Facultad de Derecho
Universidad de Buenos Aires

Programa de

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Exámenes

Inglés Nivel II

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Fuente: R. Merges and G. Reynolds- Harvard Journal on Legislation

The Proper Scope of Copyright and Patent Power

In 1998, Congress passed the Sonny Bono Copyright Term Extension Act, extending the duration of copyright protection from the life of the author plus fifty years to the life of the author plus seventy years. The constitutionality of this extension has been challenged on First Amendment and other grounds. It is argued that the language of Article 1,Section 8, Clause 8:
5 *"The Congress shall have power ...to promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries"* contains judicially enforceable limits on Congress's power to protect intellectual property and suggest that the 1998 Extension Act exceeds those limits.

As an increasing amount of society's wealth is tied up in intangible assets, strong, clear
10 property rights can make a good deal of sense. But it is also possible to have too much of a good thing, and our society is in danger of reaching that point. Recent scholarship suggest as much: a growing body of literature details the expansion of particular doctrines, the rising burden of IP (Intellectual Property) -related transaction costs, or the pressing need for collective institutions to mediate between individual firms and the mushrooming pile of IP
15 rights they must traverse to do business. We argue that the language of the Copyright and Patent Clause may restrict some of Congress's more far-reaching efforts at promoting intellectual property in recent years, particularly in passing ad hoc extensions of copyrights and patents for the benefit of individual companies.

Two traditions in constitutional theory can be mentioned in this respect: 1) the view
20 associated with legal historians Hurst and Kutler that the Constitution embodies a spirit of economic dynamism and growth and 2) the more recent 'public choice' inspired literature describing the Constitution as a bulwark against rent-seeking by special interests.

The economic dynamism perspective is best exemplified by Kutler's famous account of the Charles River Bridge case. Kutler described this cornerstone case as a contest between the
25 forces of the privileged and well-positioned holders of an old state charter to operate a ferry crossing and the dynamic new forces that led a group of entrepreneurs to propose building a bridge. Faced with the choice of upholding the original charter against a claim of impairment of state contracts and allowing the new bridge, the Supreme Court chose the latter.

The second literature on public choice sees the Constitution as a mechanism designed to
30 prevent well-organized interest groups from obtaining special favors.

We claim that the constitutional footing for intellectual property protection was constructed with inherent limitations, as well as with a grant of power. The specific language ("to promote progress," and "for limited times"), the history, and the context of the Clause dictate that the congressional power to create property rights does not extend to non-productive
35 rent-seeking. Congress exceeds its authority to grant property rights when those rights do not promote progress, or are not sufficiently limited in time. Members of Congress should keep this in mind when considering the many bills for "private relief" and term extensions that they now receive. And, failing that, the courts must exercise their authority to enforce constitutional limits on the Copyright and Patent power. To ignore this duty is to risk the
40 kinds of abuses that threatened the economic progress of seventeenthcentury Britain, and to

turn our backs on the historical transformation of ad hoc grants of rent-seeking privileges into rule-based systems for recognizing intellectual property rights.

The matter is not limited to patents: the Disney copyright on Mickey Mouse was poised to enter the public domain in 2003, but the Walt Disney Company decided that procuring
45 legislation extending that copyright for an additional twenty years was to be its "highest priority." The Disney request was folded into a general bill that recently became law, and is thus not a classic private bill. Still, some experts fear that in today's freewheeling political-funding culture it will not be long until a copyright-reliant company discovers the magic of private intellectual property protection. Such departures from the norm could well become
50 the norm, with wealthy corporate interests securing by legislative influence what they would not be able to obtain in the normal course of business.

This phenomenon certainly has been appreciated by politicians regardless of their degree of economic training, yet what is seldom appreciated is that success in organizing a special interest and pursuing its claims costs society in several ways.

55 In addition to redistributing wealth from society to the small group (in the case of patent extensions, from consumers to the patentee), successful special-interest organizing also increases the likelihood that others similarly situated will seek their own special legislation.

