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To Apply or Not to Apply: Extraterritorial Application of Federal RICO Laws

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TO APPLY OR NOT TO APPLY: EXTRATERRITORIAL APPLICATION OF FEDERAL RICO LAWS

I. STATEMENT OF THE CASE AND FACTS

Plaintiffs, foreign seamen who worked aboard the ship M/V Fir Grove, filed federal RICO[1] claims against the defendant, a group of foreign ship owners.[2] Plaintiffs alleged that the defendants purposefully misrepresented employment wages to the plaintiffs and to the International Transport Workers Federation[3] by engaging in a continuous "pattern of racketeering."[4] Plaintiffs asserted that United States RICO laws should govern because the ship travelled between Japan and the United States, and the alleged practices therefore had an adverse impact upon U.S. commerce.[5] Defendants moved to dismiss the RICO claims by alleging that there were not sufficient contacts with the United States to invoke the application of

1. RICO is an acronym for Racketeer Influenced and Corrupt Organization. 18 U.S.C. §§ 1961-1965 (1988).

2. Jose v. M/V Fir Grove, 801 F. Supp. 349 (D. Or. 1991). Plaintiffs are 14 Filipino nationals. Defendants, a group of Japanese investors acting through various corporations, are owners and operators of the M/V Fir Grove.

3. *Id.* at 353. International Transport Workers Federation is an organization that monitors and attempts to equalize shipping costs, wages and working conditions through its development of a worldwide wage scale. *See generally* HERBERT NORTHRUP, THE INTERNATIONAL TRANSPORT WORKERS' FEDERATION AND FLAG OF CONVENIENCE SHIPPING (1983).

4. *Jose*, 801 F. Supp. at 353.

5. *Id.* at 353-54. Section 1962(a) of RICO states: "It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity . . . to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce." *Id.*

the federal RICO statute.[6] The district court found that the wage misrepresentations that might support federal RICO claims occurred outside the U.S. territory, and the foreign plaintiffs' claims depended upon whether RICO could be applied extraterritorially.[7] The District Court of Oregon found that there was a lack of clear congressional intent for the statute to apply abroad, and HELD, the federal RICO statutes did not apply extraterritorially.[8]

II. HISTORY

Extraterritorial application of federal law is a highly contested issue that appears throughout U.S. judicial history.[9] Concerned with the international ramifications of applying U.S. law abroad,[10] courts continually analyzed on a case-by-case basis whether Congress intended for each federal act to apply extraterritorially.[11] Since most statutes were silent as to their extraterritorial application, courts sought guidance from both legislative history and general policy rationales.[12] As a result, federal courts created various balancing tests that incorporated both history and policy factors in order to compare U.S. interests with the sovereign rights of foreign nations.[13]

The Ninth District Court of Appeals developed an elaborate set of guidelines in order to determine the extraterritorial scope of U.S. antitrust

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6. *Jose*, 801 F. Supp. at 354.

7. *Id.*

8. *Id.* at 357.

9. *See generally* Brilmayer, *The Extraterritorial Application of American Law: A Methodological and Constitutional Appraisal*, 50 LAW & CONTEMP. PROBS. 11, 11 (1987) (discussing the controversy of applying American law to international situations).

10. *See, e.g.*, McCulloch v. Sociedad Nacional de Marineros de Honduras, 372 U.S. 10, 20-22 (1963) (discussing the "delicate field of international relations" and the reluctance of the United States to invite retaliatory action if American laws are applied extraterritorially); Baker v. Carr, 369 U.S. 186, 211-13 (1962) (warning courts not to intervene excessively in the area of foreign policy).

11. *See* Foley Bros., Inc. v. Filardo, 336 U.S. 281, 285 (1949) ("[L]egislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States." (quoting Blackmer v. United States, 284 U.S. 421, 437 (1932))).

12. *See Foley Bros.*, 336 U.S. at 286-88 (discussing legislative history and policy concerns to show that Congress intended the eight-hour law to apply to domestic labor conditions only).

