S. 244, 249 (1991) (relating EEOC arguments). The EEOC argued that as the agency charged with the enforcement of Title VII, it had consistently interpreted the law as applying to discrimination against Americans employed abroad. See EEOC Brief, supra note 31, at 22 (arguing EEOC interpretation should be persuasive). [↑](#footnote-ref-33)
33. 33 See EEOC v. Arabian Am. ***Oil*** Co., 499 U.S. 244, 249 (1991) (rejecting EEOC's argument based on broad definitions). [↑](#footnote-ref-34)
34. 34 See id. at 255 (rejecting EEOC's alien exemption argument). [↑](#footnote-ref-35)
35. 35 See id. at 256-57 (rejecting EEOC's insistence that the Court defer to the agency's interpretation). Since Congress did not grant the EEOC the authority to promulgate rules or regulations, the Court's deference to the EEOC will depend upon standards based on the circumstances surrounding the EEOC's decision. See id. (explaining judicial deference to administrative agency's interpretation); Gen. Elec. Co. v. Gilbert, 429 U.S. 125, 140-46 (1976) (stating the standards which should be applied to an EEOC interpretation). The deference afforded to an EEOC interpretation depends on the thoroughness of the agency's consideration, the validity of the EEOC's reasoning, the interpretation's consistency with other rulings, and all factors giving the agency the power to persuade. See EEOC v. Arabian Am. ***Oil*** Co., 499 U.S. 244, 257 (1991) (quoting Gen. Elec. Co. v. Gilbert, 429 U.S. 125, 140-46 (1976)). The Court found that in this instance, the interpretation of the EEOC does not meet the standards and therefore deference is at a minimum. See id. at 257-58 (finding that the Court need not defer to the EEOC). See generally Schulte, supra note 2 (criticizing the Aramco Court's reliance on clear expression and refusal to defer to EEOC interpretation). [↑](#footnote-ref-36)
36. 36 See Martin v. OSHRC, 499 U.S. 144, 150 (1991) (explaining weight of agency's interpretation of own regulations). A court will normally grant substantial deference to an agency's construction of its own regulations. See id. (setting forth general trend in the courts). The court should defer to the agency's interpretation so long as it is reasonable and conforms with the letter and spirit of the regulations. See id. at 150-51 (stating prerequisites for deference). The courts give this weight to agencies because they hold the expertise in the area; the courts also presume that agencies are endowed with the ability to interpret their own regulations as part of their lawmaking powers. See id. at 151 (explaining reasoning behind court's grant of substantial deference).

    In Aramco, however, the Supreme Court noted that Congress failed to confer rulemaking authority upon the EEOC. See EEOC v. Arabian Am. ***Oil*** Co., 499 U.S. 244, 257 (1991) (stating rulemaking authority did not accompany Title VII). Absent the power to promulgate rules, the agency interpretation must instead meet several standards before the court will defer to it. See id. (finding that without rulemaking authority, agency must meet standards); supra note 35 (stating standards that agency without rulemaking authority must meet to enjoy deference to its interpretation). Here, the Court found that the EEOC interpretation did not meet the standards and therefore the Court need not defer to the interpretation of the agency. See EEOC v. Arabian Am. ***Oil*** Co., 499 U.S. 244, 257-58 (1991) (listing standards and explaining how EEOC interpretation fails to meet them). [↑](#footnote-ref-37)
37. 37 See EEOC v. Arabian Am. ***Oil*** Co., 499 US 244, 259 (1991) (holding that petitioners failed to submit sufficient evidence of Congress' intent to apply Title VII abroad). The Court stated that the evidence that the EEOC presented to demonstrate Congressional intent fell short of the clear expression necessary to overcome the presumption against extraterritorial application of statutes. See Boureslan v. Aramco, 857 F.2d 1014, 1019 (1988) (finding lack of clear Congressional intent). According to the Fifth Circuit, the brief references that the EEOC extracted from a lengthy legislative history shed little additional light on the issue since the EEOC argued a negative inference. See id. at 1019-20 (finding negative inference unhelpful). The Fifth Circuit refused to reverse the presumption against extraterritorial application of statutes based on negative inferences from Congressional silence. See id. at 1020 (holding more than negative inference necessary to reverse presumption); see also Barella, supra note 22, at 894-99 (discussing the modern presumption against extraterritoriality). [↑](#footnote-ref-38)
38. 38 See EEOC v. Arabian Am. ***Oil*** Co., 499 U.S. 244, 258-59 (1991) (stating that Congress knows how to amend statutes to make them apply extraterritorially). To strengthen its point, the Court listed several statutes which expressly state extraterritorial application. See id. (listing statutes clearly stating their application abroad); see, e.g., Logan Act, 18 U.S.C. § 953 (stating statute applies to any citizen "wherever he may be"); Age Discrimination in Employment Act § 11(f), 29 U.S.C. § 630(f) (including U.S. citizens employed abroad by American companies in definition of employee); Export Administration Act of 1979, 50 U.S.C. § 2415(2) (applying the statute abroad). [↑](#footnote-ref-39)
39. 39 See EEOC v. Arabian Am. ***Oil*** Co., 499 U.S. 244, 248 (holding Congress had not clearly expressed intent to apply Title VII abroad). [↑](#footnote-ref-40)
40. 40 See Civil Rights Act of 1991, Pub. L. No. 102-166, § 109, 105 Stat. 1071 (1991) (amending Civil Rights Act of 1964) [hereinafter Civil Rights Act of 1991]; Smith, supra note 22, at 198 nn. 48-49 and accompanying text (explaining timing of Aramco decision). [↑](#footnote-ref-41)