A. Leer el texto e indicar con una X cuál de los siguientes términos corresponde al título.

1		
	a)	Se afirma que el Congreso no puede sancionar leyes para proteger los derechos de autor y conceder patentes ya que excedería el alcance de sus facultades.
	b)	Se afirma que el Congreso incurre en un exceso sólo porque los derechos de propiedad intelectual deberían ser amparados por períodos limitados.
	c)	Se afirma que el Congreso incurre en un exceso porque concede prorrogas en las patentes y derechos de autor con el fin de favorecer a ciertas empresas, aún cuando no se esté promoviendo el crecimiento y el progreso.
	d)	Se dice que el Congreso incurre en un exceso en sus facultades porque debería incrementar la incidencia de los costos relativos a las transacciones sobre PI.

2	El principio fundamental subyacente en toda ley de propiedad intelectual debería ser:	
	a)	Brindar asistencia al sector privado.
	b)	Procurar la obtención de rentas.
	c)	Promover una cultura de financiamiento político ilimitado.
	d)	Ninguno de los anteriores.

3	En este contexto, “la magia de la protección de la propiedad intelectual privada” significaría:
a)	Que las empresas estarán plenamente protegidas por la ley, tanto cuando desarrollen su actividad comercial habitual o cuando confíen en la labor exitosa de los ‘lobbies’.
b)	Que, al referirse a las leyes de patentes y de derechos de autor, los ‘lobbies’ pueden hacer milagros independientemente de su actividad comercial habitual.
c)	Que la actividad comercial habitual mejora si las empresas están protegidas por el derecho de autor y el de patentes.
d)	Ninguna de las anteriores.

4	Al continuar con la tendencia descripta en el texto, es probable que:
a)	Las prórrogas ad hoc se conviertan en la regla y dejen de ser la excepción.
b)	Las leyes de propiedad intelectual sólo abarcarán actividades productivas que promuevan el progreso durante períodos limitados.
c)	La sociedad, se beneficiará, en un futuro cercano con las prórrogas mencionadas.
d)	Ninguna de los anteriores.

B. Responder las siguientes preguntas.

1. ¿Qué modificación introdujo la ley denominada ‘Sonny Bono’?

2. ¿Ha sido cuestionada dicha ley? Si la respuesta es afirmativa, ¿con qué fundamentos?

3. ¿Qué posturas se mencionan en materia de teoría constitucional? Explique en qué consisten.

4. Según los autores del artículo, ¿cuál debería ser el alcance de las facultades del Congreso respecto de la Propiedad Intelectual?

U.S. Constitution - Amendment 6

Fuente: 248 *HARVARD LAW REVIEW* [Vol. 121:185], *6. Sixth Amendment, Federal Sentencing Guidelines, Presumption of Reasonableness.,* In *Rita v. United States*

In January 2003, Victor Rita purchased a machine gun parts kit from InterOrdnance of America, Inc., the target of a Bureau of Alcohol, Tobacco, Firearms, and Explosives investigation. That October, Rita provided testimony before a grand jury that was contradicted by separate evidence. The government indicted Rita in the United States
5 District Court for the District of North Carolina on various charges, including making false statements under oath to a federal grand jury.

The jury convicted Rita on all counts. Rita's presentence report stated that the Guidelines recommended a sentence of thirty-three to forty-one months and that Rita's personal circumstances did not warrant a departure. At the sentencing hearing, Rita
10 argued that the court should depart downward from the Guidelines for three reasons: he would be vulnerable in prison because he had worked for the government in a capacity that led to the conviction of many people; he had served in the military for over twenty-five years, earning more than thirty-five awards and medals; and he was in poor physical condition. The judge ruled that he was "unable to find that the . . . sentencing guideline
15 range . . . is an inappropriate guideline range, "that" the public needs to be protected and that a thirtythree- month sentence was appropriate."

