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A Sovereign in a Sovereignless Land - The Extraterritorial Application of United States Law: EDF v. Massey

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Cover Page Footnote
International Law; Commercial Law; Law
A Sovereign in a Sovereignless Land? The Extraterritorial Application of United States Law: *EDF v. Massey*

I. Introduction

Penguins and the small human population of Antarctica breathed a cold, but clean, sigh of relief following the D.C. Circuit decision on January 29, 1993,¹ that the National Science Foundation (NSF),² in its plans to incinerate wastes in Antarctica, must prepare an environmental impact statement (EIS) in compliance with the National Environmental Policy Act (NEPA).³ NSF had restarted its burning of wastes in an interim incinerator while awaiting a new one.⁴ The Environmental Defense Fund (EDF) alleged that these incinerators would release toxic pollutants into the air, and thus should require NSF to follow NEPA.⁵

The main issue raised by *EDF v. Massey* was whether NEPA should be applied extraterritorially⁶ to Antarctica. The line of cases that addressed the extraterritorial applicability of statutes were somewhat conflicting.⁷ The cases that examined this question with respect to environmental statutes also were in conflict.⁸ In addition, the D.C. Cir-

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¹ Environmental Defense Fund, Inc. v. Massey, 986 F.2d 528, 529 (D.C. Cir. 1993) [hereinafter EDF II]. Both the National Science Foundation and Walter E. Massey, the director of NSF, were named as defendants.

² The National Science Foundation is an independent federal agency established by the National Science Foundation Act of 1950. Section 2 of the Act sets up the agency. 42 U.S.C. § 1861 (1988).

³ 42 U.S.C. §§ 4321-4370(a)(1988). The relevant section is § 4332(2)(C), which requires federal agencies to "include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment" an environmental impact statement (EIS).

⁴ *EDF II*, 986 F.2d at 529-30.

⁵ Id. at 530.

⁶ A statute has an extraterritorial reach if it is applied "[b]eyond the physical and judicial boundaries of a particular state or country." BLACK'S LAW DICTIONARY 588 (6th ed. 1990).

⁷ Cf., Benz v. Compania Naviera Hidalgo, 353 U.S. 138 (1957); Steele v. Bulova Watch Co., 344 U.S. 280 (1952); New York Cent. R.R. Co. v. Chisholm, 268 U.S. 29 (1925); American Banana Co. v. United Fruit Co., 213 U.S. 347 (1908). For an extensive review of the different standards that the federal courts have used in their determination of whether to apply a statute extraterritorially, see Jonathan Turley, "When in Rome": Multinational Misconduct and the Presumption Against Extraterritoriality, 84 NW. U. L. REV. 598 (1990). Turley argues that "there is no consistent canon of construction for interpreting ambiguous statutes." Id. at 601.

⁸ For example, the Endangered Species Act of 1973 has been held to be applicable extraterritorially, but the Marine Mammal Protection Act of 1972 has not. See United States
The circuit had already declined to apply NEPA extraterritorially in *Natural Resources Defense Council, Inc. (NRDC) v. Nuclear Regulatory Commission.* The court’s rationale in *NRDC,* however, was “somewhat peculiar,” and in fact, “it is difficult to determine precisely what test the court actually used in denying extraterritorial reach.”

To add more confusion to the issue of the extraterritorial application of statutes, the Supreme Court, in *Equal Opportunity Employment Commission v. Arabian American Oil Co. (Aramco),* recently held that Title VII did not apply overseas. In its decision, the Court required that in order for a statute to apply extraterritorially, there must be an “affirmative congressional intent” clearly expressed that Congress intended the statute to apply extraterritorially. This was an apparent departure from the earlier line of cases, which were not as strict in their statutory analyses. There have been some questions as to Aramco’s scope, whether it should apply narrowly to Civil Rights statutes or whether it was meant to apply to all U.S. statutes, especially in light of Congress’ effective reversal of the Supreme Court’s holding by changing Title VII soon after the decision. The Supreme Court also recently decided that the Federal Tort Claims Act should not be applied to Antarctica. The Court held that the statute’s sovereign immunity waiver was not applicable to Antarctica because Antarctica should be included within the meaning of “foreign country” under the Act. In addition to this reasoning, the Court indicated that the presumption against extraterritoriality would require the same result.

*EDF v. Massey* is important not only because the D.C. Circuit again addressed the question of whether NEPA should be applied extraterritorially and whether Antarctica and the high seas should be treated
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differently than other jurisdictions, but also because the D.C. Circuit pulled together and attempted to make some sense of the case law on the subject of extraterritorial application of U.S. statutes. In doing this, the court developed a framework from which to analyze subsequent cases. As part of this framework, the court used a "balancing test" that the federal courts had used previously in deciding cases involving "market-related statutes." Although the D.C. Circuit, in section E of its opinion, did analyze NEPA using the Aramco analysis, the court's approach in EDF v. Massey took a step away from the Supreme Court's Aramco approach and returned to a more traditional and functional one.

Following an analysis of past cases that have dealt with the extraterritorial application of statutes in Part II, Part III of this Note will discuss the relevant facts and the procedural history of EDF v. Massey. Part IV will explore the validity of the D.C. Circuit's analysis in light of the background law and the recent Aramco decision. Part IV focuses on two particular forms of analyses—the "exceptions" and the "balancing of factors"—that the D.C. Circuit used in coming to its decision. Finally, Part V will conclude that although the district court's analysis under the strict Aramco test may be the more accurate one, the D.C. Circuit's holding was correct in light of older precedent and the facts of this case.

