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IT'S A SMALL WORLD AFTER ALL:¹ MAKING THE CASE FOR THE EXTRATERRITORIAL APPLICATION OF THE NATIONAL ENVIRONMENTAL POLICY ACT

*Browne C. Lewis**

INTRODUCTION

Since the horrible events of September 11, 2001, President George W. Bush has emphasized the need for global cooperation to fight terrorism. Indeed, over the last ten years, American law has been increasingly applied on foreign soil.² However, the United States has been hesitant to take a global stance on environmental issues. For example, as of the drafting of this article, the United States had not ratified the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal or the Convention on Environmental Impact Assessment in a Transboundary Context.³ Furthermore, shortly after taking office, President Bush rejected the Kyoto Protocol to the Framework Convention on Climate Change,⁴ which calls for the regulation of carbon dioxide emission, a major cause of global warming.⁵ In refusing to endorse the Convention, the

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¹ This phrase is part of the lyric in several popular songs. However, the use of the phrase in this article is not based on any particular song.

² See Ellen S. Podgor, *Globalization and the Federal Prosecution of White Collar Crime*, 34 AM. CRIM. L. REV. 325 (1997) (discussing cases allowing the extraterritorial application of United States criminal laws).

³ United Nations: Convention on Environmental Impact Assessment in a Transboundary Context, Feb. 25, 1991, 30 I.L.M. 800, 802.

⁴ Eric Pianin, *U.S. Aims to Pull Out of Warming Treaty*, WASH. POST, Mar. 28, 2001, at A1.

⁵ For two weeks in the winter of 2000, delegates from 180 countries met in The Hague to finalize rules for the global-climate treaty negotiated in Kyoto, Japan, in 1997. Under the pact, industrialized countries like the United States would cut their emissions of greenhouse gases, especially the carbon dioxide released when coal, oil and gas are burned. Sharon Begley, *The*

President stated that the requirements of the treaty would hurt the United States economy,⁶ proposing that the United States develop its own standards for combating global warming.⁷

President Bush's actions exemplify the United States government's reluctance to think globally when it comes to environmental issues.⁸ That type of attitude is short-sighted because we live in a small world when it comes to pollution. For example, it is just as easy for most forms of environmental pollution to cross international boundaries as it is for them to cross state lines. Contaminated air from a chemical plant in Louisiana does not stop at the Texas border. Likewise, contaminated air from a chemical plant in Mexico does not stop at the Texas border. Because pollution does not recognize geographic borders, nations should take a global approach to solve environmental problems. The National Environmental Policy Act (NEPA)⁹ could serve as part of the United States' contribution to that process.¹⁰

By enacting NEPA, Congress intended to "declare a broad national commitment to protecting and promoting environmental quality."¹¹ Congress intended that the mandates of NEPA advance the national policy of protecting and promoting environmental quality in two key ways. First, by requiring an agency to take the steps enumerated in the statute, Congress sought to make sure that, when considering whether or not to approve a project, the agency takes a "hard look" at the environmental consequences of the proposed project.¹² In order to meet the "hard look" requirement, the agency must: (1) gather opinions from its own experts and outside experts; (2) carefully analyze the scientific data; and (3) react to all genuine questions that have been put forth.¹³ Second, NEPA's stipulations were meant to guarantee that the agency made relevant information about the proposed project available to

Mercury's Rising: A Warmer World Doesn't Sound So Bad Until You Learn it May, Paradoxically, Bring an Ice Age, NEWSWEEK, Dec. 4, 2000, at 52.

⁶ Bob Kemper, *Japan Cool to Bush's Global Warning*, CHI. TRIB., Feb. 19, 2002, at 12.

⁷ Robert Schlesinger, *On Eve of Asia Trip, Bush Set to Detail Clean-Air Program*, BOSTON GLOBE, Feb. 14, 2002, at A2.

⁸ See Jennifer M. Siegle, *Suing U.S. Corporations in Domestic Courts for Environmental Wrongs Committed Abroad Through the Extraterritorial Application of Federal Statutes*, 10 U. MIAMI BUS. L. REV., 414-23 (2002) (discussing the extraterritorial application of specific federal environmental statutes).

⁹ Pub. L. 91-190, 83 Stat. 852 (1970), codified as 42 U.S.C. § 4321.

¹⁰ See Silvia M. Riechel, *Governmental Hypocrisy and the Extraterritorial Application of NEPA*, 26 CASE W. RES. J. INT'L L. 115, 136-38 (1994) ("NEPA is among the most effective ways the United States government can monitor and control its impact on the global environment.").

¹¹ *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 348 (1989) (citing 42 U.S.C. 4331).

¹² *Hughes River Watershed Conservancy v. Glickman*, 81 F.3d 437, 443 (4th Cir. 1996) (*Hughes River I*).

¹³ *Hughes River Watershed Conservancy v. Johnson*, 165 F.3d 283, 288 (4th Cir. 1999) (*Hughes River II*).

members of the public. The purpose of this requirement is to allow members of the public to actively participate in the decision-making process and in the implementation of the decision.¹⁴

The purpose of this article is to illustrate why NEPA should be applied extraterritorially. For purposes of this article, extraterritorially means "beyond the territorial jurisdiction of the United States."¹⁵ Section One discusses the mandates of NEPA and its importance to the protection of the environment. In the second section, the article addresses the historic treatment of the issue of NEPA's extraterritorial application by the legislative, executive and judicial branches. The third section analyzes the possible future treatment of the issue by those branches. The fourth section consists of a discussion of the reasons why NEPA should be applied extraterritorially. NEPA should be applied extraterritorially because there is no conclusive evidence that Congress intended to limit the scope of the statute. In addition, the extraterritorial application of NEPA would not violate the principles of international law. Because the courts have yet to reach a definitive conclusion on the issue, Congress should amend the statute to allow it to be applied extraterritorially. Moreover, the extraterritorial application of American laws has been extensively litigated under the Sherman Act and the securities laws. In those contexts, the courts have permitted United States legislation to be applied abroad. The reasoning in those cases supports the extraterritorial application of NEPA.¹⁶ The fifth section explains why the presumption against extraterritoriality should not be applied to limit the scope of NEPA to "major federal actions" inside the United States.

I. MANDATES OF NEPA

NEPA became law on January 1, 1970.¹⁷ By enacting the statute, Congress hoped to ensure that environmental management was given the same priority as other areas of national importance. The legislative history of NEPA indicates that it was meant to serve the following three

¹⁴ The CEQ regulations states: "NEPA procedures must insure that environmental information is available to public officials and citizens before decisions are made and before actions are taken. The information must be of high quality. Accurate scientific analysis, expert agency comments, and public scrutiny are essential to implementing NEPA . . ." 40 C.F.R. § 1500.1(b).

¹⁵ *Kollias v. D & G Marine Maintenance*, 29 F.3d 67, 70 (2d Cir. 1994).

¹⁶ See *Turicentro, SA v. American Airlines, Inc.*, 303 F.3d 293, 298 (3d Cir. 2002) (discussing the history of the courts' treatment of the extraterritorial application of the Sherman Act); see also John O'Brien, *It Is Business as Usual in the Extraterritorial World of Title VII: American Employers Who Employ Americans Abroad are not Subject to Title VII—EEOC v. Arabian American Oil Co.*, 111 S.Ct. 1227 (1991), 33 S. TEX. L. REV. 313, 316-18 (1992) (discussing the history of the extraterritorial application of the Sherman Act and securities laws.)

¹⁷ National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. §§ 4321-4370d.

main purposes:

(1) to declare protection of environmental quality to be a national policy and provide a mandate to all Federal agencies to effect that policy; (2) to create a Council on Environmental Quality to insure that the mandate is carried out; and (3) to establish a set of "action forcing" procedures requiring an environmental impact statement on any proposed major Federal action which could significantly affect the quality of the environment.¹⁸

NEPA is a procedural statute that places no substantive requirements on federal agencies.¹⁹ According to the United States Supreme Court, the mandates of NEPA prohibit federal agencies from making uninformed decisions about the environmental consequences of "major federal actions."²⁰ The statute does not dictate a specific result; it only explains the procedure necessary to allow agencies to make informed decisions about the environmental feasibility of proposed projects.²¹ To that end, NEPA requires a balancing of environmental costs and economic and technical benefits.²² Because NEPA's mandates are essentially procedural, the statute does not place any substantive requirements on the activities of federal agencies.²³

Under the provisions of NEPA, if an agency does not know whether a proposed action is a "major federal action" that will impact the quality of the human environment, the agency must prepare an Environmental Assessment (EA). The preparation of the EA is designed to help the agency determine whether it must prepare an Environmental Impact Statement (EIS).²⁴ The EA is meant to be a "concise public document,"²⁵ the key purpose of which is to provide the agency with enough evidence and analysis to enable it to determine the level of impact the proposed action will have on the environment.²⁶ The EA must consist of a discussion that addresses: (1) the need for the proposed action; (2) alternatives to the proposed action; (3) the environmental impacts of the proposed action and the alternatives to it; and (4) the agencies and persons consulted.²⁷

¹⁸ S. Rep. No. 94-152, at *2 (1975), *reprinted in* 1975 U.S.C.C.A.N. 859, 860.

¹⁹ *Morris County Trust v. Pierce*, 714 F.2d 271, 274-75 (3d Cir. 1983).

²⁰ *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 351 (1989).

²¹ *Id.* at 350-51.

²² *Taubman Realty Group Ltd. P'ship v. Mineta*, 198 F. Supp.2d 744, 753 (E.D.Va. 2002).

²³ *Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519, 558 (1978); *see also* William M. Cohen, *Practical Considerations in Litigating Cases under the National Environmental Policy Act*, CA37 ALI-ABA 449, 449 (1996).

²⁴ *Funds for Animals v. Mainella*, 283 F. Supp. 2d. 418, 427 (D. Mass. 2003) (quoting 40 C.F.R. § 1501.4); *see also* 42 U.S.C. § 4332(2)(C).

²⁵ *Stop the Pipeline v. White*, 233 F. Supp 2d 957, 964 n.7 (S.D. Ohio 2002) (citing 40 C.F.R. § 1508.9).

²⁶ *Mainella*, 283 F. Supp. 2d. at 427 (quoting 40 C.F.R. § 1508.9(a)); *see also* 42 U.S.C. § 4332(2)(C).

²⁷ *See* 40 C.F.R. § 1508.9(b) (2002).

As a result of this process, the agency must either issue a statement of a Finding of No Significant Impact (FONSI) explaining why the proposed activity will not have a significant impact on the environment or a decision stating its intent to prepare an EIS.²⁸ To comply with NEPA, federal agencies must prepare an EIS for all "major federal actions" that will have a significant impact on the quality of the human environment.²⁹ In preparing an EIS, the agency is required to take a hard look at the possible adverse effects of the project, methods of mitigating potential damage, and less destructive alternatives.³⁰

Although NEPA is often referred to as the Magna Carta of environmental law,³¹ many federal agencies have chosen not to comply with its mandates when their actions affect United States territories. For example, according to the Worldwatch Institute, in 1987, without considering the environmental consequences, the United States Air Force and Navy dumped large quantities of trichloroethylene, a carcinogenic solvent, in Guam. As a result, the aquifer that supplied drinking water to three-quarters of the island's population was contaminated.³²

In an attempt to justify their noncompliance with NEPA, federal agencies have argued that the statute does not apply to adverse effects upon foreign environments or to actions taken outside of the United States.³³ Some federal agencies continue to make that argument despite the fact that it has long been settled that NEPA applies to federal decisions affecting the environment of the United States, its territories and possessions.³⁴ However, the issue of whether or not NEPA applies to federal decisions affecting the environments of foreign nations has not been resolved. The next section focuses upon the manner in which the issue has been treated in the past.

²⁸ See 40 C.F.R. §§ 1501.4(e), 1508.11 (1992).

²⁹ *Ka Makani 'O Kohala Ohana, Inc. v. Water Supply*, 295 F.3d 955, 959 (9th Cir. 2002) (quoting 42 U.S.C. § 4332(2)(C)).

³⁰ 42 U.S.C. § 4332 (2)(c); see also *Hughes River Watershed Conservancy v. Glickman*, 81 F.3d 437, 443 (4th Cir. 1996).

³¹ See Kristen M. Fletcher and Sharonne R O'Shea, *Essential Fish Habitat: Does Calling It Essential Make It So?*, 30 ENVTL. L. 51, 90 (2000) (citing James W. Spensley, *National Environmental Policy Act*, in ENVIRONMENTAL LAW HANDBOOK 321, 321 (J.Gordon Arbuckle et. al. eds., 12th ed. 1993); see also *Citizens Against Burlington, Inc. v. Busey*, 938 F.2d 190, 193 (D.C. Cir.), cert. denied, 502 U.S. 994 (1991). But see *Northern Crawfish Frog v. Federal Highway Administration*, 858 F. Supp 1503, 1505 (1994) (stating "NEPA is not a green Magna Carta.").

³² L. R. BROWN ET AL., *STATE OF THE WORLD* 144 (1991).

³³ See, e.g., *Schneider, Environmental Rule is Waived for Pentagon*, N.Y. TIMES, Jan. 30, 1991, at A14; The statute simply says that "all agencies of the Federal Government shall . . . include [an EIS] in every recommendation or report on proposals for . . . major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(C).

³⁴ See *Enewetak v. Laird*, 353 F. Supp. 811 (D. Haw. 1973) (holding that *Enewetak* was part of the nation encompassed by NEPA).

II. HISTORICAL PERSPECTIVE ON EXTRATERRITORIAL APPLICATION OF NEPA

All three branches of the federal government have struggled with the issue of NEPA's extraterritorial application without reaching a definitive position. Congress has considered, but rejected, amendments to NEPA to require its extraterritorial application. Within the executive branch, the Department of State (State Department) and Council of Environmental Quality (CEQ) have adopted conflicting positions on extraterritoriality. Finally, though some federal courts have assumed that NEPA applies extraterritorially, many have not.