Rita appealed, arguing that the sentence was unreasonable because it did not "give adequate weight to all the factors and purposes of sentencing of [18 U.S.C.] § 3553" and was "greater than necessary to comply with the statute." The Fourth Circuit affirmed
20 without oral argument. In an unpublished per curiam opinion, the court noted that after *Booker*, sentencing courts must still consider the appropriate Guidelines range, and restated its post-*Booker* intuition that "we have no reason to doubt that most sentences will continue to fall within the applicable guideline range."16 It then reaffirmed its precedent that "a sentence imposed 'within the properly calculated Guidelines range . .
25 . is presumptively reasonable.'"17 Applying that presumption, the panel affirmed the sentence.

The Supreme Court affirmed. Writing for the Court, Justice Breyer20 held that a court of appeals may apply a presumption of reasonableness to sentences that fall within the appropriately calculated Guidelines range. Justice Breyer stated the underlying
30 rationale for such a presumption:

[B]y the time an appeals court is considering a within-Guidelines sentence on review, *both* the sentencing judge and the Sentencing Commission will have reached the *same* conclusion as to the proper sentence in the particular case. That double determination significantly increases the likelihood that the sentence is a reasonable one.

35 Justice Breyer next explained that the basic sentencing statute, 18 U.S.C. § 3553, instructs sentencing judges to prescribe penalties in line with certain objectives, and that Congress further instructed the U.S. Sentencing Commission to craft Guidelines that reflect those same objectives.

Given the Sentencing Commission's multiyear examination of "tens of thousands of
40 sentences," Justice Breyer stated, "it is fair to assume that the Guidelines, insofar as

practicable, reflect a rough approximation of sentences that might achieve § 3353(a)'s objectives."

Amendment 6 - Right to Speedy Trial, Confrontation of Witnesses

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public
45 trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

A. Responder o explicar, según corresponda:

1. Resumir los hechos del caso Rita v. United States.

2. ¿Cómo se estableció la pena a cumplir por Rita?

3. ¿Por qué, en la audiencia, Rita afirma que el tribunal debería apartarse de las directivas?

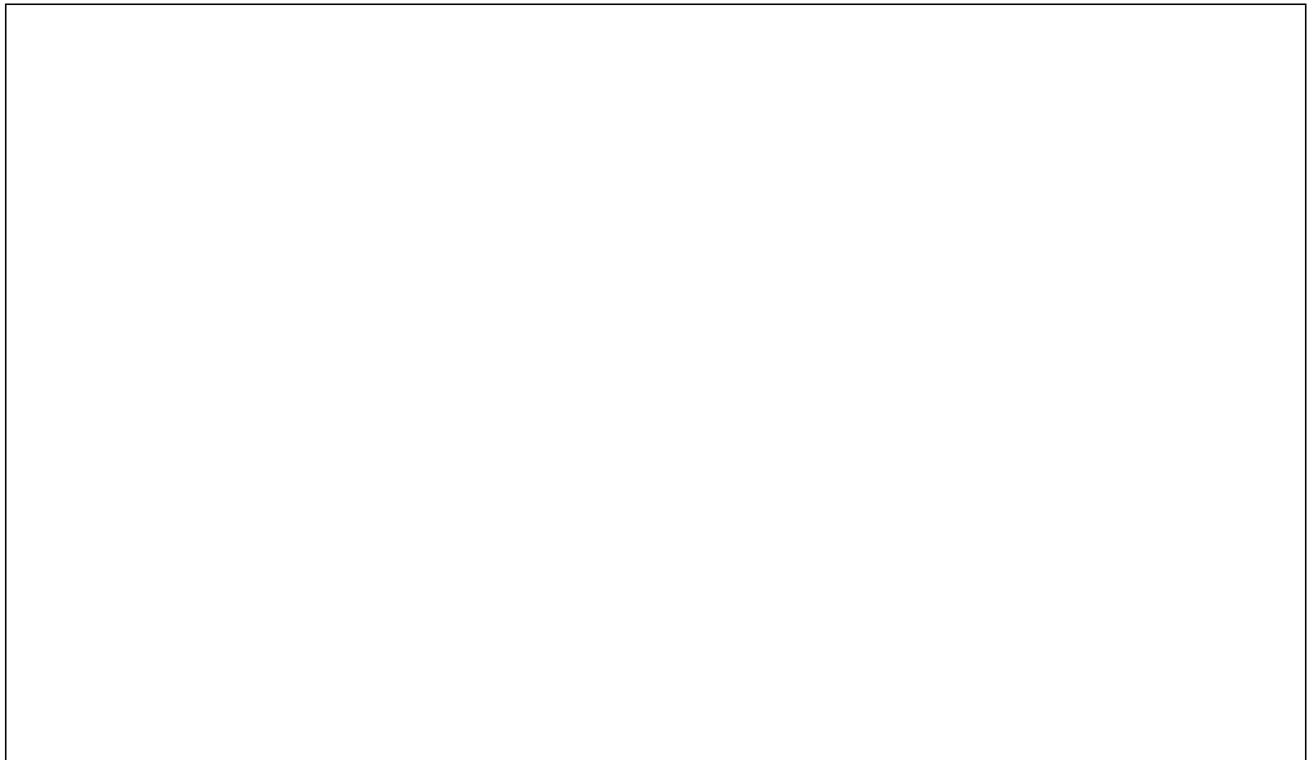
4. ¿Cuál fue la decisión del juez?