II. Background Case Law and the Development of the Presumption Against Extraterritoriality

A. The Early Cases

There is a long history of case law on the subject of the extraterritorial application of statutes. One of the earlier cases addressing this issue is American Banana Co. v. United Fruit Co. There, the Supreme Court held that the plaintiff, a domestic corporation, could not sue its rival, another domestic corporation, for violations of the Sherman Antitrust Act, where the defendant instigated Costa Rican officials to seize the plaintiff's banana plantation, railway and supplies. Justice Holmes,

19 Wilkins, supra note 14, at 313; see also Turley, supra note 7, at 601.
20 EDF II, 986 F.2d 528, 535-36 (D.C. Cir. 1993). The circuit court decided that the plain language of NEPA does indicate Congress' intent to apply it extraterritorially. This directly conflicts with the district court's findings that an Aramco analysis requires that EDF's claims be dismissed. See infra text accompanying notes 121-22.
23 213 U.S. 547 (1908).
24 Id. at 554-55. At the time of the suit, the Costa Rican government still had possession of plaintiff's property. Id. at 555.
writing for the Court, believed that in a case such as this, where the
injury to the plaintiff was the "direct effect of the acts of the Costa
Rican government," the United States courts could not interfere
"with the authority of another sovereign." In conjunction with this
argument, Justice Holmes pointed out that the determination of
whether the acts were unlawful was up to the jurisdiction in which they
had occurred.

In addition to Holmes' arguments about comity between nations,
he looked at the antitrust statute to see whether it could be applicable
against defendant. He stated that in light of the considerations of ju-
risdictional authority and law, a statute should be construed as "in-
tended to be confined in its operation and effect to the territorial
limits over which the lawmaker has general and legitimate power." He reasoned that it was unlikely that the United States would have
made acts by the Costa Rican government criminal under the Sherman
Antitrust Act, and dismissed the action. The American Banana Court,
therefore, looked at both the international conflict of laws ramifications as well as the language of the statute.

Another early case, New York Central Railroad Co. v. Chisholm, which claimed to rely on American Banana Co., held that the Federal
Employer's Liability Act could not be applied extraterritorially. In
this case, a U.S. citizen, employed by the railroad company, a U.S. cor-
poration, was fatally injured while the train was en route to Montreal.
The incident occurred thirty miles over the border. Holding that the
case presented solely a question of statutory construction, the Court
concluded that the statute in question did not use any language which
would indicate that Congress intended it to extend extraterritorially.

Under this interpretation, the Court stated that the administrator
of the decedent's estate would have to rely on the laws of the country
in which the event occurred and could not sue under U.S. law. The
New York Central Court did not look at whether Canada had a law upon
which the plaintiff could rely or whether there would be any conflict
between Canadian and U.S. law if the Court had found for the plain-
tiff. In deciding the case solely on the question of statutory construc-
tion, the Court in New York Central used a stricter analysis of the

25 Id. at 359.
26 Id. at 356.
27 Id.
28 Id. at 357.
29 Id.
30 But see Turley, supra note 7, at 604 (interpreting American Banana more rigidly).
31 268 U.S. 29 (1925).
65 (as amended April 5, 1910, ch. 143, 36 Stat. 291)).
33 Id. at 30.
34 Id. at 31.
35 Id. at 32.
extraterritorial application of a statute than did the *American Banana* Court.

### B. More Recent Precedent

A case to which the Supreme Court has given a great deal of precedential weight on the subject of extraterritorial application of statutes is *Foley Bros., Inc. v. Filardo*. In this case, the United States had contracted with Foley Brothers to help build public works in Iraq and Iran. The employers hired Filardo as a cook at the construction sites, but did not pay him overtime wages for working over eight hours a day. After the employers refused to pay him, Filardo sued under the Federal Eight Hour Law.

In its analysis, the Court followed a three-step process to determine the applicability of the Federal Eight Hour Law to an American employee working in the Middle East. The Court first examined the language of the statute to determine whether Congress gave any indication that the statute was meant to apply extraterritorially. Next, the Court searched the legislative history for any evidence of Congressional intent to apply the act to foreign jurisdictions. Finally, the Court looked at the administrative interpretations of the Act for the requisite intent to extend the statute's reach. The Court, in finding for the employers, stated that "it found nothing in the Act itself, as amended, nor in the legislative history, which would lead to the belief that Congress entertained any intention" to extend the statute extraterritorially. It also concluded that "administrative interpretations of the Act ... tended to support petitioners' contention as to its restricted geographical scope." Thus, in this case, the Court used a more expanded three-step approach to determine Congressional intent in deciding the extraterritorial application of the statute than it did in the previous cases. The Court did not, however, consider the international effects of applying the statute extraterritorially.

Another case that dealt with the extraterritorial application of a statute was *Benz v. Compania Naviera Hidalgo*. Here the question was whether the Labor Management Relations Act of 1947 covered a dis-

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37 336 U.S. 281 (1949).
38 *Foley Bros.*, 336 U.S. at 282-83.
39 Id. at 283.
40 Id. (citing 40 U.S.C. §§ 321-26 (1940)).
41 Id. at 284-90.
42 Id. at 285-86.
43 Id. at 286-88. The Court found that the legislative history indicated Congress' concern over "domestic labor conditions," not foreign ones. Id. at 286.
44 Id. at 288.
45 Id. at 285.
46 Id. at 290.
pute between a foreign flag ship and a foreign crew docked in an American port. 48 The Court looked at the Act itself and the legislative history 49 to determine the territorial reaches of the Act. Here, the Court emphasized the slight American connection in the case and the great impact on international relations the case could have if decided against the foreign ships. 50

In Benz, the Court appeared to combine two approaches to the question of the extraterritorial application of the statute. It first used the more traditional “clear indication by Congress” approach (looking to the language of the Act and the legislative history), but then it also added a functional balancing test, reminiscent of American Banana Co., 51 which analyzed both the American connections and interests in the case and those international interests with which they could conflict.