A. *Congressional Treatment*

On several occasions, Congress has attempted to amend NEPA so that the statute explicitly states that it applies extraterritorially. However, those attempts have been unsuccessful. For example, in 1989, Senator Frank Lautenberg introduced a bill³⁵ that would have changed Section 102(2)(C) of the statute by inserting the following language after "major federal actions": "including extraterritorial actions (other than those taken to protect the national security of the United States, actions taken in the course of armed conflict, strategic intelligence actions, armament transfers, or judicial or administrative civil or criminal enforcement actions)."³⁶ In addition, the proposed Senate bill would have added the following paragraph to Section 204 of NEPA:

To promulgate regulation concerning implementation of the National Environmental Policy Act by all Federal agencies (including Federal independent regulatory commissions). Such regulations shall assure compliance with the statutory requirement for full consideration of the environmental impacts of proposed major Federal agency actions on geographic, oceanographic, and atmospheric areas within as well as beyond the jurisdiction of the United States and its territories and possessions, including the cumulative impacts of proposed Federal actions on global climate change, depletion of the ozone layer, transboundary pollution, loss of biological diversity, and other international environmental impacts.³⁷

The introduction of bills seeking to amend NEPA to allow it to apply extraterritorially may indicate that Congress has recognized that

³⁵ S.1089, 101st. Cong., 1st Sess., 135 Cong. Rec. S5990 (daily ed. June 1, 1989).

³⁶ *Id.*

³⁷ *Id.* at § 1(b)(1).

the statute in its original form was not meant to be applied extraterritorially. On the other hand, by introducing such bills, current members of Congress may be trying to bring the statute into conformity with the intent of the members of Congress who originally enacted the statute. At the very least, the introduction of these amendments implies that members of Congress understand the need for NEPA to be applied extraterritorially.

The fact that none of the proposed bills have been successful does not mean that applying NEPA extraterritorially would be contrary to congressional intent. Because many internal and external forces control which bills pass and which ones fail, the lack of success of a bill is usually dependent upon the entire legislative landscape.³⁸ For example, in 1989, the importance of amending NEPA may have been overshadowed by the legislative crisis created by the Exxon Valdez oil spill that occurred that year.³⁹ In response to the devastation caused by that accident, Congress dedicated most of its time to creating a comprehensive oil pollution act.⁴⁰ Thus, it is not surprising that the issue of NEPA's extraterritorial application was not at the top of the legislative agenda. As a consequence, Congress' past treatment of the issue does not mean that NEPA should not be applied extraterritorially.

B. *Executive Treatment*

The executive agencies relevant to a discussion of the extraterritorial impact of NEPA are the State Department and the Council on Environmental Quality (CEQ). These two agencies have remained at cross-purposes when it comes to the issue of whether NEPA should be applied to federal projects outside the United States.

Historically, the State Department has maintained that NEPA should not be applied extraterritorially. The agency's view is based upon the belief that any time a United States law is applied abroad there is a danger of adversely impacting the relationship that the United States has with other countries.⁴¹ Hence, as part of its regulations, the State

³⁸ Public choice theorists have suggested that "congressional enactments are not motivated by conceptions of the public interest; rather, federal statutes might reflect private interest deals, re-election posturing, or arbitrary outcomes." Daniel A. Farber & Philip P. Frickey, *Legislative Intent and Public Choice*, 74 VA. L. REV. 423, 424 (1988).

³⁹ See Bryan Hodgson, "Alaska's Big Spill-Can the Wilderness Heal?", NAT'L GEOGRAPHIC, Jan. 1990, at 8, cited in Elizabeth R. Millard, *Anatomy of an Oil Spill: The Exxon Valdez and the Oil Pollution Act of 1990*, 18 SETON HALL LEGIS. J. 331, 346 (1993).

⁴⁰ *Id.*

⁴¹ See Department of State Regulations for Implementing the National Environmental Policy Act, 22 C.F.R. § 161.7 (2003); see also Robert Q. Lee, *International Environmental Law-The Presumption Against Extraterritorial Application of the National Environmental Policy Act: Has the Iron Curtain Been Lifted?* Environmental Defense Fund v. Massey, 986 F.2d 528 (D.C. Cir.

Department "categorically excluded" certain activities from NEPA's EIS requirement.⁴² These exempted activities include: (1) "routine conduct of Departmental and overseas political and economic functions;"⁴³ (2) "provision of consular services—visas, passports and citizenship, and special consular services;"⁴⁴ (3) "conduct of routine administrative functions;"⁴⁵ (4) "preparing for and participating in conferences, workshops or meetings for information exchange, data collection or research or study activities;"⁴⁶ and "document and information exchanges."⁴⁷ When dealing with one of these excluded activities, the State Department does not have to prepare either an EA or an EIS.⁴⁸

By enacting Title II of NEPA, Congress established CEQ within the Executive Office of the President. CEQ was created to oversee the administration of the statute and received additional responsibilities as a consequence of the Environmental Quality Improvement Act of 1970.⁴⁹ CEQ has several statutory functions, including gathering information and advising the President on environmental issues.⁵⁰ CEQ's responsibilities have been enlarged by several executive orders. For example, Executive Order No. 11,514 (March 5, 1970) requires CEQ to coordinate federal programs that deal with the quality of the environment and to issue guidelines to assist federal agencies in their preparation of EISs.⁵¹ Furthermore, Executive Order No. 11,991 (May 24, 1977) gave CEQ the authority to issue binding regulations governing the implementation of NEPA's procedural provisions.⁵²

Given the fact that CEQ is mainly responsible for the quality of the environment, it is not surprising that the members of CEQ have consistently stated that NEPA should be applied extraterritorially. In 1978, CEQ issued a memorandum and draft regulations setting forth its position that NEPA should be applied extraterritorially in some instances.⁵³ For example, if a project directly impacted the environment

1993), 29 LAND & WATER L. REV. 533, 540-41 (1993).

⁴² 22 C.F.R. § 161.7(b).

⁴³ *Id.* at (b)(1).

⁴⁴ *Id.* at (b)(2).

⁴⁵ *Id.* at (b)(3).

⁴⁶ 22 C.F.R. § 161.7(b)(4).

⁴⁷ *Id.*; 22 C.F.R. § 161.7(b)(5).

⁴⁸ 22 C.F.R. § 161.7 (b).

⁴⁹ 42 U.S.C. § 4344(3).

⁵⁰ 42 U.S.C. § 4344. Section 204 of NEPA details the duties and functions of the CEQ. *Id.*

⁵¹ *Pac. Legal Foundation v. Council On Env'tl. Quality*, 636 F.2d 1259, 1262 (D.C. Cir. 1980) (quoting §§ 3(f), (h), 3 C.F.R. 902, 904 (1966-1970 compilation)).

⁵² *Pac. Legal Foundation*, 636 F.2d at 1262 (quoting § 1, 3 C.F.R. 123, 124 (1978)).

⁵³ Council on Environmental Quality Memorandum to Agency Heads on Overseas Application of NEPA Regulations (1978), reprinted in 8 Env't Rep. (BNA) 1493 (1978); see also Council on Environmental Quality Draft Regulations on Applying NEPA to Significant Foreign Environmental Effects (1978), reprinted in 8 Env't Rep (BNA) 1495 (1978); see also Sylvia M.

of the United States, the global commons, or Antarctica, the federal agency involved had to follow the dictates of NEPA.⁵⁴ However, if only the environment of a foreign country was impacted by the project, the federal agency was only required to prepare a Foreign Environmental Statement (FEIS). The FEIS was to contain the following information: (1) a statement explaining the purpose of and the need for the proposed project; (2) a discussion examining alternatives to the proposed action; and (3) a succinct description showing the area impacted by the project.⁵⁵ Environmental groups welcomed the idea of a FEIS. Nonetheless, CEQ eventually succumbed to pressure from the State Department and other opponents of its position and withdrew the proposed regulations.⁵⁶

The conflicting positions of the State Department and CEQ left the issue of NEPA's extraterritorial application largely unresolved. Thus, in 1979, President Jimmy Carter issued Executive Order 12,114 in an attempt to resolve the issue.⁵⁷ CEQ and the State Department worked together to assist the Carter administration in preparing an order which would deal with the issue of NEPA's extraterritorial application "in a way sensitive both to environmental and foreign policy concerns."⁵⁸ Under the terms of Executive Order 12,114, NEPA should be applied extraterritorially in the following situations: (1) when the proposed action impacts a foreign country that is not involved in the action; (2) when the proposed action impacts the global commons; (3) when the proposed action exposes a foreign country to toxic or radioactive emissions; and (4) when the proposed action impacts resources of global concern.⁵⁹ By publishing the Executive Order, President Carter tried to address CEQ's concerns about the environmental consequences of projects that United States agencies sponsored in foreign countries, while assuaging concerns of environmental groups.⁶⁰

Nevertheless, in the spirit of compromise, the Executive Order exempted from NEPA compliance most of those activities that the State

Riechel, *Governmental Hypocrisy and the Extraterritorial Application of NEPA*, 26 CASE W. RES. J. INT'L L. 115, 136-38 (1994).

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ Lee, *supra* note 41, at 541.

⁵⁷ Exec. Order No. 12,114, 44 Fed. Reg. 1957 (1979), *reprinted in* 42 U.S.C. § 4321 (1988); *see* Riechel, *supra* note 53, at 138-139 (stating that "[t]he objective of this Executive Order was to 'further the purpose of the National Environmental Policy Act, with respect to the environment outside of the United States, its territories and possessions'").

⁵⁸ *Greenpeace U.S.A. v. Stone*, 748 F. Supp. 749, 763 (D. Haw. 1990), *dismissed as moot*, 986 F.2d 175 (9th Cir. 1991) (quoting Environmental Quality—1979, The Tenth Annual Report of the Council on Environmental Quality, at 582 (Dec. 1979)).

⁵⁹ Exec. Order No. 12,114, §§ 2-3 (a), (b), (c), and (d), 44 Fed. Reg. 1957 (Jan. 4, 1979), *reprinted in* 1979 WL 25866.

⁶⁰ Karen A. Klick, *The Extraterritorial Reach of NEPA's EIS Requirement after Environmental Defense Fund v. Massey*, 44 AM. U.L. REV. 291, 301-03 (1994).

Department deemed had foreign policy implications. For instance, this exemption covers all intelligence activities, arms transfers, export licenses, votes in international organizations, and emergency relief actions.⁶¹ The Order also allows agencies to modify the EIS requirements in situations involving international commercial competition and national security.⁶² Moreover, a federal agency may modify the EIS requirement when the agency has difficulty obtaining information or is unable to control the outcome of a decision to take a proposed action that might adversely impact the quality of the environment.⁶³

The promulgation of the Executive Order indicated that President Carter recognized the importance of applying NEPA extraterritorially. However, proponents of the extraterritorial application of NEPA were not satisfied because the requirements of the Executive Order fell short of NEPA's mandates.⁶⁴ Hence, as the next sub-section demonstrates, the courts were left to deal with the issue of NEPA's extraterritorial application.

C. *Judicial Treatment*

A long standing judicial principle is that, unless Congress has indicated otherwise, statutes are meant to apply only within American borders.⁶⁵ Under the presumption against extraterritoriality, a federal statute will not be applied extraterritorially if Congress has not clearly expressed its intent to regulate conduct abroad.⁶⁶ However, courts have concluded that the presumption should not be applied when the conduct regulated by the government occurs within the United States.⁶⁷ Consequently, even in cases in which the significant effects of the project occur outside American borders, courts will not apply the presumption as long as the conduct that Congress seeks to regulate occurs mostly within the United States.⁶⁸

In evaluating the extraterritorial application of NEPA, courts have recognized that there are times when the presumption against

⁶¹ Exec. Order No. 12,114, at §§ 2-5(a)(iv), (v), (vi) and (vii), 44 Fed. Reg. at 1957.

⁶² Exec. Order 12,114, at §§ 2-5(b)(iii)(2) and (4), 44 Fed. Reg. at 1957.

⁶³ Exec. Order 12,114, at §§ 2-5(b)(iii)(5) and (6), 44 Fed. Reg. at 1957.

⁶⁴ See Commander Margaret M. Carlson, *Environmental Diplomacy: Analyzing Why the U.S. Navy Still Falls Short Overseas*, 47 NAVAL L. REV. 62, 88-90 (2000) (discussing the shortcomings of Executive Order 12,114).

⁶⁵ *EEOC v. Arabian Am. Oil (Aramco)*, 499 U. S. 244, 248 (1991).

⁶⁶ See Gary B. Born, *A Reappraisal Of The Extraterritorial Reach Of U. S. Law*, 24 L. & POL'Y INT'L BUS. 1, 1 (1992).

⁶⁷ *Env'tl. Def. Fund, Inc. v. Massey*, 986 F.2d 528, 531 (D.C. Cir. 1993).

⁶⁸ *Id.*

extraterritoriality should not be applied.⁶⁹ The cases in which the courts have addressed the issue of NEPA's extraterritorial application can be divided into three groups. The first group consists of cases where the courts applied the effects doctrine. The second group consists of cases where the courts relied upon the conduct test. The last group consists of cases where national security and foreign relations concerns prevented the court from allowing NEPA to be applied extraterritorially.⁷⁰

1. The Consequences of Domestic Effects

Courts have usually declined to apply the presumption against extraterritoriality whenever the failure to extend the scope of a statute outside American borders would result in harmful effects inside the United States.⁷¹ In some cases, NEPA has been applied to projects in foreign countries because those projects had some impact within the United States. Due to these domestic effects, the United States agency involved conceded that NEPA was applicable and prepared the necessary EISs. Thus, the courts did not reach the issue of NEPA's extraterritorial application and assumed, without deciding, that NEPA applied to foreign projects with domestic effects.