41. 41 See 137 Cong. Rec. S15472 (daily ed. Oct. 30, 1991) (statement of Sen. Dole) (stating President Bush introduced the legislation in response to judicial decisions). [↑](#footnote-ref-42)
42. 42 See Civil Rights Act of 1991, Pub. L. No. 102-106 § 109, 105 Stat. 1071 (1991) (applying Title VII extraterritorially); Glen D. Nager and Julia M. Broas, Enforcement Issues: A Practical Overview, 54 La. L. Rev. 1473 (1994) (reviewing each section of the Civil Rights Act of 1991). [↑](#footnote-ref-43)
43. 43 Civil Rights Act of 1991, Pub. L, No. 102-106 § 109, 105 Stat. 1071 (1991). Section 109 also amended the Americans with Disabilities Act (ADA) to provide extraterritorial application. See id. (extending extraterritorial application to the ADA); see also 42 U.S.C. §1211 (4) (1994) (including U.S. citizens employed abroad in definition of "employee"). [↑](#footnote-ref-44)
44. 44 See 42 U.S.C. § 2000e(f) (defining employee). [↑](#footnote-ref-45)
45. 45 See 42 U.S.C. § 2000e-1(c)(1) (1994) (describing circumstances under which Title VII will apply extraterritorially). The Act also sets forth four criteria for determining whether an employer controls a corporation: interrelation of operations, common management, centralized control of labor relations, and common ownership or financial control of the employer and the corporation. See id. at § 2000e-1(c)(3) (stating the four criteria). Since the Act failed to set forth a test to determine the nationality of the corporation, the EEOC published criteria in its 1993 policy statement. See EEOC: Enforcement Guidance on Application of Title VII and ADA to Conduct Overseas and to Foreign Employers in the United States, 405 EEOC Compl. Man. (BNA) No. 734, at 6665-68 (Nov. 1993) (setting forthe EEOC interpretation) [hereinafter Application of Title VII]. The EEOC will first look to the nation of incorporation of the employer. See id. (stating place of incorporation considered first). The EEOC then takes an unusual step and considers the corporation an American employer if the company has numerous contacts in the United States. See id. (considering corporation to be American if numerous contacts exist); Smith, supra note 22, nn.57-64 and accompanying text (explaining this step is unusual). [↑](#footnote-ref-46)
46. 46 42 U.S.C. § 2000e-1(c)(2) (1991). [↑](#footnote-ref-47)
47. 47 See id. at § 2000e-1(b) (describing foreign law defense). Congress patterned § 109 almost directly after the extraterritorial application of the Older Americans Act. See Barella, supra note 22, n.115 and accompanying text (comparing § 109 and Older Americans Act). Both amendments are limited in scope and expressly allow for the foreign law defense. See id. at n.116 and accompanying text (explaining similarities between the two acts). [↑](#footnote-ref-48)
48. 48 See 137 Cong. Rec. H3934 (daily ed. June 5, 1991) (statement of Rep. Goodling) (expressing disdain over lack of hearings on issue of extraterritorial application). See also Smith, supra note 22, at n.48-51 and accompanying text (describing the sparse legislative history of § 109). Congress did not even hold additional hearings on the merits of expanding the reach of Title VII. See Barella, supra note 22, note 115 (describing lack of legislative history). Congress did compare the extraterritorial provisions of Title VII to the 1984 amendments to the Age Discrimination in Employment Act ("ADEA"). See 137 Cong. Rec. S15472, 477 (daily ed. Oct. 30, 1991) (comparing Title VII extension to that of ADEA). See also Age Discrimination in Employment Act of 1984, Pub. L. No. 98-459, § 802(a), 98 Stat. 1767, 1792 (codified in 29 U.S.C. § 630)(applying ADEA extraterritorially). See also Zimmerman, supra note 22, at 131-36 (describing ADEA's extraterritorial application). [↑](#footnote-ref-49)
49. 49 See 137 Cong. Rec. S15235 (daily ed. Oct 25, 1991) (statement of Sen. Kennedy) (stating legislation will overrule Aramco). Section 109 was included in the Civil Rights Act of 1991 in order to "extend the protections of title vii . . . to American citizens working overseas for American employers." (sic) Id. See also Smith, supra note 22, at n.52 and accompanying text. [↑](#footnote-ref-50)
50. 50 See 137 Cong. Rec. S15477 (1991) (statement of Sen. Dole) (stating employers need not take actions prohibited by law of foreign country). Section 109 does not require employers "to take actions otherwise prohibited by law in a foreign place of business." Id. [↑](#footnote-ref-51)
51. 51 See Smith, supra note 22, at n.9 and accompanying text (explaining repercussion of sparse legislative history). [↑](#footnote-ref-52)
52. 52 See 42 U.S.C. § 2000e-1(b) (1994) (setting forth foreign law defense). [↑](#footnote-ref-53)
53. 53 See id. (explaining foreign law defense). [↑](#footnote-ref-54)
54. 54 See Michael A. Warner, Comment, Strangers in a Strange Land: Foreign Compulsion and the Extraterritorial Application of United States Employment Laws, 11 Nw. J. Int'l L. & Bus. 371, 374 nn.18-19 and accompanying text (1990) (providing history of defense). [↑](#footnote-ref-55)