Six years later, the Court decided a similar case, McCulloch v. Sociedad Nacional de Marineros de Honduras. 52 The Court again looked at both the language and the legislative history of the National Labor Relations Act, and relying on Benz, concluded that neither showed an intent by Congress to extend the Act to foreign seamen. 53 Additionally, the Court emphasized that there was a relatively minor U.S. connection, that the United States should not become involved in the internal affairs of foreign flag ships, 54 that to do otherwise may be in violation of a treaty, 55 and that to hold the ships bound by U.S. law would conflict with Honduran law. 56

48 Benz, 353 U.S. at 139 (interpreting 29 U.S.C. § 141 (1947)). One of the ships in question was owned by a Panamanian corporation; the other was Liberian. The crews were mainly German and British, with no Americans. The only American connection in the case was that the ship temporarily docked in a U.S. port. Id. at 139, 142.

49 “The whole background of the Act is concerned with industrial strife between American employers and employees.” Id. at 143-44 (emphasis added).

50 The Court cites a statement by the co-author of the bill that reflects the concern about the rights of “American workingmen and . . . their employers.” Id. at 144.

51 Id. at 142. See also id. at 145 (quoting the Court of Appeals decision). For an opposing view of the “slight” American connection, see Justice Douglas’ dissent, which pointed out that American unions do have a vital interest in the wages of the foreign crew since the foreign ships are in direct competition with the American crews for carrying grain to Asia. Id. at 147 (Douglas, J., dissenting).

52 Id. at 147.

53 American Banana Co. v. United Fruit Co., 213 U.S. 347 (1908); see supra text accompanying notes 25-30.

54 372 U.S. 10 (1963). In this case, the ships were owned by a foreign subsidiary of a U.S. corporation, but flew a flag of the foreign nation. The crew consisted of Honduran citizens, who had signed an agreement that bound them to the Sociedad Nacional, a Honduran union. Id. at 12-14.

55 McCulloch, 372 U.S. at 18.

56 Id. at 21. See also id. at 16-17 (stating that the National Labor Relations Board’s assertion of power over these flag ships has “created international problems with our Government”).

57 See id. at 20 n.12 (indicating that a treaty between the United States and Honduras would also apply here).

58 Id. at 14. “Under the Honduran Labor Code, only a union whose ‘juric personality’
Interestingly, Justice Douglas, the lone dissenter in Benz, concurred in the McCulloch decision, and stated that only where a treaty exists between the United States and the other jurisdiction involved should there be a restriction on the application of the statute. He apparently considered potential international conflicts an important and relevant factor in the extraterritorial application analysis.

Both Benz and McCulloch utilized a broader and more flexible approach to the question of the extraterritorial applications of a statute than did the previous cases discussed, especially N.Y. Central. Not only did the Benz and McCulloch Courts look to the statute's language and the legislative history, they also factored in considerations of the competing U.S. and foreign interests and connections to the case and the international discord that could result from an extraterritorial application. There is a slight difference in the situations in both Benz and McCulloch that may distinguish them from the other earlier cases and that may also explain the shift and return to a balancing of interests. The events that had transpired in both cases actually occurred in American territory (in American waters and docks) rather than in a foreign country. On the other hand, because the ships themselves were foreign flag ships, they could be viewed as their own small, floating territories, and this "location of events" distinction between the two groups of cases would be irrelevant.

Steele v. Bulova Watch Co. was one of the few major cases on the extraterritoriality question in which the Supreme Court did allow the application of a U.S. statute in a foreign jurisdiction. In Steele, Bulova sued the defendant, a U.S. citizen, for trademark infringement and unfair competition that had transpired in Mexico. In deciding that the statute should apply, the Court looked at the statute itself, reading it broadly to cover the defendant's actions. The Court also emphasized that the United States can make laws governing its own citizens in other jurisdictions when the laws do not encroach upon the other ju-
The Court held that, because Mexico had already ruled against the defendant and had nullified his registration in Mexico, the United States would not infringe on foreign law by also holding him liable under U.S. laws.69

So, in Steele as well, the Court examined both the statute itself to determine whether Congress had meant to allow its application extraterritorially and the potential for conflicts between the two sovereign nations.70 The Court also determined that the United States had a strong interest in the outcome of this case because some of the watches the defendant made had found their way across the border, and thus "effects" of the defendant's activity were felt in the United States.71

The National Labor Relations Act was again at issue in International Longshoremen's Local 1416 v. Ariadne Shipping Co.72 The Act was found to be applicable extraterritorially in this case, where the workers at issue were American longshoremen who assisted foreign flag ships when they were docked.73 Here, the American connection was much greater than in the earlier cases,74 and the involvement in the foreign ships' internal affairs was minimal because the work was performed only when the ships were in port.75

A related case is Skiriotes v. State of Florida.76 Here, the Court was faced with the issue of whether a Florida statute was applicable to a U.S. citizen where the alleged infraction may have occurred on the high seas and not in Florida's jurisdicational waters.77 In Skiriotes, there was no foreign jurisdictional conflict with Florida's law. The Court reasoned that whether the defendant was in Florida waters or not was beside the point because the "United States is not debarred by any rule of international law from governing the conduct of its own citizens upon the high seas or even in foreign countries when the rights of other

