

OUTSOURCING OF LEGAL SERVICES: A BRIEF SURVEY OF THE PRACTICE AND THE MINIMAL IMPACT OF PROTECTIONIST LEGISLATION

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INTRODUCTION

The outsourcing of American jobs to overseas workers is one of the most compelling and controversial topics of recent memory. While most jobs outsourced in the past were in the fields of manufacturing and information technology, lately many white collar jobs have begun to move offshore. Legal jobs are no exception. Work done by paralegals, office assistants, and even attorneys is being outsourced to India, and other nations, where business costs are less expensive and the finished product is usually equivalent to what would be produced in the United States. Numerous state and federal bills have been proposed to curb the outsourcing of American jobs, many of which raise concerns over constitutionality and compliance with international trade agreements. Some of the bills, if enacted, could entice corporations to keep in-house legal work onshore. The only type of legislation proposed at this time that would give private law firms any incentive to limit outsourcing are bills that restrict the sending of personal information overseas. The benefits to law firms and corporations of sending legal work overseas outweigh the potential risks. The cost saved by outsourcing legal work is staggering, and soon firms may be forced to do so in order to stay competitive with their rivals who choose to outsource. Therefore, without effective legislation to regulate legal outsourcing, the practice will continue its exponential growth.

Part I of this Comment will briefly sketch the basic issues of outsourcing and the ways that state and federal legislatures have sought to regulate the practice. Part II will present a specific overview of how legal outsourcing works in practice. Part III will discuss recent protectionist legislation at the state level, difficulties that such legislation faces, and the effect the legislation may have on legal outsourcing. Part IV will turn the discussion to the federal level. Part V will forecast the future of legal outsourcing in light of anti-outsourcing legislation, and analyze the costs and benefits that it may have with regards to law firms and corporations.

I. OUTSOURCING: A HIGHLY COST-EFFECTIVE, HIGHLY CONTROVERSIAL BUSINESS PRACTICE

A. *What is Outsourcing and What Are the Costs and Benefits?*

Outsourcing refers to the business practice of taking a specific function previously performed in-house and having another company perform the operation.¹ Outsourcing is by no means a new phenomenon,² but due to advances in information technology, outsourcing has grown far more popular in recent years.³ The arrival of corporations such as Texas Instruments and Motorola to Bangalore in the late 1980s began a technology outsourcing boom,⁴ which soon moved on to business process outsourcing (BPO).⁵ A common example of BPO would be a corporation moving customer service operations overseas, with callers being connected to an operator in another country, often India.⁶ Recently, law firms have begun to outsource legal research and other tasks that would typically be handled in house.⁷ Some corporations even create offshore legal departments where international lawyers write patents and perform other tasks at a fraction of the cost an American attorney would demand.⁸ General Electric saved two

¹ See THOMAS L. FRIEDMAN, *THE WORLD IS FLAT: A BRIEF HISTORY OF THE TWENTY-FIRST CENTURY* 137 (2d ed. 2006). Friedman goes on to differentiate outsourcing from the related concept of offshoring, which he defines as a company moving a factory to a foreign country and producing the same product in the same manner, only with lower production costs.

² See Gaebler.com, *Outsourcing Payroll*, <http://www.gaebler.com/Outsourcing-Payroll.htm>. Outsourcing does not necessarily entail shipping business overseas. Many businesses regularly outsource routine, but time-consuming administrative tasks such as payroll to domestic firms.

³ See Mark B. Baker, *"The Technology Dog Ate My Job": The Dog-Eat-Dog World of Offshore Labor Outsourcing*, 16 FLA. J. INT'L L. 807, 811 (2004).

⁴ See A WORLD OF WORK: A SURVEY OF OUTSOURCING, *THE ECONOMIST*, Nov. 13, 2004, at 6.

⁵ See *id.*; see also SearchCIO.com, *What is Business Process Outsourcing?*, http://searchcio.techtarget.com/sDefinition/0,,sid19_gci928308,00.html (last accessed June 14, 2007) (defining business process outsourcing as "the contracting of a specific business task, such as payroll, to a third-party service provider"). BPO is often divided into two categories: back office outsourcing, which includes internal business functions such as billing or purchasing, and front office outsourcing which includes customer-related services such as marketing or tech support.

⁶ See Outsource2India.com, *The Outsourcing History of India*, http://www.outsource2india.com/why_india/articles/outsourcing_history.asp (last accessed June 14, 2007). These call centers have become a symbol of outsourcing and are the subject of much anti-outsourcing legislation.

⁷ Baker, *supra* note 3, at 812.

⁸ See Jayanth K. Krishnan, *Outsourcing and the Globalizing Legal Profession*, 48 WM. & MARY L. REV. 2189, 2202 (2007).

million dollars by opening such an office in India in 2001 to perform legal work for its plastic and consumer finance divisions.⁹

In terms of money saved by corporations and jobs shipped overseas, the numbers behind outsourcing are staggering. A 2003 study demonstrated that for every dollar of spending sent overseas, an average of fifty eight cents is saved.¹⁰ Companies are able to pay lower wages to an employee in India than they would to the same employee anywhere in America.¹¹ For example, the average successful lawyer in India makes \$12,000 per year,¹² whereas the median salary for a first year associate in a small American firm is \$67,500.¹³ Further, outsourcing often increases efficiency, as offshore workers are eager to perform well in jobs that lack prestige and good pay in the United States, thus increasing profits for American firms that utilize these workers.¹⁴ Besides individual company profits, outsourcing can be good for the United States economy overall.¹⁵ Studies have shown that for every \$1 of cost on services that American companies outsource abroad, a value of at least \$1.14 is created for the economy.¹⁶ In 2004, foreign subsidiaries provided 5% of all private sector jobs in the United States.¹⁷

Yet for all the economic benefits, outsourcing can harm the everyday worker. Forrester Research predicts 3.3 million Americans will have lost their jobs as a result of outsourcing by 2015.¹⁸ White collar workers are far from immune, as research indicates that 500,000 financial sector jobs will be outsourced by 2011.¹⁹

⁹ *Id.* at 2201-02.

¹⁰ MARTIN N. BAILY & DIANA FARRELL, MCKINSEY GLOBAL INST., *EXPLODING THE MYTHS ABOUT OFFSHORING 2* (2004), available at http://www.mckinsey.com/mgi/reports/pdfs/exploring_myths/exploringoffshoringmyths.pdf.

¹¹ *See id.*

¹² John W. Anderson, *The Virtual Law Firm*, 23 DEL. LAW. 36, 37 (Winter 2005/2006).

¹³ *See* LexisNexis.com, *How Does Your Salary Compare?*, <http://www.lexisnexis.com/associates/career/career0306.asp>.

¹⁴ *See* BAILY & FARRELL, *supra* note 10, at 2 (discussing how an unnamed British bank's Indian call centers process 20% more transactions and have a 3% higher accuracy level than similar call centers in the United Kingdom).

¹⁵ This is a hotly debated point. A comprehensive cost/benefit analysis of whether outsourcing helps or harms the U.S. economy is well beyond the scope of this comment.

¹⁶ DIANA FARRELL & JAESON ROSENFELD, MCKINSEY GLOBAL INST., *US OFFSHORING: RETHINKING THE RESPONSE 8* (2005), available at http://www.mckinsey.com/mgi/reports/pdfs/rethinking/US_Offshoring_Rethinking_the_Response.pdf.

¹⁷ *Id.* at 9.

¹⁸ Baker, *supra* note 3, at 812.

¹⁹ *Id.* at 813.

It is not surprising that outsourcing evokes extreme passion and heated political debate, given the statistics and the demonstration of how outsourcing often increases corporate profits while costing everyday workers their jobs. The issue has figured prominently in recent political elections. In the presidential election of 2004, Democratic challenger John Kerry took a strong anti-outsourcing stance, vowing to keep jobs in America and declaring that American CEOs who shift jobs overseas are “Benedict Arnolds.”²⁰ While Republican incumbent and eventual winner George W. Bush defended the right of businesses to outsource to any nation,²¹ he also distanced himself from the remarks of White House economist Gregory Mankiw after Mankiw praised outsourcing as a practice that would benefit the United States as much as international trade.²² While Kerry lost the election, other protectionist candidates have succeeded. In the most recent senatorial elections of 2006, Virginia Democrat Jim Webb branded primary opponent Harris Miller as “the Antichrist of Outsourcing.”²³ Webb went on to capture the nomination, taking 53% of the primary vote²⁴ before eventually defeating pro-outsourcing Republican incumbent George Allen²⁵ to win a Senate seat.²⁶ As outsourcing has become such a crucial political issue, it is not surprising that the practice has spawned numerous legislative bills.