55. 55 See Alan Gladstone, Transnational Application of Title VII Employment Protections: A Two-Sided Coin, Int'l Legal Persp., Spring 1994, at 1, 12-13 (explaining use of BFOQ to create effect of foreign law defense); supra, notes 17-21 and accompanying text (explaining the BFOQ). In ***Kern*** v. Dynalectron Co., 577 F. Supp. 1196 (N.D. Tex. 1983), an American pilot employed by an American company in Saudi Arabia claimed religious discrimination because the company required its pilots to convert to the Muslim faith. Id. at 1201. The company argued that Saudi Arabian law compelled the company to institute a conversion requirement because non-Muslims flying into Mecca are beheaded. Id. The court permitted the employer to use the BFOQ defense since the "essence of its business would be undermined" unless it complied with Saudi law. Id. at 1200. Similarly, in Abrams v. Baylor College of Medicine, 805 F.2d 528 (5th Cir. 1986), a medical school tried to argue that the BFOQ defense permitted it to discriminate against Jewish doctors because Saudi Arabian law makes it difficult for Jews to obtain visas. Id. at 531. In this case, the court rejected the BFOQ defense because it found no evidence of actual compulsion. Id. at 535. [↑](#footnote-ref-56)
56. 56 See Warner, supra note 54, at 379 (discussing confusion created by different rationales). Commentators have issued as many as five rationales for the foreign law defense in the area of antitrust law. See id. at 379 n.46 and accompanying text (listing the rationales). [↑](#footnote-ref-57)
57. 57 See Warner, supra note 54, at 379 n.47 and accompanying text (describing application of foreign law defense to employment law). Commentators have advanced two other rationales for the antitrust foreign law defense but these theories specifically concern themselves with substantive antitrust law. See id. (examining construction of Sherman Act and analogy to state action doctrine as rationales). [↑](#footnote-ref-58)
58. 58 See Warner, supra note 54, at 379-81 (analyzing act of state doctrine). Many courts conceptually link the foreign law defense and the act of state doctrine even though the two doctrines differ. See, e.g., id. at 380 (comparing foreign law defense and act of state doctrine); O.N.E. Shipping v. Flota Mercante Grancolombiana, 830 F.2d 449 (2d Cir. 1987) (linking compulsion by foreign law to act of state doctrine), cert. denied, 485 U.S. 486 (1988); Phoenix Canada ***Oil*** Co., Ltd. v. Texaco, Inc., 78 F.R.D. 445, 459 n.61 (D.Del. 1978) (claiming essence of defense is that foreign government's compulsion represents de facto action of sovereignty). The act of state doctrine represents the judiciary's deference to the executive branch because the executive is in a better position to handle the consequences of an act of state; the foreign law defense, however, represents a substantive defense that the defendant engaged in the illegal activity because the laws of a foreign nation compelled them to do so. See Warner, supra note 54, at 380 (contrasting act of state doctrine and foreign law defense). [↑](#footnote-ref-59)
59. 59 See 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, 892 (describing principles of international comity). The court balances such factors as the nationality of the defendant, the ability of each nation to enforce its legal norms, the potential hardship to the defendant, and the location of the conduct. See Warner, supra note 54, at 381 (listing factors that courts take into consideration). Since the court should apply the law of the country whose interest is clearly greater, Title VII would only apply extraterritorially when such application is reasonable. See St. John, supra note 59, at 892 (applying international comity to Title VII). Commentators have argued that direct invocation of international comity does not assist courts in deciding when the foreign law defense should apply in a particular case. See Warner, supra note 54, at 381 (applying international comity to the foreign compulsion defense). Placing the burden of balancing the factors on the courts raises questions about the ability of a court to perform a political analysis. See id. at 381-82 (questioning ability of courts to balance factors). Further, the case-by-case analysis lacks the certainty necessary in order for businesses to plan their operations abroad. See id. at 382 (criticizing lack of certainty in application of international comity to Title VII's foreign law defense). The principles of international comity provide a justification for the foreign law defense but cannot adequately describe when the defense should apply. See id. (discussing advantages and disadvantages of international comity). [↑](#footnote-ref-60)
60. 60 See Warner, supra note 54, at 382-86 (advancing fairness to defendant as a rationale for the foreign law defense). Fairness requires that companies not be subject to conflicting demands of different countries. See id. at 383 (defining fairness as rationale). Examining fairness prevents courts from determining the validity of an order from a foreign government. See id. at 385 (comparing fairness to act of state and international comity). Courts should allow the defendant to raise foreign law as a defense if the defendant can show that the violation of American law resulted from a good faith effort to comply with the law of the host country. See id. at 385 (discussing courts' consideration of laws in host country). Under this good faith compliance test, the courts would examine whether the defendant knew or should have known that the foreign compulsion was invalid. See id. at 386 (describing good faith compliance test). This test has the potential to provide relief to deserving defendants while preventing invocation of the defense to intentionally illegal behavior. See Warner, supra note 54, at 385 (discussing assets of good faith standard). The EEOC applied a good faith standard in a situation where the employer had a good faith belief that the otherwise prohibited conduct was compelled by the foreign government. See EEOC Decision, 2 Empl. Prac. Guide (CCH) P 6850, at 7054 (applying good faith standard) [hereinafter EEOC Decision]. The EEOC found that the employer had a "current, authoritative, and factual basis for its belief" that the host country required the otherwise prohibited conduct and it relied upon that belief in good faith. Id. Thus, this EEOC decision allowed an American employer to take a letter from a foreign government official, rely upon it in good faith, and avoid Title VII liability. See id. at 7054-55 (finding letter from foreign government official sufficient). [↑](#footnote-ref-61)