For example, in *Sierra Club v. Adams*,⁷² the Court of Appeals for the District of Columbia presumed that the mandates of NEPA applied to the Panamanian segment of a U.S.-sponsored highway project and focused its analysis on the adequacy of the EIS.⁷³ In 1970, the United States, Panama, and Columbia signed an agreement to build the Darien Gap.⁷⁴ The highway was designed to connect a highway located in Alaska to a highway located in Chile.⁷⁵ The Sierra Club and other environmental groups sued the Secretary of Transportation for failing to prepare and process an EIS on the highway.⁷⁶

As a result, the District Court issued a temporary injunction preventing the United States government from offering further assistance on the highway project until it had complied with the mandates of NEPA.⁷⁷ Although the project was to be completed

⁶⁹ The presumption against extraterritoriality will be discussed in more detail. *See infra* Section V.

⁷⁰ *See* Jonathan Turley, "When In Rome": *Multinational Misconduct and the Presumption Against Extraterritoriality*, 84 NW. U. L. REV. 598, 627-35 (1990) (analyzing cases addressing NEPA's extraterritorial application).

⁷¹ *See* *Env'tl. Def. Fund, Inc. v. Massey*, 986 F.2d 528, 531 (D.C. Cir. 1993).

⁷² 578 F.2d 389 (D.C. Cir. 1978).

⁷³ *Id.* at 391.

⁷⁴ The Darien Gap is a 250-mile paved road in Panama and Columbia. *Id.* at 390.

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.*

entirely outside the United States, the federal government did not object to the application of NEPA. After the United States government prepared an EIS, the District Court refused to lift the injunction because it found that the EIS was deficient, although the appellate court later vacated the injunction.⁷⁸

According to environmental groups, one of the key deficiencies in the EIS was its failure to deal with the possibility that highway construction would cause the spread of aftosa, or foot-and-mouth disease, into the United States.⁷⁹ In evaluating the adequacy of the EIS, the court agreed with the environmentalists, stating that the most significant issue to be considered was the project's potential to spread the disease into the United States.⁸⁰ The fact that the court focused upon that aspect of the EIS indicated that it believed that NEPA was meant to deal with foreign conduct that has effects in the United States. Such emphasis upon the domestic effects of foreign conduct may explain why the federal government prepared the EIS instead of arguing that NEPA did not apply to the project.

In another domestic effects case, *National Organization for the Reform of Marijuana Laws (NORML) v. U.S. Department of State*,⁸¹ federal agencies stipulated that they would prepare an EIS to evaluate the effects a program in Mexico would have within the United States.⁸² NORML, a non-profit corporation established to advocate for the decriminalization of marijuana, filed suit against several federal agencies for failing to comply with NEPA's EIS requirement. According to NORML, the agencies violated NEPA when they did not prepare an EIS to evaluate the environmental consequences of the United States' participation in a herbicide project in Mexico.⁸³ The project involved spraying herbicides on marijuana and poppy plants in Mexico as a part of the war on drugs.⁸⁴

NORML contended that the United States' participation in the project endangered the health of its members. According to the organization's complaint, as a consequence of the spraying project, Mexican-grown marijuana contained significant levels of the herbicide paraquat. NORML presented evidence that consumption of that herbicide presented a health hazard to marijuana users. NORML claimed that its members were among the class of marijuana users endangered by paraquat because they smoked or ingested Mexican-

⁷⁸ *Id.* at 391.

⁷⁹ *Id.*

⁸⁰ *Id.* at 394.

⁸¹ 452 F. Supp. 1226 (D.D.C. 1978).

⁸² *NORML*, 452 F. Supp. at 1232.

⁸³ *Id.* at 1228.

⁸⁴ *Id.*

grown marijuana that was imported to the United States,⁸⁵ and consequently, that the United States' participation in the project without preparing an EIS violated the requirements of NEPA.⁸⁶

In response, the defendant agencies argued that NEPA did not apply to the project because it was a Mexican project over which the United States exercised minimal influence. Nonetheless, the agencies agreed to prepare an EIS on the effects the Mexican spraying project would have in the United States regardless of the outcome of the case, asking the Court to assume that NEPA applied extraterritorially without deciding the issue.⁸⁷

NORML sought a judicial determination that NEPA did apply to the federal action and a court order restraining the United States from participating in the program until it had prepared an EIS. The court stated that it would assume that, with respect at least to the effects in the United States, NEPA's EIS requirement applied,⁸⁸ reasoning that, given the federal agencies' willingness to prepare an EIS, it could leave the resolution of the extraterritoriality issue for another day.⁸⁹ The agencies were willing to prepare an EIS to evaluate the impact the Mexican project would have within the United States. Hence, NEPA was applied to a project that was located entirely in a foreign country because the program had the potential to negatively impact citizens located within the United States.

2. The Focus Is On The Conduct

Under the conduct test, which emerged from decisions in securities cases, courts have concluded that subject matter jurisdiction is present if conduct taking place in the United States was more than "merely preparatory" and that conduct directly caused the alleged injuries that occurred outside of the United States.⁹⁰ *Environmental Defense Fund, Inc. v. Massey*⁹¹ provides an illustration of the conduct test. In 1961, the United States and thirty-nine other nations signed the Antarctic Treaty agreeing not to assert sovereignty rights in Antarctica,⁹² on the grounds that the area is a "global commons" owned by all countries. Accordingly, the United States established a presence in the region by building three year-round installations to serve as logistic centers for

⁸⁵ *Id.*

⁸⁶ *Id.* at 1229.

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *Id.* at 1233.

⁹⁰ *Alfadda v. Fenn*, 935 F.2d 475, 478 (2d Cir. 1991).

⁹¹ *Massey*, 986 F.2d 528.

⁹² *Id.* at 529.

scientific research. *Massey* involved the McMurdo Station, the largest of the three facilities operated by the National Science Foundation (NSF).⁹³

In 1991, NSF stopped burning food waste in an open landfill and worked to develop a more environment-friendly method for its disposal.⁹⁴ After a few months, NSF decided to burn the waste in an "interim incinerator" until it could install a state-of-the-art incinerator.⁹⁵ The Environmental Defense Fund (EDF) objected to the resumption of the burning because it claimed that NSF had violated the requirements of NEPA by not evaluating the environmental consequences of its decision. NSF responded by asserting that, in considering the proposed action, it was bound by the requirements of Executive Order 12,114 and not the mandates of NEPA.⁹⁶

The requirements of the Executive Order are similar to the ones mandated by NEPA. However, unlike NEPA, the Executive Order does not provide a private cause of action.⁹⁷ Thus, in order to challenge NSF's actions, EDF claimed that the agency was required to comply with NEPA. Relying on the presumption against extraterritoriality, the District Court dismissed EDF's claim, concluding that there was no clear congressional intent that NEPA be applied extraterritorially, and that therefore, NEPA did not apply to NSF's decision to burn food waste in Antarctica.⁹⁸

The Court of Appeals for the District of Columbia reversed, holding that NEPA applied to the decision to burn the food waste.⁹⁹ In reviewing the District Court's decision, the appellate court reframed the issue: instead of deciding whether applying NEPA extraterritorially was in conflict with the law, it analyzed whether applying NEPA to NSF's actions in Antarctica created an extraterritoriality problem.¹⁰⁰ According to the court, an extraterritoriality issue arises when a person attempts to use a United States statute to regulate conduct in another sovereign country. The issue usually occurs when the application of the United States law creates a potential for "clashes between our laws and those of other nations."¹⁰¹

After analyzing the facts of the case, the *Massey* court concluded that the case did not present an issue of extraterritoriality,¹⁰² stating that

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Id.* at 530.

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ *Id.* at 529.

⁹⁹ *Id.* at 536-37.

¹⁰⁰ *Id.* at 532.

¹⁰¹ *Id.*

¹⁰² *Id.*

the presumption against extraterritoriality did not govern situations where the regulated conduct took place primarily or exclusively within the United States.¹⁰³ The court reasoned that the conduct NEPA was enacted to regulate was the decision-making of federal agencies.¹⁰⁴ The court determined that because NSF's decision-making with regards to the burning took place almost exclusively in the United States, its actions had to comply with NEPA's requirements. The court's decision was also based upon the fact that the decision-making process involved the workings of the United States government.¹⁰⁵ The burning took place outside of the United States, but that was not the regulated conduct. The regulated conduct was the decision to allow the burning. Since that decision was made in the United States, NEPA had to be applied to the conduct.¹⁰⁶

3. The National Security/Foreign Relations Dilemma

In cases involving national security or foreign policy concerns, courts have declined to allow NEPA to be applied extraterritorially. To illustrate, in *Natural Resources Defense Council Inc. v. Nuclear Regulatory Commission*,¹⁰⁷ the Court of Appeals for the District of Columbia concluded that NEPA should not be applied extraterritorially if the situation involves a foreign policy element.¹⁰⁸ The Philippine government contracted with Westinghouse to buy a nuclear reactor which was to serve a nuclear plant to be built at Napot Point in the Philippines.¹⁰⁹ At that time, the Napot Point site was located approximately twelve miles from a United States Naval base and forty miles from a United States Air Force base. As a result, a total of 32,000 American armed services members were stationed in the area.¹¹⁰ In order to get the nuclear materials to the Philippines, Westinghouse filed for an export license with the Nuclear Regulatory Commission (NRC).¹¹¹

The problem arose when NRC approved the export license without preparing an EIS. In justifying its actions, NRC determined that it did not have the authority to consider the environmental impact the project

¹⁰³ *Id.*

¹⁰⁴ *Id.* at 533.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.* at 532.

¹⁰⁷ 647 F.2d 1345 (D.C. Cir. 1981).

¹⁰⁸ *NRDC*, 647 F.2d at 1368.

¹⁰⁹ *Id.* at 1351.

¹¹⁰ *Id.*

¹¹¹ *Id.*

would have on the citizens of the Philippines.¹¹² NRC based its conclusion on the premise that a federal statute like NEPA applied only to conduct occurring within or having effects within the territorial United States, unless the statute plainly stated otherwise.¹¹³

According to the court, the material NEPA issue was whether the decision to issue a license for the export of the nuclear reactor triggered NEPA's EIS requirement when any effects of the export would occur in a foreign country.¹¹⁴ Citing foreign policy concerns, the court concluded that NEPA did not apply to NRC's decision to issue the nuclear export license,¹¹⁵ relying upon the restriction contained in Section 102(2)(F) of NEPA, which provides that environmental decisions must be consistent with United States foreign policy.¹¹⁶

Based upon the limitation included in section 102(2)(F), the court reasoned that, when Congress enacted NEPA, it meant for the statute to be enforced with an eye towards "cooperation, not unilateral action, in a manner consistent with our foreign policy."¹¹⁷ The court concluded that the extraterritorial application of NEPA in this case would be inconsistent with United States foreign policy, because the United States' approach to foreign policy is to cooperate with other countries when dealing with problems, including environmental problems.¹¹⁸ In the court's view, applying NEPA to the situation would amount to the United States unilaterally forcing its regulations on the activities of a foreign country, an action that would conflict with the United States' desire to deal with foreign countries in a cooperative manner.¹¹⁹

Another case in which the court focused upon the foreign policy implications of NEPA's extraterritorial application was *Greenpeace U.S.A. v. Stone*.¹²⁰ In *Greenpeace*, the problem started when President Ronald Reagan entered into an agreement with West German Chancellor Helmut Kohl to remove chemical munitions, including nerve gas, from the Federal Republic of Germany to Johnston Atoll, an unincorporated United States Territory located in the central Pacific Ocean.¹²¹

In preparing to honor the removal agreement, the United States Army prepared three EISs with respect to the storage and incineration facility at Johnston Atoll. In order to comply with the mandates of

¹¹² *Id.* at 1352.

¹¹³ *Id.*

¹¹⁴ *Id.* at 1368.

¹¹⁵ *Id.*

¹¹⁶ *Id.* at 1366.

¹¹⁷ *Id.*

¹¹⁸ *Id.*; see also *Comm. for Nuclear Responsibility v. Seaborg*, 463 F.2d 796, 798 (D.C. Cir. 1971).

¹¹⁹ *NRDC*, 647 F.2d at 1366.

¹²⁰ 748 F. Supp. 749 (D. Haw. 1990).

¹²¹ *Id.* at 752.

Executive Order 12,114, the Army also prepared a Global Commons Environmental Assessment (GCEA). The GCEA addressed issues relevant to the shipment of the chemical munitions from West Germany to the territorial waters that extended twelve nautical miles from Johnston Atoll.¹²²

Despite all of the Army's efforts, Greenpeace and several other environmental groups sought a preliminary injunction to stop the shipment of the munitions. The basis of Greenpeace's argument was that the Army had failed to comply with NEPA by not preparing a comprehensive EIS before allowing the transport of the munitions.¹²³ The court noted that in order to decide whether Congress intended NEPA to be applied extraterritorially, it had to consider how applying the statute inside the borders of another country would impact presidential decisions made on a "purely foreign policy matter."¹²⁴

The *Greenpeace* court held that NEPA did not apply to the movement of the munitions through and within West Germany, reasoning that applying NEPA to actions on foreign soil would cause "grave foreign policy implications."¹²⁵ The court was also concerned that an extraterritorial application of NEPA would interfere with a decision made jointly by the President of the United States and the head of a foreign sovereign, concluding that Congress would not have intended or anticipated that NEPA would be applied in such a manner.¹²⁶

The court in *Greenpeace* limited its decision to the particular and unique facts of the case before it, leaving open the possibility that NEPA might be applied outside of the United States,¹²⁷ because Congress probably wanted federal agencies to consider the global impact of domestic actions¹²⁸ and "may have intended under certain circumstances for NEPA to apply extraterritorially."¹²⁹ Further, the court opined that NEPA might apply where the foreign activities of a federal agency had domestic environmental impacts or where neither the agency nor the foreign country involved had conducted any type of environmental assessment.¹³⁰ By the time the case was appealed to the Ninth Circuit, the transport had taken place and the issue was moot.¹³¹

Finally, in *NEPA Coalition of Japan v. Aspin*,¹³² the court held that

¹²² *Id.* at 753.

¹²³ *Id.* at 757-58.

¹²⁴ *Id.* at 759.

¹²⁵ *Id.* at 761.

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ *Id.* at 759.

¹³⁰ *Id.* at 761.

