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There is a loud and growing debate concerning the costs and benefits of outsourcing jobs to other countries. Some say that outsourcing will help keep the American economy competitive in the global economy.

Outsourcing Backlash?

Yet critics are pursuing legal measures to discourage this growing business practice.

Could efforts to keep jobs at home violate the United States Constitution and international law? (See page 4)



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The War on Terror: Balancing national security and civil liberties

Since the September 2001 terrorist attacks, the United States has undertaken vigorous political and military measures to capture groups and individuals responsible for or aiding in the attacks. This ongoing campaign against international terrorism has been called an actual, though undeclared, war. As part of that campaign, the U.S. military has seized and detained hundreds of individuals whom it has labeled as “enemy combatants” suspected of engaging in or supporting terrorist activities.

Government officials have argued that, during times of war, the President – as Commander-in-Chief of the armed forces – has the legal authority to direct the military to detain indefinitely without charges those individuals he determines to be enemy combatants, which include not only alleged foreign fighters captured in other countries but even American citizens detained within U.S. borders. Detainees are currently being held in military jails in the U.S. or at the U.S. Guantanamo Bay Naval Base in Cuba. Government lawyers have also asserted that foreign detainees currently being held by American authorities outside of U.S. borders (such as Guantanamo Bay) cannot even challenge their detentions in any American court.

But critics have responded that these detentions undermine basic Constitutional provisions designed to protect U.S. citizens and even aliens within American jurisdiction from arbitrary or unlawful detention by the government. Could these policies aimed at dismantling terrorism abroad undermine civil liberties at home?

For example, do U.S. courts have jurisdiction to consider challenges to the legality of the detention of foreign nationals captured abroad in connection with the war on terror and now detained at the U.S. Guantanamo Bay Naval Base in Cuba? Also, does the President have the legal authority to direct the military to seize and detain indefinitely without charge American citizens seized within U.S. borders and suspected of aiding terrorists?

Recently, the United States Supreme Court issued several decisions concerning these cases. While civil libertarians and government officials have each claimed that the Court had vindicated their positions, legal scholars say that the Court tried to maintain a delicate balance which would not only protect civil liberties but would also allow the President to combat terrorism and its supporters.

The campaign against terror starts abroad . . .

In November 2001, the U.S. launched a military campaign against the terrorist group al Qaeda which was suspected of coordinating and executing the September 11, 2001 attacks. As part of that campaign, the U.S. armed forces captured and detained thousands of foreign fighters and suspected terrorists in Afghanistan, a country which al Qaeda had used as its base of operations. The U.S. had labeled these detainees as “enemy combatants.”

International law and military experts say that during times of international armed conflict, warring parties have historically seized and detained enemy forces until the end of hostilities. They say that these measures serve essential military objectives such as preventing enemy soldiers from taking up arms again and collecting intelligence about future enemy operations.

At the conclusion of major military operations in Afghanistan, the U.S. announced in early-2002 that it would begin sending to Guantanamo Bay nearly 600 foreign detainees it described as the most dangerous and those who would most likely provide further intelligence about al Qaeda and its operations around the world. The U.S. presence at Guantanamo Bay exists because, in 1903, the U.S. had signed an indefinite lease with the then-Cuban government to operate a military base on its territory. Though some say that the military base on Guantanamo Bay is outside of U.S. sovereign jurisdiction (i.e. the U.S. cannot enforce its laws on that particular territory), others argue that the base is under complete American control and that U.S. laws and regulations have been enforced there in the past.

U.S. military officials also announced that because the foreign detainees at Guantanamo Bay were still regarded as enemy combatants who would likely take up arms again if released, they would be held indefinitely by the military without access to any courts or counsel to challenge their detentions until the end of hostilities (which, they say, was in accordance with international custom during times of armed conflict). In fact, to provide them with opportunities to challenge their detentions, they argued, would undermine efforts in stopping international terrorist operations.

But advocates for several of these detainees argued that

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The U.S. military campaign against terrorism has sparked heavy debate concerning the rights of both suspected terrorists captured in foreign battlefields and even American citizens detained on suspicion of aiding terrorism. Do these individuals have the right to challenge the legality of their detentions in a court of law?

because these detainees in particular were being held directly by American authorities on a U.S. military base that is – for all practical purposes – under complete U.S. control and jurisdiction, they could challenge their detentions in an American court despite their presence outside U.S. borders. They note that even non-citizens within U.S. borders have legal rights under the Constitution, and that detainees held by American authorities on a military base under U.S. control and outside a zone of combat should be afforded the same Constitutional rights such as the ability to challenge their detentions in a court of law.

... but soon presents legal questions at home

In July 2002, relatives of 14 Guantanamo Bay detainees challenged the legality of the detentions in U.S. federal court. They argued that these particular detainees were not terrorists fighting against American forces in Afghanistan, and that they were, in fact, accidentally captured *en masse* during military operations in that country.

When individuals are detained by government authorities in the U.S., they may challenge their detentions by filing a petition for a “writ of habeas corpus,” which is simply a judicial order to bring a prisoner before a court to determine – through an established legal process – the legality of that prisoner’s detention. When the U.S. Constitution came into effect in 1789, many governments around the world (and even several today) would jail people, particularly political opponents, for months or years without charges. Scholars also note that many of these countries did not have or simply ignored any legal process to determine whether a detention was carried out in a lawful manner.

According to legal historians, the right to challenge one’s detention by the government through a court was considered so important by the framers of the Constitution that they included this right in the body of that document itself. It reads: “The privilege of the writ of habeas corpus shall not

be suspended, unless when in cases of rebellion or invasion the public safety may require it.” Today, said one legal expert, “judicial review of executive detention is not limited to common law jurisdictions. This principle is enshrined in the constitutions of nearly every country in the civilized world.” In the U.S., an entire chapter of the U.S. Code (28 U.S.C. 153) details the procedural aspects for conducting habeas corpus proceedings. For example, 28 U.S.C. § 2241 states that the writ of habeas corpus extends to prisoners who are “in custody in violation of the Constitution or laws or treaties of the United States.”

Although many legal analysts broadly agree that individuals (whether they are American citizens or even foreigners) may challenge the legality of their detentions by government authorities within U.S. territory, there is still a running debate in legal circles as to whether aliens detained by American authorities outside of U.S. borders may challenge their detention in U.S. courts. According to commentators, before the families of the detainees at Guantanamo Bay could file their habeas corpus petitions, they first had to show that the federal courts actually had jurisdiction (i.e. the legal authority) to consider habeas petitions filed by aliens outside of sovereign U.S. territory (in this case, Guantanamo Bay, Cuba). In July 2002, a district court held that U.S. federal courts did not have jurisdiction to hear the detainees’ habeas corpus petitions. This decision was later upheld by an appeals court. The detainees’ families then appealed to the United States Supreme Court.

In its arguments at the Court in April 2004 (in the case of *Rasul v. Bush*), government lawyers argued that U.S. courts lacked jurisdiction to consider habeas corpus petitions from aliens being detained outside sovereign U.S. territory. They cited a 1950 Court decision (*Eisentrager v. Johnson*) which they say supported their claims. The plaintiffs in *Eisentrager* were 21 members of the German military who were captured, tried, and convicted in China by a U.S. military commission for violating the laws of war. The plaintiffs, who were sent back to Germany to serve their sentences in a prison controlled by the U.S. military, later filed a petition for writ of habeas corpus, arguing that they were denied the right to due process under the Fifth Amendment of the Constitution.

In its brief, the government argued that while aliens have certain rights under the Constitution (such as filing habeas petitions), they must have first established some “presence” within sovereign U.S. territory. The government then quoted excerpts of the Court’s decision which they say supported these views. Speaking of the members of the German military, the Court ruled that “. . . nothing in our statutes confers jurisdiction over a claim filed on behalf of an alien who at no relevant time has been within the sovereign territory of the U.S.” Therefore, argued the government, “the Court recognized that the federal habeas statutes did not grant jurisdiction over a petition filed on behalf of aliens held abroad.” The government then argued that the Guantanamo detainees were in the same position as those of the petitioners in the *Eisentrager* case: “First, the Guantanamo detainees, like the detainees in *Eisentrager*, are aliens with no

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OUTSOURCING BACKLASH?

WILL EFFORTS TO KEEP JOBS AT HOME VIOLATE THE US CONSTITUTION AND INTERNATIONAL LAW?

The latest debate concerning globalization involves the issue of outsourcing, a practice in which domestic businesses send their work to be performed overseas. Unlike previous decades when businesses largely outsourced blue-collar work to countries with lower labor costs, outsourcing is now quickly gaining ground in the services sector (i.e. white-collar jobs) such as computer programming, tax-filing preparation, and even legal work – areas which were thought to be largely insulated from foreign competition.

Since late last year, there has been a loud and growing debate concerning the costs and benefits of outsourcing jobs to other countries. While many economists and business executives say that outsourcing helps American companies stay competitive in global markets, critics such as labor unions and even a growing chorus of white-collar workers charge that this practice has been responsible for millions of job losses in recent years.

Efforts to curb outsourcing have largely involved proposed state and federal laws which would prohibit companies from bidding upon and then performing a public (i.e. government) contract in other countries. While some have applauded these efforts, legal analysts point out several potential problems. For example, some say that conflicting anti-outsourcing legislation passed by several states could create confusion among America's various trading partners and, thus, impede the primacy of the federal government in speaking and conducting foreign policy for the U.S. Furthermore, others believe that proposed anti-outsourcing legislation could violate this country's legal obligations under several international treaties such as those administered by the World Trade Organization (WTO).

Why are American companies outsourcing work to other countries? What sectors of the economy have been affected by outsourcing? Is this practice primarily responsible for the loss of American jobs in recent years? Can proposed anti-outsourcing legislation withstand Constitutional and international scrutiny? What other approaches can we take toward this growing trend?



Greater spotlight on outsourcing:

Since last year, the media have called greater attention to the practice of outsourcing where domestic businesses contract out their work to other countries. For example, several companies have moved tens of thousands of call-center jobs and computer programming positions to countries in Asia such as India and China.

Outsourcing: a practice gaining ground

Outsourcing is generally defined as a business practice in which domestic companies contract out certain aspects of their work to other countries where workers are generally paid much less than their counterparts in, say, the United States and other industrialized countries. Commentators have used other terms such as offshoring, subcontracting, or global sourcing to describe this particular business practice.

Widely publicized media stories concerning the use of outsourcing have attracted the public's attention. For example, International Business Machines Corp. – one of the world's largest computer companies – recently announced that it will move the work of over 4,700 computer programmers overseas to Asia, particularly India and China. Last year, Delta Airlines outsourced 1,000 call-center jobs to India. Even small businesses are turning to outsourcing to stay competitive. According to the National Association of Manufacturers, large corporations and companies have threatened to take their business elsewhere unless their suppliers (many of which are small companies) outsourced their work to countries such as India and China in order to bring down costs. And in the midst of the upcoming elections this fall, even presidential candidate John Kerry had relied on the practice of outsourcing. According to media reports, his campaign – until recently – directed telephone inquiries from potential donors and supporters to a call center in Canada.

Some industry analysts say that the use of outsourcing may soon embed itself as a common business practice in corporate America. For example, they claim that over 400 of the top 1,000 American corporations outsource a portion of their work overseas. A recent survey of more than 180 companies revealed that they expected to increase the use of outsourcing in coming years. The practice of outsourcing is not even restricted to the private sector. In the U.S., over 40 states currently outsource some aspects of their

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administrative work overseas. Some analysts estimate that federal, state, and local governments engage in 30 percent of all outsourcing in the U.S. (with the remainder in the private sector). But others cite a recent poll showing that while business executives are planning to further outsource some of their work, they are still concerned that it may generate negative publicity, which could hurt a company's reputation (and sales).