61. 61 See Warner, supra note 54, at 379 (arguing inconsistent application stems from disagreement on underlying rationale). [↑](#footnote-ref-62)
62. 62 See Application of Title VII, supra note 45, at 6668-71. See Smith, supra note 22, at nn.55-56 and accompanying text (describing EEOC policy statement). [↑](#footnote-ref-63)
63. 63 See Application of Title VII, supra note 45, at 6668-70 (setting forth EEOC definition of foreign law). [↑](#footnote-ref-64)
64. 64 Mahoney v. RFE/RL, Inc., 818 F. Supp. 1, 1 (D.D.C. 1992). See Application of Title VII, supra note 45, at 6670 (using Mahoney as example). [↑](#footnote-ref-65)
65. 65 See id. at 3 (finding provision in contract not a foreign law). [↑](#footnote-ref-66)
66. 66 See id. at 4 (holding that a defense of the practice requires a government mandate). [↑](#footnote-ref-67)
67. 67 See Application of Title VII, supra note 45 (stating what will be sufficient to use the defense). See Abrams v. Baylor College of Medicine, 581 F. Supp. 1570 (S.D. Tex. 1984) (finding informal conversations with Saudi Arabian officials and impressions about the country insufficient for defense); supra, note 55 (discussing Abrams); Fernandez v. Wynn ***Oil*** Co., 653 F.2d 1273 (9th Cir. 1981) (holding preferences of South American clients insufficient reason to exclude women). [↑](#footnote-ref-68)
68. 68 See Ledina, supra note 23, at 386 (citing Restatement (Third) of the Foreign Relations Law of the United States § 441). [↑](#footnote-ref-69)
69. 69 See Smith, supra note 22, at 211-12 nn.143-46 (discussing defense's exclusion of Muslim law); James David Phipps, Kiss of Death: Application of Title VII's Prohibition Against Religious Discrimination in the Kingdom of Saudi Arabia, 1994 B.Y.U.L. Rev. 399, 424 (1994) (stating defense excludes culture, morality, and traditions in foreign country). [↑](#footnote-ref-70)
70. 70 See Smith, supra note 22, at 212 (discussing EEOC's failure to recognize cultural factors in the foreign compulsion defense). [↑](#footnote-ref-71)
71. 71 See Smith, supra note 22, at 211 n.143 and accompanying text (describing application of Muslim law in Islamic countries). [↑](#footnote-ref-72)
72. 72 See Smith, supra note 22, at 212 n.146 and accompanying text (identifying prohibition against women in workplace as example of religious influence on business practices). [↑](#footnote-ref-73)
73. 73 See Smith, supra note 22, at 212 n.146 and accompanying text (concluding that religious influences are not available as a defense to Title VII compliance). [↑](#footnote-ref-74)
74. 74 See 42 U.S.C. § 2000e-1 (1994) (setting forth requirements for the defense). [↑](#footnote-ref-75)
75. 75 See Application of Title VII, supra note 45, at 6670-71 (defining "cause" in foreign law defense). [↑](#footnote-ref-76)
76. 76 See ***Kern*** v. Dynalectron Co., 577 F. Supp. 1196, 1198 (N.D. Tex. 1983) (describing Saudi Arabian law); see also supra note 55 (describing the facts and holding in ***Kern*** v. Dynalectron). [↑](#footnote-ref-77)
77. 77 See id. at 1197 (relating the facts of ***Kern*** v. Dynalectron). [↑](#footnote-ref-78)
78. 78 See id. at 1201 (reasoning safety of employees is reasonably necessary to operation of business). Even though the court heard this case before the 1991 Act, the facts provide a good example of a foreign law that causes an employer to violate Title VII. See Smith, supra note 22, at 215 (arguing the 1983 decision still applies after 1991 amendments). [↑](#footnote-ref-79)
79. 79 See Smith, supra note 22, at 215 (stating there is little judicial interpretation of what constitutes "cause"). [↑](#footnote-ref-80)
80. 80 See Hartford Fire Ins. Co. v. California, 509 U.S. 764, 795 (1993) (reviewing "cause" in foreign law defense in antitrust case); 15 U.S.C. §§ 1-36 (1988 & Supp. V 1993) (setting forth Sherman Antitrust Act). [↑](#footnote-ref-81)
81. 81 Hartford Fire Ins. Co., 509 U.S. 764, 799 (1993). [↑](#footnote-ref-82)
82. 82 See Smith, supra note 22, at 216 (arguing courts will "undoubtedly" rely on Hartford when examining other questions of extraterritorial application). [↑](#footnote-ref-83)
83. 83 See infra text and accompanying notes 84-88 (detailing the problems with the foreign law defense). [↑](#footnote-ref-84)
84. 84 See infra notes 89-93 and accompanying text (finding foreign law defense culturally insensitive). [↑](#footnote-ref-85)
85. 85 See infra notes 94-101 and accompanying text (describing disadvantage of American companies operating abroad). [↑](#footnote-ref-86)
86. 86 See infra notes 102-05 and accompanying text (giving examples of intentional discrimination still permitted). [↑](#footnote-ref-87)
87. 87 See infra notes 106-11 and accompanying text (concerning host country's exertion of own territorial reach). [↑](#footnote-ref-88)
88. 88 See infra notes 112-16 and accompanying text (arguing EEOC cannot apply one principle because all foreign countries are not the same). [↑](#footnote-ref-89)
89. 89 Phipps, supra note 69, at 424; see also Smith, supra note 22, at 208 (stating EEOC interpretation of defense ignores cultural factors). [↑](#footnote-ref-90)
90. 90 See supra notes 62-82 and accompanying text (defining "law" and the cause of a violation). [↑](#footnote-ref-91)