²⁰ Adam Mordecai, *Anti-Offshoring Legislation: The New Wave of Protectionism – The Backlash Against Foreign Outsourcing of American Service Jobs*, 5 RICH. J. GLOBAL L. & BUS. 85, 95 (2005).

²¹ See *id.*

²² *Id.* at 86; see also *The Great Hollowing-Out Myth*, THE ECONOMIST, Feb. 19, 2004, available at http://www.tomcoyner.com/great_hollowingout_myth.htm (praising Mankiw’s speech for its application of the economic law of comparative advantage to outsourcing and describing the negative reaction to the speech by Republicans and Democrats alike).

²³ *Webb-Miller Go On the Record, Debate Turns into Argument*, May 19, 2006, available at http://www.wvec.com/news/topstories/stories/wvec_local_051906_miller-webb_debate.3c0c1.html; see generally Eric Chabrow, *ITAA President Quits, May Run for Senate*, INFORMATION WEEK, Jan. 5, 2006, available at <http://www.informationweek.com/news/showArticle.jhtml?articleID=175801679> (discussing Miller’s background as president of the Information Technology Association of America and his pro-outsourcing positions that came under fire from the liberal wing of the Democratic party).

²⁴ *Virginia Primary Results*, WASH. POST, June 13, 2006, available at http://www.washingtonpost.com/wp-srv/metro/elections/2006/06/va_primaries.html.

²⁵ See *George Allen: Keeping Jobs Abroad*, AM. CHRON., Nov. 4, 2006, available at <http://www.americanchronicle.com/articles/15994>.

²⁶ CNN.com, *Elections 2006*, <http://www.cnn.com/ELECTION/2006/pages/results/senate> (last visited Apr. 13, 2008).

B. What Do Federal and State Governments Do to Regulate Outsourcing?

Despite the cost-cutting advantages of outsourcing for firms and the potential for national economic growth, the loss of jobs to taxpayers (and voters) has resulted in the proposal of many protectionist bills in state and federal legislatures. State legislation to regulate outsourcing began in earnest in early 2004.²⁷ When the economic think tank National Foundation for American Policy ("NFAP") first studied state-level outsourcing legislation in December 2003, North Carolina, Indiana, New Jersey, and Michigan were the only states with such legislation pending.²⁸ At the end of 2004, NFAP reported more than two hundred bills in over forty states.²⁹ A large amount of this legislation relates to state contract awarding. Proposed laws range from giving a three percent preference in contract bidding wars to in-state firms,³⁰ to an absolute requirement that all state contracts be performed within the United States.³¹ Other bills focus on issues such as, the implementation of a task force on ways to reduce outsourcing³² and mandatory disclosures of a call center's location.³³

On the federal level, there has been similar legislation proposed in Congress, some by noteworthy politicians. Much federal legislation takes specific aim at privacy protection of personal information sent offshore.³⁴ New York Senator and 2008 presidential candidate Hillary Clinton, introduced the Safeguarding Americans from Exporting Identification Data (SAFE-ID) Act, which requires businesses that send consumer information offshore to first disclose this to the consumer and give the consumer the opportunity to object.³⁵ Federal legislation also addresses the issue of government contracts, exemplified by Connecticut senator and 2008 presidential candidate Christopher Dodd's "Dodd Amendment," a multi-pronged anti-outsourcing measure that, amongst other things, prohibits the

²⁷ See NAT'L FOUND. FOR AM. POL'Y, ANTI-OUTSOURCING EFFORTS DOWN BUT NOT OUT 2 (2007), available at <http://www.nfap.com/pdf/0407OutsourcingBrief.pdf>.

²⁸ *Id.*

²⁹ *Id.*

³⁰ See H.B. 315, Leg. Sess. (Va. 2004).

³¹ See S. 494, 211th Leg. Sess. (N.J. 2004).

³² See C.R. 8407, 59th Leg., 1st Sess. (Wa. 2005).

³³ See S.B. 6641, Jan. Sess. (Conn. 2005); Mordecai, *supra* note 20, at 98-99 (citing similar call center disclosure legislation proposed in sixteen states and the U.S. Senate).

³⁴ See SHANNON KLINGER & M. LYNN SYKES, NAT'L FOUND. FOR AM. POL'Y, EXPORTING THE LAW: A LEGAL ANALYSIS OF OUTSOURCING LEGISLATION 16-17 (2004), available at http://www.nfap.com/researchactivities/studies/NFAPStudyExportingLaw_0404.pdf.

³⁵ See S. 2471, 108th Cong. (2d Sess. 2004).

outsourcing of federal contract work unless the president decides the contract is in the best interest of national security.³⁶

Despite the controversy behind outsourcing and legislation proposed to limit or eliminate the practice, businesses continue to take advantage of outsourcing's huge profit potential. Law firms and corporate legal departments are no exception.

II. THE OUTSOURCING OF LEGAL SERVICES: POTENTIALLY GREAT PROFITS, A FEW RISKS TO CONSIDER

The outsourcing of legal jobs grows literally by the day. From 2001 to 2005, more than three million legal jobs were outsourced to foreign nations.³⁷ Some estimates state that thirteen million legal jobs will move overseas in the next ten years.³⁸ This section of the Comment will explain how the legal outsourcing process works, the role of India as a favored destination of legal outsourcers, and some of the risks of outsourcing legal work that contrast the clear economic benefits of the practice.

A. *What Does Legal Outsourcing Involve?*

The first known outsourcing of American legal work occurred in the early 1990s, when Bickel & Brewer, a relatively small Dallas firm,³⁹ started an Indian subsidiary to perform basic office tasks.⁴⁰ Since then the process has become far more specialized.⁴¹ Scholars separate forms of legal outsourcing into three models: outsourcing of legal work to subsidiaries, direct hiring of foreign law firms, and third party vendors known as legal process outsourcers (LPOs).⁴² The remarkable list of businesses that participate in each of the first two

³⁶ See KLINGER & SYKES, *supra* note 34, at 17; S. 2094, 108th Cong. (2d Sess. 2004); *see also* UNDERSTANDING THE DODD AMENDMENT, NAT'L FOUND. FOR AM. POL'Y (2004) (explaining how the Dodd Amendment, though passing 70-26 in the Senate, was eventually dropped and did not become law).

³⁷ Alison M. Kadzik, Current Development, *The Current Trend to Outsource Legal Work Abroad and the Ethical Issues Related to Such Practices*, 19 GEO. J. LEGAL ETHICS 731, 731 (2006).

³⁸ *Id.*

³⁹ Bickel & Brewer had thirty-three attorneys as of April 13, 2008. Bickel-Brewer.com, Attorneys, <http://www.bickelbrewer.com/index.php?id=attorneys> (last visited April 13, 2008).

⁴⁰ See Krishnan, *supra* note 8, at 2201.

⁴¹ *Id.*

⁴² *See id.* at 2201-03; *see also* Mimi Samuel and Laurel Currie Oates, *From Oppression to Outsourcing: New Opportunities for Uganda's Growing Number of Attorneys in Today's Flattening World*, 4 SEATTLE J. SOC. JUST. 835, 859 (2006) (discussing a fourth model known as ancillary outsourcing where independent providers and law firms enter joint ventures).

models demonstrates the prominence of outsourcing legal work. The third model is most likely to affect the everyday paralegal, secretary, or associate in traditional American law firms.

The first model, establishing a subsidiary, is not only the original method of legal outsourcing,⁴³ but also highly profitable.⁴⁴ Bickel & Brewer started a bandwagon for some very notable corporations, as Dupont uses an Indian subsidiary to investigate patents,⁴⁵ and legal publisher West hires Indian lawyers to outline unpublished American judicial opinions.⁴⁶ Statistical indications of cost saving and the fact that prominent companies such as Dupont and West have built these offices goes far to show outsourcing's value, and suggests that similarly prominent firms are likely to follow suit.

The second model also provides great cost savings and hence attracts major corporations.⁴⁷ As an example, Indian tax and corporate firm Nishith Desai Associates has expanded from its home office in Mumbai all the way to California,⁴⁸ and boasts a diverse list of American clients including Motorola, Clorox, and Warner Brothers.⁴⁹ American investment banks seem to be satisfied with Nishith Desai's legal services, as J.P. Morgan, Bear Stearns, and Merrill Lynch also make the client list.⁵⁰ Nishith Desai also provides legal services for prominent businesses outside of the United States, such as the United Kingdom giant Barclay's Bank.⁵¹ The idea that prominent investment banks as well as household name corporations trust their legal services to Indian firms goes far in proclaiming the popularity of legal outsourcing.

The third model, legal process outsourcing, describes companies that connect American law firms and legal departments with legal outsourcing solutions.⁵² The industry has grown rapidly⁵³ and there is no shortage of demand for these services,⁵⁴ so foreseeably

⁴³ See Krishnan, *supra* note 8, at 2201 (discussing Bickel & Brewer).