¹³¹ *Greenpeace U.S.A. v. Stone*, 924 F.2d 175 (9th Cir. 1991).

¹³² 837 F. Supp. 466.

the presumption against extraterritoriality applied to prevent the application of NEPA to a situation in which there were foreign policy considerations.¹³³ NEPA Coalition sued the Secretary of Defense claiming that the Department of Defense (DOD) had violated the mandates of NEPA by failing to prepare EISs for United States military bases in Japan.¹³⁴ Several of the bases were used by both the United States military and the Japanese Self-Defense Forces,¹³⁵ and were operated pursuant to the Treaty of Mutual Cooperation and Security of 1960 and the Status of Forces Agreement.¹³⁶

The *Aspin* court held that it was not appropriate to apply NEPA to the situation,¹³⁷ because Japanese use of the military bases raised foreign relations concerns.¹³⁸ In order to prepare the EISs, DOD would have to collect data within and around the installations, raising a possibility that the Japanese might be forced to reveal confidential information.¹³⁹ The court was hesitant to risk interfering with long standing treaty relationships,¹⁴⁰ because, in its opinion, Congress did not intend for NEPA to apply to situations where there is a strong probability that treaty relations will be affected.¹⁴¹ In dictum, the court stated that, even if NEPA applied to the situation, DOD would not have to prepare EISs because foreign policy considerations outweighed the benefits to be gained from the preparation of the EISs.¹⁴²

As this section indicates, the legislative, executive and judicial branches have been reluctant to apply NEPA extraterritorially. However, the ambiguous manner in which the branches have treated the issue has left open the possibility that extraterritorial application may yet be the policy of the future.

¹³³ *NEPA Coalition*, 837 F. Supp. at 468.

¹³⁴ *Id.* at 467.

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ *Id.* at 467.

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ *Id.* at 467.

¹⁴² *Id.* at 468.

III. THE FUTURE OF NEPA'S EXTRATERRITORIAL APPLICATION

Since neither the legislative, executive, nor judicial branches have reached a definitive conclusion regarding the extraterritorial application of NEPA, it is difficult to predict whether these entities will decide that NEPA should be applied extraterritorially in the future. The only thing certain is that the question of the extraterritoriality of NEPA remains open and will continue to be the subject of litigation. Nonetheless, a review of the various interpretations of the statute does provide some guidance on the subject.

A. *Possible Congressional Action*

The extraterritorial application of NEPA was not debated in the 107th Congress. However, that Congress considered several bills that attempted to limit the scope of NEPA.¹⁴³ For example, the Healthy Forests Reform Act (HFRA),¹⁴⁴ which would have exempted fire policy decisions from NEPA's requirements, was introduced by Congressmen Scott McInnis (R-CO)¹⁴⁵ and George Walden (R-OR). As initially proposed, the HFRA would have eliminated the requirement to consider alternatives to a proposed agency action,¹⁴⁶ but was eventually amended to take out the language dealing with NEPA.¹⁴⁷ Nevertheless, the attempt by members of the 107th Congress to pass this bill and other similar legislation indicates that the current Congress is not inclined to expand the application of NEPA. Given this pattern of behavior, it is unlikely that in the near future Congress will decide to amend NEPA to apply extraterritorially.

B. *Possible Executive Action*

There is no evidence that the State Department has changed its stance against the extraterritorial application of NEPA. The Department's current regulations indicate that the agency's position is that the mandates of Executive Order 12,114 are sufficient to deal with actions that adversely impact environments outside of the United

¹⁴³ See *Defending NEPA from Assault*, NRDC BACKGROUNDER, October 3, 2002, at 1, at www.nrdc.org (last visited April 29, 2003).

¹⁴⁴ H.R. 5319, 107th Cong. (2002).

¹⁴⁵ McInnis was the chair of the Forest and Forest Health Subcommittee.

¹⁴⁶ ALYSSON DRA CAMPAIGNE ET AL., *HOLDING THE LINE: THE ENVIRONMENTAL RECORD OF THE 107TH CONGRESS*, 12-13 (NRDC Dec. 2002).

¹⁴⁷ *Id.*

States.¹⁴⁸ Given its concerns with national security and the threat of terrorism, it is doubtful that the State Department will change its position.¹⁴⁹

From its initial creation, CEQ has pushed for NEPA's extraterritorial application, but has been forced, on numerous occasions, to retreat from its position. In recent years, CEQ has been too busy fighting for its continued existence to deal with the extraterritoriality issue. During the Reagan administration, the agency's resources were drastically reduced, and have never been restored to pre-Reagan era levels.¹⁵⁰

Further, in February of 1993, President William Clinton stated his intention to ask Congress to abolish CEQ and replace it with a non-statutory Office on Environmental Policy within the White House. After the plan met with resistance from Congress, the President relented, and the former White House staff office was merged into CEQ.¹⁵¹ Unfortunately, CEQ is still under-staffed and lacks the necessary resources to do the job it was created to do.¹⁵² Thus, it is doubtful that any future action by CEQ will increase the likelihood of NEPA being applied extraterritorially.

During the Clinton Administration, the executive branch considered modifying Executive Order 12,114 to apply NEPA-like environmental impact analysis requirements to major federal actions by United States agencies overseas.¹⁵³ However, attempts to make the mandates of the Order as expansive as the dictates of NEPA were unsuccessful because of strong opposition from politically powerful multinational corporations and federal agencies such as DOD.¹⁵⁴

¹⁴⁸ See 22 C.F.R. § 161.3 (stating "[t]he Department is establishing separate environmental review procedures under Executive Order 12,114 (January 4, 1979) for actions having the potential effects on the environment of global commons or areas outside the jurisdiction of any nation, or on the environment of foreign nations."); see also 32 C.F.R. § 187.4; 40 C.F.R. § 6.1001.

¹⁴⁹ The State Department has created a Terrorism Threat Integration Center and issues an annual report that tracks terrorist activity. See Mary Curtius, *State Department Issues Revised Terrorism Report; Powell Cites Errors by the New Terrorism Threat Integration Center and Denies that the Inaccuracies were Politically Motivated*, L.A. TIMES, Jun. 23, 2004, at A15.

¹⁵⁰ See NPR: *All Things Considered, Analysis: Environmental Policy under President Ronald Reagan* (NPR Radio Broadcast, June 10, 2004), available at 2004 WL 57378344 (stating that one of Reagan's first acts was to reduce the staff of CEQ from 50 to 8); see also 40 C.F.R. § 1515.3 (detailing the way the agency is organized).

¹⁵¹ Victoria Verbyla Sutton, *Have We Sold the Environment Down the River?*, 8 S.C. ENVTL. L.J. 39, 39 (1999).

¹⁵² See 40 C.F.R. § 1515.2 (listing the primary responsibilities of CEQ); see also 40 C.F.R. § 1515.3 (enumerating the manner in which CEQ is organized). The agency consists of three members appointed by the President and subject to approval by the Senate. *Id.*

¹⁵³ Commander Margaret M. Carls, *Environmental Diplomacy: Analyzing Why the U.S. Navy Still Falls Short Overseas*, 47 NAVAL L. REV. 62, 88-89 (2000).

¹⁵⁴ See George H. Brauchler, Jr., *United States Environmental Policy and the United States Army in Western Europe*, 5 COLO. J. INT'L ENVTL. L. & POL'Y, 479, 479-81 (1994) (criticizing

President Clinton did not issue an executive order that directly called for the extraterritorial application of NEPA, but did issue executive orders directing that the North American Agreement on Environmental Cooperation¹⁵⁵ and the agreement between the United States and the United Mexican States concerning the establishment of a Border Environment Cooperative Commission¹⁵⁶ be implemented in a manner consistent with United States environmental policy. That action indicated that, while Clinton was president, the executive branch was concerned about the global environment.

The Bush administration has not yet directly addressed the issue of the extraterritorial application of NEPA, but has indicated that it would like to limit, not expand, the application of NEPA. For example, in August 2002, the Bush Administration considered a Navy proposal that NEPA no longer be applied to any activity or program in waters beyond three nautical miles from the United States coastline. Under the proposal, NEPA's EIS requirement would no longer apply to activities within the exclusive economic zone of the United States or on the high seas.¹⁵⁷

There is other evidence that the Bush Administration would like to limit, not expand, the scope of NEPA. In response to a lawsuit filed by the Natural Resources Defense Council (NRDC), the Justice Department, with the support of the White House, argued that its program for testing and developing sonar in the ocean was not subject to environmental scrutiny under NEPA.¹⁵⁸ NRDC countered by arguing that NEPA applied to protect the ocean from environmental hazards.¹⁵⁹ The District Court agreed with NRDC and ordered the parties to meet to stipulate to the terms of a preliminary injunction while the Navy conducted its environmental reviews.¹⁶⁰ The parties met and the stipulation was filed with the court on August 7, 2002.¹⁶¹

Based upon its actions up to the time of the writing of this article, it was unlikely that the Bush administration would take any steps to expand NEPA's scope to allow the statute to be applied to projects in other countries. Thus, the issue will probably continue to be the subject of future litigation.

the PRD 23 by stating that it would "work disastrous results on the U.S. military's ability to accomplish its mission abroad").

¹⁵⁵ Exec. Order No. 12,915, 59 Fed. Reg. 25,775 (May 13, 1994).

¹⁵⁶ Exec. Order No. 12,916, 59 Fed. Reg. 25,779 (May 13, 1994).

¹⁵⁷ At the time of the completion of this Article, the Bush Administration had not yet publicly announced its decision with regards to this proposal.

¹⁵⁸ John McQuaid, *Oceans Ruling a Loss for Bush: Environmental Act Applicable*, *Judge Says*, TIMES-PICAYUNE, Sept. 20, 2002, at 5.

¹⁵⁹ N.R.D.C. v. Evans, 232 F. Supp. 2d 1003, 1038-39 (N.D. Cal. 2002).

¹⁶⁰ *Id.* at 1055.

¹⁶¹ N.R.D.C. v. Evans, 2002 WL 31553527 (N.D. Cal. Nov. 15, 2002).

C. Possible Judicial Action

Because it does not appear that the text of NEPA will be changed, it is necessary to look to the judiciary to determine whether NEPA will be applied extraterritorially in the future. In order to forecast how future NEPA extraterritoriality cases coming before the courts will be decided, it is necessary to review the principles established by the key cases that have addressed the issue.

If both a project and its effects occur exclusively within the United States, NEPA and its EIS requirement will apply if an agency has undertaken a "major federal action."¹⁶² In addition, NEPA probably applies to situations where agency actions occurring outside the United States have effects that might be felt within the United States, as in *Sierra Club* and *NORML*.¹⁶³ Under the effects doctrine, an argument can always be made for the extraterritorial application of NEPA, because pollution in other parts of the world always has the potential to impact citizens inside the United States.¹⁶⁴ Thus, the judiciary could eventually establish a rule that NEPA applies extraterritorially unless there is a compelling reason to limit the scope of the statute.

A broad reading of *Massey* supports the argument that NEPA applies to a situation where domestic conduct has foreign effects. The *Massey* court focused on the location of the regulated conduct—the decision-making—not the location of the project that caused the adverse effects. As a consequence, the court decided not to apply the presumption against extraterritoriality to prevent the application of NEPA,¹⁶⁵ reasoning that because the federal decision-making process, the regulated conduct which resulted in the challenged activity, occurred in the United States, it was appropriate to apply NEPA.¹⁶⁶

It is difficult to predict how courts will decide the extraterritorial issue when agency actions and effects both occur outside the United States. The outcome of such a case will depend upon how courts choose to interpret *Massey*. A broad reading of *Massey* supports the argument that NEPA applies to "major federal actions" that occur outside the United States because the focus should be on the conduct regulated by the statute and not on the location of the actions. In NEPA

¹⁶² See *Cold Mountain v. Garber* 375 F.3d 884, 892 (9th Cir. 2004).

¹⁶³ *Sierra Club*, 578 F.2d at 392 n.14; *NORML*, 452 F. Supp. at 1233.

¹⁶⁴ See Jeffrey L. Roelofs, *United States-Canada Air Quality Agreement: A Framework For Addressing Transboundary Air Pollution Problems*, 26 CORNELL INT'L L.J. 421 (1993) (discussing the mobility of pollution).

¹⁶⁵ *Massey*, 986 F.2d at 533.

¹⁶⁶ *Id.*; see also Jeffrey E. Gonzalez-Perez & Douglas A. Klein, *The International Reach of the Environmental Impact Statement Requirement of The National Environmental Policy Act*, 62 GEO. WASH. L. REV. 757, 793-794 (1994).

cases, the conduct to be regulated is the decision to implement the federal project, which will typically occur within the United States.

Under a narrower reading of *Massey*, an argument can be made that courts should consider the location of the action that actually causes the negative effects in determining whether the presumption against extraterritoriality applies. Under that reading, if the action and effects occur in the global commons (i.e., Antarctica, the high seas, outer space, etc.), then an EIS is required. However, courts will be reluctant to allow NEPA to be applied to situations where the territory involved has a sovereign government, due to considerations of international comity.¹⁶⁷ The reasoning of the *Massey* court supports such a narrow reading of the case, though the court emphasized that its holding should be limited to its facts because it concerned Antarctica, a continent without a sovereign.¹⁶⁸

It is unclear how the legislative, executive and judicial branches will deal with the issue of NEPA's extraterritoriality in the future. Nevertheless, as the next section illustrates, there are strong reasons for NEPA to be applied to federal projects outside of the United States.

IV. REASONS NEPA SHOULD APPLY EXTRATERRITORIALLY

Courts have recognized Congress' authority to enact laws that regulate conduct that occurs outside American territory,¹⁶⁹ relying on a two-part test to determine whether a statute should be applied extraterritorially. The first component of that test is a determination of whether or not Congress intended that the statute be applied outside the United States. The second component is an evaluation of whether extraterritorial application would violate the principles of international law.¹⁷⁰

A. *Congressional Intent*

In the absence of explicit language to the contrary, Congressional statutes are construed to apply only within the territorial jurisdiction of the United States,¹⁷¹ but this presumption may be overcome with

¹⁶⁷ See, e.g., *Natural Res. Def. Council v. Nuclear Regulatory Comm'n*, 647 F.2d 1345 (D.C. Cir. 1981).