5. ¿Qué argumento presentó Rita en su apelación al fallo?

B. Decir verdadero o falso y en que renglón se encuentra la respuesta. Fundamentar las respuestas en ambos casos.

		Verdadero	Falso	Renglón
1.	Después del caso Booker los tribunales, al dictar sentencia **podían** considerar o no las directivas.			
2.	El panel ***confirmó*** la sentencia aplicando la presunción de razonabilidad.			
3.	El juez Breyer determinó que un tribunal de apelaciones **tiene obligación** de aplicar la presunción de razonabilidad a las sentencias comprendidas en las directivas.			
4.	La justificación del juez Breyer es que ni el juez ni la Comisión que dicta sentencia llegarán a la misma conclusión con respecto a la sentencia apropiada para un caso determinado.			

C. Explicar en castellano el contenido de las oraciones subrayadas (renglones 34-41).



U.S. Court Backs off Patent Case

By Andrew Pollack

Published: FRIDAY, JUNE 23, 2006

Fuente: http://www.iht.com/articles/2006/06/23/business/patent.php

The U.S. Supreme Court has backed away from ruling on a closely watched case that could have set the boundaries on what kinds of discoveries and inventions can be patented.

Saying it had "improvidently" agreed to hear the case in the first place, the court on Thursday dismissed the appeal. That action effectively upheld the medical diagnostic testing 5 patent at issue in the case. And it averted a decision that some patent lawyers said could have undermined thousands of patents on medical tests or genes.

Three justices dissented, saying the court should have decided the case. They strongly suggested that they were concerned that patents in areas like biotechnology and financial services were being granted too liberally and should be rolled back.

10 The failure to decide the case "threatens to leave the medical profession subject to the restrictions imposed by this individual patent and others of its kind," Justice Stephen Breyer wrote in the dissent, which was joined by Justices John Paul Stevens and DavidSouter. Breyer said such restrictions "may raise the cost of health care while inhibiting its effective delivery."

15 The case, LabCorp v. Metabolite Laboratories, involved a patent that said that deficiencies of some B vitamins could be detected by finding high levels of the amino acid homocysteine in a person's blood.

The question for the Supreme Court was whether that part of the patent was merely the statement of a natural relationship between chemicals in the body. Natural phenomena, like 20 gravity, are not patentable.