An old phenomenon appearing in unexpected places?

Analysts say that companies outsource their work to other countries mainly to take advantage of lower labor costs. For example, they say that while a senior computer programmer in the U.S. could make over \$100,000 a year, his counterpart in India receives around \$20,000 for performing similar work. Economists say that these salary differences allow companies not only to save substantial amounts of money, but that these savings, in turn, will allow companies to become more competitive in their respective marketplaces by lowering the prices that consumers pay for goods and services. Others believe that outsourcing will help businesses increase their productivity by allowing them to work 24-hour shifts. As employees in the U.S. are finishing their work day, their counterparts are often beginning their shifts overseas. Business executives also argue that the costs savings gained through outsourcing will also allow them to expand company operations and services into new markets.

For example, a spokesman for Delta Airlines said that by outsourcing its call-center jobs to India, the company not only saved \$25 million in labor costs, but that it also allowed the company to add 1,200 reservation and sales positions in the U.S. The world's largest auto maker, General Motors, recently reported that outsourcing allowed the company to save over a billion dollars in its information technology sector.

While there has been public uproar over the use of outsourcing by American companies in recent months, experts say that this economic phenomenon is not new. In fact, analysts point out that businesses in this country have been outsourcing their work to other countries for decades. Economic historians further note that companies around the world have outsourced some aspect of their work to other countries for hundreds of years, though the term 'outsourcing' did not come into use until recent times. Experts say that most companies taking advantage of outsourcing are located in the U.S. (around 70 percent) followed by several countries in Europe (particularly Great Britain), and that the contractors actually performing the outsourced work are primarily based in India and other countries in Asia.

In previous decades, the practice of outsourcing largely affected blue-collar manufacturing jobs, millions of which were sent to countries with lower labor costs. Experts now say that technological advances (such as faster computers and cheaper, more reliable international communications) have made outsourcing a more viable option for companies in the services sector looking to cut costs and better compete with other businesses. (The services sector of the economy includes areas such as tax preparation, legal, computer, engineering, management, travel, and educational services, just to name a few.) Others say that a better-educated and – more importantly – English-speaking workforce overseas makes outsourcing possible in the services sector. For example, one analyst said that 80 percent of all Indian college graduates speak English.

But as with any other business practice, outsourcing has not been free of problems or criticisms. Some claim that operators in overseas call centers are unable to provide adequate customer service for complex queries going beyond scripted responses. While many businesses have taken advantage of outsourcing to reduce their labor costs, some economists now estimate that these savings are dwindling sharply. One legal commentator said: "The biggest misconception is that outsourcing always results in significant cost savings." He noted that some companies have failed to examine the legal and regulatory requirements needed to outsource work to other countries, which have, in turn, led to much higher costs than anticipated. Another analyst added: "Often management gets sold on a particular service provider only to learn later that regulations

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An old practice in new places: Many businesses outsource their work to other countries mainly to take advantage of lower labor costs. Economic historians note that this practice has existed for hundreds of years, and has mainly affected blue-collar work. But others point out that outsourcing is now rapidly affecting positions in the services sector (i.e. white-collar positions) in a variety of areas, including the accounting, financial services, engineering, and even legal fields.



Guaranteed cost savings? Experts say that faster computers and cheaper international communications have made outsourcing possible in the services sector. But others note that some companies have underestimated the regulatory hurdles needed to outsource work to other countries, which have, in turn, led to higher costs.



The culprit in a sluggish economy? Labor economists say that while outsourcing has certainly led to tens of thousands of job losses, they estimate that those losses represent only 1.5 percent of the 15 million jobs that are lost every year due to all reasons. Economists say that the recent recession and gains in productivity are responsible for the sluggish job market.



A creator of new jobs? Economists point out that more countries outsource more work to the U.S. than the other way around. In fact, according to the government, the U.S. had a \$54 billion surplus in trade in services last year. Business executives say that foreign outsourcing to the U.S. helps to employ over six million Americans, and millions of other workers indirectly.

or other barriers in that provider's country negatively impact their company."

While many commentators have expressed alarm at the growing use of outsourcing in the services sector, experts say that his practice will mainly affect routine and low-level skills jobs that can be telecommunicated to other parts of the world. Jobs in the services sector that have been affected by outsourcing include accounting, finance, tax preparation, employee compensation, insurance claims processing, computer programming, medical transcription, animation, desktop publishing, telemarketing, and journalism. One commentator added: "If they [i.e. back-office jobs] do not go overseas, they are still at risk from automation." While the practice of outsourcing has been gaining ground in the services sector, many labor experts believe that most jobs in the U.S. will not be outsourced to other countries because many require geographical proximity such as the provision of health care services. And others believe that complex jobs requiring a high degree of skill and innovation will most likely stay in the U.S.

Outsourcing has affected legal services. Experts say that the outsourcing of legal work overseas largely involves a mixture of both legal and secretarial work such as word processing, legal transcription, drafting contracts, researching memoranda, and surveying laws of various jurisdictions. Much of this work is currently done in India by legal assistants and lawyers who make two-thirds less than their counterparts in the U.S. While several observers have raised concerns as to whether legal assistants in India are qualified to perform such work, some legal experts have said that such work may be performed abroad as long as a qualified lawyer in the U.S. conducts a proper review of that work.

Outsourcing: the culprit in a slow economy?

Many commentators note that outsourcing has become a growing concern among American workers. They say that almost 80 percent of the U.S. gross national product is derived from the services sector, and that over 70 percent of all employed Americans work in that sector of the economy. Political analysts point out that the issue of outsourcing has taken on greater resonance because of this year's presidential election. Labor unions and many white-collar workers say that the U.S. has lost close to 3.5 million jobs over the last four years, and they have attributed most of these losses to the practice of outsourcing.

While the government does not keep official statistics concerning job losses due to outsourcing, one widely-publicized study by Forrester Research, a private economics forecasting group, stated that 3.4 million jobs in the services sector will be lost to outsourcing between the years 2000 and 2015. This translates roughly into 227,000 jobs lost every year in that particular time period.

While this may seem like a large number, economists say that this figure should be put into perspective. According to the Federal Reserve, the U.S. economy undergoes a tremendous amount of job "churn" every year (which is simply the normal process of job destruction and creation). During the past decade, say officials, over 15 millions jobs were eliminated every year in the U.S. for all reasons but were later offset by the creation of over 35 million new jobs. Analysts have said that, historically, "the creation of new jobs always overwhelms the destruction of old jobs by a huge margin." They calculated that the estimated job losses due to outsourcing in any given year (227,000) only represented 1.5 percent of the 15 million total job losses that occurred in the U.S. annually. Therefore, said another expert, "quantitatively, outsourcing abroad simply cannot account for much of the recent weakness in the U.S. labor market."

And while many people criticize outsourcing, international trade experts argue that the U.S. largely benefits from this practice. For example, they note that more countries outsource their work to the U.S. than the other way around (i.e. other countries, for example, have sent more of their legal, accounting, banking, architectural, engineering, and management consulting work to be performed in the U.S. than American companies

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have sent abroad). In fact, according to the Office of the U.S. Trade Representative, the U.S. had a \$54 billion surplus in trade in services last year. (On the other hand, the U.S. has a \$550 billion deficit in trade of goods with the rest of the world, meaning that the U.S. bought far more goods from abroad than foreigners bought in the U.S.) Business associations also claim that foreign outsourcing to the U.S. directly employs over six million Americans and millions of other workers indirectly. Said one commentator: "Politicians have largely ignored the jobs created in the U.S. when Americans sell white-collar services to foreign customers."

So what is responsible for the slow pace of job growth in recent years? Economists and other experts attribute the slow labor market to the recent recession, the implosion of the technology sector, and gains in productivity in the U.S. labor market where American companies have increased their output by using more technology and automation rather than hiring more workers.

Legal efforts to curb outsourcing

In response to the public outcry over jobs moving overseas, many state legislatures and even the federal government have proposed measures which would supposedly curb recent job losses due to outsourcing. For example, one bill would require workers at telephone call centers to disclose their physical locations at the beginning of each call. Other bills, if enacted, would restrict companies from bringing foreign workers to the U.S. on guest visas to do jobs that were previously performed by Americans.

Through the end of April 2004, analysts say that over 36 state legislatures have proposed over 100 anti-outsourcing bills, many of which either prohibit companies from bidding upon and then performing a government contract overseas (i.e. the contract may only be executed in the U.S.) or would give – during a competitive bidding process – special preferences to in-state companies that promise to perform the contract within local jurisdictions. The U.S. Senate recently passed a bill (called the Workers Protection Act) which would prevent companies from performing most federal contracts overseas "unless the President deems a contract to be in the national security interest of the United States." So far, though, no one has proposed any law which would restrict the private sector from engaging in the practice of outsourcing.

Despite the proliferation of such anti-outsourcing bills (none of which has yet become law), many experts have questioned their legality under the US Constitution. For example, there is a growing debate over whether proposed state legislation prohibiting the performance of a public contract in other countries could violate the Constitution's *Foreign Commerce Clause*, which gives the federal government exclusive power to regulate foreign commerce and set uniform trade policies with other nations. Some legal experts believe that if several states enacted conflicting anti-outsourcing legislation, the result would be to sow confusion among America's various trading partners. One analyst said: "A patchwork of state outsourcing laws would create a complicated, unwieldy framework in which businesses with foreign operations or interests would have to tread." A legal observer warned that the U.S. Supreme Court in 2000 had ruled unconstitutional a Massachusetts state law which prohibited the state and its agents from purchasing goods or services from anyone having a business in or doing business with countries with poor human rights records.

Scholars also argue that legislation restricting outsourcing to other countries could impede upon the federal government's sole power to conduct foreign relations. One expert said that the Constitution allows only the federal government "to set uniform policies for the U.S. as a whole in dealing with foreign nations." Allowing different states to enact their own unique anti-outsourcing policies, some say, would, in essence, allow each state to carry out its own foreign policy.

Others believe that giving special preferences in awarding public contracts to in-state companies that do not outsource their work overseas could violate several other provisions in the Constitution. For example, some say that such a provision could violate



Legal curbs on outsourcing: Public outcry over the loss of white-collar jobs due to outsourcing has led many state (and even the federal) governments to propose laws which would curb this practice. According to one group, over 36 state legislatures have proposed over 100 anti-outsourcing bills to prohibit companies from bidding upon and then performing a government contract overseas.



Possible violations under the U.S. Constitution? Some have challenged the legality of some anti-outsourcing measures. For example, one legal analyst argued that if many states enacted conflicting anti-outsourcing bills, it could violate the U.S. Constitution's *Foreign Commerce Clause*, which gives the federal government exclusive power to regulate foreign commerce and set uniform trade policies with other nations.

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Violations under international law?

Other legal scholars believe that some proposed anti-outsourcing bills could also violate this country's obligations under certain international agreements such as those administered by the World Trade Organization (WTO).

The WTO administers various trade treaties, all of which operate under the principle of "national treatment." This requires that a WTO member nation must give another member nation's goods and services the same treatment it accords to like goods and services of domestic origin. Therefore, member nations cannot discriminate against foreign products or services by, for example, imposing discriminatory taxes on imported goods.



the *Commerce Clause*, which not only gives power to Congress to regulate trade among the states, but also generally prohibits a state from "using its regulatory power to protect its own citizens from outside competition." One legal expert said: "State preferential treatment laws would do just that."