¹⁶⁸ *Massey*, 986 F.2d at 534.

¹⁶⁹ See *EEOC v. Arabian Am. Oil (Aramco)*, 499 U.S. 244, 248 (1991) (stating that "[b]oth parties concede, as they must, that Congress has the authority to enforce its laws beyond the territorial boundaries of the United States").

¹⁷⁰ *U.S. v. Neil*, 312 F.3d 419, 421 (9th Cir. 2002).

¹⁷¹ See Sandra W. Magliozzi, *Criminal Law—International Jurisdiction—Federal Child*

evidence of congressional intent to apply the statute beyond United States borders.¹⁷² Whether the presumption against extraterritoriality applies is thus a matter of statutory construction and is determined on a case-by-case basis.¹⁷³

Courts have not held that a statute applies extraterritorially only when the statute expressly so provides, but rather, they consider statutory language, structure, and legislative history to determine Congressional intent.¹⁷⁴ Thus, even if a statute does not specifically state that it applies outside United States borders, extraterritorial application may be inferred by evaluating congressional intent.¹⁷⁵

It is well settled that the courts are the final authorities on statutory construction.¹⁷⁶ Nonetheless, when interpreting a federal statute, a court must attempt to determine and give effect to Congress' intent,¹⁷⁷ beginning its analysis by applying the plain meaning rule.¹⁷⁸ If the application of that rule fails to clarify the issue, the court then examines the statute's legislative history.¹⁷⁹ After the court evaluates the statute with these interpretative tools, congressional intent may still be unclear, thus, the court may have to turn to other extrinsic aids for resolution.¹⁸⁰

1. Statutory Language

In order to determine the plain meaning of a statute, the court must review the language of the statute¹⁸¹ to determine whether the statutory language is clear and unambiguous.¹⁸² Once the court decides that the

Pornography Statute Applies to Extraterritorial Acts, United States v. Thomas, 893 F.2d 1066 (9th Cir. 1990), 14 SUFFOLK TRANSNAT'L L.J. 605, 608 (1991).

¹⁷² United States v. Ivanov, 175 F. Supp. 2d 367, 373 (D. Conn. 2001).

¹⁷³ *Aramco*, 499 U.S. at 248, cited in *Ivanov*, 175 F. Supp. 2d at 373.

¹⁷⁴ *Sale v. Haitian Ctrs. Council, Inc.*, 509 U.S. 155, 177 (1993).

¹⁷⁵ Jeffrey B. Groy & Gail L. Wurtzler, *International Implications of U.S. Environmental Laws*, 8-FALL NAT. RESOURCES & ENV'T 7, 7 (1993); see also *United States v. Baker*, 609 F.2d 134, 136 (5th Cir. 1980) (giving statute extraterritorial application if nature of law permits and intended by Congress).

¹⁷⁶ *Chevron U.S.A. v. Natural Res. Def. Council*, 467 U.S. 837, 843 n.9 (1984); see also *Appalachian Power Co. v. State Tax Dep't of West Virginia*, 466 S.E.2d 424, 440 n.19 (W. Va. 1995).

¹⁷⁷ *Federal Elec. Comm'n v. Democratic Senatorial Campaign Comm.*, 454 U.S. 27, 31-32 (1981).

¹⁷⁸ In defining the term the Court stated:

It is elementary that the meaning of a statute must, in the first instance, be sought in the language in which the act is framed, and if that is plain, and if the law is within the constitutional authority of the lawmaking body which passed it, the sole function of the courts is to enforce it according to its terms.

Caminetti v. United States, 242 U.S. 470, 485 (1917).

¹⁷⁹ *Catholic Social Servs., Inc. v. Meese*, 664 F. Supp. 1378, 1382 (E.D. Cal. 1987).

¹⁸⁰ *Id.*

¹⁸¹ *Heckler v. Turner*, 470 U.S. 184, 193 (1985).

¹⁸² *North Dakota v. United States*, 460 U.S. 300, 312 (1983).

statutory language is plain, it must stop the analysis, for then it is not necessary for the court to further interpret the meaning of the statute.¹⁸³ NEPA does not contain a provision expressly addressing its application outside United States borders, making it difficult to rely upon the statutory language to resolve the issue of the statute's extraterritorial reach.¹⁸⁴

In *People of Enewetak v. Laird*,¹⁸⁵ one of the first cases in which a court dealt with the issue of NEPA's extraterritorial application, the District Court for Hawaii recognized that the language of the statute was broad enough to support the conclusion that it was meant to be applied beyond United States borders.¹⁸⁶ In *Enewetak*, the leaders of Enewetak sought a preliminary injunction against the United States Secretary of Defense and others,¹⁸⁷ alleging that United States governmental agencies did not comply with NEPA's provisions when they authorized a nuclear testing project in Enewetak.¹⁸⁸ At that time, Enewetak was a Pacific Atoll administered by the United States under a Trust Agreement with the United Nations.¹⁸⁹

The *Enewetak* court concluded that it was Congress' intent to include trust territories within the coverage of NEPA,¹⁹⁰ reasoning that, by using the broader term "Nation" instead of the narrower term "United States," Congress intended for NEPA to apply to a broader geographic area than the fifty states.¹⁹¹ However, the court chose not to answer the question of whether NEPA applies to territory under the jurisdiction of a nation other than the United States.¹⁹²

A review of NEPA's language could arguably support arguments against extraterritorial application. The statute mentions a concern for "future generations of Americans" and "our national heritage,"¹⁹³ terminology that seems to imply that Congress meant for the statute to have strictly a domestic application. According to its preamble, the statute's key purpose is

[t]o declare a *national policy* which will encourage productive and enjoyable harmony between man and his environment; to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man; [and] to

¹⁸³ *Chevron, U.S.A. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842 (1984).

¹⁸⁴ Klick, *supra* note at 60, at 297.

¹⁸⁵ 353 F. Supp. 811 (D.C. Haw. 1973).

¹⁸⁶ *Id.* at 816.

¹⁸⁷ *Id.* at 812-13.

¹⁸⁸ *Id.*

¹⁸⁹ *Id.* at 813.

¹⁹⁰ *Id.* at 816.

¹⁹¹ *Id.*

¹⁹² *Id.* at 817.

¹⁹³ 42 U.S.C. §§ 4321, 4331; *see also* *N. Crawfish Frog (Rana Areolata Circulosa) v. Fed. Highway Admin.*, 858 F. Supp. 1503, 1505-06 (D. Kan. 1994).

enrich the understanding of the ecological systems and natural resources important to the *Nation*¹⁹⁴

Because NEPA's key purpose is to declare a national policy, opponents of extraterritorial application argue that its requirements should be enforced at the national, not the international, level. Further, the statute is concerned with the ecological systems and natural resources important to the "Nation," an indication of geographic limitation. Hence, by using such a restrictive term, Congress may have intended that NEPA apply only inside United States borders. Moreover, another part of the statute discusses the necessity for making sure that nature can "fulfill the social, economic, and other requirements of present and future generations of *Americans*."¹⁹⁵ The reference to such a distinct class of people like "Americans" may indicate that Congress was primarily concerned with protecting the geographic area inhabited by Americans. Arguably, in order to fulfill that goal, it is only necessary to apply NEPA to the domestic effects of federal projects.

In addition, the statute includes a congressional declaration that mandates use of all practicable means "consistent with other essential considerations of *national* policy" to "assure for all *Americans* safe . . . surroundings," and to "preserve important . . . aspects of our *national* heritage."¹⁹⁶ If the application of NEPA is expanded to situations outside the United States, the effectiveness of the statute may be diluted and American citizens may be unprotected. Federal agencies have a finite number of resources, and every EIS they have to prepare in a foreign country is one less EIS that can be prepared for a project in the United States. Thus, a consequence of extraterritorial application might be that Americans would not be adequately protected by the mandates of NEPA, an absurd result.

The preceding analysis notwithstanding, NEPA also contains language that indicates Congress intended for its application to be limited to federal actions in the United States, it also contains language that supports the contention that that Congress anticipated and supported the statute's extraterritorial application.¹⁹⁷ The language of NEPA was broad enough to convince the *Greenpeace* court that Congress meant to encourage federal agencies to consider the global impact of their actions and that Congress may have intended that NEPA be applied extraterritorially in certain situations.¹⁹⁸

The conclusions of the *Greenpeace* court are supported by the

¹⁹⁴ *St. Joseph Historical Soc. v. Land Redevelopment Auth. of St. Joseph, Mo.*, 366 F. Supp. 605, 609 (W.D. Mo. 1973) (quoting 42 U.S.C. § 4321) (emphasis added); see also Lee, *supra* note 41, at 538.

¹⁹⁵ 42 U.S.C. § 4331 (a) (emphasis added).

¹⁹⁶ 42 U.S.C. § 4331 (b) (emphasis added).

¹⁹⁷ See Gonzalez-Perez & Klein, *supra* note 166, at 777-80.

¹⁹⁸ *Greenpeace*, 748 F. Supp. at 759.

statute's universal tone. By enacting the statute, Congress hoped to "encourage productive and enjoyable harmony between man and his environment" and to "stimulate the health and welfare of man."¹⁹⁹ Congress was also concerned with the "impact of man's activity on . . . the natural environment," and "restoring and maintaining environmental quality to the overall welfare and development of man."²⁰⁰ If Congress intended to limit NEPA's mandate to activities in the United States, instead of using broad terms such as "man" and "environment," it could have referred to "Americans" and "United States environment."

Further, in Section 102(2)(C), Congress required "all agencies of the Federal Government" to prepare an EIS for "major federal actions significantly affecting the quality of the human environment."²⁰¹ Several federal agencies, such as the State Department and DOD, engage in activities that are largely or exclusively international. Those agencies arguably must follow the mandates of NEPA because no language in the statute provides that the EIS requirement does not apply to international activities. If Congress intended NEPA to apply only to activities within the United States, it could have exempted agencies responsible for activities outside of the United States.

Finally, Section 102 of the statute uses language that indicates Congress' concern for the global environment. For example, Section 102(2)(F) requires all federal agencies to "recognize the *worldwide* and long-range character of environmental problems and, where consistent with the foreign policy of the United States, lend appropriate support to initiatives, resolutions, and programs designed to maximize international cooperation in anticipating and preventing a decline in the quality of *mankind's* world environment."²⁰² Given this qualification, Congress might have intended for NEPA to be applied extraterritorially as long as such application raises no foreign policy concerns.

As the foregoing discussion indicates, the statutory language does not definitively answer the question whether Congress intended NEPA to be applied extraterritorially. Consequently, in order to ascertain congressional intent, it is necessary to look at the statute's legislative history.

¹⁹⁹ 42 U.S.C. at § 4321 (emphasis added).

²⁰⁰ *Id.* at § 4331(a) (emphasis added).

²⁰¹ 42 U.S.C. at § 4332(2)(C); see also *Citizens Alert Regarding The Env't v. EPA*, 259 F. Supp.2d 9, 15 (D.D.C. 2003).

²⁰² 42 U.S.C. § 4332(2)(F) (emphasis added), cited in *Natural Res. Def. Council v. Nuclear Regulatory Comm'n*, 647 F.2d 1345, 1366 (D.C. Cir. 1981).

2. Legislative History

The plain meaning rule does not prevent a court from looking at the legislative history of a statute.²⁰³ A court may review a statute's legislative history²⁰⁴ to determine whether it indicates that Congress intended something different than was implied by the plain language of the statute.²⁰⁵ Unfortunately, because it is difficult to determine from the legislative history how broadly Congress intended NEPA to be applied, courts have determined that NEPA's legislative history illuminates nothing with regard to extraterritorial application.²⁰⁶ The lack of an adequate legislative history resulted from the manner in which NEPA became law.²⁰⁷

In the late 1960s, when Congress decided that it needed to address the environmental problems occurring in the country, it organized a Colloquium consisting of members of both the House of Representatives and the Senate.²⁰⁸ Members of the Colloquium held several meetings to listen to debates about the best way to address the environmental problems facing the country.²⁰⁹ The results of those debates were summarized in the Congressional White Paper on a National Policy for the Environment.²¹⁰

Relying on information contained in the White Paper, the House and Senate reported their own versions of the environmental statute. To reconcile the House and Senate bills, Congress appointed members from each House to participate in a conference whose members agreed upon a compromise bill that became the basis for NEPA. To understand NEPA's legislative history it is necessary to review the White Paper, section of which dealt with the environmental impacts of international projects.²¹¹ In addition, the White Paper contained information

²⁰³ *Heppner v. Alyeska Pipeline Service Co.*, 665 F.2d 868, 871 (9th Cir. 1981).

²⁰⁴ There has been strong criticism of the use of legislative history to ascertain the meaning of a statute. See Donna A. Adler, *A Conversational Approach To Statutory Analysis: Say What You Mean and Mean What You Say*, 66 MISS. L. J. 37, 59 (1996) (discussing Justice Scalia's rejection of legislative history).

²⁰⁵ *Heppner*, 665 F.2d at 871.

²⁰⁶ *NRDC*, 647 F.2d at 1367.

²⁰⁷ See Gonzalez-Perez & Klein, *supra* note 166, at 780-83.

²⁰⁸ *Joint House-Senate Colloquium to Discuss a National Policy for the Environment: Hearing, Before the Comm. on Interior and Insular Affairs*, U.S. Senate, and *Before the Committee on Science and Astronautics*, U.S. House of Representatives, 90th Cong. 87-127 (1968).

²⁰⁹ *Id.*

²¹⁰ 115 CONG. REC. 29,078 (1969).