13. *See* Phillip Trimble, *A Revisionist View of Customary International Law*, 33 UCLA L. REV. 665, 697 (1986):

> [The test for the extraterritorial validity of statutes] is applied by balancing a number of factors to determine whether the United States interest is sufficiently high, as compared with the foreign interest, to justify application of United States law. The factors range from the vague and imponderable — like the importance of the regulation in question to the international, political, legal or economic systems and whether it is "consistent with the traditions of the international system" — to more concrete factors like the nationality of the parties and location of the conduct.

Id. at 697.

laws in *Timberlane Labor Co. v. Bank of America.*[14] The plaintiffs contended that the foreign defendants maintained a monopoly on the lumber export business in Honduras, which directly harmed U.S. commerce.[15] The plaintiffs claimed that this effect on U.S. commerce invoked federal antitrust laws, even though the statute was silent as to its extraterritorial application.[16] In determining whether to apply federal antitrust laws extraterritorially, the *Timberlane* court discussed the inadequacy of the traditional "direct and substantial effects" test[17] due to its narrow scope.[18] The *Timberlane* court stated that this traditional effects test often resulted in excessive intrusion on the sovereign rights of foreign countries.[19]

In response, the *Timberlane* court developed a broader tripartite analysis that incorporated and expanded upon the previous test.[20] First, the defendant's actions must intend to or actually effect U.S. commerce;[21] second, the plaintiff must show a substantial burden;[22] and finally, the United States must display an interest that is stronger than that of the foreign country.[23] The *Timberlane* court further explained the newly articulated third prong of the tripartite analysis by listing several factors that were relevant constituent parts of it.[24] These elements included: (1) the degree of conflict with foreign law or policy, (2) the nationality or allegiance of the parties and the locations or principal places of business, (3) the extent to which enforcement by either state can be expected to achieve compliance, (4) the relative significance of effects on the United States as compared with those elsewhere, (5) the degree to which there is a purpose to harm or affect U.S. commerce, (6) the foreseeability of such effect, and (7) the relative impor-

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14. 549 F.2d 597 (9th Cir. 1976).

15. *Id.* at 601.

16. *Id.* at 601, 610. The Sherman Antitrust Act, 15 U.S.C. §§ 1-2 reaches "[every] contact . . . in restraint of . . . and [every] person who shall monopolize, or attempt to monopolize . . . any part of the trade or commerce among the several States, or with foreign nations." Plaintiffs relied upon this section to allege that the statute was intended by Congress to apply extraterritorially. *Id.*

17. *Id.* at 611-12. "The effects test by itself is incomplete because it fails to consider the other nation's interests. Nor does it expressly take into account the full nature of the relationship between the actors and [the United States]." *Id.*

18. *Id.*

19. *Id.*

20. *Id.* at 613.

21. *Id.* This element is necessary so that federal courts have proper subject matter jurisdiction. *Id.*

22. *Id.*; *see also* Occidental Petroleum Corp. v. Buttes Gas & Oil Co., 331 F. Supp. 92, 103 n.15 (C.D. Cal. 1971), *aff'd*, 461 F.2d 1261 (9th Cir. 1972) (stating that plaintiffs were substantially affected "when control of an item in commerce is wrested from one competitor by another"). The court then defined a substantial burden as that which is not "insubstantial and indirect." *Id.*

23. *Timberlane*, 549 F.2d at 613; *see also* RESTATEMENT OF FOREIGN RELATIONS LAW § 40: "Where two states have jurisdiction to prescribe and enforce rules of law and the rules they may prescribe require inconsistent conduct upon the part of a person, each state is required by international law to consider, in good faith, moderating the exercise of its enforcement jurisdiction." *Id.*

24. *Timberlane*, 549 F.2d at 597.

tance to the violations charged of conduct within the United States as compared with conduct abroad.[25] Based upon incorporation of the third prong, the presumption against extraterritorial application of federal statutes could be overcome only if U.S. interests were strong enough to warrant it.[26] From this extensive analysis that looked to legislative history and policy considerations, the *Timberlane* court held that federal antitrust law was intended by Congress to apply extraterritorially.[27]