68 Id. (quoting Skiriotes v. State of Florida, 313 U.S. 599 (1941)). For a more detailed discussion of Skiriotes, see infra notes 76-78 and accompanying text.
69 Steele, 344 U.S. at 285.
70 But see id. at 290 (Reed, J., dissenting) (stating that the proper analysis of this case is to look at the statutory construction only, and that with "[l]anguage of such nonexplicit scope," the Court should find that the statute should not apply beyond the United States territories). This analysis is reminiscent of the N.Y. Central holding. See supra text accompanying notes 34-35.
71 Steele, 344 U.S. at 285-87. When "effects" of the defendant's activities are felt in the United States, courts may also invoke the "effects doctrine" in order to claim jurisdiction over the activities. For a discussion of the effects doctrine and its relationship to territorial principles, see Ryuichi Yamakawa, Territoriality and Extraterritoriality: Coverage of Fair Employment Laws After EEOC v. Aramco, 17 N.C.J. Int'l L. & Com. Reg. 71, 75-76 (1992).
73 Ariadne Shipping Co., 397 U.S. at 196-97.
74 Id. at 199-200. Unlike McCulloch or Benz, the workers were American and were working on American soil. Compare supra notes 48 and 54.
75 Ariadne Shipping Co., 397 U.S. at 199-200.
76 313 U.S. 69 (1941). Defendant was charged with removing sponges illegally from waters which may or may not have been Florida's.
77 Skiriotes, 313 U.S. at 70-71.
nations or their nationals are not infringed."\(^7\) Here, the Court again suggested that the issue of international conflicts with other countries or their citizens is a relevant consideration where the applicability of a U.S. law to a non-U.S. territory is in question.

C. The Aramco Decision

In 1991, the Supreme Court decided *Equal Opportunity Employment Commission v. Arabian American Oil Co. (ARAMCO).*\(^7\) In *Aramco,* the Court decided whether Title VII applied extraterritorially when a U.S. employer abroad employed a U.S. citizen.\(^8\) The Court stated that "Congress legislates against the backdrop of the presumption against extraterritoriality. Therefore, unless 'the affirmative intention of the Congress [is] clearly expressed,'" the statute is assumed to apply only within the jurisdictional limits of the United States.\(^9\)

In order to determine Congress' intent, the Supreme Court looked to the statutory language,\(^10\) the legislative history,\(^11\) and the administrative agency's interpretation of the statute.\(^12\) The *Aramco* Court, unlike the *Steele* Court,\(^13\) read the statute strictly and found the broad jurisdictional language of Title VII lacking the requisite intent for it to apply extraterritorially.\(^14\) The Court also stated that where the statutory language is ambiguous as to its territorial reach, the presumption against extraterritorial application is not overridden.\(^15\)

In its examination of the legislative history, the Court again performed a strict reading and found no Congressional intent to apply Title VII extraterritorially.\(^16\) In the final step of the Court's analysis, a consideration of the agency's interpretation of the statute,\(^17\) the Court claimed that because the EEOC's interpretation had been "neither contemporaneous with [Title VII's] enactment nor consistent since the statute came into law,"\(^18\) its construction was unpersuasive.\(^19\) There-

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\(^7\) *id.* at 73; *see also* *id.* at 76.
\(^8\) *Id.* at 1229. Petitioner in *Aramco* was a naturalized American citizen who was employed in Saudi Arabia by a Delaware Corporation. He claimed his discharge was due to discrimination because of his race, religion, and national origin. *Id.* at 1228.
\(^9\) *Id.* at 1230 (quoting *Benz v. Compania Naviera Hidalgo,* 353 U.S. 138, 147 (1957)).
\(^10\) *Id.* at 1230-34.
\(^11\) *Id.* at 1231.
\(^12\) *Id.* at 1231.
\(^13\) *Id.* at 1235.
\(^14\) *Id.* at 1235. \(See supra\) note 67 and accompanying text.
\(^15\) *Aramco,* 111 S. Ct. at 1231. The Court says the evidence "falls short of demonstrating the affirmative congressional intent required to extend the protections of the Title VII beyond our territorial borders." *Id.*
\(^16\) *Id.* *See also* *id.* at 1233 ("If we were to permit possible, or even plausible interpretations of language such as that involved here to override the presumption against extraterritorial application, there would be little left of the presumption.").
\(^17\) *Id.* at 1231.
\(^18\) The EEOC claimed that the statute applied to discrimination against U.S. citizens, both in the United States and abroad. *Id.* at 1235.
\(^19\) *Id.* The majority found that the EEOC's interpretation had changed over time. Ini-
fore, the Court held that Congress did not intend Title VII to apply extraterritorially.\textsuperscript{92}

The three dissenters vehemently disagreed. They claimed that the majority had “convert[ed] the presumption against extraterritoriality into a clear-statement rule in part through selective quotation.”\textsuperscript{93} They felt that the previous \textit{Foley Bros.} test—“unless a contrary intent appears”\textsuperscript{94}—was not equivalent to the majority’s “clear statement” rule, and in changing the rule as such, the majority allowed itself to narrowly analyze Title VII.\textsuperscript{95}

The dissent pointed out that the \textit{Foley Bros.} Court looked extensively at “[t]he scheme of the Act,” the legislative history, and the administrative interpretations.\textsuperscript{96} The dissent reasoned that the \textit{Foley Bros.} Court, in performing such an extensive search of these factors, showed that the presumption was “not a 'clear statement' rule,”\textsuperscript{97} as the majority claimed. The dissent pointed out that precedent also had looked at functional factors, such as the other nation’s laws, international relations issues, and “the separation-of-powers and international-comity questions,” which the majority, in holding the presumption so strictly, allowed itself to avoid.\textsuperscript{98}

The dissent suggested that there are two different categories of presumptions against extraterritoriality: the weak \textit{Foley Bros.} presumption and the stricter \textit{Benz} and \textit{McCulloch} presumption.\textsuperscript{99} The stricter rule should be applied where the “extraterritorial application of a statute

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\textsuperscript{91} \textit{Id.} at 1246 (Marshall, J., dissenting).