²¹¹ The White Paper describes "[t]he urgent necessity of taking into account major environmental influences of foreign economic assistance and other international developments." *Id.* at 29,079.

recognizing that the environments of different nations are connected.²¹²

It was also noted in the White Paper that NEPA should be drafted in a flexible manner because members of Congress cannot predict future scientific discoveries or changes in societal values.²¹³ Despite the apparent recognition that Congress should be concerned about the global environment, the White Paper stopped short of stating that NEPA should be applied extraterritorially.²¹⁴ However, discussion of international law problems in the White Paper indicated that Congress considered the international implications of NEPA.

The fact that language addressing extraterritoriality did not make it into the final version of the statute may imply that members of Congress assumed that the extraterritorial mandate was implicit in the statute. Significantly, some of NEPA's legislative history seems to imply that Congress assumed the statute would be applied extraterritorially. For example, the House Report noted that implicit in the statute was a mandate to assess international environmental impacts of major federal actions.²¹⁵ Additionally, following the conference meetings, Senator Jackson stated his belief that the application of NEPA would not result in any ideology, security, or balance of power conflicts with foreign countries,²¹⁶ which implies that the senator expected the statute to be applied in international situations. However, the assumptions of a single senator are not sufficient legislative history to support a determination that NEPA was intended to apply to activities outside United States borders.

Because examination of Congressional documents such as committee reports does not reflect the reality of how laws are made in the United States, several commentators have recently criticized the use of legislative history in statutory interpretation.²¹⁷ There are many factors that influence the final version of an enacted statute. Some of those factors are internal and some external. Internal factors include partisan politics, the status of the person sponsoring the bill, and other competing bills that are on the legislative agenda. Among possible external factors impacting the legislative process are events happening

²¹² "Organic nature is such a complex, dynamic, and interacting, balanced and interrelated system that change in one component entails change in the rest of the system." *Id.*

²¹³ *Id.*

²¹⁴ *Id.*; see also Klick, *supra* note 60, at 298 (discussing components of the White Paper).

²¹⁵ H. R. 378, 91st Cong. (1969), reprinted in 1969 U.S.C.C.A.N. 2751, 2759.

²¹⁶ 115 Cong. Rec. S40, 417 (daily ed. Dec. 20, 1969) (statement of Sen. Jackson), quoted in *Enewetak v. Laird*, 353 F. Supp. 811, 818 (D. Haw. 1973).

²¹⁷ See Kenneth A. Shepsle, *Congress Is A "They" Not An "It": Legislative Intent as Oxymoron*, 12 INT'L REV. L. & ECON. 239, 254 (1992) (stating that "individuals have intentions and purposes and motives; collections of individuals do not."); see also Adler, *supra* note 204; Bernard W. Bell, *Legislative History Without Legislative Intent: The Public Justification Approach to Statutory Interpretation*, 60 OHIO ST. L.J. 1 (1999).

in the country, events happening in the world, and the media.²¹⁸

In determining legislative intent, a court should consider the difference between the climate that existed when a bill was passed and the climate that exists at the time the matter is before the court. This is especially pertinent when there is not a clear congressional consensus on an issue. Utilizing this approach, a case can be made for applying NEPA extraterritorially.

During the latter part of the 1960s when NEPA was enacted, Congress was primarily concerned with domestic issues such as environmental protection and civil rights.²¹⁹ Since September 11, Congress and the Bush Administration have focused upon taking actions to combat international terrorism. As a consequence, the congressional agenda has been dominated by issues that deal with activities happening outside the United States.²²⁰ For example, although the domestic economy is still troubling,²²¹ the key issue in the race for the White House in 2004 has focused on wars—conduct of candidates during the Vietnam War²²² and the current war in Iraq.²²³ Therefore, in this current world climate, it is unrealistic to believe that Congress' intent is to enact legislation that solely addresses domestic issues.

In light of the global perspective of the United States government, it stands to reason that either courts should interpret NEPA to apply extraterritorially or Congress should amend NEPA to apply extraterritorially. Neither action would be contrary to the plain meaning of the statute or to current congressional priorities. Not only was Congress silent regarding extraterritorial application when it enacted

²¹⁸ See Victoria F. Nourse & Jane S. Schacter, *The Politics of Legislative Drafting: A Congressional Case Study*, 77 N.Y.U. L. REV. 575 (2002).

²¹⁹ See Stanley Rothman, *Panel 1: Liberty, Property, and Environmental Ethics*, 21 ECOLOGY L.Q. 390, 390 (1994) ("The contemporary environmental movement began in the United States in the late 1960s and gained strength as the war in Vietnam wound down.").

²²⁰ See Jennifer C. Evans, *Hijacking Civil Liberties: the USA Patriot Act of 2001*, 33 LOY. U. CHI. L.J. 933 (2002) (discussing the steps Congress took after September 11th to strengthen the country against future terrorist attacks).

²²¹ Although 1.7 million jobs were created in the past year, there are still 900,000 fewer jobs available than when President Bush took office in January 2001. Nell Henderson and Amy Joyce, *Payrolls Resumed Growth in August, Gain Not Strong; Unemployment Drops to 5.4%*, WASH. POST, Sept. 4, 2004, at E01.

²²² A deal of media attention has focused upon John Kerry's participation in the Vietnam War. See Richard Morin and Christopher Muste, *Kerry Loses Edge on Issues of Security*, WASH. POST, Aug. 31, 2003, at A01.

²²³ See Jake Thompson, *Bush-Kerry Debate Boils Down to the Economy vs. Terrorism Observers Say the Candidates' Convention Themes Set the Stage for a Bruising Fall Campaign*, OMAHA WORLD-HERALD, Sept. 5, 2004, at 7A ("Although the economy usually drives American presidential elections, 9/11 and the war in Iraq have elevated national security as an issue this year."); see also Tyler Marshall, *The Race to the White House; Voters Worried about America's Global Image; Poll Shows Eroding Support for the War and Dissatisfaction with Bush's Foreign Policy*, L.A. TIMES, Aug. 19, 2004, at A12 ("For the first time since the height of the Vietnam War, America's relations with the world loom as the most important issue for voters in the run-up to the November presidential election, according to a poll released Wednesday.").

NEPA, but courts have assumed in several cases that Congress meant for NEPA to be applied extraterritorially. Even though several years have passed since those decisions, Congress has not taken any action to indicate that those decisions were inconsistent with its intent. Instead, Congress has attempted, albeit unsuccessfully, to amend NEPA in a manner that reflects the results of those cases.²²⁴

Another approach would be for a court considering the extraterritoriality issue to conduct a foreseeability analysis. Under that approach, if Congress could have foreseen that the statute might be applied extraterritorially, the court would conclude that there was sufficient intent that the statute be applied outside the United States. Extraterritorial application is foreseeable if the conduct the statute was meant to regulate could potentially occur outside of the United States. A foreseeability analysis would justify the extraterritorial application of NEPA. Congress enacted NEPA to regulate major federal actions by federal agencies that impact the quality of the environment. Because some federal agencies deal almost exclusively with international matters, it is clear that agency actions can occur inside or outside of the United States. Thus, Congress could have anticipated that NEPA could be applied to federal agency projects in other countries. Congress did not take any steps to limit the scope of NEPA's application to domestic projects. As a consequence, the courts should determine that Congress might have intended that the statute be applied extraterritorially.

3. Other Extrinsic Evidence

If there is a conflict between the legislative history and the plain meaning of a statute, a court will consider the statute to be ambiguous. As a result, the court will look to other sources to determine the true meaning of the statute.²²⁵ If courts find such ambiguity, they typically

²²⁴ See, e.g., Report on the Activities of the Committee on Merchant Marine and Fisheries During the 101st Congress, H.R. Rep. No. 1018, 101st Cong. (Jan. 3, 1991), available at 1991 WL 47274 (Mr. Studds, Mr. Davis, Mr. Young of Alaska, and Mr. Weldon introduced H.R. 1113 on February 23, 1989). One purpose of H.R. 1113 was to insure that federal agencies consider the impact of major Federal actions on the global environment and to make amendments to NEPA. *Id.* By introducing the bill, the authors meant to:

(1) clarify procedures for achieving the objectives of NEPA; (2) amend NEPA to make explicit the applicability of that law to extraterritorial Federal actions; (3) provide for the systematic monitoring and appraisal of the EIS process; and (4) authorize \$1 million annually for the operation of the Office of Environmental Quality

Id.; see also Final Report On The Activities Of The Committee On Merchant Marine And Fisheries During The 103rd Congress, H.R. Rep. No. 887, 103rd Cong. (Jan. 2, 1995), available at 1995 WL 14810 (H.R. 3219 introduced to amend NEPA in order to clarify the application of the statute to the extraterritorial actions of the United States government.).

²²⁵ *Catholic Social Servs., Inc. v. Meese*, 664 F. Supp. 1378, 1382-83 (E.D. Cal. 1987).

consider the position of the agency responsible for enforcing the statute.²²⁶ If the court determines that Congress has not specifically answered the question at issue, the court will give deference to the agency's interpretation.²²⁷

As indicated above, CEQ, the agency responsible for enforcing NEPA, has consistently stated that the statute was meant to apply extraterritorially. Given the inconclusiveness of the statute's language and legislative history on the issue, courts should give deference to CEQ's position and rule that NEPA applies to "major federal actions" outside the United States.

B. *International Law Principles*

CEQ's pro-extraterritoriality position is supported by the fact that NEPA's extraterritorial application would not conflict with the principles of international law. In fact, under all of those principles, an argument can be made for the extraterritorial application of NEPA. In deciding whether or not a statute should be applied extraterritorially, courts begin with the assumption that, when enacting legislation, Congress does not intend to violate the principles of international law.²²⁸ Consequently, unless Congress explicitly dictates otherwise, courts will not interpret statutes to apply extraterritorially, if that interpretation will result in a violation of the principles of international law.²²⁹

International law permits a country to exercise extraterritorial jurisdiction under the following principles: geographic, territorial, national, protective, passive personality and universality.²³⁰ These principles, cabined by a reasonableness limitation, are set forth in the Restatement (Third) of Foreign Relations.²³¹

According to the Restatement, a country may exercise its jurisdiction without violating the principles of international law if its

²²⁶ *White v. Shalala*, 7 F.3d 296, 300-03 (2d Cir. 1993).

²²⁷ *Perry v. Dowling*, 95 F.3d 231, 236 (2d Cir. 1996); see *Gonzalez-Perez & Klein, supra* note 166, at 783 (summarizing *Andrus v. Sierra Club*, 442 U.S. 347, 358-361 (1979) for the proposition that "the Supreme Court has held that the interpretation of the Council on Environmental Quality (CEQ) is entitled to 'substantial deference' in interpreting NEPA.").

²²⁸ *U.S. v. Vasquez-Velasco*, 15 F.3d 833, 839 (9th Cir. 1994).

²²⁹ *McCulloch v. Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10, 21-22 (1963) (quoting *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64 (1804)).

²³⁰ *United States v. Hill*, 279 F.3d 731, 739, n.28 (9th Cir. 2002) (citing *Vasquez-Velasco*, 15 F.3d at 840 & n. 5).

²³¹ See RESTATEMENT (THIRD) OF FOREIGN RELATIONS § 402 (1987); see also Wade Estey, *The Five Bases of Extraterritorial Jurisdiction And The Failure Of The Presumption Against Extraterritoriality*, 21 HASTINGS INT'L & COMP. L. REV. 177 (1997) (examining principles of extraterritorial jurisdiction).

conduct: (1) takes place, wholly or in substantial part, within the country's borders (*geographic principle*);²³² (2) impacts the status of persons or things in the country (*territorial principle*);²³³ (3) takes place outside the country's borders but produces detrimental effects within the country (*objective territorial principle*);²³⁴ (4) involves the country's nationals (*nationality principle*);²³⁵ and (5) affects the country's national security (*protective principle*).²³⁶ The *passive personality principle*, an offshoot of the *protective principle*, bases jurisdiction on the victim's nationality and allows a country to assert jurisdiction over extraterritorial acts that harm citizens of that country wherever they are located.²³⁷

Absent any of the aforementioned circumstances, a country may rely on the universality principle to regulate and punish offenses that cause widespread concern.²³⁸ The universality principle, applicable to such offenses as piracy, terrorism, slavery, and war crimes,²³⁹ is based upon the belief that some activities are so reprehensible that they should be condemned and suppressed wherever they occur. In these types of situations, a type of universal jurisdiction exists, allowing a country, within reason, to apply its laws extraterritorially to prevent the unwanted conduct.²⁴⁰

1. Geographic And Territorial Principles

Under the geographic and territorial principles, it is clear that NEPA applies to a major federal action in the United States. Thus, the United States can apply its laws to regulate a project within its boundaries that has the potential to pollute the environment. The territorial principle is one of the most common sources upon which a country may rely to exercise its jurisdiction to prevent certain conduct.²⁴¹ In reliance on the territorial principle, a country may also apply its laws to regulate conduct outside of its borders.²⁴² For example, courts have held that the United States may exercise its jurisdiction to regulate activities performed outside its borders that

²³² RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 402 (1)(a) (1987).

²³³ *Id.* at § 402 (1)(b).

²³⁴ *Id.* at § 402 (1)(c).

²³⁵ *Id.* at § 402 (2).

²³⁶ *Id.* at § 402 (3).

²³⁷ *Id.* at § 402 cmt. g.

²³⁸ *Id.* at § 404.

²³⁹ *Id.*

²⁴⁰ *Id.* at § 404, cmt. a. The universality doctrine was historically developed to deal with piracy that interfered with international trade on the high seas. *Id.*

²⁴¹ *Id.* at § 402 cmt. c.

²⁴² *U.S. v. Neil*, 312 F.3d 419, 422 (9th Cir. 2002).

produce harmful effects within the United States.²⁴³ Because environmental pollution is mobile, there is always the possibility that a project in a foreign country can have adverse effects on the environment of the United States. As a consequence, an American governmental agency should not be allowed to sponsor a project in a foreign country without doing any type of environmental analysis. The territorial principle thus supports the application of United States laws, including NEPA, to prevent environmental pollution from negatively impacting the territory of the United States.