While not directly utilizing the *Timberlane* test, the U.S. District Court for the Southern District of Florida looked beyond the silent federal RICO statute and determined that it applied extraterritorially in *United States v. Noriega*.[28] Defendant was charged with participating in a "pattern of racketeering,"[29] in violation of RICO statutes, for involvement in a drug cartel.[30] Defendant moved to dismiss by arguing that U.S. laws should not apply to a foreign leader for alleged illegal acts that took place outside of the United States.[31] In analyzing the extraterritorial applicability of RICO, the court discussed the traditional effects test by analyzing statutory and legislative history.[32]

Like the *Timberlane* court, the *Noriega* court further defined the traditional effects test by noting that a mere intent to produce effects in the United States is sufficient, regardless of actual effects produced.[33] Also, the *Noriega* court noted the need to consider foreign effects by invoking a reasonableness test that considers three factors: the character of the activity regulated, the importance of regulation to the regulating state, and the degree to which the regulation is accepted.[34] The *Noriega* court also employed a modified version of the traditional effects test similar to that employed by the *Timberlane* court.[35] With this framework in place, the *Noriega* court found that federal RICO laws apply extraterritorially.[36] Even

25. *Id.*

26. *Id.* at 615 n.34. The court advises: "It is merely the relative involvement and concern of each state with the suit at hand that is to be evaluated in determining whether extraterritorial jurisdiction should be exercised by American courts as a matter of comity and fairness." *Id.*

27. *Id.* at 615.

28. 746 F. Supp. 1506 (S.D. Fla. 1990).

29. *Id.* at 1510. The government contended that this activity was a possible violation of 18 U.S.C. § 1962(c)-(d) specifically.

30. *Id.*

31. *Id.*

32. *Id.* at 1513; *see also* Strassheim v. Dailey, 221 U.S. 280, 285 (1911) ("Acts done outside a jurisdiction, but intended to produce and producing detrimental effects within it, justify a State in punishing the cause of the harm as if he had been present at the effect, if the State should succeed in getting him within its power.")

33. *Noriega*, 746 F. Supp. at 1513.

34. *Id.* at 1515.

35. *Id.* at 1516.

36. *Id.* at 1517.

though the statute is silent, the *Noriega* court noted that Congress intended for RICO to be widely interpreted.[37] By analyzing both policy and legislative history, the *Noriega* court reached the same result as the *Timberlane* court, concluding that the federal law in question applied extraterritorially.

Departing from precedent, the Supreme Court of the United States took a narrow approach to the interpretation of the extraterritorial application of federal statutes in *Equal Employment Opportunity (EEOC) v. Arabian American Oil Co.*[38] Petitioner, a U.S. citizen working abroad for a U.S. subsidiary, brought suit against his employer for employment discrimination under Title VII.[39] Petitioner argued that Title VII should apply extraterritorially because of its "broad jurisdictional language" regarding commerce and alien exemptions.[40] Respondents contended that the Court lacked subject matter jurisdiction because the general commerce language of Title VII was insufficient to invoke extraterritorial application.[41]

In denying extraterritorial application of Title VII, the Supreme Court stated that an act must clearly indicate the affirmative intent of Congress to apply it abroad.[42] The *Arabian* court characterized the act's reference to commerce and alien exemption clauses as mere boilerplate language which did not show clear congressional intent.[43] The *Arabian* court continued by noting that, read as a whole, the statute suggested a "purely domestic focus."[44] The *Arabian* court examined this plain meaning of the statute and held that Title VII did not apply extraterritorially.[45] In a vigorous dissent, three Justices noted that the majority's analysis parted from the traditional analysis of both legislative history and policy aspects.[46]

III. INSTANT CASE

In the instant case, the Federal District Court of Oregon rejected plaintiff's argument supporting the extraterritorial application of the RICO

37. *Id.* Congress specifically stated that "RICO [should be] liberally construed to effectuate its remedial purpose." Pub. L. No. 91-452, § 904(a), 84 Stat. 947 (1970).

38. 499 U.S. 244 (1991).

39. *Id.* at 247.

40. *Id.* at 248-49. An employer is subject to Title VII, 42 U.S.C. § 2000e-2, if it is "engaged in any industry affecting commerce." The petitioner also argues that the "alien exemption clause," 42 U.S.C. § 2000e-1, implied that Congress intended to protect American citizens employed abroad. *Id.*

41. *Id.* at 249. Respondents maintain that the statute's "commerce" language does not extend to regulation of conduct within a foreign country.