Some also say that the enactment of anti-outsourcing laws giving preferential treatment to in-state interests (such as in-state companies and residents) over those from other states could violate the *Privileges and Immunities Clause*, which provides that "the Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in several States." In other words, a state generally cannot discriminate against out-of-state interests unless it has a compelling reason to do so. Opponents of these kinds of anti-outsourcing laws say that they will try to show that the practice of outsourcing has so far played an insignificant role in a particular state's unemployment levels, and that enacting such laws would fail to provide a sufficient justification for the restriction. One analyst noted that past court decisions have generally struck down state laws giving preference to in-state interests (though states have been allowed to restrict direct employment with the state.) One district court had already noted: "The argument that nonresidents are a 'peculiar source of evil' to the general welfare of the local citizenry because they displace residents from the local job market has also been rejected in previous cases." Experts say that such past decisions foreshadow the legal difficulties that anti-outsourcing laws could encounter if their legality is challenged in court.

Anti-outsourcing bills: potential violations of international law?

Other legal scholars believe that proposed anti-outsourcing legislation prohibiting a contractor from performing a public contract outside of the U.S. could also violate this country's obligations under certain international agreements such as those administered by the World Trade Organization (WTO), which is the international organization setting the rules for global trade and the settlement of trade disputes among its 148 member nations.

The WTO administers the General Agreement on Tariffs and Trade (GATT), which covers goods, and the General Agreement on Services (GATS). Both the GATT and the GATS contain provisions calling for "national treatment" of imports. Thus, when imported and domestic goods are "like products," and when services provided abroad and domestically are "like services," the GATT and the GATS require that all such goods and services be accorded "national treatment," meaning the treatment that is accorded to domestic goods and services. The GATT is particularly stringent as regards the requirement of "national treatment." The GATS, while setting out a basic requirement of "national treatment," provides for negotiated exceptions in cases where all 148 WTO members have agreed to allow the exceptions.

In addition to administering the multilateral GATT and GATS, the WTO administers the plurilateral Agreement on Government Procurement (AGP). (Plurilateral signifies that less than all 148 WTO members are parties to the AGP.) The United States is a party to the AGP. Governments around the world and their agencies purchase trillions of dollars of private sector goods and services very year. Some of these purchases include office supplies, food, construction services, weapons systems, and computer services. In some countries, government procurement can represent anywhere between 10 percent to 15 percent of a country's gross national product, which means that a government can play "a significant role in domestic economies," say economists. Because the government can play a large role in an economy through its procurement decisions, political analysts say that some politicians may try to favor certain domestic industries by inhibiting foreign suppliers from competing in a particular country's procurement market, which could, in turn, lead to unfair discrimination and a distortion of international trade.

The purpose of the AGP is "to open up as much of this business [i.e. government

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procurement] to international competition [as feasible]” and to prevent unfair discrimination against foreign suppliers of goods and services. Like the other treaties administered by the WTO, the AGP operates under the principle of national treatment. Thus, under the AGP, “each Party is required to ensure that its entities [i.e. government agencies and their agents] . . . do not discriminate against a locally-established supplier on the basis of country of production of the good or service being supplied.”

Some legal experts say that if lawmakers actually enacted a proposed anti-outsourcing bill prohibiting the performance of a public contract overseas, it could violate the principle of national treatment under the AGP in several situations. For example, one analyst said that if a foreign-based contractor won a state or federal contract, it would have to relocate some of its operations to the U.S. simply to carry out that contract. Because such a move could substantially increase the financial costs of carrying out the contract, a foreign contractor could argue that such a law accorded “less favorable treatment” compared to domestic-based contractors who would not face such a financial hurdle. Other analysts believe that such a law would also discriminate against domestic companies that mostly performed their contracts overseas. As already noted, the AGP prohibits government agencies from treating domestic contractors less favorably based on “country of production of the good or service being supplied.”

Although no WTO member has yet challenged these anti-outsourcing initiatives (since none has yet become law), several countries such as India have expressed concerns that these legislative proposals could gain further political momentum in the future. Officials in India, for example, have said that while there was “no evidence now that any of these proposed restrictions would violate any of the WTO agreements,” they would closely monitor further developments.

What can be done to address concerns over outsourcing?

Views on how the government must (or even should) address the practice of outsourcing have not been unanimous. While labor unions and some white-collar workers continue to oppose outsourcing, many economists say that such an approach will hurt, rather than help, the U.S. economy in the long term. They note that many other industrialized countries are also taking advantage of outsourcing, and to prevent only American companies from doing the same would leave the economy at a competitive disadvantage. Many experts also fear that anti-outsourcing efforts at home could lead to a backlash among countries that outsource their work to the U.S. The Office of the U.S. Trade Representative recently said: “What goes around comes around. If America closes its markets, others will close their markets.”

Many analysts believe that a better approach to curb outsourcing would be to provide more funding for education and job training so that American workers will have the specialized skills that are less likely to be automated or even outsourced abroad in the future. Furthermore, business executives argue that extending tax credits for research and development, and increasing spending in new technological fields such as biotechnology, nanotechnology, and digital media will create new and better-paying jobs for millions of people. But critics respond that because of the growing budget deficits, it is unlikely that Congress will increase spending on these educational initiatives in the near future.

In another approach, the U.S. Department of State has urged other nations such as India (where U.S. companies are outsourcing much of their work) to open their agricultural and services sector to more outside competition. This approach, say State Department officials, will allow U.S. companies to enter into what are still highly-protected economies and blunt any claims that other countries are not competing on a level playing field. Still, many political commentators believe that no single approach will satisfy the proponents and opponents of outsourcing. One Nobel laureate in the field of economics recently said: “This [outsourcing] is a hot issue now, and in the coming decade, it will not go away.”



One of the treaties administered by the WTO is the Agreement on Government Procurement (or the AGP), which regulates government procurement practices and prohibits unfair discrimination against foreign contractors who want to bid on domestic government contracts. Some say that proposed anti-outsourcing bills which give special preferences to domestic contractors over foreign ones in bidding for government contracts violate the principle of national treatment.



Addressing outsourcing in the future: Some have proposed that the U.S. provide more funding for education and job training to make job positions less vulnerable to outsourcing. The U.S. government is calling for other countries to open their economies to further competition to blunt criticism against outsourcing.



NYLS Alumna Profile

Name: Roberta Baldini '94

Title: Assistant Trial Attorney, International Criminal Tribunal for Rwanda (ICTR)

My duties and responsibilities: The other prosecutors and I work in the city of Arusha, which is in the neighboring country of Tanzania where the ICTR is located. Our investigations team, however, is based in Kigali, Rwanda. The ICTR is made up of three equal arms – the Office of the Prosecutor (OTP), Chambers (where the judges sit), and Defense (which, as its name implies, provides defense counsel for those being prosecuted by the Tribunal). I am a member of the prosecution team.

The mandate of the ICTR is to prosecute those individuals most responsible for the 1994 genocide in the country of Rwanda where extremist members of the majority Hutu population killed over 800,000 members of the minority Tutsi tribe. The OTP is preparing and prosecuting these cases. The Tribunal uses an adversarial trial system, although our rules of procedure combine the common and civil law procedures.

My principal task is to prepare and prosecute the case against Jean-Baptiste Gatete, a Hutu extremist who was allegedly responsible for the slaughter of between 20,000 and 50,000 people, mostly Tutsi. As part of my duties as an Assistant Trial Attorney, I wrote the plea agreement policy which was later presented to the United Nations Security Council by Hassan Jallow who is the Prosecutor of the ICTR. I am also working on several other projects. For example, as a member of the OTP sexual assault task, I am helping the OTP develop a set of best practices on how to prosecute rape as a crime against humanity and as genocide. Furthermore, I am working on a policy that will dictate how defendants will be transferred to other national jurisdictions. I also handle other cases assigned to our prosecution team.

Prosecuting genocide cases has been extremely difficult. During and shortly after the genocide of 1994, no one was able to collect evidence. The entire country of Rwanda was destroyed, and its population either dead or moving to and from refugee camps. Now, ten years after the genocide, our work has become even more difficult – more witnesses have either died or do not want to open their profound wounds to a group of strangers, especially in court where they may have to face the accused; bodies have been buried; and evidence may have been removed or altered in massacre sites around the country. While a collective historical memory has taken hold during the last

decade, the stories of the genocide have been repeated so often that many people can no longer distinguish what they experienced, heard, or saw from what actually happened.

There are also serious logistical concerns. It has been very difficult to interview witnesses who live in remote areas of Rwanda and who don't have access to telephones. The ICTR has also complicated matters by the way they have treated some witnesses. Furthermore, survivor groups and the Rwandan government have, at times, refused to allow witnesses to travel to Arusha to assist the ICTR in prosecuting its cases.

My path to the ICTR: Before I began my work at the ICTR, I served as an Assistant District Attorney (ADA) in the Domestic Violence/Sex Crimes (DVS) Bureau of the Bronx District Attorney's Office. As an ADA, I learned how to try cases and work with victim and witnesses.

While working in the DVS Bureau, I began to realize that our cases would be stronger and our victims and witnesses would be more comfortable with the legal process if prosecutors implemented a "victim-centered" approach in trying their cases. This method of prosecution recognizes the victim as an equal partner in the cases and seeks to strengthen the roles of the victims and witnesses by providing as much information to them about the legal process, and also by including psychological support during their cases. The victim-centered approach uses recent psycho-social research to inform how a prosecutor prepares a witness, selects a jury, and presents evidence at trial. While the prosecutor is the expert in the legal aspects of the case, the victim is the expert concerning the facts.

A victim-centered approach also provides prosecutors with information about the neurobiology of trauma, cultural competence, acute stress disorder, post-traumatic stress disorder, and vicarious trauma. As I learned about the psycho-social aspects of victim impact, I also understood how traumatic events affected victims and, in turn, how this affected a trial.

I was fortunate enough to have had the opportunity to use what I learned as a prosecutor to develop and co-author a national prosecutor's curriculum entitled "Understanding Sexual Violence: Prosecuting Adult Rape and Sexual Assault Cases" for the US Department of Justice's Violence Against Women Office. This three volume curriculum teaches victim-centered prosecution.

I then spent three years traveling across the US (with other national experts in topics such as DNA, toxicology, and victim impact) teaching this curriculum to prosecutors from over 12 states. The American Bar Association's (ABA) Domestic Violence Commission later recognized this curriculum and my work in general. Before moving to Tanzania to work at the ICTR, I was invited to teach my curriculum at the Civil Litigation Institute in Colorado Springs, Colorado. The ABA, Department of Justice, and the US Department of Defense also asked me to conduct a workshop for the US Air Force Judge Advocate Generals on prosecuting and defending rape and sexual assault cases.

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I also developed and wrote the content for instructional videos and accompanying guidebooks for my curriculum – one for judges new to the bench or unfamiliar with sexual assault cases, and another for prosecutors. The prosecutor’s video is entitled “Presenting Medical Evidence at an Adult Rape Trial.” The Department of Justice sent this video to every prosecutor’s office in the US and to the Judge Advocate Generals of the Armed Forces.

Because of my work in this area, I came to the attention of a group of prominent attorneys such as JoAnne Harris – former Chief of the Criminal Division of the Department of Justice – and Loretta Lynch – former US Attorney of the Eastern District of New York. Together we were invited by the United Nations Prosecutor Carla Del Ponte to develop and present a trial advocacy and witness preparation workshop for the OTP. The workshop was well-received, and we were invited to conduct a second workshop. The Ford Foundation and a large international law firm funded our activities.

I have always been interested in international politics, and have never seen a wide distinction between domestic and international legal issues. So I saw my transition to international criminal law (and to my current position at the ICTR) as a natural extension of my work.