2. Objective Territorial Principle

Based upon the objective territorial principle, in some cases, NEPA should be applied extraterritorially. In *Strassheim v. Daily*, Justice Holmes referred to the objective territorial principle as a way to allow a country to expand its power to control activities that are detrimental to it.²⁴⁴ According to Justice Holmes, under this principle, a country may punish acts occurring outside its jurisdiction if the actors intended to produce and did produce detrimental effects within the country.²⁴⁵ Applying the objective territorial principle, courts have recognized that the United States has jurisdiction over acts that take effect within its borders, regardless of the location of the actor.²⁴⁶ In light of this precedent, the *objective territorial principle* may be used to support the application of NEPA in cases in which actions by federal agencies in foreign countries may cause harmful consequences within the United States. For example, American citizens may consume contaminated fruits and vegetables that are imported into the United States or American citizens on the borders of Texas or Michigan may breathe contaminated air from projects located in Mexico or Canada.²⁴⁷ When evaluating whether the agencies intended for the projects to cause negative impacts in the United States, courts should apply the broad definition of intent employed in tort law. In tort law there is a presumption that a person intends the natural and probable

²⁴³ *Unites States v. Peterson*, 812 F.2d 486, 493 (9th Cir. 1987), *cited in* *United States v. Hill*, 279 F.3d 731, 739-740 & n. 29 (9th Cir. 2002).

²⁴⁴ 221 U.S. 280, 285 (1911), *cited in* *United States v. Pizzarusso*, 388 F.2d 8, 10 (2nd Cir. 1968).

²⁴⁵ *Stassheim*, 221 U.S. at 285.

²⁴⁶ *See Rivard v. United States*, 375 F.2d 882, 885 (5th Cir. 1967), *cert. denied*, 389 U.S. 884 (1967).

²⁴⁷ *See* Robert L. McGeorge, *The Pollution Haven Problem In International Law: Can the International Community Harmonize Liberal Trade, Environmental and Economic Development Policies?*, 12 WIS. INT'L L.J. 277 (1994) (describing how easy it is for Americans to be adversely affected by environmental pollution that takes place in Mexico.).

consequences of his action.²⁴⁸ In tort, intent is attributed to a person if the actor acted with purpose or design or with substantial certainty that the result would occur.²⁴⁹

Under the tort law definition of intent, the fact that an agency intended to implement a project without doing an environmental analysis is sufficient to indicate that the agency intended the adverse environmental consequences of the project, if negative environmental impacts were foreseeable. Hence, the United States should be allowed to apply its laws to ensure that those consequences do not produce harmful effects within the United States.

3. Nationality Principle

Courts have determined that extraterritorial jurisdiction is appropriate under the *nationality principle*, which permits a country to apply its statutes to the extraterritorial acts of its nationals.²⁵⁰ In applying this principle, a court would treat a federal agency as a United States citizen, exercising jurisdiction over the actions of that agency wherever they occur. As a result, any time a federal agency implemented a project it would be subject to the requirements of NEPA regardless of whether the project was located within the United States or abroad. An argument may be made that agencies are public entities and should not be treated in the same manner as individual American citizens. Nonetheless, because traditionally, corporations have been considered to be citizens,²⁵¹ it would not be unreasonable for agencies to be treated as citizens.

4. Protective Principle

The protective principle, which states that a country may exercise

²⁴⁸ Cheek v. Hamlin, 277 N.E.2d 620, 702 (Ind. App. 1972).

²⁴⁹ Substantial certainty has been described as more than "mere knowledge and appreciation of a risk." Pariseau v. Wedge Prod., Inc., 522 N.E.2d 511, 514 (1988) (quoting PROSSER & KEETON, THE LAW OF TORTS 36 (5th ed. 1984); Richard R. Orsinger, *Asserting Claims for Intentionally Recklessly Causing Severe Emotional Distress in Connection with Divorce*, 25 ST. MARY'S L.J. 1253, 1259-60 (1994).

²⁵⁰ United States v. Thomas, 893 F.2d 1066, 1069 (9th Cir. 1990), cited in United States v. Hill, 279 F.3d 731, 740 n.30 (9th Cir. 2002).

²⁵¹ See 43 U.S.C. § 177 (stating that the definition of citizen under the statute includes "a corporation organized under the laws of the United States or any State or Territory thereof"); see also Louisville, C. & CR Co. v. Letson, 43 U.S. 497, 558 (1844) (holding that "a corporation is 'capable of being treated as a citizen of the [state which created it], as much as a natural person'"), cited in Sonoma Fall Developers, LLC v. Nevada Gold & Casinos, Inc., 272 F. Supp. 2d 919, 922 (N.D. Cal. 2003).

jurisdiction when its national interest has been injured,²⁵² also supports the extraterritorial application of NEPA. The United States should be allowed to exercise jurisdiction to protect its relationship with other countries and to protect its environment, because it is in the United States' national interest to maintain a good relationship with other countries. That relationship may be threatened if a United States agency sponsors a project that pollutes the environment of another country. In some instances, polluting the environment of another country may be perceived as being tantamount to a criminal act. In addition, if pollution from an American project injures citizens of another country, the United States may open itself up to litigation.²⁵³ As noted above, the United States also has an interest in protecting the quality of its environment from pollution that originates in foreign countries. Thus, NEPA should be applied to insure that, when federal agencies implement projects in foreign countries, they act in an environmentally responsible manner.

5. Passive Personality Principle

Extraterritorial jurisdiction of NEPA is also appropriate under the passive personality principle, which holds that a country may apply its laws to an act committed outside its territory by a foreign citizen if the act harmed one of its citizens.²⁵⁴ Under this principle, the country's jurisdiction is dependent upon the nationality of the victim.²⁵⁵ In other words, the United States can enforce its laws in situations where it is necessary to protect its citizens or nationals from the actions of persons in a foreign country. Given the transboundary nature of pollution,²⁵⁶ United States citizens are always potential victims of environmental hazards that occur in foreign countries.²⁵⁷ Hence, it would not violate

²⁵² *United States v. Benitez*, 741 F.2d 1312, 1316 (11th Cir. 1984); see also *United States v. Layton*, 509 F. Supp. 212 (N.D. Cal. 1981).

²⁵³ As a part of the war on drugs, the United State government contracted DynCorp to spray herbicides on coco plants in Colombia. A group of Ecuadorian farmers filed a class-action lawsuit claiming that the spraying destroyed their health, crops and land, and killed four young children. See *Ecuador: Quichua Indians File U.S. Lawsuit Against DynCorp*, at <http://www.colombiasolidarity.org.uk/Solidarity%203/quichualawsuit.html> (last visited Mar. 2, 2004).

²⁵⁴ RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 402 cmt. g (1987); see also *U.S. v. Neil*, 312 F.3d 419, 422 (9th Cir. 2002).

²⁵⁵ *Benitez*, 741 F.2d at 1316.

²⁵⁶ Transboundary pollution refers to polluted air and water, or any other contaminated waste, that is generated in one country and transmitted to others. Since this type of pollution has no regard for national boundaries, its environmental impacts are felt in areas far removed from the original source. THOMAS J. SCHOENBAUM & RONALD H. ROSENBERG, ENVIRONMENTAL POLICY LAW 1073, 1076 (1991).

²⁵⁷ See McGeorge, *supra* note 239, at 286 ("Pollutants and toxic materials that originate in Mexican maquiladora plants migrate to U.S. border states through surface waterways,

the passive personality principle to apply NEPA extraterritorially to protect United States citizens from the possible consequences of a United States-sponsored project, if the project were conducted by foreign nationals.

6. Universality Principle

Under the universality principle, a country may enforce its laws to prevent certain actions recognized by the international community as undesirable.²⁵⁸ Because there is an international consensus that certain kinds of conduct should be regulated, the focus is upon the nature of the conduct and not the location.²⁵⁹ In recent years, the international community has recognized the importance of protecting the environment,²⁶⁰ thus it is doubtful that any country would object to a procedural statute that seeks to prevent environmental degradation. Because environmental pollution is a serious and universally condemned activity, no conflict is likely to be created by the extraterritorial application of NEPA.

7. The Reasonableness Limitation

A key principle of international law is that a country cannot rely on one of the Restatement principles to regulate conduct if the exercise of that jurisdiction would be unreasonable.²⁶¹ As a consequence, if the exercise of United States jurisdiction would be unreasonable under the circumstances, courts will conclude that international comity dictates that the United States statute not be applied extraterritorially.²⁶² The Restatement sets out a non-exclusive list of factors that courts should consider in deciding whether or not it would be unreasonable for a statute to apply extraterritorially. The weight given to each factor depends on the particular circumstances of the case.²⁶³

One reasonableness factor is the link of the regulated conduct to

underground water tables and the atmosphere, where they endanger the health of U.S. citizens and damage the economy.”).

²⁵⁸ *United States v. Bin Laden*, 92 F. Supp. 2d 189, 196 (S.D.N.Y. 2000).

²⁵⁹ *Id.*

²⁶⁰ That concern was evident by the high attendance at meetings like the Rio Conference on Environment and Development in 1992. *United Nations Conference On Environment and Development: Rio Declaration on Environment and Development (UNCED)*, at 874, U.N. Doc. A/CONF.151/5 Rev. 1 (1992), reprinted in 31 I.L.M. 874 (1992).

²⁶¹ *United States v. Vasquez-Velasco*, 15 F.3d 833, 840 (9th Cir. 1994); see also RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 403 (1) (1987).

²⁶² See *Sarei v. Rio Tinto PLC*, 221 F. Supp. 2d 1116, 1199, 1201 (2002).

²⁶³ RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 403 cmt. b (1987).

the country attempting to apply its law. For example, if the conduct takes place within the country or has a substantial, direct and foreseeable effect upon or within the country, it is not unreasonable for that country's laws to be applied to regulate the conduct.²⁶⁴ Another factor is the connection between the country attempting to apply its law and the person principally responsible for the conduct, or the connection between that country and the persons the law is enacted to protect.²⁶⁵ If a strong connection exists, it is not unreasonable for the country's laws to regulate the conduct.²⁶⁶

Courts may also consider the character of the conduct to be regulated, the importance of regulation to the regulating country, the extent to which other countries regulate such activities, and the degree to which it is generally accepted that the conduct should be regulated.²⁶⁷ Other factors are the existence of expectations that might be protected or hurt by the regulation,²⁶⁸ the importance of the regulation to the international political, legal or economic system,²⁶⁹ the extent to which the regulation is consistent with the traditions of the international system,²⁷⁰ the extent to which another country may have an interest in regulating the conduct,²⁷¹ and the likelihood of conflict with the laws of another country.²⁷²

None of these factors would make extraterritorial application of NEPA unreasonable. We live in a global society and environmental pollution does not acknowledge geographic borders. Therefore, when United States agencies implement projects in foreign countries, those projects always have the potential to have an impact within the United States. Consequently, it is not unreasonable to apply NEPA to those situations.

By enacting NEPA and similar laws, the United States has indicated the importance it places on environmental protection, a concern shared by members of the international community.²⁷³ Thus, it is generally accepted that conduct that has the potential to damage the environment should be regulated. Unfortunately, many of the less

²⁶⁴ *Id.* at § 403 (2) (a).

²⁶⁵ *Id.* at § 403 (2) (b).

²⁶⁶ *Id.*

²⁶⁷ *Id.* at § 403 (2)(c).

²⁶⁸ *Id.* at § 403 (2)(d).

²⁶⁹ *Id.* at § 403 (2)(e).

²⁷⁰ *Id.* at § 403 (2)(f).

²⁷¹ *Id.* at § 403 (2)(g).

²⁷² *Id.* at § 403 (2)(h).

²⁷³ See Alfred C. Aman, Jr., *The Next Generation*, 3 IND. J. GLOBAL LEGAL STUD. 1, 1 (1995) ("Numerous international environmental treaties have been written that address a variety of global problems, including ozone depletion, climate change, hazardous waste, endangered species, and ocean pollution."); see also Andronio O. Adele, *The Treaty System from Stockholm (1972) to Rio De Janeiro (1992)*, 13 PACE ENVTL. L. REV. 33, 33 (1995) (discussing the international community's attempt to address environmental problems).

developed countries do not have effective environmental statutes in place.²⁷⁴ Consequently, it is important that federal agencies perform environmental assessments as dictated by NEPA before sponsoring projects in those areas. Because NEPA is strictly procedural and imposes no substantive legal requirements, its application is unlikely to conflict with the laws of another country. In order to fully make the case for the extraterritorial application of NEPA, it is necessary to address the presumption against extraterritoriality.

V. NEPA AND THE PRESUMPTION AGAINST EXTRATERRITORIALITY

The presumption against extraterritoriality should not be applied to prevent NEPA from being applied to actions taking place outside of the United States. For years, the courts relied upon a strict application of the presumption against extraterritoriality to prevent attempts to have United States laws reach conduct outside its borders. Nonetheless, the courts consistently reiterated that Congress has the authority to extend United States laws beyond its borders to regulate the actions of its citizens,²⁷⁵ with the limitation that in order to exercise that power Congress' intent to do so must be explicitly demonstrated in the statute.²⁷⁶ One of the first Supreme Court cases to apply the extraterritoriality presumption was *American Banana Co. v United Fruit Co.*²⁷⁷ In that case, American Banana, an Alabama company doing business in Costa Rica, filed suit alleging that United Fruit Company, a New Jersey corporation, tried to monopolize the banana trade in Costa Rica²⁷⁸ in violation of the Sherman Anti-trust Act.²⁷⁹ At the time of the trial, the Costa Rican government, at the insistence of United Fruit, had authorized its soldiers to seize the banana plantations owned by American Banana.²⁸⁰

The Court held that defendants' acts were beyond the reach of the Sherman Act because it applied only to those subject to United States

²⁷⁴ See Joseph G. Block and Andrew R. Herrup, *The Environmental Aspects of NAFTA and their Relevance to Possible Free Trade Agreements between the United States and Caribbean Nations*, 14 VA. ENVTL. L.J. 1, 10-15 (1994) (discussing the lack of comprehensive environmental protection legislation in the Caribbean nations).

