

National Foundation for American Policy

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First Legal Analysis of State and Federal Outsourcing Legislation Shows Such Bills May Violate the U.S. Constitution and Jeopardize U.S. Obligations Under Trade Pacts

Legislators in at least 36 states have introduced more than 100 bills to restrict overseas outsourcing, and legislation on the issue has also proliferated at the federal level, according to a study released Monday by the National Foundation for American Policy (NFAP).

The study's authors warn that policy makers should be fully informed and confident that such actions are both legally sound and capable of withstanding international challenge "before moving further down this path of passing or proposing more such measures."

"International concerns are significant since much of the proposed legislation, if implemented, could invite retaliation by other nations," said Stuart Anderson, Executive Director of the NFAP and Shannon Klinger, who co-authored the study released today at the National Press Club in Washington, D.C.

The National Foundation for American Policy is a non-partisan, Arlington, Va.-based public policy research organization.

"Proposed state and federal legislation to restrict outsourcing may violate the U.S. Constitution and jeopardize U.S. obligations under international trade agreements," concluded the legal affairs study.

"The proposed legislation is thus subject to challenge on a variety of grounds,"

notes the report. A complete copy of the study can be found at www.nfap.net.

The National Foundation for American Policy's study *Exporting the Law: A Legal Analysis of State and Federal Outsourcing Legislation* was authored by Shannon Thyme Klinger and Lynn Sykes, attorneys in the Washington, D.C. office of Alston & Bird. This legal analysis of proposed outsourcing legislation -- the first of its kind -- concludes that:

- Prohibitions on state contract work being performed overseas are the most legally suspect category of proposed outsourcing legislation, since courts would likely find that such measures improperly intrude on the federal foreign affairs power and violate the U.S. Constitution's Foreign Commerce Clause.
- State laws offering preferential treatment for in-state interests, though not outright prohibitions, also may violate the U.S. Constitution.
- State and federal measures that restrict or ban sending U.S. consumers' financial, medical, or other related personal information overseas may be unenforceable under the doctrine of preemption. Existing federal laws, including the Fair Credit Reporting Act, the Health Insurance Portability and Accountability Act of 1996, and the Gramm-Leach-Bliley Act of 1999, already address the treatment of certain types of consumer information and permit the sharing of consumer information among affiliated entities without regard to geography and provide mechanisms

for recourse against U.S. corporations for failing to take appropriate measures to guard consumer information.

- The Thomas-Voinovich Amendment, which became law as part of a federal omnibus appropriations act on January 23, 2004, bans certain federal overseas contracts. This law may violate U.S. trade obligations under the World Trade Organization's Government Procurement Agreement because the Government Procurement Agreement prohibits member countries from treating domestic firms less favorably on the basis of "the country of production of the good or service being supplied." At minimum, it appears that the Thomas-Voinovich Amendment, as applied, fails to comply with the non-discrimination and national treatment principles of the Government Procurement Agreement, which may result in an adverse finding by a World Trade Organization dispute settlement body.
- Various proposed state outsourcing bans as well as other proposed federal legislation, including the Dodd Amendment, which makes the Thomas-Voinovich Amendment permanent, are similarly subject to challenge under the Government Procurement Agreement.

The authors warned that the study does not provide an exhaustive analysis of every potential constitutional or other legal challenge to the myriad state and federal

pending or existing legislation that prohibits or restricts outsourcing. Its aim is serve as the beginning of a necessary dialogue that transcends emotion and politics and highlights the core constitutional and legal concerns raised by proposed outsourcing legislation.

States that have introduced legislation to restrict outsourcing include AL, AZ, CA, CO, CT, FL, GA, HI, ID, IL, IN, IA, KS, KY, LA, MD, MI, MN, MS, MO, NE, NJ, NM, NY, NC, OH, PA, RI, SC, SD, TN, VT, VA, WA, WV and WI.

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About the National Foundation for American Policy

Started in 2003, the NFAP is a non-profit, non-partisan organization dedicated to public policy research on trade, immigration and other issues of national importance. Its Advisory Board members include economist Jagdish Bhagwati (Columbia University); Richard Vedder (Ohio State University); former U.S. Rep. Guy Vander Jagt (MI); former INS Commissioner Jim Ziglar; Cesar Conda, former Domestic Policy Advisor for Vice President Dick Cheney, and others.

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