42. *Id.*

43. *Id.* at 250-51. The Court noted that numerous acts contain similar boilerplate language, none of which applies extraterritorially. *Id.*

44. *Id.* at 255. The Court noted that Title VII failed to mention foreign proceedings such as mechanisms for overseas enforcement or conflicts with foreign law. *Id.*

45. *Id.*

46. *Id.* at 260.

statute.[47] The instant court found that the general presumption against extraterritoriality could only be overcome by an explicit intent demonstrated by Congress within the statute itself.[48] The instant court then noted in the alternative that even if RICO was intended by Congress to apply extraterritorially, it did not apply in the instant case.[49] In originally finding that generally federal RICO was not intended by Congress to apply extraterritorially, the instant court relied on the reasoning of the Supreme Court in *Arabian*.[50] The plaintiffs argued that RICO should apply extraterritorially because of language in the statute that prohibits "racketeering" activities which "affect interstate or foreign commerce."[51] However, the instant court found that this language was too vague because it did not establish a clear congressional intent.[52]

The instant court then discussed *Noriega*, which found, contrary to the instant court, that RICO applied extraterritorially.[53] The instant court noted that the language of RICO is extensive and has been construed broadly by courts.[54] While this fact provided a basis for the *Noriega* court to apply RICO extraterritorially,[55] the instant court made a further distinction which limited RICO to apply only domestically.[56] The instant court reasoned that RICO's broad construction extends solely to conduct, and RICO is geographically limited to the territory of the United States by the procedural mechanisms provided in the act itself.[57] The instant court reasoned that since the act contained no procedures for foreign application, and the statute in general did not address extraterritorial application, then, according to *Arabian*, the act extends only to the territory of the United States.[58]

However, the instant court did not completely reject the traditional effects tests for determining extraterritoriality. The court stated that even if RICO did apply to foreign countries in general, under these specific facts it did not.[59] In reaching this holding, the instant court employed the tripartite analysis utilized in *Timberlane* to the facts before it.[60] First, the effect on U.S. commerce due to the plaintiffs receiving substandard wages from the

47. *Jose*, 801 F. Supp. at 357.
48. *Id.*
49. *Id.*
50. *Id.* at 357 n.12.
51. *See supra* note 4 and accompanying text.
52. *Jose*, 801 F. Supp. at 357.
53. *Id.* at 356.
54. *Id.*; *see* RICO STATEMENTS OF FINDING AND PURPOSE, H.R. REP. No. 452, 91st Cong., 2d Sess. 484 (1970), *reprinted in* 1970 U.S.C.C.A.N. 1073.
55. *Jose*, 801 F. Supp. at 356.
56. *Id.* at 357.
57. *Id.*
58. *Id.*
59. *Id.*
60. *Id.*

defendants was negligible.[61] Second, there was no evidence that the defendants intended to affect U.S. commerce.[62] Third, the interests of the United States were minor compared to those of the home country of the plaintiffs.[63] Therefore, based upon either the traditional effects test or *Arabian*'s new clear congressional intent standard, the instant court found that RICO did not apply extraterritorially under these specific facts.[64] Although it is well settled that statutory construction is determined solely by congressional intent,[65] the instant court narrowed the former analysis of congressional intent by looking solely to the statutory language.[66]

IV. ANALYSIS

Traditional common law statutory interpretation like that undertaken by the *Timberlane* court includes an examination of policy considerations and legislative history in addition to the plain meaning of the language in order to ascertain congressional intent.[67] The *Noriega* court adopted this broad form of analysis in determining the scope of the RICO statute and finding that it did apply extraterritorially.[68] In contrast, the instant court retreated both from the traditional effects test and from the holdings of the *Timberlane* and *Noriega* courts in finding that Congress did not intend for RICO to apply extraterritorially.[69]

The instant court justified this retreat from the traditional effects test by relying on the reasoning adopted by the Supreme Court in *Arabian*.[70] However, both the instant court and the *Arabian* court failed to fully articulate why *Arabian*'s intent standard, or as the dissent called it, the "clear statement rule,"[71] was the appropriate analysis to undertake. The dissent in

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61. *Id.*

62. *Id.*

63. *Id.* at 357-58. The instant court noted that this third factor was the most significant because of the effect of these wage misrepresentations in the Philippines. The defendant's actions, if proven, will have a great impact on employment and recruitment practice standards in the Philippines. *Id.*

64. *Id.* at 358.