Career advice: Students interested in international criminal law should have a strong grounding in criminal law, and international humanitarian and human rights law. While it is important to take courses such as criminal law, criminal procedure, trial advocacy, and evidence, it is also critical to learn about other areas of law and understand a variety of non-legal subjects. Those interested in international law, in particular, must have a critical understanding of world events, politics, and economics. A wide breadth of knowledge will enrich and inform an attorney’s personal and professional life.

The various ad hoc (i.e. temporary) criminal tribunals created by the UN in recent years and the permanent International Criminal Court (ICC) all use English and French as their official working languages. So it is important to be conversant in French when pursuing jobs in the area of international criminal law. The prosecutors who work at the ICTR are from both common and civil law jurisdictions. But not all lawyers working at the ICTR have criminal law backgrounds. Case managers (who are the most junior of the legal staff) have had between five to seven years of legal experience before joining the ICTR.

Having an internship with a prosecutor’s office or a defense attorney’s office is a good way to test if you are truly interested in criminal law before pursuing a career in this area of practice. While I was a New York Law School student, I worked as an intern in two district attorneys’ offices, and I also clerked for former Justice Leslie Crocker Snyder who offered me the opportunity to learn about a wide variety of criminal issues (such as joint criminal enterprise, constructive possession of weapons, and criminal contempt) as they were unfolding during a trial.

Her attention to detail, thoroughness, passion for the work, and fearlessness were qualities I hoped to emulate. I was able to use everything I learned in Justice Snyder’s office when I served as an ADA.

If you are sure that you want to practice international criminal law, then the best preparation is to try cases either as a prosecutor or defense counsel, and also volunteer with one of the international human rights non-governmental organizations (NGOs). Students should also attend open meetings at the United Nations (UN) such as those held in the Security Council, the General Assembly, the Commission on the Status of Women, and the Human Rights Committee when they are in session.

Rather than focusing exclusively on large bureaucracies such as the UN when looking for career opportunities, I recommend that students focus on NGOs such as Human Rights Watch, Amnesty International, the International League for Human Rights (ILHR), the International Rescue Committee, and other groups that work in the field. You should not accept at face value what you see on the news or read in the newspapers, but should, instead, analyze what is reported. I also recommend that you look to other sources of information such as those provided by these human rights and humanitarian groups.

In fact, before I arrived at the ICTR, I was the acting Africa Program Director at ILHR where I was responsible for developing legal capacity programs in west and central Africa. I also worked with women’s rights and good governance NGOs, and various UN agencies on the promotion of human rights in various African states.

I try to live, as the yogis say, in the moment. Once my work at the ICTR is complete, I would love to work at the ICC which is located in The Hague in the Netherlands. But as an American, it will be difficult for me to get an appointment at the ICC because the US has refused to become a state-party to the ICC treaty, and positions there are given first to state-party citizens. I may try to find a teaching position and write about international law, gender-based violence, and other legal topics.

Because I’ve never followed the money in my legal career, I’ve found amazing opportunities. I believe that learning new things and having these varied experiences are how I count my riches. Therefore, if you are looking for jobs which will provide significant financial compensation, there is no need to follow my example. But if you wish to do interesting and challenging work that may change a tiny bit of the world, then follow your moral compass.

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connection to the United States. Second, the Guantanamo detainees, like the detainees in *Eisentrager*, were being held by the U.S. military outside the sovereign territory of the United States.”

Lawyers for the detainees responded that the *Eisentrager* decision did not “automatically bar foreign nationals outside the ultimate sovereignty of the U.S. from seeking redress in the U.S. legal system,” and that the Court’s decision in that particular case was not as absolute as characterized by the government. They argued that federal statutes gave district courts jurisdiction to hear habeas applications filed by “any person imprisoned under or by color of the authority of the United States, or in violation of the Constitution or laws or treaties of the United States,” which they say should include the Guantanamo detainees who were being held by American authorities on a military base essentially controlled by the U.S.. To allow the Executive branch to imprison foreign nationals indefinitely without legal process and access to a court, they said, would undermine basic civil liberties. One advocate said that the applicable statutes “should not be read to condone creating a prison outside the law.”

Turning to the *Eisentrager* decision itself, lawyers for the detainees argued that the Court had simply limited its exercise of reviewing the petitioners’ habeas petitions “only to instances where a party has already been through a fair legal process.” According to the high court in its *Eisentrager* decision, the petitioners had already received “a lawful trial before a properly constituted military commission,” which included a full array of legal rights during the trial such as representation by legal counsel. But, unlike the petitioners in the *Eisentrager* case, lawyers for the Guantanamo Bay detainees noted that their clients were being held indefinitely “without recourse to any legal process, and with no opportunity to establish their innocence.” To deny the courts jurisdiction to consider habeas petitions would “run afoul of the Constitution,” they argued.

Rounding up American citizens: criminals or terrorists?

During the course of the campaign against terror, the U.S. also announced the capture of two American citizens who were supposedly involved with al Qaeda in planning future terrorist attacks within U.S. borders or captured on a foreign battlefield fighting on that group’s behalf. One person, Jose Padilla, was detained in Chicago by civilian law enforcement agents, and the other suspect, Yaser Hamdi, was supposedly captured on a battlefield in Afghanistan.

Legal experts say that during past international armed conflicts, the military had usually detained enemy combatants for the entire length of the war. If required, these detainees were also subject to a military system of justice which, according to legal analysts, does not provide its defendants with the same legal protections afforded by civilian courts. But, on the home front, legal historians say that the Constitution and several Supreme Court decisions have constrained the military from exerting its jurisdiction over civilian affairs and potentially threatening civil liberties.

For example, the Constitution places the command of this country’s armed forces under civilian authority. Also, only Congress may suspend habeas corpus.

But legal analysts acknowledge that situations may arise when the military must exert its jurisdiction over a civilian population. For example, during times of rebellion or an invasion which could lead to a breakdown of civilian authority, Congress may have to suspend habeas corpus and authorize the military to impose martial law.

Although these are extreme circumstances, analysts say that no broad consensus exists among legal, military, and policy circles as to when exactly civilian authority must give way to military jurisdiction. One prominent critic noted: “There is little law . . . to explain exactly when one set of rules should apply instead of the other.” For example, does the current war on terror represent a situation where the military may exercise its jurisdiction over a civilian population in a more robust fashion? Legal observers note that the cases of the two American citizens detained by the military on the suspicion of aiding al Qaeda had thrust this issue to the forefront of debate.

Jose Padilla was detained in Chicago in May 2002 and accused of working with al Qaeda in planning to detonate a “dirty bomb” in the U.S. which would have spread radioactive materials over and contaminate large civilian areas. Although Mr. Padilla was initially detained by civilian law enforcement agents, he was later declared an “enemy combatant” by President Bush (as part of the war on terror) and transferred to military authorities who then interrogated him in a military brig (or jail) for over two years without allowing him to challenge his detention. Government lawyers argued that as Commander-in-Chief of the armed forces during the current war on terror, the President had the constitutional authority to direct the military to seize and detain enemy combatants (including American citizens captured within U.S. borders) indefinitely. They also noted that, under the laws and customs of war, enemy combatants were subject to military and not civilian jurisdiction.

Furthermore, the administration argued that Congress had passed a resolution shortly after the September 11 attacks (called the “Authorization for Use of Military Force” or AUMF) directing the President to use “all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, . . . in order to prevent any future acts of international terrorism against the United States.” Part of that force, argued administration supporters, included the detention of enemy combatants, including American citizens.

On the other hand, lawyers for Mr. Padilla argued that the President did not have the legal authority to authorize the military to detain their client. They argued that the so-called war on terror did not represent a situation where the military may expand its jurisdiction into civilian life. Accordingly, American citizens captured within U.S. borders and who are accused of aiding enemy forces should, instead, be detained

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While U.S. officials argued that the foreign detainees held in the Guantanamo Bay Naval Base in Cuba did not have the right to challenge their detentions in an American court because they were located outside of sovereign U.S. territory, advocates for the detainees responded that the Constitution did not “condone creating a prison outside the law.”

by civilian authorities (such as the police) and have their cases handled by, say, a criminal court where they will be entitled to many constitutional protections such as the right to a speedy trial and the right to confront witnesses. Speaking of the detained Americans, one critic asked: “Aren’t they more like ordinary criminals?”

Critics of the administration’s position also argued that, under current federal law, only Congress may authorize domestic detentions of American citizens on U.S. soil outside of actual areas of combat. That law (18 U.S.C § 4001(a), which is also known as the Non-Detention Act) reads: “No citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress.” They say that since the AUMF resolution did not explicitly authorize domestic detentions, any detention of an American citizen would violate that act.

In December 2002, a federal district court ruled that while the President did have the authority to detain American citizens as enemy combatants, the defendant in question had the right to “rebut the claim that he is an enemy combatant.” But an appeals court later overturned the district court’s decision and ruled that only Congress had the authority to authorize domestic detentions and ordered that Mr. Padilla must be “charged with a crime, held as a material witness, or released.” The government later appealed this decision to the Supreme Court.

In their arguments at the high court (in the case of *Rumsfeld v. Padilla*) in April 2004, lawyers for the government cited a 1942 decision (*Ex Parte Quirin*) which they say supported their view that “the settled authority of the military to capture and detain enemy combatants fully applies to a combatant who is an American citizen and is seized within the borders of the United States.” In the *Quirin* case, an American citizen helping German saboteurs during World War II argued that the President did not have the authority to subject him to military detention and that he was entitled to be detained as a civilian and to be tried in a civilian court. That citizen, in turn, cited the 1866 decision,

Ex Parte Milligan, which held that the military lacked the authority to subject a citizen to a trial by military commission during the Civil War. But according to the government, the Court had ruled that the *Milligan* protections were inapplicable in the case of *Quirin* because Milligan himself was not directly associated with any armed forces, and was, thus, not considered an enemy combatant subject to military jurisdiction.

On the other hand, argued the government, the U.S. citizen in the *Quirin* case was directly associated with enemy forces, and, therefore, subject to military jurisdiction as an enemy combatant. In its decision, the Court ruled: “Citizens who associate themselves with the military arm of the enemy government, and with its aid, guidance and direction enter this country bent on hostile acts are enemy belligerents . . .” Government officials also noted that, during this time, Congress had given explicit authorization to the military to detain American citizens found to be enemy combatants. Government lawyers argued that Mr. Padilla was associated with enemy forces, and was, therefore, subject to military jurisdiction as an enemy combatant. They also said that, as in the *Quirin* case, Congress had authorized the detention of American citizens found to be enemy combatants through the AUMF resolution.

Lawyers for Mr. Padilla responded that the *Milligan* decision held unconstitutional “the exercise of military jurisdiction over an American citizen who was not an actual member of the armed forces,” and, accordingly, that “the President does not have the legal authority to order the military to detain citizens who are not soldiers in a recognized army or found in an area of active combat or under military occupation or martial law.” They noted that in the *Quirin* case, the defendants were admitted soldiers. On the other hand, they argued that Mr. Padilla, like Mr. Milligan, was not an enemy combatant and, therefore, should not come under the jurisdiction of the military. For example, they argued that Mr. Padilla “was not captured in combat, nor is he alleged to be a soldier or member of a military organization. Padilla was wearing civilian clothing and carrying a valid United States passport. He had no weapons or explosives.” Therefore, they said that the military did not have the authority to detain their client.

Furthermore, lawyers for Mr. Padilla said that the *Milligan* decision “held that military jurisdiction could not extend to civilians in areas where the courts are open and their process unobstructed.” Despite the ongoing war against terror, they said that there was no reason why the military should extend its jurisdiction into civilian life. Lawyers for Mr. Padilla also argued that, unlike the *Quirin* case, the Executive branch today did not receive clear congressional authorization for the military detention of U.S. citizens as called for under the Non-Detention Act. They pointed out that the AUMF resolution (which was cited by the government to help justify its detention of Mr. Padilla) did not even contain the word “detention.”