\textsuperscript{92} \textit{Aramco}, 111 S. Ct. at 1236-37.

\textsuperscript{93} \textit{Id.} at 1238 (Marshall, J., dissenting). The dissent pointed out that when the majority quoted both \textit{New York Central R. Co.} and \textit{McCulloch} to support its contention that the presumption against extraterritoriality is a clear-statement rule, it did not quote the entire sentence, but left out critical words which indicate that the clear-statement rule is not an accurate definition of the presumption against extraterritoriality. \textit{Id.}

\textsuperscript{94} \textit{Id.} at 1237 (Marshall, J., dissenting) (citing Foley Bros., Inc. v. Filardo, 336 U.S. 281, 285 (1949)).

\textsuperscript{95} \textit{Id.} (Marshall, J., dissenting).

\textsuperscript{96} \textit{Id.} at 1238 (Marshall, J., dissenting) (quoting Foley Bros. v. Filardo, 336 U.S. 281, 286 (1948)).

\textsuperscript{97} \textit{Id.} (Marshall, J., dissenting).

\textsuperscript{98} \textit{Id.} at 1239 (Marshall, J., dissenting).

\textsuperscript{99} \textit{Id.} at 1240 (Marshall, J., dissenting). For a slightly different perspective on the two presumptions that the courts have used, see Yamakawa, \textit{supra} note 71.
ute would 'implicat[e] sensitive issues of the authority of the Executive
er over relations with foreign nations.' The stricter rule avoids any
"separation of powers and international comity questions associated
with construing a statute to displace the domestic law of another na-
tion." Presumably, when the issue is the "conduct of United States
nationals abroad," delicate international questions should not be a ma-
jor factor, and the weaker presumption should be applied.

Thus, the dissenters concluded that the weaker Foley Bros. pre-
sumption should have been applied in the Aramco decision, not the
*Benz and McCulloch* "clear-statement" rule that the majority utilized.
If the weaker presumption had been applied, the broad terms of Title
VII, the inference arising from the alien-exemption provision in the
statute, the legislative history of the statute and alien exemption,
and the administrative interpretation of the statute would all have
led to the extraterritorial application of Title VII.

In response to the Supreme Court's decision and as an indication
of what Congress intended Title VII to cover, Congress subsequently
passed the Civil Rights Act of 1991, which does give Title VII an extra-
territorial application. U.S. citizens employed abroad by U.S. com-
panies are now explicitly covered by the Act.

**III. Statement of the Case**

**A. The Background Facts of EDF v. Massey**

The United States owns and operates three year-round research
installations in Antarctica. The largest one of these, McMurdo Sta-
tion, is operated exclusively by NSF. The food wastes generated
by this station had been burned by NSF in an open landfill until 1991,
when asbestos was discovered in the landfill. In July 1991, NSF be-
gan burning the waste in an "interim incinerator," while awaiting the
arrival of a "state-of-the-art" incinerator.

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100 Aramco, 111 S. Ct. at 1239 (Marshall, J., dissenting) (quoting NLRB v. Catholic Bishop
of Chicago, 440 U.S. 490, 500 (1979)).
101 *Id.* at 1240 (Marshall, J., dissenting).
102 *Id.* (Marshall, J., dissenting).
103 *Id.* (Marshall, J., dissenting).
104 *Id.* at 1240 (Marshall, J., dissenting).
105 *Id.* at 1240-42 (Marshall, J. dissenting).
106 *Id.* at 1241 (Marshall, J., dissenting).
107 *Id.* at 1245 (Marshall, J., dissenting).
see Wilkins, supra note 14.
110 EDF II, 986 F.2d 528, 529 (D.C. Cir. 1993).
111 It has more than 100 buildings and supports over 1200 people in the summer
months. *Id.*
112 *Id.*
113 *Id.*
114 *Id.* at 529-30.
In its initial action, EDF, a national environmental interest group, sought to halt the operation of the interim incinerator and to enjoin the use of the permanent incinerator. EDF claimed that the incineration of NSF’s wastes could produce toxic pollutants and thus would be hazardous to the environment. EDF contended that until NSF considered the environmental impact of its actions, it would be in violation of NEPA, the Council of Environmental Quality regulations, and Executive Order No. 12,114.

B. District Court Ruling

The district court denied EDF’s request for injunctive relief under NEPA because the court concluded that NEPA does not apply extraterritorially. The court reasoned that although Congress may have used “broad language to describe NEPA's purpose, Congress failed to provide a clear expression of legislative intent through a plain statement of extraterritorial statutory effect.” This, it stated, fell under Aramco’s presumption against extraterritoriality. Thus, without examining the legislative history of the Act, the district court held that NSF’s decision to build an incinerator was not covered by NEPA.

The district court also held that the Executive Order could not be the basis for a private cause of action by EDF because the order explicitly stated that it did not create a cause of action and was not “issued pursuant to a statutory mandate or delegation of authority from Congress.” The court, therefore, dismissed EDF’s complaint.