65. *See, e.g.*, Benz v. Compania Naviera Hidalgo, 353 U.S. 138 (1957).

> For us to run interference in such a delicate field of international relations there must be present the affirmative intention of the Congress clearly expressed. It alone has the facilities necessary to make fairly such an important policy decision where the possibilities of international discord are so evident and retaliative action so certain.

Id. at 147.

66. *Jose*, 801 F. Supp. at 357.

67. *See supra* notes 19-24 and accompanying text.

68. *See supra* text accompanying notes 34-35.

69. *Jose*, 801 F. Supp. at 357.

70. *Id.* at 357 n.12.

71. *Arabian*, 499 U.S. at 261-78 (Marshall, J., dissenting). "Clear statement rule" was the term adopted by the dissent in referring to the analysis utilized by the majority. *Id.* at 261. The dissent also

Arabian suggested that the distinction between employing the clear statement rule or the traditional effects test depended upon whether the given statute invoked "international comity questions"[72] that challenged the law of the foreign country.[73] This reasoning by the dissent established a basis in order to determine which test to employ, and the instant court's analysis would appear more complete if it had included reasoning explaining why it invoked the clear statement rule instead of the traditional effects test.

By ignoring legislative history and policy considerations,[74] the instant court arguably frustrates the intent of Congress by holding that RICO cannot apply extraterritorially.[75] In discussing the breadth of RICO, the *Noriega* court noted that Congress insisted that RICO be broadly construed so that it could be an effective statute in eradicating harmful racketeering conduct.[76] In fact, the instant court acknowledges that RICO is extensive and continually applies to a broad range of activities.[77] The *Noriega* court, for example, after considering congressional history,[78] as well as the policy considerations of the eradication of crime,[79] reasoned that RICO should apply extraterritorially as long as there is an actual or intended effect on the United States.[80] The instant court dismisses this line of reasoning by main-

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noted that, "Clear statement rules operate less to reveal actual congressional intent than to shield important values from an insufficiently strong legislative intent to displace them." *Id.* at 262.

72. *Id.* at 265. International comity questions require consideration whenever a certain construction of an American statute would displace the domestic law of another nation. This is a difficult analysis that courts seek to avoid by shifting the burden to Congress to make an express assertion if they intend to displace the laws of a foreign nation. Courts shift this burden by requiring a clear statement of congressional intent within the plain meaning of the statute. *Id.*

73. *Id.*

74. *Jose*, 801 F. Supp. at 357. While the court states that it considers legislative history, it does so only through quoting *Noriega*. The court subsequently dismisses this history by looking back to the plain meaning of the statute and referring to its lack of extraterritorial procedures. *Id.*

75. *Id.*

76. *See supra* note 36 and accompanying text; *see also infra* note 78.

77. *Jose*, F. Supp. at 356-57.

78. *Noriega*, 746 F. Supp. at 1517; *see also* Haroco, Inc. v. American Nat'l Bank & Trust Co., 747 F.2d 384, 398 (7th Cir. 1984) ("Congress deliberately chose to employ broad terms which would defy judicial confinement . . . Congress chose to employ that extraordinarily broad language in order to achieve its desired goals.").

79. *Noriega*, 746 F. Supp. at 1516-17; *see* RICO STATEMENTS OF FINDING AND PURPOSE, H.R. Rep. No. 452, 91st Cong., 2d Sess. 484 (1970), *reprinted in* 1970 U.S.C C.A.N. 1073. Congress stated:

> (1) organized crime in the United States . . . annually drains billions of dollars from America's economy . . . (3) this money and power are increasingly used to infiltrate and corrupt legitimate business and labor unions and to subvert and corrupt our democratic processes; (4) organized crime activities in the United States weaken the stability of the Nation's economic system, . . . interfere with free competition, seriously burden interstate and foreign commerce, and undermine the general welfare of the Nation and its citizens.