91. 91 See Smith, supra note 22, at 208 (arguing that in foreign countries, cultural factors do not always rise to level of law). While Japan has adopted a civil code it still relies on traditional rules of conduct with others. See id. at 203-10 (arguing American companies in Japan cannot look solely to the country's code). Many Islamic countries have adopted Western-style legal systems but still rely heavily on Muslim law. See id. at 210-12 (describing importance of Muslim law in Islamic countries). [↑](#footnote-ref-92)
92. 92 See Smith, supra note 22, at 208 (stating important cultural factors are not always codified). [↑](#footnote-ref-93)
93. 93 See Smith, supra note 22, at 208 (criticizing EEOC's failure to recognize non-legal influences). The EEOC's interpretation has been criticized as "arrogant trampling on the values of other cultures." Id. at 220. American companies operating abroad are guests in the foreign country; nonetheless, the extraterritorial application of Title VII spreads American ideals and values to cultures very different from our own. See id. (criticizing infusion of American employment laws into other cultures). [↑](#footnote-ref-94)
94. 94 See Smith, supra note 22, at 218-19 (arguing requirements of Title VII and ADA put American companies at a disadvantage). [↑](#footnote-ref-95)
95. 95 See Smith, supra note 22, at 218-19 (using specific provisions of Title VII to show universal application required). [↑](#footnote-ref-96)
96. 96 See Smith, supra note 22, at 218-19 (stating provisions that apply to all employees place U.S. companies at a competitive disadvantage). [↑](#footnote-ref-97)
97. 97 See Smith, supra note 22, at 219 (arguing preferential treatment of U.S. citizens will create disharmony). [↑](#footnote-ref-98)
98. 98 See Smith, supra note 22, at 219 (using parental leave as example of Title VII provision that could cause workplace tension). See also Equal Employment Opportunity Commission, Policy Guidance on Parental Leave, Notice 915.058, EEOC Compl. Man (CCH) P 4818, at 4031 (Aug. 27, 1990) (requires both parents equal leave from work to care for newborn). [↑](#footnote-ref-99)
99. 99 See 42 U.S.C. § 2000e(f) (1994) (failing to include foreign citizens employed by American companies operating abroad); see supra notes 43-46 and accompanying text (describing 1991 amendments to Title VII). [↑](#footnote-ref-100)
100. 100 See Smith, supra note 22, at 219 (stating U.S. companies operating abroad may treat American and foreign citizens differently). [↑](#footnote-ref-101)
101. 101 See Smith, supra note 22, at 219 (arguing disparity will cause hostile and competitive environment). [↑](#footnote-ref-102)
102. 102 See Gladstone, supra note 55, at 13-14 (suggesting employer could transfer black employee to South Africa in order to fire). The foreign law defense may be most significant with respect to discrimination based on race. See id., at 13 (arguing inclusion of race in defenses could create problems). Congress previously allowed the BFOQ for certain discriminatory acts based on sex, religion, and national origin. See id., at 13 (listing discriminatory acts permitted under BFOQ). See also supra notes 17-21 and accompanying text (describing the BFOQ). While the BFOQ denies application to discrimination based on race, the foreign law defense makes no such exception. See supra note 21 and accompanying text (stating BFOQ does not apply to discrimination based on race or color); see also 42 U.S.C. § 2000e-1(b) (1994) (failing to omit race discrimination). [↑](#footnote-ref-103)
103. 103 See Gladstone, supra note 55, at 13-14 (questioning whether U.S. employer may transfer black employee to South Africa in order to fire). [↑](#footnote-ref-104)
104. 104 See Smith, supra note 22, at 221 (arguing discrimination takes place in United States and therefore Title VII applies). Title VII, along with its extraterritorial reach, assumes that discriminatory conduct always happens in either the United States or abroad; it fails to realize that international discriminatory conduct does not always happen exclusively in one country or another. See Phipps, supra note 69, at 426-27 (criticizing foreign law defense as overly simplistic). [↑](#footnote-ref-105)
105. 105 See 42 U.S.C. § 2000e-1(b) (1994) (neglecting to provide for intentional acts of discrimination). With respect to intentional discrimination, the courts have split on whether the discriminatory action takes place in the United States. See Smith, supra note 22, at 221 n.194 (describing the case law). While some courts have required employers to comply with Title VII if they make the discriminatory decision in the United States, other courts have determined that the discriminatory effect takes place in the foreign country. See, e.g., EEOC v. Berm. Star Line, 744 F. Supp. 1109, 1113 (M.D. Fla. 1990) (holding employer must comply with Title VII if discriminatory decision made in United States); Cleary v. United States Lines, Inc., 728 F.2d 607, 610 (3rd Cir. 1984) (rejecting application of ADEA to discriminatory decision made in United States); Zahourek v. Arthur Young & Co., 567 F. Supp. 1453, 1457 (D. Colo. 1983) (holding discriminatory effect was in foreign country and ADEA does not apply). [↑](#footnote-ref-106)
106. 106 See St. John, supra note 59, at 872 (arguing breach of informal compulsion may harm relations between U.S. and host government). Justice Oliver Wendell Holmes stated:

     For another jurisdiction, if it should happen to lay hold of the actor, to treat him according to its own notions rather than those of the place where he did the acts, not only would be unjust, but would be an interference with the authority of another sovereign, contrary to the comity of nations, which the other state concerned justly might resent.