C. D.C. Circuit Holding

EDF subsequently appealed to the United States Court of Appeals for the D.C. Circuit, which reversed the district court’s decision and

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116 EDF II, 986 F.2d at 530.
119 3 C.F.R. § 356 (1979). Executive Order 12,114 states that it “furthers the purpose of the National Environmental Policy Act...with respect to the environment outside the United States, its territories and possessions” by extending the reach of NEPA. 3 C.F.R. §§ 356-357 (1979). Actions which are governed by the Executive Order include “major Federal actions significantly affecting the environment of the global commons outside the jurisdiction of any nation (e.g., the oceans and Antarctica).” 3 C.F.R. § 357 (1979).
121 Id.
122 Id. at 1297-98.
123 Id.
124 Id. at 1298. See 3 C.F.R. § 356 (1979), which states: "[N]othing in this Order shall be construed to create a cause of action."
125 EDF I, 772 F. Supp. at 1298.
126 Id.
remanded the case. In its decision, the D.C. Circuit reviewed the history of the extraterritorial application of statutes in conjunction with the presumption against extraterritoriality as laid out in the *Aramco* decision. The court determined that there are three “well-established exceptions to the presumption.” The first is where “there is an ‘affirmative intention of the Congress clearly expressed’ to extend the scope of the statute to conduct occurring within other sovereign nations.” The second exception applies when adverse effects will occur in the United States if the statute is not extended to the foreign sovereignty. The third exception is applicable where there may be significant effects outside the United States, but the regulated conduct itself occurs in the United States.

Using this analysis, the D.C. Circuit concluded that the district court erred in not determining whether NSF’s conduct fell under the third exception. The court held that since NEPA is aimed at an agency’s decisionmaking process, and agency decisions are largely made in the United States, the actual “conduct” that NEPA regulates will generally occur in the United States. In this case, consequently, there is no extraterritoriality problem despite the fact that the actual agency activity, the use of a waste incinerator, would itself occur abroad, because the decisionmaking process largely took place in the United States.

In addition to this reasoning, the D.C. Circuit suggested that Antarctica presented a unique situation for a number of reasons. First, Antarctica is not “subject to the sovereign rule of any nation.” For this reason, in complying with NEPA there should be no conflicts with the laws of other nations, and thus, “the purpose behind the presumption is eviscerated, and the presumption against extraterritoriality ap-

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127 EDF II, 986 F.2d 528, 539 (D.C. Cir. 1993).
128 Id. at 530-32. These “exceptions” do not appear to be listed as such in any previous cases. The D.C. Circuit apparently extracted them from a number of cases that dealt with the extraterritorial application of statutes, and combined them into a coherent list.
129 Id. at 552.
131 Id. See also Turley, *supra* note 7, at 601 (suggesting that the Supreme Court uses different standards to analyze the question of extraterritorial applications, depending on the statute in question).
132 EDF II, 986 F.2d at 531.
133 Id. at 552.
134 NEPA is a procedural rather than a substantive statute. It mandates that an agency must follow certain steps in making a decision, but does not require that the agency subsequently must follow a certain course of action because of its environmental determinations. See id. at 552.
135 Id.
136 Id. at 533. The court did point out that Antarctica may not be entirely “unique.” There are two other situations where the court’s analysis may be applicable: the high seas and outer space. Id. at 534.
137 Id. at 529.
plies with significantly less force.” Second, the United States has a significant amount of control over Antarctica and exclusive legislative control over the U.S. research stations there, including McMurdo Station. The court concluded, therefore, that where there is no sovereign and the United States has a large amount of control, the “presumption against extraterritoriality has little relevance and a dubious basis.” The court’s “sovereignless” exception appears to be a possible fourth exception in its framework.

Finally, the circuit court examined the plain language of NEPA to determine whether there was an intent by Congress to apply NEPA extraterritorially. This was, in reality, the test described in Aramco. The court found that not only is the scope of NEPA extremely broad, but the statute’s language is indicative of Congress’ concern about worldwide problems. For these reasons, the D.C. Circuit held that NEPA should be read to apply extraterritorially.

IV. Significance of the Case

A. The D.C. Circuit’s Balancing of Factors and Interests

The D.C. Circuit, in deciding EDF V. Massey, appears to turn back the clock to a pre-Aramco analysis. Instead of the very strict “clear-statement” rule that the majority in Aramco developed, the circuit court attempted to return to a less strict analysis, an approach favored by the dissent in Aramco. This approach is in fact more consistent with earlier precedent.

Reading between the lines, it appears that the D.C. Circuit used a “balancing test” in deciding the case. Although the court did not announce it as such, the court weighed and balanced a number of factors in reaching a decision. In its analysis of NEPA, for example, the court pointed out that “NEPA would never require enforcement in a foreign forum or involve a ‘choice of law’ dilemma,” and that NEPA “imposes no substantive requirements which could be interpreted to govern conduct abroad.” Underlying these statements is a determi-
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nation that there would be no international problems, which indicates some type of balancing of foreign and domestic considerations. Furthermore, in the circuit court's comments about Antarctica's uniqueness, its status as sovereignless, and the large measure of control that the United States has in Antarctica,\(^\text{149}\) the court again looked at and weighed various international/national factors. Moreover, the court discussed foreign policy considerations that NEPA and this case presented,\(^\text{150}\) which are direct questions of national versus international power and control. There is no doubt that some sort of balancing process occurred in the court's analysis of this case.

A main issue, therefore, is whether this "balancing test" is consistent with precedent. Beginning with American Banana Co., which noted the actual physical involvement of the foreign government in the actions at issue in the case and declined to apply a U.S. statute to those acts,\(^\text{151}\) different courts have looked to a number of balancing factors in making their decisions.

In Ariadne, Benz, and McCulloch, the Court looked at the extent of American connections to the activity in question, the American interest in the activity, the international and/or foreign interests in the activity, and the degree to which American and foreign law were in conflict.\(^\text{152}\) The Steele Court also scrutinized the effects of the defendant's actions on the United States in deciding to extend the Lanham Trademark Act to cover the defendant's extraterritorial activities. The dissent in Aramco also believed that past case law indicated the need for balancing.\(^\text{153}\)

In light of these cases and their use of balancing factors, the D.C. Circuit's weighing and balancing of similar factors does not represent a significant departure from the pre-Aramco precedent.