⁴⁴ See *id.* at 2201-2202.

⁴⁵ See *id.* at 2202.

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.*; see Welcome to Nishith Desai Associates, <http://www.nishithdesai.com/nishithdesai.htm> (follow "CLIENTS" hyperlink) (last visited Apr. 13, 2008).

⁵⁰ Welcome to Nishith Desai Associates, *supra* note 49.

⁵¹ *Id.*

⁵² Krishnan, *supra* note 8, at 2203.

⁵³ See Kadzik, *supra* note 37, at 731-32 (discussing growth and exponential potential for growth in legal outsourcing).

⁵⁴ See Biman Mukherji, *India Rides Outsourcing Boom to Capture Legal Work from Abroad*, Agence France Presse, Oct. 16, 2005, available at http://www.channelnewsasia.com/stories/afp_asiapacific_business/view/173723/1/.html (quoting

more LPOs will open in the next few years. Some of the more prominent LPOs include Atlas Legal Research, Pangea3, and Lexadigm.⁵⁵ The majority of these firms are based in the United States and have secondary offices in India.⁵⁶ While at first LPOs focused on rote paralegal work,⁵⁷ and smaller LPOs continue to primarily work on such routine tasks as document reviews,⁵⁸ these larger LPOs produce more sophisticated work product and in turn charge more money.⁵⁹ In a notable example, Lexadigm's Indian office recently produced a brief which American attorneys filed before the Supreme Court of the United States in a case involving a tax dispute and its relation to the Due Process Clause of the Fifth Amendment.⁶⁰

A glance at Atlas Legal Research's (hereinafter "Atlas") corporate website sheds light on how LPOs operate.⁶¹ The company is based in both Dallas and Bangalore,⁶² and describes itself with the following:

The people of Atlas Legal Research can be described in one word: *pioneers*. In 2001, Atlas made history by training lawyers in India to perform U.S. legal analyses. . . .[s]ince its inception, Atlas has enabled lawyers and law firms to control overhead, increase output, and improve quality. In 2004, Atlas introduced its services to in-house corporate legal departments, thereby allowing companies to control legal budgets and maximize the efficiency of internal legal resources. Today Atlas is increasing its services and its client base while maintaining a strict commitment to quality and ethics. Atlas performs a full array of functions, from legal re-

Atlas Legal Research founder Abhay Dhir on how his business tripled between 2003-2005).

⁵⁵ See Moumita Bakshi Chatterjee, *Playing on a New Court*, THE HINDU BUSINESS LINE: INTERNET EDITION, Sep. 12, 2005, available at <http://www.thehindubusinessline.com/ew/2005/09/12/stories/2005091200020100.htm>.

⁵⁶ Krishnan, *supra* note 8, at 2203 (stating that Atlas Legal Research is based in Dallas, Lexadigm is based in Michigan, and Pangea3 is U.S. based and founded by two University of Pennsylvania School of Law graduates).

⁵⁷ See *id.* at 2201.

⁵⁸ See Daniel Brook, *Made in India: Are Your Lawyers in New York or New Delhi?*, LEGAL AFF. May/June 2005, available at http://www.legalaffairs.org/issues/May-June-2005/scene_brook_mayjun05.msp.

⁵⁹ See *id.*

⁶⁰ Krishnan, *supra* note 8, at 2203-04.

⁶¹ Atlas Legal Research, <http://atlaslegal.com> (last visited Apr. 13, 2008).

⁶² See *id.*

search and brief/memo writing to document coding and contract review services.⁶³

A look at Atlas' Careers page shows several methods of limiting costs. The company requires that newly hired attorneys relocate to Bangalore and does not engage in salary negotiations.⁶⁴ Atlas is evidently aware of the risks involved in legal outsourcing. To quell fears over confidentiality, the company promises to thoroughly check for any potential conflict of interest,⁶⁵ and at the customer's request, will alter any personally identifying information before sending the work assignment to India.⁶⁶ To quell fears regarding quality of product, Atlas provides writing samples of its final product on the company's website.⁶⁷ These samples include an office memorandum regarding a California stock split issue,⁶⁸ as well as a motion for summary judgment on behalf of an American insurance company in a complex case involving the murder of Czech citizen in Belarus.⁶⁹ Most notably, Atlas provides its fee structure, which states that "rates range from \$65-\$110 an hour, depending on turnaround time. Special rates apply for high-volume, on call services."⁷⁰ The firm also provides five different structures for litigation support billing.⁷¹

With three distinct outsourcing models available and thriving, most law firms and corporations should have no trouble finding a legal outsourcing solution that fits their needs.

⁶³ Atlas Legal Research, <http://www.atlaslegal.com/112907%20who%20we%20are.html> (last visited Apr. 13, 2008) (providing a comprehensive list of services offered to corporate in-house departments and private law firms).

⁶⁴ See Atlas Legal Research, <http://www.atlaslegal.com/112907%20careers.html> (last visited Apr. 13, 2008).

⁶⁵ See Atlas Legal Research, <http://www.atlaslegal.com/112907%20confidentiality.html> (last visited Apr. 13, 2008).

⁶⁶ See *id.*

⁶⁷ See Atlas Legal Research, <http://www.atlaslegal.com/112907%20writing%20samples.html> (last visited Apr. 13, 2008).

⁶⁸ See Atlas Legal Research, <http://www.atlaslegal.com/CA%20Reverse%20Stock%20Splits.pdf> (last visited Apr. 13, 2008).

⁶⁹ See Atlas Legal Research, <http://www.atlaslegal.com/Murder%20in%20Belarus.pdf> (last visited Apr. 13, 2008).

⁷⁰ Atlas Legal Research, <http://www.atlaslegal.com/112907%20rates%20and%20payment.html> (last visited Apr. 13, 2008).

⁷¹ *Id.* (providing possible rate structures of hourly, per attorney, per document, flat fee, or hybrid).

B. *Where Do Firms Outsource Legal Services?*

While the Indian subcontinent is not the only destination to which law firms outsource work,⁷² and some work goes to domestic providers in areas of the United States where business operation costs are lower,⁷³ India takes in more legal outsourcing business than any other nation.⁷⁴ There are distinct advantages for the firm that chooses India as its outsourcing partner. Without question, the cheaper price for legal work in India is the most important factor. Salaries for successful Indian attorneys are significantly lower than for entry-level American attorneys.⁷⁵ An LPO executive reports that the highest salary paid to Indian personnel is \$40,000.⁷⁶ Other reports show that many Indian attorneys only charge \$20 an hour for legal research.⁷⁷ As the price of legal research by a junior associate at an American law firm is often around \$200 an hour,⁷⁸ it is very easy to see why legal outsourcing is such a rapidly growing phenomenon. Legal processes other than research are similarly being outsourced with the same end result of good quality work at a lower price. A patent application that costs \$10,000 to file in Minneapolis can be completed in India for roughly half of that price.⁷⁹ India also benefits from its time zone. Because the time in Mumbai is fourteen hours different from New York and eleven from Los Angeles,⁸⁰ round-the-clock legal assistance

⁷² See Samuel and Oates, *supra* note 42, for a thorough discussion of legal outsourcing in Uganda.

⁷³ See Posting of J. Craig Williams to May It Please the Court, <http://www.mayitpleasethecourt.com/journal.asp?blogid=1520> (May 23, 2007, 01:40 EST). The post describes how global law firm Orrick, Harrington, and Sutcliffe cut expenses by 30% by opening a worldwide operations center in Wheeling, WV. The center, which provides everything from paralegal work to billing services, is open 24 hours a day and has a guaranteed turnaround time of four hours. See Orrick.com, Global Operations Center, <http://www.orrick.com/offices/goc/> (last visited June 14, 2007).

⁷⁴ See *Law Firms Mull Outsourcing*, TECHNOLIGENCE, (Confederation of Indian Industry, Gurgaon (Haryana)), July 2, 2006, available at <http://www.tech2transfer.com/newsletters/100706/ipr.htm>.

⁷⁵ See Anderson, *supra* note 12, at 37.

⁷⁶ See Krishan, *supra* note 8, at 2205.

⁷⁷ *Id.* at 2206.

⁷⁸ See Krysten Crawford, *Outsourcing the Lawyers*, CNNMoney.com, Nov. 15, 2004, available at http://money.cnn.com/2004/10/14/news/economy/lawyer_outsourcing/.

⁷⁹ See Krishnan, *supra* note 8, at 2206 (describing how a patent application that costs between \$8,000-\$10,000 to file in the Midwest and up to \$12,000 to file in Silicon Valley costs between \$5,000 and \$6,000 if produced in India).