     American Banana Co. v. United Fruit Co., 213 U.S. 347, 356 (1909) (citation omitted). [↑](#footnote-ref-107)
107. 107 See St. John, supra note 59, at 872 (suggesting conflict between informal compulsion and U.S. law may create tension). [↑](#footnote-ref-108)
108. 108 See Barella, supra note 22, at 889-90 (defining types of jurisdiction). [↑](#footnote-ref-109)
109. 109 See Barella, supra note 22, at 889 (defining territoriality principle). [↑](#footnote-ref-110)
110. 110 See Barella, supra note 22, at 889 (describing jurisdiction based on nationality). Under nationality jurisdiction, the state may regulate the activities and interests of its nationals whether the conduct occurs within or outside the state's geographic boundaries. See id. (stating that regulated conduct may occur inside or outside state's territorial limits). [↑](#footnote-ref-111)
111. 111 See Barella, supra note 22, at 890 (concluding different extensions of jurisdiction on same actor has potential to create conflict of laws). This potential for conflict will only increase as the world economy becomes more interdependent. See id. (arguing interdependence of world economy and capitalization of foreign markets increases potential for conflict). [↑](#footnote-ref-112)
112. 112 See St. John, supra note 59, at 897 (arguing reduction of extraterritorial application to rigid formula ignores complexity of issues). [↑](#footnote-ref-113)
113. 113 See St. John, supra note 59, at 897 (concluding results of disputes regarding extraterritorial application not likely to be same). [↑](#footnote-ref-114)
114. 114 See St. John, supra note 59, at 897 (stating government's preferences may not rise to level of compulsion). [↑](#footnote-ref-115)
115. 115 See St. John, supra note 59, at 897 (finding violation of some informal practices and customs carry serious penalties). [↑](#footnote-ref-116)
116. 116 See St. John, supra note 59, at 897 (comparing countries that have mere preferences and those that compel compliance with informal policies). [↑](#footnote-ref-117)
117. 117 See infra text accompanying notes 118-47 (describing suggested solutions to problems with foreign law defense). [↑](#footnote-ref-118)
118. 118 See Smith, supra note 22, at 222-23 (urging Congress to define "law" for purposes of foreign law defense). [↑](#footnote-ref-119)
119. 119 42 U.S.C. § 2000e-1(b) (1994). See also supra notes 52-53 and accompanying text (discussing background of foreign law defense). [↑](#footnote-ref-120)
120. 120 See Application of Title VII, supra note 45, at 6668-71 (interpreting Civil Rights Act of 1991). See also supra notes 62-73 and accompanying text (describing EEOC's interpretation of what constitutes a law). [↑](#footnote-ref-121)
121. 121 See supra notes 91-93 and accompanying text (discussing EEOC's failure to recognize cultural and religious influences). [↑](#footnote-ref-122)
122. 122 See Smith, supra note 22, at 223 (making this argument). The EEOC should not be responsible for determining the sovereignty of foreign nations or dealing with international business and trade; Congress should be responsible for regulating these areas. See id. at 224-25 (arguing Congress, not the EEOC, should be responsible for these areas). [↑](#footnote-ref-123)
123. 123 See Warner, supra note 54, at 385 (defining good faith standard). [↑](#footnote-ref-124)
124. 124 U.C.C. § 2-615 (1987). See also Warner, supra note 54, at 385-86 (discussing UCC provision). [↑](#footnote-ref-125)
125. 125 See EEOC Decision, supra note 60, at 7054-55 (applying good faith standard). [↑](#footnote-ref-126)
126. 126 EEOC Decision, supra note 60, at 7054. The fact that the EEOC requires a "current, authoritative" basis for the belief prevents an employer from arguing that it discriminated because the competitors discriminated. See St. John, supra note 59, at 891 nn.161-64 and accompanying text (describing good faith standard). [↑](#footnote-ref-127)
127. 127 See Warner, supra note 54, at 385 (describing assets of good faith standard). [↑](#footnote-ref-128)
128. 128 See St. John, supra note 59, at 891 (listing benefits of good faith standard). [↑](#footnote-ref-129)
129. 129 See St. John, supra note 59, at 891-92 (pointing out weaknesses in good faith standard). [↑](#footnote-ref-130)
130. 130 See Smith, supra note 22, at 223-24 (describing judicial interpretation as a solution to problems with foreign law defense). [↑](#footnote-ref-131)
131. 131 See Smith, supra note 22, at 223 n.202 (arguing courts need not defer to EEOC interpretation). See also EEOC v. Arabian Am. ***Oil*** Co., 499 U.S. 244, 256-57 (1991) (rejecting EEOC's argument that the Court must follow EEOC's interpretation of law). [↑](#footnote-ref-132)
132. 132 See Smith, supra note 22, at 223 (arguing lack of legislative history leaves room for different interpretation). [↑](#footnote-ref-133)
133. 133 See Smith, supra note 22, at 224 (urging courts to interpret "law" more broadly than the EEOC interpretation). [↑](#footnote-ref-134)
134. 134 See St. John, supra note 59, at 892-95 (describing the principles of international comity). [↑](#footnote-ref-135)
135. 135 See Warner, supra note 54, at n.53 and accompanying text (defining principles of international comity). [↑](#footnote-ref-136)
136. 136 See St. John, supra note 59, at 892-94 (describing court's balancing under comity analysis). The courts balance such factors as the potential hardship to the defendant, the location of the conduct, and the interests of the two nations. See Warner, supra note 54, at 381 (listing factors courts consider in comity analysis). Several courts have utilized this balancing approach in deciding cases with a foreign compulsion defense. See id. at n.55 and accompanying text (stating courts have applied balancing test). [↑](#footnote-ref-137)
137. 137 See St. John, supra note 59, at 892-94 (describing reasonableness standard). [↑](#footnote-ref-138)