B. The Relation Between the D.C. Circuit's Exceptions and Precedent

In conjunction with the above-mentioned balancing analysis, the D.C. Circuit attempted to analyze precedent and distill some basic core law from the cases' somewhat conflicting holdings. In doing so, the court explicitly outlined three exceptions (with a possible implicit fourth) to the presumption against extraterritoriality, which provides a more practical and predictable guideline for deciding whether to apply a statute extraterritorially.

\(^{149}\) Id. at 533-34.  
\(^{150}\) Id. at 534-55.  
\(^{151}\) American Banana Co. v. United Fruit Co., 213 U.S. 347, 356, 359 (1908). See also supra notes 23-30 and accompanying text.  
Although the court purported to be using "well-established exceptions" to the presumption against extraterritoriality,\textsuperscript{154} the earlier cases do not list or mention exceptions. The circuit court's exceptions are actually an interpretation and distillation of the pre-\textit{Aramco} case law, brought together in a cohesive manner.

The first exception that the D.C. Circuit identified applies when there is an affirmative intention of Congress to extend the statute to other jurisdictions.\textsuperscript{155} This "exception" is actually the only escape hatch from the presumption against extraterritoriality that the \textit{Aramco} Court allowed.\textsuperscript{156}

The second exception that the D.C. Circuit enumerated arises "where the failure to extend the scope of the statute to a foreign setting will result in adverse effects within the United States.\textsuperscript{157} The court extracted this exception from past Supreme Court cases that allowed the application of a statute extraterritorially when there would have been effects within the United States borders if the statute was not applied.\textsuperscript{158} These cases tend to deal with the Lanham Trademark Act\textsuperscript{159} and the Sherman Antitrust Act,\textsuperscript{160} which are "market-related" statutes,\textsuperscript{161} but this rule could presumably apply to any statute.

The third exception arises when the "conduct regulated by the government occurs within the United States."\textsuperscript{162} The court suggested that if the conduct largely occurs in the United States, then the statute should not even raise the question of extraterritoriality.\textsuperscript{163} The court cited the Restatements of Foreign Relations Law of the United States as authority for this exception.\textsuperscript{164} This exception seems to be perfectly logical, although there does not appear to be much case law on the subject, probably because this scenario is rare. The court held that this exception was applicable to NEPA, since NSF's decisionmaking process took place in the United States, and this decisionmaking was the conduct intended to be regulated under NEPA.

The D.C. Circuit also appears to have suggested a fourth excep-

\textsuperscript{154} \textit{EDF II}, 986 F.2d at 532.
\textsuperscript{155} \textit{Id.} at 531.
\textsuperscript{156} The \textit{Aramco} Court stated that unless there was a clear expression by Congress to apply the statute extraterritorially, the presumption would apply. \textit{Aramco}, 111 S. Ct. at 1230.
\textsuperscript{157} \textit{EDF II}, 986 F.2d at 531.
\textsuperscript{158} \textit{Id.} at 531. The court referred to a number of cases: \textit{Laker Airways Ltd. v. Sabena, Belgian World Airlines}, 731 F.2d 909 (D.C. Cir. 1984) (antitrust laws applied to England); \textit{Steele v. Bulova Watch Co.}, 344 U.S. 280 (1952) (Lanham Trademark Act applicable to Mexico); \textit{United States v. Aluminum Co. of America}, 148 F.2d 416 (2d Cir. 1945) (antitrust laws applicable).
\textsuperscript{161} See \textit{Turley}, \textit{supra} note 7, at 601.
\textsuperscript{162} \textit{EDF II}, 986 F.2d at 531.
\textsuperscript{163} \textit{Id.}
\textsuperscript{164} \textit{Id.} at 531-32. The court also suggested that there is additional support in \textit{Laker Airways Ltd. v. Sabena, Belgian World Airlines}, 731 F.2d 909, 921 (D.C. Cir. 1984).
tion to the presumption: where no possibility of clashes between other laws and United States law would result, especially where there is no "other sovereign." This exception has some support from precedent. First of all, it incorporates, to some degree, the international interests versus national interests balancing test discussed above. According to this exception, therefore, if there is little or no international conflict, then the statute could be applied extraterritorially. Furthermore, these are issues that have been explicitly referred to and used in prior case law. For these reasons, it would seem that this "no clashes with other nations" factor should also be an exception to the presumption against the extraterritorial application of statutes. This fourth exception, if the circuit court meant it as such, presumably would apply to NSF's activities in this case. This exception would also be relevant to future agency activity on the high seas that affected the marine environment.

C. Does NEPA Truly Pass the Aramco "Clear-Statement" Test

In its determination of whether or not NEPA can be applied extraterritorially to Antarctica, the D.C. Circuit also applied the actual Aramco test to the statute. In doing so, the court found the "sweeping scope of NEPA and the EIS requirement" to be evidence of Congress' intent to apply NEPA extraterritorially. The circuit court supported its position by reading all parts of NEPA's Section 102 together, and by finding a "clear interrelationship between the Section 102 subsections and the Section 102 mandate as a whole." To bolster its argument further, the court referred to case law which also indicated that NEPA is to be read broadly.