⁸⁰ See WorldTimeZone.com, World Time Zones Map with Current Time – 12 Hour Format, <http://www.worldtimezone.com/index12.php> (last accessed June 14, 2007).

is possible.⁸¹ In theory, an attorney in New York could send a research assignment to Mumbai when he is leaving his office at 6:30 P.M. and have an emailed memorandum of law waiting in his Inbox at 7:00 A.M. the next morning.

The similarities between the American and Indian legal systems also serve to give India an edge over other potential outsourcing destinations. Like the United States, India has a common law legal system based in British legal tradition.⁸² Conveniently for American firms, Indian court proceedings are conducted exclusively in English.⁸³ Additionally, Indian Appellate and Supreme Court opinions are written only in English.⁸⁴ Further, the world's second most populous nation⁸⁵ is brimming with lawyers! India has over one million lawyers and 70,000 new law school graduates each year.⁸⁶ Finally, India's government allows tax breaks and export exemptions to LPOs and also reduces the red tape inherent to Indian business for these firms.⁸⁷

C. *What Are the Risks Involved in Legal Outsourcing?*

This Comment has touched on some of the reasons that American law firms and corporations choose to outsource legal operations, the primary reason being a comparable work product at a much lower cost. Yet legal outsourcing is not without detractors, and there are certainly risks involved in the practice. The primary risks are ethical issues, distaste with the idea of outsourcing, risk of poor work quality, and protectionist legislation.

1. *The Ethical Risks of Outsourcing*

Legal outsourcing, while not unethical by nature, opens the door for potential ethical violations under American Bar Association

⁸¹ ANTONIO RIERA ET AL., THE BOSTON CONSULTING GROUP, PASSAGE TO INDIA: THE REWARDS OF REMOTE BUSINESS PROCESSING 10 (2002), available at http://www.bcg.com/impact_expertise/publications/files/Passage_to_India_Dec2002.pdf.

⁸² See Pankajh Parnami, *Legal Process Outsourcing Industry – An Analysis*, THE CHARTERED ACCOUNTANT, Nov. 2006, at 760, 762.

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ See THE ECONOMIST, POCKET WORLD IN FIGURES 2007 (Profile Books, 2007) (stating India's 2004 population as 1,081,000,000).

⁸⁶ Anderson, *supra* note 12, at 37.

⁸⁷ See Krishnan, *supra* note 8, at 2209. *But see* Mordecai, *supra* note 20, at 104-05 (discussing victory for left wing parties in India's recent election and the potential for the new government to turn back economic reforms that have rejuvenated India's formerly sluggish economy and in turn made India such a friendly destination for outsourcers).

rules.⁸⁸ Client confidentiality is a major concern.⁸⁹ Cultural differences regarding the sharing of information must be addressed,⁹⁰ as attorneys are responsible for the ethics violation of their overseas assistants even though the assistants themselves cannot be punished.⁹¹ The issue of confidentiality affects other types of outsourcing just as much as legal outsourcing, as evidenced by the large amount of anti-outsourcing legislation in both Congress and the states that is driven by privacy concerns.⁹² Supervision is understandably a serious concern as well, due to the difficulty in monitoring the work of someone in another country.⁹³ While an American attorney can supervise an in-office paralegal with little difficulty, supervision is a trickier proposition when the attorney is in Charlotte and the paralegal is in Chennai. A related issue involves disclosure to the client of the fact that a foreign worker is handling a portion of their case.⁹⁴ It is unnecessary to disclose such an arrangement if the assistant is under the direct supervision of the attorney.⁹⁵ ABA rules, however, clearly indicate that an attorney must obtain the consent of clients if a temporary lawyer will handle a portion of their case without direct supervision.⁹⁶ This again raises the difficulty of supervision problem discussed above. Lastly, attorneys must be careful to screen the projects performed in the past and future by individual overseas assistants in order to avoid any conflicts of interest.⁹⁷

2. *Not All Clients Support Outsourcing*

As previously stated, outsourcing is an extremely controversial practice, and some law firms may wish to avoid alienating clients who

⁸⁸ See Kadzik, *supra*, note 37 at 734; see also Marcia L. Proctor, *Considerations in Outsourcing Legal Work*, 84 MICH. BAR J. 20-24, Sept. 2005 (discussing the minefield of ethical issues involved in legal outsourcing and analyzing the application of current ABA rules regarding "temporary lawyers" to the legal outsourcing problem).

⁸⁹ See Kadzik, *supra* note 37, at 735.

⁹⁰ See *id.* at 735 (describing how in some cultures, bragging about business ventures or discussing "confidential" work information with friends and family is not unusual).

⁹¹ See *id.* at 734.

⁹² See ANTI-OUTSOURCING EFFORTS DOWN BUT NOT OUT, *supra* note 27, at 7.

⁹³ See Kadzik, *supra* note 37, at 736.

⁹⁴ See *id.* at 737.

⁹⁵ *Id.*

⁹⁶ See *id.* (citing MODEL RULES OF PROF'L CONDUCT R. 7.5(D) (2004); ABA Comm. On Ethics and Prof'l Responsibility, Formal Op. 88-356 (1988)).

⁹⁷ *Id.* at 734-35.

disapprove of outsourcing.⁹⁸ In the age of “Buy American,”⁹⁹ a firm that openly sends legal work offshore may be less likely to earn clients who have been negatively affected by outsourcing or simply disfavor the practice. Also, identity theft raises another prominent issue.¹⁰⁰ Clients concerned over privacy may choose a firm with in-office paralegals over a firm with paralegals in India.¹⁰¹

3. *Quality is Not Assured in Outsourced Legal Work*

Quality concerns are a factor as well. India is full of smart and talented legal workers,¹⁰² and legal outsourcing would not be a popular practice if the work was regularly of substandard quality. Yet concerns over quality, result in American lawyers spending more time to carefully review work produced offshore for errors, thus mitigating to an extent the cost savings from outsourcing.¹⁰³ This is particularly critical in the highly technical field of patent law, in which firms often outsource patent drafting to India despite the fact that the value of the entire patent can hinge on a single word.¹⁰⁴

4. *Federal and State Legislation Has Targeted and Will Continue to Target Outsourcers*

A final, but perhaps crucial risk in legal outsourcing is the specter of protectionist legislation. The political backlash against outsourcing has created a firestorm in Congress and state legislative halls. Much anti-outsourcing legislation has failed,¹⁰⁵ and the protectionist legislative movement is less active than in its heyday of early 2004.¹⁰⁶ With the economic incentives for law firms to engage in out-

⁹⁸ See Joel R. Merkin, Recent Development, *Litigating Outsourced Patents: How Offshoring May Affect Attorney-Client Privilege*, 2006 U. ILL. J.L. TECH. & POL'Y 215, 216-17 (2006).

⁹⁹ See Ed Fraenheim, “Buy American” Legislation Draws Fire, CNET News.com, May 20, 2005, available at http://news.com.com/Buy+American+legislation+draws+fire/2100-1022_3-5715486.html (discussing legislation encouraging the purchase of American products in response to outsourcing).

¹⁰⁰ See Christine Dugas, *Federal Survey: Identity Theft Hits One on Four Households*, USA TODAY, Sept. 4, 2003, available at <http://www.whitecanyon.com/identity-theft-statistics-ut-09-2003.php> (discussing how 9.9 million Americans were victims of identity theft in 2003).

¹⁰¹ Merkin, *supra* note 98, at 218 (discussing the laxity of Indian data protection laws compared to similar laws in the U.S.).

¹⁰² See Krishnan, *supra* note 8, at 2210 (discussing how India is often called the “Silicon Valley of Asia”).

¹⁰³ See Merkin, *supra* note 98, at 217.

¹⁰⁴ *Id.* (discussing the risks of patent drafting by Indian legal assistants).

¹⁰⁵ See ANTI-OUTSOURCING EFFORTS DOWN BUT NOT OUT, *supra* note 27, at 5.

¹⁰⁶ See *id.* at 1.

sourcing outweighing the risks, it is a safe guess that more legal jobs will continue be transferred to India and other low cost nations at a rapid pace.

III. ANTI-OUTSOURCING LEGISLATION IN THE STATES: HOW THE CONSTITUTION GETS IN THE WAY

With all the economic benefits to firms, there is no way around the fact that outsourcing costs many ordinary Americans their jobs. Industries, such as information technology (IT), have suffered particularly bad losses, as estimates show that outsourcing has cost 70,000 IT professionals their jobs.¹⁰⁷ In a Pew Research Center poll released in 2006, 77% of Americans opposed offshoring.¹⁰⁸ Affected industries have released strong position statements regarding opposition to outsourcing.¹⁰⁹ In light of these developments, many laws have been proposed in state legislatures seeking to curb the job losses caused by outsourcing.