Noriega, 746 F. Supp. at 1516.

80. *Noriega*, 746 F. Supp at 1517.

taining that RICO is intended to apply to a broad range of conduct, but not a broad geographic range due to its lack of procedural mechanisms.[81] Thus, the instant court ignored the strong history and policy arguments for extraterritorial application of RICO by focusing on the lack of specific procedural guidelines in determining that RICO does not apply extraterritorially.[82]

After holding that RICO cannot apply extraterritorially, the instant court analyzed, in the alternative, how the given set of facts specifically would not invoke RICO extraterritorially even if RICO did generally apply abroad.[83] This analysis weakens the main part of the instant court's reasoning by suggesting that the instant court believes it could be wrong in its denial of the general extraterritorial application of RICO. In this analysis, the instant court shifts back to utilizing the traditional effects test presented in *Timberlane*.[84] This reliance on the traditional effects test shows the instant court's general discomfort with its reliance on the clear statement rule, as articulated in *Arabian* and its progeny.

However, this traditional effects test strengthens the instant court's holding in denying the extraterritorial application of RICO to this specific set of facts. The court notes that the low wages paid to the foreign seamen were not intended by the defendants to effect U.S. commerce and, in fact, had virtually no effect on it.[85] Most importantly, the court notes that the foreign seamen's home country had a much stronger interest in this labor dispute than did the United States.[86] By applying the *Timberlane* test, the instant court presents a convincing and orderly analysis stating why the U.S. interests were too weak to justify extraterritorial application of federal RICO laws in this case.[87] Here, the instant court applies the law to the set of facts before it and creates a more complete analysis instead of just stating a rule of law with virtually no analysis as it did in the first part of the opinion in declining to apply RICO extraterritorially in general.

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81. *Jose*, 801 F. Supp. at 357.

82. *Id. But see* Brink's Mat Ltd. v. Diamond, 906 F.2d 1519 (11th Cir. 1990) (holding that plaintiff was not limited to domestic service of process by the RICO statute, but could use state procedure to reach foreign defendants abroad).

83. *Jose*, 801 F. Supp. at 357.

84. *Id.*

85. *Id.*

86. *Id.*; *see supra* note 62 and accompanying text.

87. *Noriega*, 801 F. Supp. at 357; *see supra* notes 59-63 and accompanying text.

V. CONCLUSION

As a result of the instant court's adoption of the clear statement rule as the sole prerequisite to give effect to congressional intent, the instant court imposes a large burden on Congress.[88] Absent clear provisions in the statute articulating its specific extraterritorial application, Congress can no longer rely on the judiciary to carry out its legislative intent.[89] Legislative history and policy concerns will become insignificant since the court will only look to the plain meaning of the statute in order to determine a statute's extraterritorial application. What previously was considered a mere rebuttable presumption against extraterritoriality[90] has been converted abruptly into a direct denial of extraterritoriality as a result of *Arabian*'s clear statement rule and the instant court's adoption of this standard.[91] The instant court, while adopting the Supreme Court's clear statement rule in its original analysis of RICO's extraterritorial application, retreats from it by later applying the traditional effects test. This use of both tests shows the instant court's reluctance to rely on this dramatic change in interpretation invoked by the Supreme Court. The instant court's reluctance is well founded considering that many statutes which were clearly intended by Congress to apply extraterritorially as evidenced by legislative history, will no longer have their intended effects because of the strictness of this newly promulgated rule.[92]

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88. *See, e.g., The Supreme Court, 1990 Term — Leading Cases*, 105 HARV. L. REV. 177, 370 (1991) (stating that the clear statement rule may signal a general expansion of the rule that could threaten to undermine congressional intent for previously drafted statutes); *see also Arabian*, 499 U.S. at 278 (Marshall, J., dissenting) (stating that the majority's clear statement rule has erected a "barrier to any genuine inquiry into the sources that reveal Congress' actual intentions"). *Id.*

89. *See supra* text accompanying note 87.

90. *Arabian*, 499 U.S. at 278 (Marshall, J., dissenting).

91. *Id.*

92. *Id.*