138. 138 See St. John, supra, note 59, at 892 (suggesting comity be used to limit Title VII in cases of informal compulsion). [↑](#footnote-ref-139)
139. 139 See St. John supra, note 59, at 894-95 (describing two main arguments against balancing test of international comity). [↑](#footnote-ref-140)
140. 140 See St. John, supra note 59, at 894 (describing the first argument against application of international comity). Commentators have argued that as a result, courts tend to favor domestic law over foreign interests. See id. (stating courts are inappropriate forum for interest balancing because decisions are unilateral). [↑](#footnote-ref-141)
141. 141 See St. John, supra note 59, at 894 (explaining international comity application may lead to unpredictability). [↑](#footnote-ref-142)
142. 142 See Smith, supra note 22, at 193-94 (arguing Title VII should not apply abroad). [↑](#footnote-ref-143)
143. 143 See Smith, supra note 22, at 193 (explaining argument that Title VII should not apply abroad). Some American citizens employed by American companies are excluded from Title VII protection by the statute itself. See id. at 193 n.13 (citing provisions of the statute that exclude U.S. workers). Other United States employees have been excluded by case law. See id. (citing cases which exclude certain workers). [↑](#footnote-ref-144)
144. 144 See Smith, supra note 22, at 193-94 (listing problems with extraterritorial application of Title VII); supra notes 83-116 and accompanying text (setting forth problems with applying Title VII abroad). [↑](#footnote-ref-145)
145. 145 See Smith, supra note 22, at 194 (arguing extraterritorial application of Title VII hampers business). [↑](#footnote-ref-146)
146. 146 See Smith, supra note 22, at 221(describing variation on this proposed solution). [↑](#footnote-ref-147)
147. 147 See Smith, supra note 22, at 221 (stating variation would not permit intentional discrimination). [↑](#footnote-ref-148)
148. 148 See supra note 48 and accompanying text (discussing sparse legislative history). [↑](#footnote-ref-149)
149. 149 See supra notes 83-116 and accompanying text (describing problems created by EEOC interpretation). [↑](#footnote-ref-150)
150. 150 See Application of Title VII, supra note 45, at 6663-68 (interpreting the ambiguous language of the 1991 Act). [↑](#footnote-ref-151)
151. 151 See supra notes 52-53 and accompanying text (defining foreign law defense). [↑](#footnote-ref-152)
152. 152 See supra note 67 and accompanying text (citing cases used by EEOC to define "law"). [↑](#footnote-ref-153)
153. 153 See supra notes 69-73 and accompanying text (giving example of Muslim influence that falls short of government mandate). [↑](#footnote-ref-154)
154. 154 See supra notes 142-47 and accompanying text (noting arguments against extraterritorial application of Title VII). [↑](#footnote-ref-155)
155. 155 See supra notes 143-45 (discussing advantages of limited application of Title VII). By denying extraterritorial application of Title VII, Congress could avoid conflicts with other countries and culturally insensitive policies. See supra note 144 and accompanying text (discussing problems with extraterritorial application). The elimination of the extraterritorial reach would also prevent a competitive disadvantage for United States companies operating abroad. See supra note 145 and accompanying text (arguing elimination of extraterritorial reach would assist United States companies operating abroad). Further, when Title VII did not extend extraterritorially, problems of universality did not exist since the policies of other governments were irrelevant. See supra notes 112-16 and accompanying text (defining universality problem). The elimination of extraterritorial application would alleviate all of the problems associated with the foreign law defense except the allowance of intentional discrimination; a variation of this solution would instead impose liability on United States employers who send employees abroad for the sole purpose of firing them for a discriminatory reason not permitted in the United States. See supra notes 146-47 and accompanying text (describing variation of elimination of Title VII's extraterritorial reach). [↑](#footnote-ref-156)
156. 156 See supra note 37 and accompanying text (discussing holding in Aramco that absent Congressional intent, Court would not apply U.S. laws extraterritorially). [↑](#footnote-ref-157)
157. 157 See supra note 23 (giving examples of discriminatory acts taken by U.S. companies against American citizens). [↑](#footnote-ref-158)
158. 158 See text accompanying notes 156-57 (giving reasons why Title VII should continue to apply extraterritorially); see also supra note 14 (listing discrimination not permitted under Title VII). [↑](#footnote-ref-159)
159. 159 See supra text accompanying notes 83-88 (listing problems with provision as interpreted by the EEOC). [↑](#footnote-ref-160)
160. 160 See supra notes 89-93 and accompanying text (attacking EEOC interpretation as culturally insensitive); supra notes 94-101 and accompanying text (arguing EEOC interpretation places American companies operating abroad at a competitive disadvantage); supra notes 102-05 and accompanying text (discussing intentional discrimination permitted under EEOC interpretation); supra notes 106-11 (recognizing tension that may be created between U.S. extraterritorial reach and foreign governments' territorial jurisdiction); supra notes 11216 and accompanying text (arguing application of U.S. law may vary in different foreign countries). [↑](#footnote-ref-161)
161. 161 See supra text accompanying note 160 (listing problems associated with EEOC interpretation). [↑](#footnote-ref-162)
162. 162 See supra notes 130-33 (discussing judicial interpretation as potential solution). [↑](#footnote-ref-163)