The D.C. Circuit statutory analysis appears to be contrary to the

165 EDF II, 986 F.2d at 552, 534.
166 See discussion supra part IV.A.
167 For example, see Steele v. Bulova Watch Co., 344 U.S. 280, 285 (1952), which discussed the fact that Mexico had already acted in its capacity so that the application of the Lanham Act to defendant's acts in Mexico would not encroach on Mexico's sovereignty. Also, recall the discussion in American Banana Co. v. United Fruit Co., 213 U.S. 347, 357 (1908), where the court stated that it absolutely could not be involved when the acts of a foreign government are directly involved. See supra notes 24-30 and accompanying text.
168 See EDF II, 986 F.2d at 535-36. The circuit court looked at the plain language of NEPA and determined that Congress did intend it to apply "with a far greater brush than NSF is willing to apply." Id. at 536.
169 Id. at 536. Note that on this issue, the district court held that under the Aramco test, the exact opposite is true. It stated that despite the broad language of NEPA, "Congress failed to provide a clear expression of legislative intent through a plain statement of extraterritorial statutory effect" and, thus, NEPA should not be applied extraterritorially. EDF I, 772 F. Supp. 1296, 1297 (D.D.C. 1991), rev'd and remanded, 986 F.2d 528 (D.C. Cir. 1993). See also Natural Resources Defense Council, Inc. v. Nuclear Regulatory Commission, 647 F.2d 1345 (D.C. Cir. 1981) (holding that NEPA does not apply extraterritorially to the Philippines).
170 EDF II, 986 F.2d at 556.
171 Id. (referring to City of Los Angeles v. NHTSA, 912 F.2d 478, 491 (D.C. Cir. 1990); Calvert Cliffs' Coord. Comm. v. United States A.E. Comm'n, 449 F.2d 1109, 1122 (D.C. Cir. 1971)).
Aramco majority's "clear-statement" rule and the Supreme Court's very narrow reading of statutes when attempting to apply them extraterritorially.\footnote{172} The circuit court's statutory analysis and application is more similar to the Aramco dissent's approach to the question of extraterritoriality.\footnote{173} The majority in Aramco stated that statutes that contain "broad jurisdictional language," without more definite language expressing Congress' intent to apply the statute extraterritorially, would not suffice under the "clear-statement" rule.\footnote{174} It is likely that if the Aramco court decided the EDF v. Massey case on the question of Congress' intent as indicated in the language of NEPA, the majority would hold as the district court did—that NEPA should not apply extraterritorially to Antarctica.

On the other hand, it is important to note that the district court neither searched NEPA's legislative history nor examined the agency's interpretation of the statute in making its decision.\footnote{175} Although the D.C. Circuit also omitted a search of the legislative history, it did look to the Council on Environmental Quality's (CEQ) original interpretation of the statute and found that CEQ's interpretation supported the application of NEPA to Antarctica.\footnote{176} The Aramco majority decision does give some weight to both the legislative history and administrative interpretations in deciding the extraterritorial question.\footnote{177} Therefore, this additional evidence increases the possibility that the circuit court's holding under Aramco is correct.

V. Conclusion

The D.C. Circuit correctly held that NEPA applies to NSF's plan to operate a waste incinerator in Antarctica in EDF v. Massey. In attempting to interpret the conflicting case law regarding the "presumption against extraterritoriality," the court developed some useful guidelines in deciding whether to apply U.S. statutes extraterritorially. The D.C. Circuit utilized a "balancing approach," which the Supreme Court had used numerous times in its analysis of individual cases, although the Court had never identified it as such. Balancing a number of factors has led the Supreme Court in the past to interpret the actual statutory

\footnote{172} Aramco, 111 S. Ct. 1227 (1991).
\footnote{173} Compare EDF II, 986 F.2d at 535-36 with Aramco, 111 S. Ct. at 1237-46 (Marshall, J., dissenting).
\footnote{174} Aramco, 111 S. Ct. at 1232. Note, however, that the Aramco majority agreed that the "broad jurisdictional grant" of the Lanham Act, which states that it applies to "all commerce which may lawfully be regulated by Congress," was properly applied extraterritorially in Steele. Id. at 1292. The majority distinguished Aramco because Title VII is more limited and is "boilerplate," deriving from another statute that had been held to apply only domestically. Id. at 1233.
\footnote{176} EDF II, 986 F.2d at 536.
\footnote{177} Aramco, 111 S. Ct. at 1231, 1235.
language either more narrowly or more broadly, depending on the outcome of the balancing. In many of its older cases, the Supreme Court had not only looked at the language and legislative history of the statute, but had also analyzed the U.S. interests in the matter, the direct effects of the activity on the United States (the D.C. Circuit's "exception two"), and the possible international conflicts that could arise because of the presence of a treaty or some law in the foreign state which made the application of the U.S. law extremely difficult.

In pulling together and then using some of the exceptions that it had enumerated, the circuit court appears to have brushed over, to some degree, the Supreme Court's decision in Aramco. Because the Aramco decision was not entirely square with past Supreme Court decisions, as the dissent in Aramco correctly pointed out, the circuit court's holding is defensible. In addition, under an Aramco analysis, the D.C. Circuit's holding may have been correct because, although it is questionable whether the necessary "clear statement" is present in NEPA to allow its application extraterritorially, the supporting CEQ interpretation, which clearly indicated its intended applicability to Antarctica, provided sufficient evidence to apply NEPA extraterritorially. Notwithstanding all of the above arguments, the facts of this case also support the D.C. Circuit's holding. As the court stated, Antarctica is "unique" in that it has no sovereign, and therefore, "the presumption against extraterritoriality has little relevance."

In order to develop a clearer and more consistent approach to determine the extraterritorial applicability of statutes, the judiciary needs to combine the balancing factors (which have been partially incorporated into the D.C. Circuit's exceptions) and the presumption against extraterritoriality with the exceptions that the D.C. Circuit has delineated. A possible starting point could be an extended version of the D.C. Circuit's three (or four) categories of exceptions, which more accurately depict the case law on the subject of extraterritoriality than does the Supreme Court's majority opinion in Aramco.

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178 See discussion supra part III.
179 With additional legislative history evidence, the case for the application of NEPA to Antarctica would probably be even stronger.
180 EDF II, 986 F.2d at 534.