Examples of regulations proposed in state legislatures include prohibition of state contract work being performed overseas,¹¹⁰ preferential treatment for in-state businesses,¹¹¹ restrictions on the sending of personal information overseas,¹¹² mandatory disclosure of the location of call centers,¹¹³ tax incentives to private corporations that keep jobs in-state,¹¹⁴ and requirements that a study be conducted in relation to outsourcing's effect on a state's economy.¹¹⁵ This Comment cannot comprehensively analyze the voluminous body of anti-outsourcing legislation in the states. Rather, it will highlight two types of protectionist legislation that could potentially affect the legal outsourcing

¹⁰⁷ See BAILY & FARRELL, *supra* note 10, at 7.

¹⁰⁸ Roger Bybee, *Sorry, Your Job's Been Outsourced!*, THE DAILY PAGE, Nov. 2, 2007, available at <http://www.thedailypage.com/isthmus/article.php?article=12661>.

¹⁰⁹ See Position Statement on the Outsourcing of Paralegal Duties to Foreign Countries, Nat'l Fed'n of Paralegals Ass'n, Inc. (adopted July 23, 2005), available at <http://www.paralegals.org/associations/2270/files/outsourcing.pdf>. The statement brings up issues of confidentiality and quality of work while arguing (dubiously) that not enough evidence exists to say that outsourcing saves money for the average law firm.

¹¹⁰ See STUART ANDERSON, NAT'L FOUND. FOR AM. POL'Y, CREEPING PROTECTIONISM: AN ANALYSIS OF STATE AND FEDERAL GLOBAL SOURCING LEGISLATION 4 (2003), available at <http://www.nfap.net/researchactivities/studies/creepingprotect.pdf>; Baker, *supra* note 3, at 822.

¹¹¹ See KLINGER & SYKES, *supra* note 34, at 2.

¹¹² See *id.*

¹¹³ See ANDERSON, *supra* note 110, at 4.

¹¹⁴ See KLINGER & SYKES, *supra* note 34, at 15.

¹¹⁵ See *id.* at 16.

industry (privacy law protection and state contract legislation), describe the legislation and what it aims to prevent, discuss briefly any constitutional or other problems with the legislation, and conclude with an analysis of the potential impact on legal outsourcing.

A. *State Restrictions on Sending Personal Information Overseas*

The law firm that currently outsources legal services or plans to do so in the future should closely monitor privacy legislation. A lawyer cannot properly serve his or her client without obtaining confidential personal information. Such information has to go overseas for an offshore legal assistant to aid the lawyer in the case. Thus, legislation that would restrict the transmission of personal information overseas or require disclosure of such a practice has more potential than other types of legislation to hinder legal outsourcing for both corporate legal departments and law firms. Thirteen bills introduced in 2005-2006 state legislative sessions were designed to restrict the sending of personal data overseas.¹¹⁶ Many of these bills require companies to obtain express consent to send financial or medical information abroad.¹¹⁷ This section will examine bills from Tennessee, South Carolina, and California.

1. *Analysis of Selected State Privacy Restrictions*

In 2004, House Bill No. 2340 was introduced in the Tennessee legislature.¹¹⁸ Entitled the Consumer Right to Know Act, the bill sought to require disclosure and consent before sending any financial, credit, or identifying information offshore.¹¹⁹ The bill defined identifying information as "the home and work addresses, telephone numbers, social security number and any other information that could reasonably be used to locate the whereabouts of an individual."¹²⁰ A practically identical bill introduced in the South Carolina legislature the same year¹²¹ would have voided any transactions entered into without disclosure that information would be sent overseas.¹²²

In August 2004, the California state legislature passed a bill attempting to protect outsourced personal information.¹²³ The bill

¹¹⁶ ANTI-OUTSOURCING EFFORTS DOWN BUT NOT OUT, *supra* note 27, at 7.

¹¹⁷ See Mordecai, *supra* note 20, at 100-101.

¹¹⁸ *Id.* at 100.

¹¹⁹ *Id.*

¹²⁰ H.B. 2340, 103d Gen. Assem. Sess. (Tenn. 2004).

¹²¹ See Mordecai, *supra* note 20, at 100.

¹²² H.R. 4434, 115th Gen. Assem. Sess. (S.C. 2004).

¹²³ See Jennifer Skarda-McCann, Note & Comment, *Overseas Outsourcing of Private Information & Individual Remedies for Breach of Privacy*, 32 RUTGERS COMPUTER & TECH. L.J. 325, 362 (2006).

aimed to “ensure that confidential information regarding a California resident that is legally protected within California will be protected when it is used by parties outside the State of California.”¹²⁴ The bill also attempted to confer the jurisdiction of California courts upon anyone who misused such confidential information, whether in California or overseas.¹²⁵ Governor Arnold Schwarzenegger vetoed the bill in September 2004.¹²⁶ Yet in 2005, California passed a bill into law forbidding voter information from being sent offshore.¹²⁷

2. *Constitutional and International Law Concerns*

Federal preemption concerns make some state privacy laws suspect, as the federal government has recently passed numerous privacy laws that would trump state laws.¹²⁸ For example, the Gramm-Leach-Bliley Act¹²⁹ places strict privacy restrictions on financial institutions regarding the protection of private customer data.¹³⁰ Any state law limiting transfers of personal financial information risks preemption from this standing federal law.¹³¹ This Act does not differentiate between American and international business affiliates,¹³² so state laws that attempt to make this differentiation risk preemption.¹³³ Further, any prohibition on overseas data transmission could violate WTO agreements and other treaties involving the United States.¹³⁴

¹²⁴ S. 1451, 2004 Leg., 2003-2004 Sess. (Cal. 2004).

¹²⁵ Cal. S. 1451; see Skarda-McCann, *supra* note 123, at 362-363.

¹²⁶ Skarda-McCann, *supra* note 123, at 363.

¹²⁷ See Assem. .B. 1741, 2005 Leg., 2005-2006 Sess. (Cal. 2005); ANTI-OUTSOURCING EFFORTS DOWN BUT NOT OUT, *supra* note 27, at 7.

¹²⁸ KLINGER & SYKES, *supra* note 34, at 10 (citing the Fair Credit Reporting Act, Health Insurance Portability and Accountability Act of 1996, and Gramm-Leach-Bliley Act).

¹²⁹ 15 U.S.C. § 6801 (2007).

¹³⁰ See Colleen Walsh Schultz, *To Offshore or Not to Offshore: Which Nations Will Win a Disproportionate Share of the Economic Value Generated from the Globalization of White Collar Jobs?*, 29 HOUS. J. INT'L L. 231, 253-254 (2006) (discussing how the Gramm-Leach-Bliley improves privacy at high compliance costs).

¹³¹ See KLINGER & SYKES, *supra* note 34, at 10.

¹³² *Id.* at 11.

¹³³ *Id.*

¹³⁴ See *id.* The effect of protectionist laws on U.S. trade is discussed in greater detail in Part IV of this Comment.

3. *Effect on Legal Outsourcing*

Bills such as the Tennessee Right to Know Act and the South Carolina bill specifically target call centers.¹³⁵ The California bill was directed at outsourcing of personal information in general, not particularly at lawyers.¹³⁶ Yet the application of such privacy laws could harm legal outsourcing. Clients may not wish to send information overseas. An outright ban on sending information overseas, though improbable, would devastate the industry. The Voter Information Bill in California should cause some concern for legal outsourcers as a possible precursor to a cavalcade of harmful privacy legislation.¹³⁷

Regardless, law firms can avoid much of the impact of privacy legislation simply by complying with existing ethics rules. While the issue of whether lawyers must disclose the sending of private information overseas to comply with ethical rules is murky,¹³⁸ it seems that making such disclosures is certainly the safer practice. Almost all of the privacy legislation allows companies to send personal information overseas, so long as the customer consents.¹³⁹ This plainly means that lawyers must disclose and obtain consent. By disclosing that client information will be sent to India to aid in preparation of the case, and obtaining permission, a lawyer can satisfy legal and ethical requirements while reaping the benefit of less expensive research. Anti-outsourcing sentiment and identity theft concerns will certainly cause some clients to refuse to send information overseas. It seems unlikely, however, that such fears will cause a notable downturn in business for firms that choose to outsource.

Further, LPOs understand the seriousness of the privacy issue. Firms such as Atlas have already taken steps to reduce privacy risk, offering to change names and readily identifiable information on legal documents before sending them to India.¹⁴⁰ Continuance and enlargement of such practices will only benefit and help to popularize the LPO industry.

While little state legislation that limits the sending of information offshore has succeeded,¹⁴¹ law firms and corporations that outsource legal work should closely watch for the development of any such legislation, as privacy laws could impact legal outsourcing practice.

¹³⁵ See H.R. 2340, 103d Gen. Assem., Reg. . Sess. (Tenn. 2004); H.R. 4434, 115th Gen. Assem., Reg. Sess. (S.C. 2004).