Lawyers for the second American detainee, Yaser

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Hamdi, argued similar points at the Supreme Court (in the case of *Hamdi v. Rumsfeld*). They said that the President did not have the legal authority to direct the military to seize and detain their client indefinitely unless that detention was authorized by Congress as required under the Non-Detention Act. Unlike the Padilla case, however, Mr. Hamdi (who was born in the U.S. but lived most of his life in Saudi Arabia) was supposedly captured on a battlefield in Afghanistan in late-2001 with foreign fighters who had supported al Qaeda, and then handed over to American military authorities who say that Mr. Hamdi was armed with an assault rifle.

As in the *Padilla* case, government officials declared Mr. Hamdi an enemy combatant and transferred him to a military brig within U.S. borders in 2002 to undergo interrogation without access to a court or counsel. His lawyers had noted that nearly two years had passed since Mr. Hamdi filed a petition for a writ of habeas corpus challenging his detention, but that government officials had challenged the court's jurisdiction to review the petition. While Mr. Hamdi's lawyers conceded that their client was captured in an area of actual combat in Afghanistan, they went on to say that "once a citizen is removed from areas of actual fighting, the Executive cannot detain the citizen indefinitely without statutory [i.e. Congressional] authorization."

The government responded that the President, as Commander-in-Chief, had "the authority to capture and detain enemy combatants for the duration of hostilities. That included enemy combatants presumed to be United States citizens." Government lawyers also argued that the Constitution did not "guarantee captured enemy combatants an automatic or immediate right of access to counsel in a habeas proceeding." In fact, doing so would "interfere with the military's compelling interest in gathering intelligence to further the war effort," said another supporter of the administration's position. Furthermore, they argued that while an American citizen "who is detained in this country is entitled to judicial review by way of habeas corpus," that review – in light of the war on terror and continuing threats to national security – should be limited to determine whether the detention of that individual was justified using a low standard of proof devised by the government itself.

Although the Supreme Court makes its rulings . . .

On June 28, 2004, the Supreme Court issued what legal commentators described as "landmark" decisions concerning the cases of the Guantanamo Bay and American detainees.

Rasul v. Bush: In an 8-1 decision, the Court rejected the Government's interpretation of *Johnson v. Eisentrager* and ruled that federal courts had jurisdiction to consider habeas corpus petitions filed by the relatives of the foreign detainees held in Guantanamo Bay. The Court decided that although the base was under the "ultimate sovereignty" of Cuba, American authorities still exercised "exclusive jurisdiction and control." The Court also noted that while the petitioners in *Eisentrager* had been afforded due process by means of a military tribunal, the Guantanamo Bay detainees had not.

After the decision was released, one commentator said: "As a legal matter, there is no difference between being held in Guantanamo and being held in the United States." A lawyer for one of the detainees said that "now that the U.S. courts are open to the detainees, the cases will be remanded to the district court to determine the legality of the detentions and what kind of hearings will be required."

Hamdi v. Rumsfeld: In a 6-3 decision, the Court ruled that while the military had the authority to detain an American citizen who ultimately proved to be an enemy combatant, the current war on terror did not give "a blank check for the President when it comes to the rights of the nation's citizens." The Court decided that Mr. Hamdi (as an American citizen) was still entitled to his due process rights afforded by the Constitution, including "notice of the factual basis for his classification," and also a "fair opportunity to rebut the government's factual assertions before a neutral decision-maker" such as a court. The majority opinion stated that "indefinite detention for the purpose of interrogation is not authorized" under the Constitution, and that an "unchecked system of detention carries the potential to become a means for oppression and abuse of others."

The majority opinion also rejected the government's use of a low standard of proof in justifying its detention of Mr. Hamdi, arguing that "the process Hamdi had received is not that to which he is entitled under the Due Process Clause." But, at the same time, the Court argued that, given the threats posed by terrorism, the courts had to give deference to the Executive branch when questioning these detentions. It said that "the full protections that accompany challenges to detentions in other settings may prove unworkable and inappropriate in the enemy-combatant setting."

Rumsfeld v. Padilla: In a 5-4 decision, the Court ruled that Mr. Padilla's original habeas petition was filed in the wrong court. The majority opinion ruled that lawyers for Mr. Padilla should have filed their habeas petition with federal district court in South Carolina (where Mr. Padilla is currently being held in a military jail) and not in federal district court in New York. Lawyers for Mr. Padilla later re-filed his case in South Carolina. They also said that they were heartened by the Court's ruling in *Hamdi*, which they say could help their client.

. . . many issues remain unresolved

According to legal commentators, the justices' rationales in their opinions "took very different lines of attack" and did not resolve all of the matters argued by the petitioners and respondents in their legal briefs submitted to the Court. For example, in the *Hamdi* decision, legal experts say that the Court did not lay out a clear blueprint as to how the lower courts can protect individual liberties while maintaining national security under the continuing threat of terrorism. The majority opinion stated: "Whether and what further proceedings may become necessary after the respondents make their response are matters we need not address now." While the decision offered that "enemy combatant

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While the Supreme Court decided that the war on terror did not give “a blank check for the President when it comes to the rights of the nation’s citizens,” it also ruled that the lower courts must still give deference to the Executive branch when deciding whether to review these detentions. Some say that the Court’s rulings did not provide a clear blueprint for balancing civil liberties and national security.

proceedings may be tailored to alleviate their uncommon potential to burden the executive [branch] at a time of ongoing military conflict,” a legal commentator noted that it did not say whether, for example, “proceedings will be opened or closed, whether prisoners will have unrestricted access to lawyers . . .”

In that same decision, the majority argued that the AUMF resolution did provide statutory justification for the detention of citizens. But the dissenting opinion argued that the resolution did not even mention the word “detention” anywhere in its text, and, therefore, could not be used as a basis for authorizing detentions of American citizens.

Commenting on the *Rasul* decision, many legal experts said that while it was clear that federal courts may now consider habeas petitions filed by enemy combatants detained in Guantanamo Bay, it was unclear as to whether federal courts had jurisdiction to hear habeas corpus petitions from enemy combatants detained by American authorities in other countries such as Afghanistan. In a dissenting opinion, one justice worried that “the court boldly extends the scope of habeas statute to the four corners of the earth.” But another commentator said that the *Rasul* decision “should apply to detainees both in Guantanamo and elsewhere.”

Complying with the Supreme Court’s decisions

Even before the Court had issued its rulings, federal officials said that they would allow Guantanamo detainees to challenge their detentions once a year through a newly-established review panel set up by the Pentagon. But many political analysts say that the Pentagon had probably decided to create such a panel (officially known as the “Combatant Status Review Tribunal”) simply to respond to domestic and international criticism of the detentions. Critics have described the review process as a “last-ditch effort to retain control of the detainees by arguing that the military had

provided a fair process and so persuading the courts not to take jurisdiction.”

Many civil libertarians and lawyers for the detainees say that, in light of the Court decisions, the review system now in place “could not satisfy the court’s requirements for providing a fair hearing to the detainees.” Critics say that under the current review process (which is not open to the public), detainees are given “a personal representative who is neither a lawyer nor an advocate.” The review tribunal may also withhold information “about how, where, and from whom the information about the accusations supporting the enemy combatant charge originated if officials deem it classified.” One legal analyst said: “All these factors would appear to make the process inadequate to the requirements of due process the court has mandated.”

In order to blunt the administration’s efforts, lawyers for the detainees have continued to file habeas petitions for their clients. Instead of filing habeas petitions for each detainee, lawyers say that they will, instead, file particular lawsuits which they hope “will form the first of a dozen or so distinct categories of cases into which most of the more than 600 [Guantanamo] prisoners will fall.”

In the meantime, the government announced that it would continue to process its detainees at Guantanamo Bay through the new review tribunal. A Pentagon spokesman said that, as of September 2004, military officials had completed the review process for 38 detainees, and that all but one have been determined to be enemy combatants. But some legal observers say that lawyers for the detainees may eventually challenge the work of the review tribunal by arguing that its legal process did not conform to the Supreme Court’s decisions handed down in June 2004.

In late-September 2004, officials at the U.S. Justice Department announced that, rather than provide a hearing for Mr. Hamdi to challenge his detention, they had reached an agreement which would allow him to renounce his American citizenship and travel back to Saudi Arabia. The agreement also required Mr. Hamdi to remain in that country for a set period of time and to report “suspicious activities.” Some note that the agreement lacked provisions to enforce its terms. . A spokesman also said that the “United States has no interest in detaining enemy combatants beyond the point that they pose a threat to the U.S.”

On the other hand, several civil libertarians believe that the government most likely had a weak case in detaining Mr. Hamdi, and rather than “risk further embarrassment in a failed prosecution, they’ve decided to just send him out of the country.”

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Global Trade and Financial Round-up



Global trade talks back on track?

The member nations of the World Trade Organization (WTO) announced that they have restarted the latest round of global trade talks aimed at expanding several areas of international commerce. In July 2004, trade officials said that the WTO had reached what they called a “historic breakthrough” in the talks when several members of the organization agreed to reduce some agricultural subsidies given to their farmers, an issue which many observers say had held up these talks since last year.

Under WTO rules, its 148 member nations must hold periodic meetings (also called ministerial conferences because the participants are trade ministers from member nations) at least once every two years to discuss trade matters and also to review the status of any ongoing negotiations.

In November 2001, the WTO members agreed to begin their latest round of global trade talks – called the Doha Round – to bring down tariffs and other barriers to global trade, and to agree to new measures, in such areas as agriculture, services, intellectual property, investment, and competition policy. Experts point out that this round had been dubbed the “development round” to call greater attention to the needs of developing countries in the world trade system. Analysts also note that the negotiations are being conducted as a “single undertaking,” meaning that all WTO member nations must agree on the results in order to conclude the round and implement its provisions.

Current negotiations in the Doha Round had stalled during the last WTO meeting held in Cancun, Mexico, in September 2003 after member nations – largely divided along the lines of rich and poor nations – failed to reach an agreement on several areas of negotiations, particularly in the area of agriculture. Trade experts say that agriculture has always been a particularly sensitive area of trade in both developing and industrialized countries for decades. They note that 80 percent of WTO member nations are developing countries, and that many depend on their agricultural exports for their main source of economic growth.

On the other hand, economists estimate that industrialized countries – mainly the United States and the European Union (EU) – provide over \$300 billion in subsidies to their farmers every year (an amount which

greatly exceeds foreign assistance to the developing world), and also claim that these subsidies encourage farmers to overproduce and flood the world market with cheap food. Although developing countries have long-complained that they cannot compete against such subsidies, analysts say that richer nations of the WTO find it difficult to reduce them because the farm lobbies in these countries are highly influential in national politics.

Observers say that during negotiations in Cancun last year, several industrialized countries offered to reduce their agricultural subsidies, but only if the developing countries first committed themselves to lowering their tariffs on manufactured goods. Business executives say that rich countries dominate the trade in manufactured goods, which makes up close to 60 percent of global trade. But they point out that developing countries impose tariffs averaging 40 percent on the import of manufactured goods from the industrialized world. (On the other hand, US tariffs on such goods average around five percent.) According to one statistic, the U.S. exported more than \$670 billion of industrial goods last year, and analysts say that reducing tariffs on these particular goods could help to increase exports and, possibly, employment. But trade ministers from the developing countries refused to continue negotiations until richer nations pledged to reduce their agricultural subsidies. Said one commentator concerning the future of the talks: “It is agriculture that will make or break the meeting.”