163. 163 See supra notes 134-38 (discussing principles of international comity). [↑](#footnote-ref-164)
164. 164 See supra notes 134-38 (discussing principles of international comity). [↑](#footnote-ref-165)
165. 165 See supra note 133 and accompanying text (encouraging courts to broaden definition of "law"); supra note 138 and accompanying text (stating comity considers factors outside codification). [↑](#footnote-ref-166)
166. 166 See supra note 133 and accompanying text (stating broadening of "law" would include employment practices not codified). [↑](#footnote-ref-167)
167. 167 See supra note 138 and accompanying text (taking nonlegal factors into consideration). [↑](#footnote-ref-168)
168. 168 See supra note 107 and accompanying text (stating employer breach of informal compulsion may lead to conflict). [↑](#footnote-ref-169)
169. 169 See supra notes 112-16 and accompanying text (discussing universality problems with EEOC approach). [↑](#footnote-ref-170)
170. 170 See supra notes 102-05 and accompanying text (describing problem of intentional discrimination). [↑](#footnote-ref-171)
171. 171 See supra notes 140-41 and accompanying text (explaining arguments against comity approach). [↑](#footnote-ref-172)
172. 172 See supra note 141 and accompanying text (arguing comity leads to unpredictability). [↑](#footnote-ref-173)
173. 173 See supra notes 22-28 and accompanying text (discussing uncertainty before Aramco because courts reached different results). [↑](#footnote-ref-174)
174. 174 See supra note 140 and accompanying text (arguing issues too complex for courts to handle). [↑](#footnote-ref-175)
175. 175 See supra note 122 (arguing Congress, not EEOC, should be responsible for regulating these areas). [↑](#footnote-ref-176)
176. 176 See supra notes 130-33 (explaining solution which waits for courts to address the problems). [↑](#footnote-ref-177)
177. 177 See text accompanying notes 170-75 (presenting problems with international comity analysis and judicial interpretation). [↑](#footnote-ref-178)
178. 178 See supra note 118 and accompanying text (presenting Congressional interpretation as a solution to the problems created by the EEOC approach). [↑](#footnote-ref-179)
179. 179 See supra note 67 and accompanying text (describing EEOC failure to consider influences not codified); supra notes 121-22 (arguing Congress should broaden definition beyond boundaries set by EEOC). [↑](#footnote-ref-180)
180. 180 See supra notes 91-93 and accompanying text (arguing EEOC interpretation culturally insensitive because not all countries codify mechanisms for conducting employment relationships); supra note 122 and accompanying text (stating Congressional broadening of definition would take nonlegal factors into consideration). [↑](#footnote-ref-181)
181. 181 See supra note 105 and accompanying text (stating foreign law defense fails to consider intentional discrimination). [↑](#footnote-ref-182)
182. 182 See supra notes 106-07 and accompanying text (describing conflict between United States and host country). [↑](#footnote-ref-183)
183. 183 See supra notes 112-16 and accompanying text (arguing influences not the same in all countries). [↑](#footnote-ref-184)
184. 184 See supra notes 112-13 and accompanying text (arguing rigid formula does not leave room for differing situations). [↑](#footnote-ref-185)
185. 185 See supra note 113 and accompanying text (urging different solutions for conflicts of application in different countries). [↑](#footnote-ref-186)
186. 186 See supra note 116 and accompanying text (arguing EEOC ignores differing influences on employment standards). [↑](#footnote-ref-187)
187. 187 See supra notes 114-15 and accompanying text (discussing varying results of breach of informal policy or customs in different countries); supra note 116 (comparing mere preferences with informal compulsion that carries a penalty). [↑](#footnote-ref-188)
188. 188 See supra text accompanying notes 182-86 (explaining universality problems Congress will face if it replaces "law" with a list of influences). [↑](#footnote-ref-189)
189. 189 See supra text accompanying notes 182-87 (urging Congress to avoid a list of accepted influences); supra notes 123-29 and accompanying text (describing good faith standard as potential solution to problems created by EEOC interpretation). [↑](#footnote-ref-190)
190. 190 See supra note 123 and accompanying text (describing good faith standard). [↑](#footnote-ref-191)
191. 191 See supra note 125-26 and accompanying text (describing EEOC decision). [↑](#footnote-ref-192)
192. 192 See supra notes 127-28 and accompanying text (stating good faith standard provides relief to deserving defendants). [↑](#footnote-ref-193)
193. 193 See supra note 127 and accompanying text (stating good faith standard does not permit intentional discrimination). [↑](#footnote-ref-194)
194. 194 See supra note 129 and accompanying text (stating potential problem with good faith standard). [↑](#footnote-ref-195)
195. 195 See supra text accompanying notes 177-93 (urging Congress to broaden definition of "law" and apply good faith standard). [↑](#footnote-ref-196)
196. 196 See supra notes 39-42 and accompanying text (explaining provision's quick insertion in Civil Rights Act of 1991). [↑](#footnote-ref-197)
197. 197 See supra note 48 and accompanying text (discussing lack of legislative history). [↑](#footnote-ref-198)
198. 198 See supra part III.C (describing problems with EEOC interpretation of foreign law defense). [↑](#footnote-ref-199)
199. 199 See supra text accompanying notes 159-61 (explaining need for new interpretation). [↑](#footnote-ref-200)
200. 200 See supra text accompanying notes 177-87 (arguing Congress should broaden definition of "law"). [↑](#footnote-ref-201)
201. 201 See supra text accompanying notes 188-94 (explaining good faith standard and urging Congress to compel EEOC to use it). [↑](#footnote-ref-202)