¹³⁶ See S. 1451, 2004 Leg., 2003-2004 Sess. (Cal. 2004).

¹³⁷ See ANTI-OUTSOURCING EFFORTS DOWN BUT NOT OUT, *supra* note 27, at 7.

¹³⁸ See Kadzik, *supra* note 37, at 735.

¹³⁹ See, e.g., Cal. S. 1451 (showing that with disclosure and consent, companies can send private information abroad).

¹⁴⁰ See Atlas Legal Research, *supra* note 65.

¹⁴¹ See Skarda-McCann, *supra* note 123, at 364.

These firms should also be mindful of existing ethics rules and when in doubt, disclose to clients that their personal information may be sent overseas.

B. State Restrictions on Awarding Contracts

Limitations on the awarding of government contracts to firms that outsource are the most popular type of state anti-outsourcing legislation.¹⁴² The validity of such legislation is particularly suspect in terms of its constitutionality.¹⁴³ If the legislation passed constitutional scrutiny, it could have some impact on corporations with offshore legal departments, though private law firms would probably remain unscathed. This section will discuss a New Jersey bill that passed, a New Hampshire bill that failed, and two Virginia bills that did not reach a vote.

1. Analysis of Selected State Contract Preference Legislation

In 2004, New Jersey State Senator Shirley Turner became outraged upon learning that calls from welfare recipients seeking assistance were being redirected to an Indian call center, and quickly proposed a new law.¹⁴⁴ The result of Turner's efforts is the most restrictive anti-outsourcing provision ever passed in the United States.¹⁴⁵ The bill, which passed in May 2005,¹⁴⁶ is an outright prohibition on state contract work being performed outside the United States unless a state official certifies that the work cannot be performed in the U.S.¹⁴⁷ After the bill was enacted, the contract that spawned Turner's legislation was reworked in order to return many of the call center jobs back home for New Jersey workers.¹⁴⁸

¹⁴² See Mordecai, *supra* note 20, at 96.

¹⁴³ See KLINGER & SYKES, *supra* note 34, at 2.

¹⁴⁴ See John R. Weber, *Backlash to Globalization in the Form of State Legislation: Constitutional Implications* 5-6 (Cal. W. Sch. of Law, Working Paper No. 1054, 2006).

¹⁴⁵ ANTI-OUTSOURCING EFFORTS DOWN BUT NOT OUT, *supra* note 27, at 5; see Weber, *supra* note 144, at 13, 15 (discussing how New Jersey's law is especially restrictive as an outright ban on foreign contracts and how the law allows absolutely no price comparison between a domestic contractor's bid and a foreign contractor's bid).

¹⁴⁶ Weber, *supra* note 144, at 6.

¹⁴⁷ *Id.*

¹⁴⁸ ANDERSON, *supra* note 110, at 5. As stated previously, a discussion of whether outsourcing is beneficial or harmful to the U.S. economy is beyond the scope of this Comment, but it should be noted that relocating the twelve call center jobs in question back to New Jersey cost New Jersey taxpayers \$900,000. Anderson posits that "saving" 1,400 more jobs in such a manner would cost taxpayers an additional \$100,000,000. The author of this Comment tends to agree with Ander-

A 2007 state contract bill introduced in the New Hampshire House of Representatives demonstrates that anti-outsourcing legislation is alive and well at the state level, though the bill failed to pass.¹⁴⁹ In its Purposes and Findings Section, the bill attacks outsourcing for exacerbating unemployment and costing jobs to New Hampshire residents,¹⁵⁰ lists companies such as AT&T and Tyco as culprits,¹⁵¹ and concludes that outsourcing is detrimental to New Hampshire and that companies who choose to outsource should not receive procurement contracts.¹⁵² The bill would ban any company that sent fifty or more jobs overseas in a calendar year from receiving a procurement contract from the state for seven years.¹⁵³ Any firm that won a contract and violated the bill's anti-outsourcing provisions would face voiding of the contract and a penalty of \$5,000, twenty percent of the contract cost, or the amount paid for work outside the United States, whichever amount is greater.¹⁵⁴

Two Virginia bills from 2004 also exemplify state anti-outsourcing legislation. House Bill 315 requires state public bodies that award contracts to "consider the beneficial effects of the award on Virginia's economy,"¹⁵⁵ award a three percent preference to Virginia firms,¹⁵⁶ and give the bid to the Virginia firm in case of a tie.¹⁵⁷ Not to be outdone by the House, Senate Bill 151 would require preferences to United States based firms over foreign firms when awarding contracts unless the domestic bid is at least twenty percent higher than the international bid.¹⁵⁸

2. *Constitutional Concerns*

The constitutionality of state contract laws is highly suspect.¹⁵⁹ The New Jersey bill would almost certainly not pass constitutional

son that spending \$900,000 to make sure twelve jobs stay in America is very bad economic policy.

¹⁴⁹ See New Hampshire General Court, <http://www.gencourt.state.nh.us/ie/bill-status/defaultpwr.asp> (enter "HB129" into Bill Number box and "2007" into Year box) (last accessed Apr. 13, 2008).

¹⁵⁰ See H.B. 129, 160th Gen. Sess. (N.H. 2007).

¹⁵¹ N.H. H.B. 129.

¹⁵² *Id.*

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ H.B. 315, 2004 Leg. Sess. (Va. 2004).

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

¹⁵⁸ S.B. 151, 2004 Leg. Sess. (Va. 2004).

¹⁵⁹ See ANTI-OUTSOURCING EFFORTS DOWN BUT NOT OUT, *supra* note 27, at 6.

scrutiny if challenged.¹⁶⁰ Under the Constitution, federal law preempts state law.¹⁶¹ State laws that prohibit performance of overseas' contracts, like the New Jersey law, are probable violations of the Commerce Clause.¹⁶² Further, Supreme Court precedent holds that a state "cannot structure national foreign policy to conform to its own domestic policy."¹⁶³ As states cannot regulate foreign policy under the Constitution, New Jersey's state contract prohibition would probably not withstand a challenge. If the New Jersey law could not survive, it is unlikely that the similar New Hampshire bill could withstand such a challenge if it was ever revived and enacted.

The Virginia bills, should they ever become law, would also face difficult constitutional questions. Preferential treatment bills can violate the Commerce Clause, Privileges and Immunities Clause, and Full Faith and Credit Clause.¹⁶⁴ The Commerce Clause is implicated, almost always contrary to a state's desire, when the state requires business to be performed in the home state where it could be performed less expensively elsewhere,¹⁶⁵ even if there is a legitimate local interest.¹⁶⁶ Virginia's local interest of bolstering its economy would be unlikely to survive this rule. Laws that discriminate against nonresidents, even when the discrimination is a preference and not an outright restriction, implicate the Privileges and Immunities Clause.¹⁶⁷ Full Faith and Credit could be invoked if one state were to challenge another's preference for in-state services as violation of public policy,¹⁶⁸ as the Supreme Court has held that states need not apply another state's law in violation of their own public policy.¹⁶⁹

Given the of myriad constitutional problems inherent in state contract restrictions and in-state preferences, it is apparent that much

¹⁶⁰ *Id.* at 5 (discussing that the bill has not been challenged because it includes a grandfather clause allowing existing offshore work on state contracts to continue).

¹⁶¹ U.S. CONST. art. VI., § 2.

¹⁶² KLINGER & SYKES, *supra* note 34, at 7 (citing U.S. CONST. art. I, § 8, cl.3).

¹⁶³ *Id.* at 7 (quoting *United States v. Pink*, 315 U.S. 203, 232 (1942)).

¹⁶⁴ KLINGER & SYKES, *supra* note 34, at 11.

¹⁶⁵ *Id.* (quoting *Lewis v. BT Inv. Managers Inc.*, 447 U.S. 27, 36 (1980) ("[W]here simple economic protectionism is effected by state legislation, a virtually per se rule of invalidity has been erected.")).

¹⁶⁶ *Id.* (quoting *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 145 (1970) ("[E]ven where the State is pursuing a legitimate local interest, this particular burden on commerce has been declared to be virtually pro se illegal.")).

¹⁶⁷ *Id.* at 13 (citing *Connecticut ex. rel. Blumenthal v. Crotty*, 346 F.3d 84, 95 (2d Cir. 2003)).

¹⁶⁸ *Id.* at 15.

¹⁶⁹ *Id.* (citing *Nevada v. Hall*, 440 U.S. 410, 422 (1979)).

of this legislation would not survive a constitutional challenge.¹⁷⁰ Such legislation is therefore unlikely to seriously affect the outsourcing industry.