In July 2004, the WTO announced that several industrialized members had pledged to reduce their agricultural subsidies by 20 percent on such products as corn, rice, wheat, and soybeans during the first year of the final agreement’s implementation. They also made a commitment to eliminate export subsidies completely. The U.S. had also reached an understanding with several major cotton-growing nations in Africa that it would reduce subsidies to its cotton farmers within the context of ongoing WTO negotiations rather than having separate talks outside of that organization.

Commentators say that these pledges soon broke the bottleneck in negotiations and cleared the way to a general “framework agreement” on a wide variety of other trade areas such as market access for industrial products, services, investment, competition policy, and transparency in government procurement policies. A framework agreement is a general outline of principles and understandings on particular issues and areas of trade which will then guide future negotiations. The WTO Director-General said that “although these frameworks are not final agreements, they do include significant commitments.” For example, in return for the concessions they have made to reduce their agricultural tariffs, some rich nations of the WTO have asked their poorer counterparts for a “general commitment” to reduce their tariffs on manufactured goods. Trade experts say that negotiators in the coming months will use the framework agreement to set actual numerical targets in reducing and eliminating tariffs and other barriers to trade for a specified time period.

Political analysts believe that agricultural concessions

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made by the richer members of the WTO did not reflect any particular generosity on their part. They noted that the U.S. had, in April 2004, lost a significant decision at the WTO when a dispute settlement panel ruled that the amount of subsidies paid to its cotton growers violated global trade rules. Rather than losing its leverage, political analysts say that the U.S. wanted to take the initiative by making its own offers to the poorer WTO nations.

Trade experts also say that although the U.S. and other industrialized WTO members had agreed to reduce their agricultural subsidies, the actual language in the framework agreement gave them enough room to amend their plans. One U.S. official said that he expected the developing countries of the WTO to reduce tariffs for industrial goods: “We have a framework for cuts [in agricultural subsidies], but the [final] numbers are going to depend on what we get in market access [for our industrial goods].”

Some economists estimate that a successful conclusion of these global trade talks could increase world gross income by almost \$3 trillion by the year 2015. Although the WTO had planned to conclude the Doha Round negotiations by January 1, 2005, trade experts predict that the talks will now end in 2006. The organization will review the status of these negotiations when its members meet in Hong Kong in December 2005. But many observers worry that the WTO member nations may have made too many general commitments which could easily change during actual negotiations. Said one commentator: “The very ambitiousness of the pact raises the question of whether governments have signed an agreement they have no intention of keeping.”



One-sentence curb on human rights abuses

Can foreign nationals file lawsuits in American courts against other foreign nationals and even corporations for alleged violations of human rights which occurred outside of the United States? In a recent decision, the United States Supreme Court ruled that an obscure law passed by Congress in 1789 does give American courts jurisdiction to hear and adjudicate these kinds of cases. But does this decision resolve the many uncertainties surrounding this law or does it simply raise more questions than it answers?

In 1990, at the urging of officials in the U.S. Drug Enforcement Agency (DEA), a Mexican police officer – Jose Francisco Sosa – kidnapped and sent to California for trial a Mexican doctor – Humberto Alvarez-Machain – who was allegedly involved in the torture and murder of a DEA narcotics agent investigating a drug cartel. After being acquitted by a U.S. court, Dr. Alvarez filed a lawsuit against Mr. Sosa under the Alien Tort Claims Act (ATCA). This

one-sentence statute which was passed over 200 years ago by the U.S. Congress reads: “The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.”

Legal circles have long debated the actual intent of the ATCA statute. For example, many legal scholars believe that the ATCA simply grants U.S. district courts “jurisdiction to the kinds of cases it covers” and does not, in fact, allow people to file lawsuits. But others point out that, since 1980, American courts have ruled that foreign nationals can bring suit under the ATCA against other foreign nationals if a particular case satisfied three conditions: (1) an alien sues, (2) for a tort, (3) committed in violation of the law of nations (i.e. international law). In one case, Philippine citizens filed suit in California against the estate of Ferdinand Marcos, former president of the Philippines, for human rights abuses committed in that country under his regime. In another case, a Paraguayan citizen brought suit in New York against a Paraguayan police inspector for the torture and murder of a family member in Paraguay. Federal courts later awarded large judgments to the plaintiffs in both cases.

International law experts around the world now generally agree that certain acts committed by a foreign sovereign and its agents clearly violate international law, and that these parties could be held legally responsible for these acts under the ATCA. Some of those acts include genocide, slavery or the slave trade, the murder or disappearance of people, and torture (including rape). Later courts have also ruled that the ATCA even applies to private parties who acted under the auspices of or received assistance from a government in committing an act considered to be a violation of international law. Despite these court decisions, jurists note that there is no global consensus on what other acts constitute a violation of human rights or international law.

More troubling for the private sector, foreign nationals are now filing lawsuits under the ATCA against corporations (including several American companies) that have set up operations in countries with a history of human rights abuses. In past ATCA cases, plaintiffs have usually filed lawsuits against those parties who actually carried out the alleged abuses. But in a new twist, these plaintiffs are now arguing that, for example, corporations should be held legally responsible for human rights abuses directly committed by host governments in connection with current business projects in those countries if the corporations were complicit in and benefited from these alleged acts.

In his lawsuit filed in federal district court, Dr. Alvarez argued that his arrest and kidnapping was a violation of the norms of international law (i.e. most nations agreed that kidnappings coordinated by or sanctioned by a government or its agents were unlawful and violated generally accepted behavior on the part of nations). The district court ruled in favor of Dr. Alvarez, saying that the doctor had been subjected to “an arbitrary arrest in violation of the law of nations.” It awarded him \$25,000, a decision which was later upheld by an appeals court.

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In an appeal to the United States Supreme Court, the U.S. Department of Justice argued that the ATCA statute “did nothing more than define an aspect of the federal courts’ original jurisdiction, without conferring an ability to bring private lawsuits or to invoke modern notions of international law.” According to one observer, the government claimed that every ATCA case adjudicated by lower courts was based “on a mistaken interpretation of the law.” Furthermore, the government argued that the lower courts’ interpretation of the ACTA law violated the doctrine of separation of powers. Government lawyers said that whether the U.S. was bound by a certain standard or norm of international law should be decided not by the courts but by the Executive branch as part of its role in conducting the foreign relations for this country.

On the other hand, lawyers for Dr. Alvarez argued that the Supreme Court should uphold the plain meaning of the one-sentence ATCA statute. They also said that a strict interpretation of the law as only conferring jurisdiction would sweep away many important court precedents involving the statute.

In June 2004, the Court decided unanimously to overturn the appeals court’s judgment. In its ruling, the justices held that the ATCA did not intend to cover Dr. Alvarez’s kidnapping as an “egregious human rights violation.” The majority opinion stated: “A single detention of less than a day, followed by the transfer of custody to lawful authorities and a prompt arraignment, violates no norm of customary international law.”

At this point, say legal experts, the high court could have sidestepped an interpretation of the ATCA statute itself since Dr. Alvarez’s arrest did not violate any norms of international law. But the decision did provide a broader interpretation of the statute. It stated that the when Congress first enacted the ATCA in the 18th century, there was a “very limited category offenses” which were generally considered a violation of international law (such as piracy).

It then reasoned that the courts today had the discretion to apply the ATCA statute to modern-day international norms having “definite content and acceptance among civilized nations.” One advocate of the law said: “The court has accepted that international law evolves and that this law [ATCA statute] has contemporary meaning.” The Court then went on to instruct the lower courts to “require any claim based on present-day law of nations to rest on a norm of international character accepted by the civilized world and defined with a specificity comparable to the features of the 18th-century paradigms.”

But the high court also instructed lower courts to apply the ATCA statute with “judicial caution” so that they would not unduly interfere in, say, the conduct of foreign affairs which is a power primarily entrusted to the Executive branch of government. For example, legal commentators say that both the current government of South Africa and the U.S. Department of State are opposed to a pending ATCA case where plaintiffs are suing over 20 corporations that allegedly cooperated with the apartheid government in South Africa in

violating their human rights. Officials argue that these lawsuits interfere with South Africa’s own “post-apartheid approach to reconciliation and reconstruction.”

Human rights lawyers hailed the decision as upholding the use of the ATCA statute in punishing acts such as genocide, slavery, and war crimes, which are already recognized around the world as violating international laws and standards. On the other hand, administration officials and the business community say that the Court’s ruling curtailed the use of the ATCA by restricting its application to only those acts generally considered a violation of international law such as genocide and war crimes. They say that potential plaintiffs will face greater difficulty if they tried to apply the ATCA statute to more novel or unusual acts such as violations of labor conditions in workplaces or environmental laws. One critic of the statute said that the Court’s decision was “riddled with mixed signals” and provided the lower courts with too much discretion. Even the Court itself acknowledged that “a judge deciding in reliance on an international norm will find a substantial element of discretionary judgment in the decision.”

Some legal scholars say that the Supreme Court’s ruling on the ATCA statute probably won’t affect pending cases involving that law. Much of these claims involve alleged acts which are widely recognized around the world as violating human rights such as slavery and torture.



Cotton no longer king at WTO?

In what legal experts are calling a landmark decision, the World Trade Organization (WTO) recently ruled that the amount of subsidies that the United States government provides to its cotton growers harmed other cotton producers around the world in violation of international trade rules. Political analysts say that this is the first WTO decision nullifying a country’s use of a domestic agricultural subsidy, and, if upheld, could have wide-ranging ramifications beyond cotton itself.

In a dispute first filed in the WTO in February 2003, Brazil argued that the \$12.5 billion in government subsidies given to American cotton growers from 1999-2002 exceeded limits set by global trade rules and eventually led to an overproduction of cotton. They noted that U.S. cotton production increased from 14 million tons in 1999 to 20 million tons in 2001. Brazilian officials said that as this larger supply of cotton flooded global markets, the price of that cash crop began to fall, and, subsequently, forced the Brazilian cotton industry out of many third country markets. This, in turn, gave the U.S. an unfair share of world cotton

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exports (increasing from 24 percent in 1996 to 37 percent in 2001). Brazilian officials claimed that American cotton subsidies have caused damages totaling over \$600 million a year in lost revenue, lost production, and higher unemployment since 1999. They further argued that certain subsidies provided by the U.S. government to its cotton growers were, in fact, prohibited by WTO rules.

The U.S. government responded that its cotton subsidy programs did not encourage the overproduction of cotton because subsidy payments were not dependent on the amount of cotton grown by farmers, and, therefore, could not have caused a drop in the price of cotton in global markets.

Economists note that, in comparison to other cotton regions around the world, the price of growing cotton in the U.S. is very high. One analyst said that it costs farmers up to 86 cents to grow a pound of cotton while other nations can grow the equivalent amount for much less. Given this high price, some analysts say that American cotton would not be competitive in the world market where it currently sells for 40 cents per pound, down 66 percent since 1995. But they note that, bowing to intense political pressure from agricultural interests, the U.S. government had guaranteed that American farmers would receive anywhere from 52 to 72 cents per pound for cotton. The government pays the difference between the market and government cotton prices by giving tens of billions of dollars in subsidies (which come from tax revenues) to the cotton growers. According to a humanitarian organization, “the U.S. pays three times more in subsidies to its 25,000 cotton farmers than its budget for aid to Africa’s 500 million people.”

The U.S. is currently the world’s largest exporter of cotton and now holds 40 percent of the world market. Analysts say that the 30 largest industrialized countries in the world (including the U.S., those in Europe, and Japan) gave their farmers over \$318 billion in subsidies for a variety of crops in 2002, which is more than they gave in development aid to poorer countries around the world.