²⁷⁵ See Gabriel Burghel, *The Extraterritorial Application Of Antitrust Law and the National Environmental Policy Act: A Comparative Study*, 8 GEO. INT'L ENVTL. L. REV. 351 (1996).

²⁷⁶ *United States v. Mitchell*, 553 F.2d 996, 1001-02 (5th Cir. 1977); see also Gonzalez-Perez & Klein, *supra* note 166, at 774-777.

²⁷⁷ 213 U.S. 347 (1909); see also James E. Ward, "Is That Your Final Answer?" *The Patchwork Jurisprudence Surrounding the Presumption against Extraterritoriality*, 70 U. CIN. L. REV. 715, 718-19 (2002).

²⁷⁸ *American Banana*, 213 U.S. at 354.

²⁷⁹ *Id.* at 354-55.

²⁸⁰ *Id.* at 355.

legislation,²⁸¹ asserting that the "universal rule is that the character of an act as lawful or unlawful must be determined wholly by the law of the country where the act is done."²⁸² Relying on that rule, the court concluded that if it were to deem the actions of the Costa Rican government as unlawful under United States antitrust laws, an American court would be interfering with the national sovereignty of Costa Rica.²⁸³ The Supreme Court has long since moved away from its position in *American Banana*, indicating that the presumption against extraterritoriality is not a strict bar to the extraterritorial application of American law.²⁸⁴

In a more recent case, *EEOC v. Arabian American Oil Co. [Aramco]*,²⁸⁵ the Supreme Court again discussed the presumption against extraterritoriality. In *Aramco*, Boureslan, a naturalized United States citizen, was employed by Arabian American Oil Company, a Delaware corporation doing business in Saudi Arabia.²⁸⁶ After he was discharged, Boureslan filed discrimination claims with the Equal Employment Opportunity Commission (EEOC) and the District Court.²⁸⁷ Boureslan alleged that Aramco had violated Title VII of the Civil Rights Act of 1964 (Title VII) by discharging him because of his race, religion and national origin.²⁸⁸ Title VII prohibits discrimination in employment on the basis of race, color, religion, sex, or national origin.²⁸⁹

The source of Boureslan's discrimination complaint was conduct that Arabian American Oil allegedly committed while he was its employee in Saudi Arabia.²⁹⁰ Nonetheless, Boureslan and EEOC argued that the language of Title VII was broad enough to indicate that Congress intended it to be applied extraterritorially.²⁹¹ The *Aramco* Court held that Title VII did not apply to the employment practices of an American company conducting business outside of the United States,²⁹² reasoning that there was not enough evidence that Congress intended to impose American employment discrimination laws upon

²⁸¹ *Id.* at 356.

²⁸² *Id.*

²⁸³ *Id.* at 358.

²⁸⁴ See *Zenith Radio Corp. v. Matsushita Elec. Indus. Co., Ltd.*, 494 F. Supp. 1161, 1181 (1980) (stating "[A]merican Banana has never been explicitly overruled. However, its authority has been so eroded by subsequent case law as to have been effectively limited to its specific factual pattern").

²⁸⁵ 499 U.S. 244 (1991).

²⁸⁶ *Id.* at 247.

²⁸⁷ *Id.*

²⁸⁸ *Id.*

²⁸⁹ 42 U.S.C. § 2000e-2(c), cited in *Aramco*, 499 U.S. at 249.

²⁹⁰ *Aramco*, 499 U.S. at 247.

²⁹¹ *Id.* at 249-50.

²⁹² *Id.* at 255.

foreign corporations when it enacted Title VII.²⁹³ Thus, the presumption against extraterritoriality precluded the application of Title VII to the situation.²⁹⁴

The *Aramco* Court was also concerned that, if it applied Title VII extraterritorially, there might be a conflict with foreign laws.²⁹⁵ The Court adhered to a strict application of the presumption against extraterritoriality even though the statute contained broad language indicating that it covered the actions of all employers engaged in an "industry affecting commerce."²⁹⁶ The Court was not persuaded by the broad statutory definition of the term commerce as "between a State and any place outside thereof,"²⁹⁷ nor by EEOC's position that Title VII should be applied extraterritorially.²⁹⁸

The presumption against extraterritorial application of federal statutes is based upon several important policies.²⁹⁹ Courts cite two main policy justifications for the adoption of the presumption against extraterritoriality.³⁰⁰ First, applying the presumption guards against unintentional conflicts between United States statutes and the laws of foreign countries,³⁰¹ preventing international discord.³⁰² Moreover, courts adopted the presumption in reliance upon the following closely related canon of construction that Congress' intent is to legislate in a manner that complies with international law. Chief Justice John Marshall first invoked that canon in the *Charming Betsy*, stating that "an act of Congress ought never to be construed to violate the law of

²⁹³ *Id.* at 255-56.

²⁹⁴ *Id.*

²⁹⁵ *Id.*

²⁹⁶ *Id.* at 248-56; *see also* 42 U.S.C. at § 2000e(g).

²⁹⁷ *EEOC v. Arabian American Oil Co.*, 499 U.S. 24, 248-56 (1991).

²⁹⁸ *Id.* at 255.

²⁹⁹ *See* William S. Dodge, *Understanding The Presumption Against Extraterritoriality*, 16 BERKELEY J. INT'L. L. 85, 112-13 (1998). According to Professor Dodge, there are six potential justifications for the presumption against extraterritoriality. Those justifications are the following:

(1) international law limitations on extraterritoriality, which Congress should be assumed to have observed; (2) consistency with domestic conflict-of-laws rules; (3) the need "to protect against unintended clashes between our laws and those of other nations which could result in international discord;" (4) "the commonsense notion that Congress generally legislates with domestic concerns in mind;" (5) separation-of-powers concerns-i.e. "that the determination of whether or how to apply federal legislation to conduct abroad raises difficult and sensitive policy questions that tend to fall outside both the institutional competence and constitutional prerogatives of the judiciary;" and (6) that having some background rule about when statutes apply extraterritorially helps Congress predict the application of its law and that the presumption against extraterritoriality is as good a rule as any.

Id.

³⁰⁰ *Kollias v. D & G Marine Maintenance*, 29 F.3d 67, 70 (2d Cir. 1994).

³⁰¹ *Aramco*, 499 U.S. at 248; *see Ward, supra* note 277, at 739.

³⁰² *Id.*

nations if any other possible construction remains.”³⁰³ Nonetheless, the Court has noted that “the presumption has a foundation broader than the desire to avoid conflict with the laws of other nations.”³⁰⁴

The second primary justification for the presumption against extraterritoriality is that Congress “is primarily concerned with domestic conditions.”³⁰⁵ In light of that premise, courts usually interpret congressional silence as an indication that the legislative intent was only to regulate activities within the United States.³⁰⁶ Nonetheless, courts have concluded that the presumption does not apply even when the legislation involves concerns that are not inherently domestic.³⁰⁷ Courts have followed this rule in criminal cases and it is equally applicable in the context of NEPA.³⁰⁸ As Professor Dodge noted, the phrase “Congress is ‘primarily concerned with domestic conditions’” should be interpreted to mean that “Congress is primarily concerned with conduct that causes effects in the United States.”³⁰⁹

Neither of the two main reasons underlying application of the presumption should prevent NEPA from being applied extraterritorially. Because NEPA is a procedural statute, it is unlikely to conflict with the laws of a foreign country. Procedural statutes like NEPA seldom clash with the laws of a foreign country. NEPA’s application is limited to major federal actions, thus, it would not directly interfere with projects that private companies implement in foreign countries. As such, there would be no *Aramco*-type problem with NEPA’s extraterritorial application. Further, NEPA does not stop potential projects but rather ensures that federal agencies consider the environmental consequences of proposed projects. The main function of NEPA is to allow the parties involved in a project to make an informed decision about whether to allow the project to go forth, which is especially helpful in projects situated in foreign countries where the government does not have the resources to do its own analysis of the environmental consequences of a proposed activity.

The presumption against extraterritoriality is partially based on the assumption that Congress primarily legislates on domestic matters.³¹⁰ Since September 11, 2001, Congress has been preoccupied with global issues like terrorism.³¹¹ Because times have changed, it may be time to

³⁰³ *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804).

³⁰⁴ *Sale v. Haitian Ctrs. Council, Inc.*, 509 U.S. 155, 174 (1993) (citing *Smith v. United States*, 507 U.S. 197, 206-07 & n.5 (1993)).

³⁰⁵ *Foley Bros. v. Filardo*, 336 U.S. 281, 285 (1949).

³⁰⁶ *United States v. Corey*, 232 F.3d 1166, 1170 (9th Cir. 2000).

³⁰⁷ *United States v. Bowman*, 260 U.S. 94, 98 (1922), cited in *Corey*, 232 F.3d at 1170.

³⁰⁸ See *United States v. MacAllister*, 160 F.3d 1304 (11th Cir. 1998).

³⁰⁹ Dodge, *supra* note 299, at 119.

³¹⁰ Suzanne Harrison, *The Extraterritoriality Of The Bankruptcy Code: Will the Borders Contain the Code?* 12 BANKR. DEV. J. 809, 815 (1996).

³¹¹ See Harold Hongju Koh, *Focus: September 11, 2001—Legal Response to Terror the Spirit*

relax the application of the presumption, especially with respect to statutes that have the potential to impact situations that occur outside the United States.

Several commentators have attacked the continuing validity of the presumption against extraterritoriality. For example, Professor Turley opined that it would make sense for the court to start with a presumption that Congress intends statutes to apply extraterritorially, which could be rebutted by a showing that Congress expressly limited the scope of the statute.³¹²

Federal agencies are more frequently implementing projects in foreign countries. Therefore, before these agencies make decisions that have the potential to damage the environment of the United States or the environment of a foreign country, they should be required to take the hard look that is mandated by NEPA.³¹³ When the extraterritorial application of United States criminal laws are involved, courts have been reluctant to invoke the presumption against extraterritoriality.³¹⁴ Given the transboundary nature of environmental pollution and the growing number of global environmental problems,³¹⁵ courts should exercise that same restraint when addressing the extraterritorial application of NEPA.

CONCLUSION

Environmental pollution in all forms is a part of our daily lives. The international community has recognized that, because it is a small world, all ecosystems are connected and environmental problems are transboundary. That recognition has caused countries to work together to organize meetings such as the Rio Convention to find solutions to global environmental problems. Several countries have followed the United States' lead and implemented statutes similar to NEPA,³¹⁶ which

of the Laws, 43 HARV. INT'L L.J. 23 (2002).

³¹² Turley, *supra* note 70, at 659-60.

³¹³ *Hughes River Watershed Conservancy v. Johnson*, 165 F.3d 283, 288 (4th Cir. 1999) (*Hughes River II*).

³¹⁴ See *U.S. v. Delgado-Garcia*, 374 F.3d 1337, 1344-47 (D.C. Cir. 2004); see also Mark Gibney & R. David Emerick, *The Extraterritorial Application of United States Laws and the Protection of Human Rights: Holding Multinational Corporations to Domestic and International Standards*, 10 TEMP. INT'L & COMP. L.J. 123, 128-29 (1996) (discussing the ease of overcoming the presumption when American criminal statutes are involved).

³¹⁵ Global environmental problems are those which cause damage and adverse impacts on a global scale. Schoenbaum & Rosenberg, *supra* note 256, at 1076.

³¹⁶ These nations should be distinguished from nations with limited statutory regimes. See David M. Driesen, *The Congressional Role in International Environmental Law and its Implications For Statutory Interpretation*, 19 B.C. ENVTL. AFF. L. REV. 287, 299 (1991) (stating that, at the time of the drafting of the article, over 30 countries had passed legislation resembling NEPA).

was passed to announce the national environmental policy of the United States. Thus, the statute's focus should be upon the actions of United States agencies wherever those actions occur if they have the potential to impact the environment.

It has not been conclusively decided whether NEPA was meant to be applied extraterritorially. On the one hand, the language of the statute and some of the legislative history implies that Congress was concerned with the planet and not just the nation. Soon after the enactment of the statute, CEQ was the only division of the executive branch to make a clear declaration on the issue, but has been forced to retreat from its position that NEPA should be applied extraterritorially. Executive Order 12,114, which is still in effect, required agencies to consider the environmental consequences of their international actions. In an attempt to clarify the issue, Congress has tried unsuccessfully to amend NEPA to make it apply to actions outside of the United States. The courts have weighed in on the issue, but have left open the question of whether it is appropriate to apply NEPA to activities in a foreign land that is not considered to be a global commons.³¹⁷

On balance, the reasons to apply NEPA extraterritorially outweigh the reasons not to apply it. Because environmental pollution is rarely contained in a geographic area, activities that affect the environment in a foreign country will affect the United States environment and its citizens. Thus, it makes sense to apply the requirements of NEPA to those activities, especially because federal agencies are key participants in them. The primary argument against applying NEPA extraterritorially, that the United States should not impose its environmental laws on other countries, is weakened by the fact that NEPA gives agencies the discretion to exempt a particular project for foreign policy reasons. Further, NEPA is only procedural and does not mandate the application of other United States laws.

Since the September 11th tragedy, there has been an increased recognition by the United States and the international community that we live in a global society. Global problems such as terrorism require global solutions. The United States and the international community also realize that, because all ecosystems are connected, cooperation between nations is needed to work to protect the environment. In light of this realization, NEPA should be amended to apply extraterritorially. Short of such legislative action, courts should rely upon the principles established in antitrust and securities cases to establish a rule that it is

³¹⁷ See *Mayaguezanos Por La Salud Y El Ambiente v. United States*, 198 F.3d 291 (1st Cir. 1999) (concluding that since the plaintiffs' claims did not pass the "major federal action" tests, it did not have to reach the issue of whether or not NEPA should be applied extraterritorially. However, in dictum, the Court stated that it was skeptical that NEPA's "major federal action" requirement would work in the same fashion in the domestic and the international contexts).

reasonable to apply NEPA extraterritorially. After all, when it comes to pollution, it's a small world.



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