3. *Effect on Legal Outsourcing*

Constitutional concerns limit the applicability of state contract regulation to legal outsourcing. However, if a state legislature passed these laws such that they met constitutional scrutiny, legal outsourcing could be affected. Laws that disallow the awarding of state contracts to firms that outsource might affect a corporation's choice to outsource legal services. Imagining that New Hampshire had passed House Bill 129, a corporation that outsourced fifty jobs to India would be ineligible for state contracts for a seven year period. Such a law would give that corporation incentive to keep its operations, including its legal department, in Concord. However, such legislation likely would have no impact on private law firms. Each state has an Office of the Attorney General which manages state legal issues; hence, states do not need to hire private attorneys.¹⁷¹ Thus, House Bill 129 would have no effect on a private law firm's choice to outsource. In-state preferences such as the Virginia bills would likely have no appreciable effect on legal outsourcing. A North Carolina corporation seeking to do business in Virginia would face the same entry barriers whether it outsourced its legal services or not, and the legislation does not penalize Virginia corporations for outsourcing. Private law firms, in Virginia or elsewhere, would feel positively no effect from such legislation.

IV. FEDERAL PROTECTIONIST LEGISLATION, AND THOSE PESKY INTERNATIONAL TRADE AGREEMENTS

The national backlash against outsourcing has reached Washington, DC, and numerous attempts to regulate outsourcing have occurred in Congress, though federal legislators have been less aggressive than state legislators in directly attacking it.¹⁷² Federal anti-outsourcing laws are not constitutionally suspect for the very reason similar state laws are suspect,¹⁷³ namely that the federal govern-

¹⁷⁰ *But see* Weber, *supra* note 144, at 15 (positing that due to the sheer volume of legislation, some bills would almost certainly pass constitutional muster).

¹⁷¹ *See, e.g.*, North Carolina Department of Justice, http://www.ncdoj.com/default_about.jsp (last visited June 10, 2007) (describing how the N.C. Attorney General represents the state of North Carolina in all types of cases).

¹⁷² *See* Baker, *supra* note 3, at 828-829 (explaining that Congress tends to attack job losses from outsourcing more indirectly through immigration control, such as limitation on H-1B visas, and Trade Adjustment Assistance programs, which attempt to teach workers who have lost their jobs to outsourcing a new trade).

¹⁷³ *See* KLINGER & SYKES, *supra* note 34, at 16.

ment holds the power to regulate international commerce.¹⁷⁴ These federal bills do, however, risk running afoul of United States trade agreements.¹⁷⁵

As in Part III, this Comment cannot comprehensively analyze federal anti-outsourcing provisions. Rather, it will discuss some notable bills involving privacy and contract awarding, comment briefly on international commerce concerns or other problems with the legislation, and conclude with an analysis of how the legislation may impact legal outsourcing.

A. Federal Restrictions on Sending Personal Information Overseas

1. Analysis of SAFE-ID Act and the Personal Data Offshore Protection Act

Bills to regulate the transmission of personal information have arisen in both the Senate and the House. Hillary Clinton introduced the SAFE-ID Act in the Senate in May 2004.¹⁷⁶ In its own text, the SAFE-ID Act is "a bill to regulate the transmission of personally identifiable information to foreign affiliates and subcontractors."¹⁷⁷ The Act's definitions of personally identifiable information includes a person's name, financial information, social security number, and email address.¹⁷⁸ While seemingly focused on the healthcare industry,¹⁷⁹ the Act covers all "business enterprises established to make a profit."¹⁸⁰ The same year, Massachusetts Congressman Edward Markey introduced the aptly titled Personal Data Offshoring Protection Act.¹⁸¹ Markey's bill is harsher than Clinton's. In addition to the usual disclosure and permission requirements, this Act demands a yearly renewal of permission for long term business relationships¹⁸² if the information is sent to a country "without adequate privacy protection."¹⁸³ Markey's Act goes further, by prohibiting the denial of service to customers who refuse to give permission for their data to be

¹⁷⁴ See U.S. CONST. art. I, § 8, cl. 3.

¹⁷⁵ See KLINGER & SYKES, *supra* note 34, at 16.

¹⁷⁶ See SAFE-ID Act, S. 2471, 108th Cong. (2004).

¹⁷⁷ S. 2471.

¹⁷⁸ *Id.*

¹⁷⁹ See *id.*

¹⁸⁰ *Id.*

¹⁸¹ See Personal Data Offshoring Protection Act of 2004, H.R. 4366, 108th Cong. (2004).

¹⁸² H.R. 4366.

¹⁸³ *Id.* (defining a country with adequate privacy protection as "a country certified by the Federal Trade Commission as having a legal system with sufficient privacy protection").

sent abroad,¹⁸⁴ and by imposing severe punitive damages to any violators.¹⁸⁵

2. *International Concerns with Federal Privacy Legislation*

Federal laws mandating disclosure and consent before a firm sends personal information offshore have the best chance of any anti-outsourcing legislation to withstand constitutional or international trade challenges. The federal government, unlike the states, can regulate international commerce.¹⁸⁶ The SAFE-ID Act and Personal Data Offshoring Protection Act do not facially violate any American trade agreements,¹⁸⁷ but both invite retaliation from trade partners who do not restrict the transmission of private information.¹⁸⁸ In addition, strict application of a law, such as the SAFE-ID Act, could possibly violate the Government Procurement Agreement, a WTO provision binding the United States.¹⁸⁹ Finally, from a business perspective, privacy restrictions are burdensome, as they require firms to spend time and money obtaining consent before shipping data offshore.¹⁹⁰ Such restrictions could make international transactions unduly time-consuming and less cost-effective.

3. *Effect on Legal Outsourcing*

Neither the SAFE-ID Act nor the Personal Data Offshoring Protection Act actually became law.¹⁹¹ However, if such a bill were to become law, corporate legal departments and law firms should react to such federal legislation in the same way they would react to state privacy legislation. To stay within legal and ethical boundaries, lawyers must disclose that information will be sent abroad and ask permission of their clients before sending the information. Lawyers who outsource must accept possible delays or torrents of questions from clients before sending data abroad, and can expect to lose some privacy-con-

¹⁸⁴ *Id.*

¹⁸⁵ See *id.* (allowing the FTC to award punitive damages up to three times the amount of regular damages for willful violations of the Act's provisions).

¹⁸⁶ See U.S. CONST., art. I, § 8, cl. 3.

¹⁸⁷ KLINGER & SYKES, *supra* note 34, at 16-17.

¹⁸⁸ Mordecai, *supra* note 20, at 102 (speculating that retaliation could lead to more U.S. jobs being lost than saved).

¹⁸⁹ See KLINGER & SYKES, *supra* note 34, at 19 (disallowing of the free flow of information could be construed as discrimination and hence violate the GPA).

¹⁹⁰ See NAT'L FOUND. FOR AM. POL'Y, PRIVACY CONCERNS AND GLOBAL SOURCING RESTRICTIONS 1 (2006), available at <http://www.nfap.com/researchactivities/articles/PrivacyConcerns0306.pdf>.

¹⁹¹ See GovTrack.us, <http://www.govtrack.us/congress/bill.xpd?bill=s108-2471> (last accessed Apr. 13, 2008); GovTrack.us, <http://www.govtrack.us/congress/bill.xpd?bill=h108-4366> (last accessed Apr. 13, 2008).

scious clients. Yet with the money that can be saved by outsourcing, lawyers that outsource and comply with disclosure rules will probably find more than enough cost-conscious clients to make up for any losses.

B. Federal Restrictions on Awarding Contracts

1. Analysis of Thomas-Voinovich Amendment and the Dodd Amendment

In 2004, Senators Craig Thomas and George Voinovich attached an anti-outsourcing amendment to a Senate appropriations bill.¹⁹² The Thomas-Voinovich Amendment states that:

An activity or function of an executive agency that is converted to contractor performance under Office of Management and Budget Circular A-76 may not be performed by the contractor at a location outside the United States except to the extent that such activity or function was previously performed by Federal Government employees outside the United States.¹⁹³

In essence, the Thomas-Voinovich Amendment states that government organizations cannot hire foreign contractors for any jobs which in the past have not been performed by government employees outside the United States.¹⁹⁴ The Amendment's likely intention was to help American firms win contract wars over foreign competitors who could make a lower bid. While the Thomas-Voinovich Amendment only applied to job competitions using 2004 appropriations,¹⁹⁵ and only involved the Department of Transportation and United States Treasury,¹⁹⁶ in 2004 the Dodd Amendment attempted to make such contracting regulations permanent, and in fact, expand them.¹⁹⁷ The failed Dodd Amendment, noted in Part I-B of this Comment, would have in most cases banned the use of federal funds for work to be performed offshore.¹⁹⁸ It included provisions such as withholding grants to state governments unless the state certified that the granted funds would not be used outside the United States.¹⁹⁹ The Dodd Amend-

¹⁹² See GLOBALIZATION AND THE OFFSHORING OF SOFTWARE: A REPORT OF THE ACM JOB MIGRATION TASK FORCE 255 (William Aspray et al. eds., 2006).