Many critics believe that these large subsidies hinder economic development in poorer nations that depend on agricultural exports as a major source of income. One analyst said: “Cotton is the mainstay of economies in central and west Africa,” which is also the third largest cotton producing region (and one of the poorest) in the world. According to another commentator: “Cotton figures as a significant export item for at least 20 of the 50 nations designated as ‘least developed countries’ by the United Nations.” Subsidies, claim critics, encourage overproduction of many cash crops which then lead to lower market prices. They note that although some poor countries around the world have a cost advantage in growing cotton, declining market prices would make cotton production unprofitable in the long term.

A joint study released by the World Bank and the International Monetary Fund said the elimination of the U.S.’s cotton subsidy programs would lead to a drop in the production of cotton, which would then be followed by an increase in world cotton prices. Economists say that such a

price increase would provide an extra \$250 million to western Africa, a region where a majority of people live on less than one dollar a day.

Subsidies are financial contributions made directly or indirectly by governments for various economic and political purposes. Experts say that many governments provide subsidies, for example, to maintain low prices for some basic commodities (such as cooking oil) which may otherwise be too expensive for the public at market rates. Others say that governments use subsidies to improve or protect the competitive position of certain sectors of their economies such as the cotton industry in the U.S. Subsidies are also controversial in the realm of international trade. Nations have accused other nations of using subsidies to damage a particular industry in a competing country.

In order to prevent governments from using subsidies to hurt the commercial interests of other countries, the WTO administers a treaty called the “Agreement on Subsidies and Countervailing Measures” – otherwise known as the SCM agreement – which is just one of many agreements administered by that world trade body for its 148 member nations (which includes the U.S.).

The SCM agreement itself does not prohibit the use of subsidies by its member nations. In fact, the WTO believes that some subsidies can actually “play an important role in developing countries and in the transformation of centrally-planned economies to market economies.” Rather, the SCM agreement strictly regulates the use of these measures. For example, the SCM agreement generally prohibits the use of government export subsidies (i.e. subsidies which help directly in the export of goods). Article 5 of the agreement also prohibits a WTO member from using a subsidy which will cause “serious prejudice” to the trade interests of another member. Article 6.3(b) and (d) go on to state that a particular subsidy causes serious prejudice if its effect is “to displace or impede the exports of a like product of another [WTO] member from a third country market” or if the effect of the subsidy is “an increase in the world market share of the subsidizing Member in a particular subsidized primary product or commodity.”

In June 2004, a WTO dispute settlement panel ruled largely in favor of Brazil, agreeing that American subsidies for its cotton growers violated Article 5, and Articles 6.3(b) and (d) of the SCM agreement. The panel concluded that the amount of cotton subsidies paid to US farmers had exceeded established limits (at \$1.62 billion a year) and caused serious prejudice to the Brazilian cotton industry by encouraging overproduction, which then undercut the global price for cotton. In its decision, the panel even cited a study conducted by the chief economist at the US Department of Agriculture showing that if the U.S. had not provided cotton subsidies to its cotton growers, American cotton production would have decreased and would have led to a 12.6 percent price increase for cotton. It also ruled that the use of several cotton subsidies were, in fact, prohibited by the SCM agreement. Experts note that the WTO also found that indirect subsidies

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(such as marketing loans and marketing loan assistance programs) were largely responsible for causing serious prejudice to Brazil's trade interests.

In order to comply with the WTO's decision, experts say that the U.S. must modify or eliminate some of its cotton subsidy programs. It must also reclassify those programs which were deemed as prohibited under the SCM agreement. Despite the WTO's ruling, commentators say the decision will not have an immediate impact on the US's cotton subsidy programs. The U.S. recently announced that it would appeal the WTO ruling, and that a decision from the WTO's Appellate Body (the highest judicial body in the WTO dispute settlement process) will not be available until the end of the year. And even if the U.S. loses its appeal, analysts say that the WTO will likely give the U.S. several years to phase out those subsidies declared illegal under the SCM agreement.

Political analysts say that this decision could have wide ramifications beyond the cotton subsidies themselves. For example, they say that many developing countries could use this WTO ruling to challenge the legality of other subsidies provided by rich nations to their farmers. One analyst said: "This could mean problems for all domestic subsidy programs, for corn, rice, everything that receives big direct payments from the United States Treasury."

Other analysts believe that the ruling could also affect the course of global trade talks (called the Doha Round) currently being negotiated under the auspices of the WTO. In September 2003, the Doha Round came to a standstill after WTO members failed to set an agenda for negotiations. Developing countries had argued that they would not proceed with further talks unless industrialized countries lowered their agricultural subsidies. Experts now say that the WTO cotton ruling may allow developing countries to argue that giving other subsidies beyond a certain limit could be declared WTO-incompatible in the future if they cause serious prejudice to another member's interests.



Open and shut: First WTO case against China

In March 2004, the U.S. filed its first complaint against China at the World Trade Organization (WTO), claiming that Chinese trade policy unfairly discriminated against the import of foreign-made semiconductor chips, thus limiting American access into that country's semiconductor market. This case also marked the first time that a WTO member filed a complaint against China since its accession into that organization in 2001.

Semiconductor chips serve as the "brain" of many

electronic products such as computers and cell phones. Just last year, China purchased \$25 billion in semiconductor chips. Under its value-added tax (or VAT) policy on semiconductor chips, which was established in 2000, China charges a 17 percent tax on all semiconductor chip sales in its market, but would immediately refund 14 percent of this tax back to companies (whether foreign or domestic) that designed and manufactured these chips in China. On the other hand, companies abroad that exported chips to China did not receive any refunds. Analysts say that this particular VAT policy made semiconductors manufactured abroad – in countries such as the U.S. – more expensive than those made in China.

Many critics in the business community believe that China is using its VAT policy to encourage domestic production of semiconductor chips. One analyst claimed that the VAT policy was simply a "protectionist measure to nurture the Chinese [semiconductor] industry by discriminating against foreign companies." Analysts note that China has been able to satisfy only 20 percent of domestic demand for semiconductors, and that its VAT policy could encourage foreign companies to move their operations to China in order to avoid the tax. Since the implementation of this VAT policy, lobbyists for the American semiconductor industry point out that foreign and domestic investment in China's semiconductor sector totaled \$3.6 billion from 2000 to 2002, and will reach \$25 billion by 2013. Said a spokesperson for the industry: "It is clear that the VAT rebate is a major factor in these investment decisions . . . If the problem is not solved, the bulk of cutting edge capacity will be in China."

Many executives say that China's VAT policy could eventually hurt American semiconductor sales in that country, which totaled over \$2 billion last year and represent America's third largest export to China. Some claim that US chip manufacturers have lost sales totaling over \$244 million because of China's VAT refund. One industry supporter said: "In a competitive semiconductor industry, a tax on foreign products can be the difference between winning or losing a sale." Analysts say that the American semiconductor industry currently employs over 250,000 workers and has a 50 percent share of the world market, but that this dominant position could shift over time under China's VAT policy on semiconductor chips.

Since 2003, several U.S. companies have complained that China's VAT policy violated WTO trade rules by unfairly discriminating against foreign imports of semiconductor chips. The various treaties administered by the WTO operate under the principle of "national treatment" where one member nation must give another member nation's goods and services the same treatment it accords to its own domestic goods and services. Some economists and policymakers say that "countries and consumers benefit most when products and services have fair and equal access to markets without regard to their national origin." So under the principle of national treatment, WTO members generally are

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forbidden to discriminate against imported goods by, for example, charging higher internal taxes on these goods than those charged on domestic products.

The WTO also provides an enforceable dispute settlement process in the event one member nation believes that another member's trade policies violate WTO rules. After the filing of a complaint, the disputing parties have 60 days to work out their dispute during consultations. If the parties have still not resolved their disagreements, the complaining party may request a dispute settlement panel which will then formally adjudicate the dispute.

In March 2004, the U.S. filed a formal complaint at the WTO, arguing that China's VAT policy on semiconductors violated the principle of national treatment. The U.S. said that by imposing different tax rates on semiconductor chips, China was giving preference to semiconductors manufactured in that country. Chinese officials responded that their VAT policy came into effect before it joined the WTO, and that this issue was never an issue during China's accession talks to that organization.

But, according to some experts, WTO documents show that during accession talks, Chinese officials agreed that once their country became a member of the WTO, they "would ensure that its laws, regulations and other measures relating to internal taxes and charges levied on imports would be in full conformity with its WTO obligations," which presumably includes adhering to the principle of national treatment. In July 2004, the U.S. decided to drop its complaint after reaching a settlement with China concerning its VAT policy. Under the terms of the settlement, China agreed to phase out its VAT policy on semiconductor chips by April 2005. Many trade experts and scholars say that China would not have been able to defend its VAT policy before a WTO dispute settlement panel.



International high stakes poker?

Will a recent trade dispute between the United States and the nation of Antigua and Barbuda turn into a high stakes poker match? In its first decision concerning the Internet and online services, the World Trade Organization (WTO) recently ruled that American laws restricting offshore Internet gambling services from the U.S. market violated international trade rules. Could this decision open up the American gambling market to greater foreign competition?

Experts say that online gambling and betting services – where people can, for example, place or take bets on sporting events or even play casino games such as poker and blackjack – is the "fastest-growing sector of the gambling

industry." From 1998 to 2003, online gambling companies saw their revenues grow from \$651 million to over \$6 billion. On the other hand, revenues from actual casinos and other gambling establishments grew from \$55 billion to \$69 billion in the same time period.

Though there is an array of laws that regulate gambling in this country, individual states are primarily responsible for regulating gambling operations in their respective jurisdictions. For example, current regulations require casino owners and other gambling venues to hold a license or have a charter (i.e. specific government authorization) from the state to operate their establishments. But legal experts say that current laws have not kept up with the explosive growth of the online gambling industry. They point out that many states do not have laws that specifically prohibit "the offering and/or playing of gambling games offered over the Internet."

There is also a debate as to whether existing federal laws actually prohibit online gambling. Federal officials claim that various statutes, such as the Wire Act of 1961, implicitly criminalize gambling on the Internet. And they argue that offshore gambling operations are breaking these laws by providing gambling services in the US market through the Internet. But other legal experts have stated that "no United States federal statute or regulation explicitly prohibits internet gambling, either domestically or abroad." Despite these varying interpretations, recent statistics show that American residents make up over 50 percent of all online gamblers and provide over half of all worldwide online gambling revenue.

Because of the ambiguity in state and federal laws concerning Internet gambling, analysts note that many state and federal lawmakers are trying to pass legislation which would not only expressly prohibit online gambling in the U.S., but would also hinder the growth of this particular segment of that industry. For example, the U.S. House of Representatives approved a bill which would "make it a crime to accept financial instruments, such as credit cards and debit cards, for debts incurred in Internet gambling that is already illegal under state law." In response to this bill, many financial services companies – such as credit card issuers – have announced plans to stop processing gambling transactions.

Furthermore, when law enforcement officials recently announced that they would investigate those companies accepting advertisements from online gambling services (arguing that these companies were possibly "aiding and abetting" illegal gambling operations), many of these businesses stopped accepting such advertisements. Analysts also say that law enforcement officials have successfully prosecuted and incarcerated individuals who have operated online gambling sites in the U.S.

But in many other jurisdictions around the world, it is legal to operate and provide online gambling services. Some of these countries include Antigua and Barbuda, Costa Rica, Panama, Belize, Australia, and even a few countries in Europe. Commentators say that online gambling operations

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have provided a steady stream of revenue for these countries. But analysts say that as the U.S. began to implement its restrictions on the supply of cross-border gambling and betting services into the US market, revenues for these online gambling operations began to fall.

In a complaint filed at the WTO in June 2003, Antigua and Barbuda – which is a single country and once had what experts described as “a thriving Internet gaming business” – argued that US federal and state laws which have restricted the cross-border supply of online gambling and betting services into US markets violated international trade laws administered by the World Trade Organization (WTO).

Officials from Antigua and Barbuda say that when the U.S. ratified the General Agreement on Trade in Services (or GATS) – which is a treaty regulating international trade in services – it had committed itself to offer unrestricted access to the American gambling market. GATS operates under a principle called most-favored-nation treatment (MFN), which requires that when one WTO member nation grants a trade preference to another member, it must do the same for all other members. Furthermore, under the GATS, a WTO member may make certain “commitments” (or promises) to provide greater market access to specific service sectors in its economy.

In its complaint, Antigua and Barbuda argued that the enactment of U.S. laws and other legal measures restricting cross-border gambling services violated a prior U.S. commitment to open its gambling services market under the GATS. Officials cited a U.S. schedule of commitments covering a category called “recreational, cultural, and sporting services,” which they say implied and included online gambling and betting services. They also cite a similar list from the UN which they say includes a subheading called “gambling and betting services.” Officials from Antigua and Barbuda said that U.S. gambling restrictions violated the principle of MFN. They argued that while the U.S. allowed its own gambling establishments to provide their services to the American market via actual casinos, its laws prevented similar businesses based in other countries (whether online or offline) from doing the same.

Officials from Antigua and Barbuda (which has a population of 67,000 people) said that the country was home to 119 licensed online gambling services, which employed over 5,000 people and generated close to \$90 million in revenue over the last three years. But they say that recently-enacted laws in the U.S. restricting offshore Internet gambling had harmed their country’s online gambling industry. They also claimed that only 30 such operations still operated in that country and that over 4,000 people had been laid off since the enactment of the U.S. gambling restrictions.

The U.S. responded that it had never promised greater market access for cross-border gambling and betting services under the GATS agreement. In fact, officials argued that there was no specific reference to gambling services in its GATS commitments. Said one official: “We believe that the language on U.S. services commitments . . . clearly intended to exclude gambling.” U.S. officials also said that Antigua

could not use the UN list to claim that the U.S. committed itself to opening its gambling services sector because it chose not to use the UN list as a basis for its GATS schedule.

In addition, U.S. officials said that their restrictions did not violate the principle of MFN because “the cross-border restrictions are applied [equally] to both foreign and domestic operators.” Furthermore, they pointed out that the GATS agreement allowed exemptions for those trade measures deemed “necessary to protect public morals or to maintain public order.” The U.S. argued that its restrictions on offshore gambling operations were necessary to protect vulnerable segments of its population (such as children) from gambling, and also to deter organized criminal activity in this particular area.

In March 2004, a WTO dispute settlement panel upheld Antigua’s complaint. In its decision, the panel ruled that the U.S.’s GATS schedule “does not contain any restrictions on cross-border supply of such [gambling] services.” It also rejected Washington’s defense that “the United States never intended to include gambling services . . . in its GATS schedule.” In particular, the WTO cited the UN list of services as a basis for its decision. The panel also argued that U.S. gambling restrictions failed to qualify for exemptions provided by the GATS agreement. (Again, the U.S. argued that its restrictions on offshore gambling operations were necessary to protect vulnerable segments of its population.) U.S. officials later announced that they would appeal the WTO’s ruling.

Trade experts say that the appeals process could take several months, and that the U.S. will not have to comply immediately with the WTO’s ruling. Although this decision only applies to gambling operations based in Antigua, some trade experts say that the decision, if upheld, could “open the door for other nations to seek similar access for their Internet gambling businesses.” Legal experts believe that the WTO’s decision raises further questions. For example, one commentator asked: “If Americans can place bets at offshore casinos, would US-based internet casinos continue to be illegal?” Officials from both countries have said they have started discussions to resolve this ongoing dispute.



Narcotics: An exception to an exception

In a recent decision, the Appellate Body of the World Trade Organization (WTO) overturned a previous ruling declaring an anti-narcotics initiative promoted by the European Union (EU) to be incompatible with international trade rules. Though the decision was welcomed by those WTO member nations offering special trade preferences only to those countries helping to counter the illegal drug trade, others say that the ruling will allow WTO member nations to

violate a core provision of the global trading system.

The WTO administers three main agreements governing trade in goods (the General Agreement on Tariffs and Trade or GATT), services, and intellectual property, respectively. These agreements incorporate the principle of “most-favored-nation” (MFN) treatment, which requires that when one WTO member nation grants a trade benefit to another member, it must grant to all other members benefits that are not less favorable, and must do so on an unconditional basis. The principle of MFN serves “as one of the pillars of the WTO trading system,” say legal experts.

But, given the economic difficulties faced by many WTO member nations (80 percent of which are developing countries), the WTO agreements contain exceptions to the MFN principle so that more prosperous members may treat the developing countries more favorably. For example, a GATT provision called the “Enabling Clause” serves as the legal basis for special trade preferences and programs (which would otherwise violate the principle of MFN) to benefit certain developing countries. This clause authorizes the extension of “nonreciprocal and non-discriminatory preferences” to developing countries.

One program created under the Enabling Clause is a “generalized system of preferences” (or GSP) program. Under a GSP program, a richer country gives non-reciprocal, preferential treatment to specific products originating from designated developing countries, an action that would ordinarily violate the MFN principle. The anti-narcotics GSP program administered by the European Union (EU), for instance, not only reduces tariffs for particular goods from certain developing countries, but provides *further* benefits in the form of duty-free access to other products from countries that agree to combat the illegal drug trade.

In January 2003, India filed a formal complaint in the WTO, arguing that the additional trade preferences given under the anti-narcotics provisions in the EU’s GSP program violated both the principle of MFN and provisions in the Enabling Clause because those countries in the GSP program which decided not to participate in the anti-narcotics program did not receive the additional benefits. (India did not challenge the legality of the GSP itself.) In December 2003, a WTO dispute settlement panel ruled largely in favor of India, arguing that the principle of MFN and provisions in the Enabling Clause required developed countries to provide “identical GSP tariff preferences to all developing countries without differentiation.”

Legal analysts say that this decision would have put into jeopardy similar GSP programs (such as those administered by the U.S.) granting additional benefits to those developing countries helping to fight the illegal drug trade, protecting the environment, or complying with core labor standards.

In April 2004, the WTO Appellate Body (which is the highest WTO judicial body) overturned the dispute settlement panel’s decision. It ruled that WTO member nations “may be selective in choosing which developing countries benefit from special treatment under GSP schemes,

provided that they do not discriminate against countries with the same development, financial, or trade needs which the benefits are intended to address.” In other words, the Appellate Body ruled that while the EU’s anti-narcotics GSP program does not have to provide identical benefits even to those countries choosing not to participate in the anti-narcotics program, the EU must provide the same benefits to all developing countries choosing to participate in that program and who share similar circumstances in dealing with the illicit drug trade so as to comply with the principle of MFN and provisions in the Enabling Clause.

In justifying its ruling, the Appellate Body cited paragraph 3(c) of the Enabling Clause, which states that any GSP program which gives differential treatment to certain developing countries shall be “designed and, if necessary, modified, to respond positively to the development, financial, and trade needs of developing countries.” It then went on to say: “We are of the view that, by requiring developed countries to ‘respond positively’ to the ‘needs of developing countries’, which are varied and not homogeneous, paragraph 3(c) indicates that a GSP scheme may be [considered to be] ‘nondiscriminatory’ even if ‘identical’ tariff treatment is not accorded to ‘all’ GSP beneficiaries.”

But the Appellate Body also ruled that, under this distinction, the EU’s anti-narcotics GSP program was still incompatible with WTO rules because the program did not, in fact, provide similar benefits among recipient countries similarly affected by the illicit drug trade. For example, the Appellate Body noted that a country which currently did not participate in the anti-narcotics GSP program would be unable to do so in the future because the EU had “failed to set out clear criteria for determining which countries could be included as beneficiaries or added to the list of beneficiaries.”

A spokesman for the EU said that it welcomed the Appellate Body’s decision and that it would immediately comply with the ruling. On the other hand, India said that the final decision would allow WTO member nations to violate the core principle of MFN in the future.

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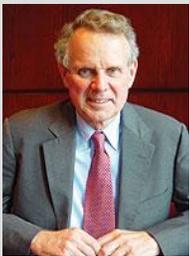
OCTOBER 13, 2004: INTERNATIONAL LAW CAREER PANEL, 12:45 pm – 2:00 pm, Wellington Conference Center. Speakers will include: **Arthur Estrella '92**, Vice President and Tax Director, Commerzbank A.G. (International Tax Law); **Sandra Liss Friedman '80**, Partner, Barnes, Richardson & Colburn (Customs and International Trade Law); **Holly J. Gregory '86**, Partner, Weil, Gotshal & Manges, L.L.P. (International Corporate Governance); **Daniel G. McDermott '75**, Managing Partner, Donovan, Parry, McDermott & Radzik (Admiralty and Maritime Law).



NOVEMBER 3, 2004: C.V. STARR LECTURE – Nation Building and Exporting the Rule of Law: Lessons Learned from Russia and Egypt with RICHARD P. BERNARD, Executive Vice President and General Counsel of the New York Stock Exchange, 4:30 pm – 6:00 pm, Wellington Conference Center. In October 1992, less than a year after the Soviet Union imploded, Rich Bernard left Wall Street “forever” and opened the office of Milbank, Tweed, Hadley & McCloy in Moscow. At the end of 1994, he resigned his Milbank partnership to start a two-year hitch assisting the newly-formed Russian Securities and Exchange Commission to create securities markets in Russia. By Thanksgiving 1995, he had been fired. Providing insight relevant to our efforts in Iraq today, Mr. Bernard will extract from his mid-life crisis in Russia and from his more recent advisory work in Egypt “lessons learned” about inculcating the rule of law in countries where “getting a dial tone can be a triumph of will.” He will show how historical and cultural differences and American arrogance make for a dangerous combination. He will show the difficulty in separating what is idiosyncratic to the American experience from what is universal.



NOVEMBER 10, 2004: C.V. STARR LECTURE – Bringing Human Rights Home: International Human Rights Principles and Women's Rights in the United States with KATHY RODGERS, President, Legal Momentum (the new name of NOW Legal Defense and Education Fund), 4:30 pm – 6:00 pm, Wellington Conference Center. The United States has long been looked to as a leader in developing civil rights and women’s rights. Other nations and women’s rights groups around the world saw the American system of legal protections as a model to improve their own governance. But the tide is shifting. This model is not designed to address the deep-rooted bias and systemic barriers that continue to constrain women's full participation in the economic, political and social aspects of American society. Thus, both legal advocates and grassroots activists are increasingly looking outward to international human rights principles and methods of advocacy to provide new approaches and tools to advance social justice here at home. What are the benefits of applying international human rights principles in the United States? Can human rights principles be successfully integrated into the American civil rights structure? Kathy Rodgers will address these questions and others during her lecture.



NOVEMBER 17, 2004: C.V. STARR LECTURE – Whose Disclosure Laws Ought to Apply to Cross-Border Securities Transactions? with MERRITT B. FOX, Michael E. Patterson Professor of Law at Columbia Law School, 4:30 pm – 6:00 pm, Wellington Conference Center. A global market is developing for the shares of an increasing portion of the world’s 41,000 publicly-traded issuers. This trend has given rise to an active debate concerning what United States policy should be toward regulation of their disclosure practices. Professor Merritt B. Fox will urge that, with certain limited exceptions, the United States should retain its existing mandatory disclosure regime and impose this regime on each issuer that has the United States as its economic center of gravity.