¹⁹³ Consolidated Appropriations Act of 2004, Pub. L. No. 108-199, § 647, 118 Stat. 362 (2004).

¹⁹⁴ See KLINGER & SYKES, *supra* note 34, at 18-19.

¹⁹⁵ See *A Legislative Status Report on Outsourcing*, FED. FORECASTER (Reed Smith, New York, N.Y.), Fall 2005, Vol. I, No. 6, at 5.

¹⁹⁶ See Baker, *supra* note 3, at 834.

¹⁹⁷ See UNDERSTANDING THE DODD AMENDMENT, *supra* note 36, at 1.

¹⁹⁸ ANTI-OUTSOURCING EFFORTS DOWN BUT NOT OUT, *supra* note 27, at 8.

¹⁹⁹ UNDERSTANDING THE DODD AMENDMENT, *supra* note 36, at 1.

ment also would have made the Thomas-Voinovich Amendment permanent.²⁰⁰

2. *International Concerns with Federal Contract Legislation*

The Thomas-Voinovich Amendment potentially violates the Government Procurement Agreement (GPA)²⁰¹ of the WTO.²⁰² Effectively, the Amendment disallows bids from domestic firms that outsource, unless the firm agrees to perform the entire contract in the United States.²⁰³ The GPA explicitly prohibits procuring agencies from discriminating against domestic firms on the basis of the nation in which the firm produces its goods or services.²⁰⁴ The GPA requires equal treatment for the goods and services of a fellow GPA member state as is given to domestic goods and services.²⁰⁵ Thus, if Thomas-Voinovich were the controlling law, Congress would have to ignore bids from firms with offshore legal departments, in clear violation of the GPA. Furthermore, Thomas-Voinovich invites retaliation from trading partners through its disregard of international treaties.²⁰⁶ The Dodd Amendment, had it passed, would have perhaps violated the GPA in a similar fashion, as it does not exempt GPA signatories²⁰⁷ from its provisions.²⁰⁸ Also, as the Dodd Amendment would have made the offshore contracting restrictions of the Thomas-Voinovich Amendment permanent, any provisions of the Amendment found to be in violation of international trade agreements would have become per-

²⁰⁰ *Id.*

²⁰¹ See Uruguay Round Agreement on Government Procurement, art. III, Apr. 15, 1994, available at http://www.wto.org/English/docs_e/legal_e/gpr-94_e.pdf (approved and implemented by the Uruguay Round Agreement Act of 1994, Pub. L. No. 103-465, 108 Stat. 4809 (1994)).

²⁰² See KLINGER & SYKES, *supra* note 34, at 19 (discussing multiple potential violations of the GPA, as well as potential violations of NAFTA and Uruguay Round Agreements).

²⁰³ *Id.*

²⁰⁴ *Id.*

²⁰⁵ *Id.*

²⁰⁶ See Baker, *supra* note 3, at 835 (describing strong international criticism of the Thomas-Voinovich Amendment as a hypocritical law, the passage of which threatened the Doha talks); UNDERSTANDING THE DODD AMENDMENT, *supra* note 36, at 3 (discussing how the Dodd Amendment would drive contracts to European, Canadian, and Asian companies).

²⁰⁷ See Julie B. Nesbit, Note, *Transnational Bribery of Foreign Officials: A New Threat to the Future of Democracy*, 31 VAND. J. TRANSNAT'L L. 1273, 1298 (1998) (describing how the GPA is a voluntary agreement which is primarily entered into by industrialized nations).

²⁰⁸ See UNDERSTANDING THE DODD AMENDMENT, *supra* note 36, at 1-2 (discussing this problem in detail and also proposed amendments from Senators Mitch McConnell and John McCain to encourage compliance with the GPA).

manent law.²⁰⁹ This certainly would have angered trade partners even further.

3. *Effect on Legal Outsourcing*

As with the state contract laws discussed in Part III, protectionist federal contract legislation has struggled to pass or stay intact, so any analysis of its effect on legal outsourcing is speculative. Yet the analysis is very similar to state contract legislation. Corporations that outsource might be inclined to keep those jobs on United States soil in order to avoid Thomas-Voinovich style discrimination in the bidding process. As with state contract legislation, private law firms who wish to outsource face little threat from federal contract legislation. There is no federal legislation directly intended to stop private law firms from outsourcing, and it appears that no proposed, enacted, or pending bill would have a seriously debilitating effect on the practice.

V. THE FUTURE OF LEGAL OUTSOURCING: TO INDIA WE GO (OR, TO INDIA, LEGAL RESEARCH GOES)

The legal outsourcing industry is in a strong position with vast growth potential, but certain legislative developments could hinder the process. Notably, any prohibition on sending private information offshore could impact both corporations that outsource legal work and private law firms. Alternatively, contract prohibitions and preferences could have an impact on a corporation's decision to offshore its legal services, though these will not affect the private law firm.

As of April 2008, the legal outsourcing industry is at no great risk from protectionist legislation. Bills that seek to limit outsourcing are either unlikely to pass, unconstitutional, or incompatible with international treaties. Anti-outsourcing legislation is still alive, but the number of bills is dwindling.²¹⁰ Despite the fact that the Democrats now control both houses of Congress following the election of 2006,²¹¹ there has not been an immediate rise in federal outsourcing legislation.²¹² Even if some bills were to become law and survive a constitu-

²⁰⁹ *Id.* at 1.

²¹⁰ ANTI-OUTSOURCING EFFORTS DOWN BUT NOT OUT, *supra* note 27, at 1.

²¹¹ See Michael D. Shear and Alec MacGillis, *Democrats Take Control of Senate As Allen Concedes to Webb in Va.*, WASH. POST, Nov. 10, 2006, at A01, available at <http://www.washingtonpost.com/wp-dyn/content/article/2006/11/09/AR2006110900775.html>.

²¹² See ANTI-OUTSOURCING EFFORTS DOWN BUT NOT OUT, *supra* note 27, at 1-5 (indicating that as of April 2007, three months after the Democrats took power, outsourcing legislation continued to decline from its peak of 2004). The author of this Comment posits that Congress' focus on the war in Iraq is the major reason

tional challenge, lawyers can still legally and ethically benefit from outsourcing. While corporations who outsource could possibly miss out on government contracts, private law firms can outsource as much as they please, if they disclose to clients that they intend to send data overseas and obtain permission to do so.

Without the hindrance of legislation, more corporate legal departments and law firms will choose to send jobs to India, or perhaps to newcomers like Uganda. The financial benefits of outsourcing are massive and firms cannot afford to ignore them. Paying \$65 an hour for legal research to an LPO²¹³ when comparable research would usually cost \$200²¹⁴ makes too much sense from a financial perspective. LPO workers also do not require health benefits or office space.

The risks of legal outsourcing are comparatively negligible. Diligence by attorneys and data protection steps taken by increasingly savvy LPOs²¹⁵ can prevent or at least minimize the risk of ethical violations. Client opposition to outsourcing will not be a serious problem because while some clients may not personally support outsourcing, all clients personally support lower legal fees. Quality of work concerns should not be a serious problem either, as the work produced in India is often as good as what a junior associate would produce. While attorneys must take the time to review work produced offshore to comply with ethical rules,²¹⁶ as Indian attorneys are not admitted to the Bar in the United States, the vast amount of money saved in production of the work should easily justify the extra time spent reviewing it.

The practice of outsourcing legal work will continue to expand. In time, cost savings may grow to such a level that law firms may in fact need to outsource if they wish to stay competitive with their counterparts who choose to save money by outsourcing. For now, without effective legislation to prevent legal outsourcing and with cost-benefit

that outsourcing legislation has decreased, and that plentiful anti-outsourcing bills will be proposed if the Democrats still control Congress when the war ends. The presidential election year of 2008 and the new president's first year of 2009 may also bring a new wave of anti-outsourcing bills, particularly due to the prominence of illegal immigration and job loss in the national spotlight. Out of the three remaining contenders in April 2008, an Obama administration would seem to be the most likely to support new anti-outsourcing laws.

²¹³ See Atlas Legal Research, <http://www.atlaslegal.com/112907%20rates%20and%20payment.html>, *supra* note 69.

²¹⁴ See Crawford, *supra* note 78.

²¹⁵ See Atlas Legal Research, <http://www.atlaslegal.com/112907%20confidentiality.html>, *supra* note 65 (discussing privacy controls set up by LPO Atlas Legal to alleviate fears of the misuse of confidential data).

²¹⁶ See Proctor, *supra* note 88, at 24.

analysis showing a potential for great profits from the practice against manageable risk, corporations and law firms of all sizes hoping to save serious money will continue to outsource legal work.