Some people in the biotechnology industry contend that such patents are fundamental, that many diagnostic tests are based on finding a relationship between a body chemical or gene and a disease.

Others, including groups representing doctors, contend that such patents would impede 25 medicine. Doctors, for instance, might be guilty of infringement merely by thinking that a patient with high homocysteine levels had a vitamin deficiency.

A U.S. trial jury in Denver and an appeals court both upheld the patent, which is controlled by Metabolite Laboratories, a tiny testing company based at the University of Colorado, and Competitive Technologies, a patent management company in Fairfield, Connecticut.

30 LabCorp, a giant clinical testing company, was found to have infringed on the patent and was ordered to pay $7.8 million in damages and lawyers' fees, according to LabCorp.

The Supreme Court agreed to hear LabCorp's appeal even though the U.S. solicitor general advised against it. The solicitor general contended that LabCorp had not formally made the argument about natural phenomena in the lower courts.

35 But after hearing arguments in March and reading about 20 briefs from interested parties, the court said Thursday that it would not consider the case after all. It did not offer any further explanation. Such decisions to drop cases are made occasionally.

A spokeswoman for LabCorp, formally known as Laboratory Corporation of America Holdings, said the company was "very disappointed that the court decided not to hear the case based 40 on a technicality."

Competitive Technologies called the outcome "a big win."

A. Responder.

1. ¿Qué decidió la Corte Suprema de los Estados Unidos?

2. ¿Qué pasó el jueves?

3. ¿Qué consecuencias tuvo?

4. ¿Cuál es la opinión de los abogados especializados en patentes?

5. ¿Cuál es el fundamento de la justificación de los jueces en disidencia?

6. ¿Cómo justifica el juez Breyer su voto en disidencia?

7. ¿Por qué no puede patentarse la "gravedad"?

8. ¿Cuál es la postura de algunas personas de la industria biotecnológica?

9. ¿Cuál es la postura de los grupos que representan a los médicos?

10. ¿Qué ocurrió en Denver?

11. ¿Qué se resolvió en primera instancia respecto de LabCorp?

12. ¿Qué decidió la Corte Suprema?

13. ¿Qué recomendó el Vice Ministro de Justicia de los Estados Unidos?

14. ¿Qué declaró el vocero de LabCorp?

Judicial Precedent: Law Reporting

JAMES, Philip S., Introduction to Law, Butterworths, 1979.

It will be appreciated that the system of case law calls for accurate reporting and publication of all the more important decisions of the superior courts. Consequently there has been law reporting of some kind from as early as the thirteenth century. The history of the law reports falls into three main periods: the period of the "Year Books", 5 the period of private reporting and the modern period. The Year Books, many of which have from time to time been printed with varying degrees of accuracy, and some of which are now available in translation, appear to have been notes, taken by counsel or students upon cases which they considered to be of interest. They were originally written in Anglo-French (the court language of the Middle Ages) and they cover the 10 period from 1283 to 1535. They are seldom cited today, partly because there is now seldom need to refer to decisions of those early times and partly because, on the whole, they are not, and apparently were not intended to be, accurate records of the decisions of the courts. Although some rulings upon important points of law appear in them, they are more often concerned with matters which seem irrelevant to the 15 modern lawyer, such as arguments between judge and counsel, arguments, conducted out of court and occasionally even remarks about the weather. They are, nevertheless, invaluable documents to the historian.

Law reporting proper began with the era of "private" reporting. About the second quarter of the sixteenth-century practitioners (one of the earliest of them was Sir 20 James Dyer, a Chief Justice of the Court of Common Pleas, whose Reports begin in 1537) began to compile reports of cases which, for various reasons, they or their successors found it convenient to publish. These reports were intended for practical use; hence in the course of time they came to contain the essential matters which practitioners required to know; that is to say, a statement of the facts in issue, the 25 general nature of the pleadings on either side, a brief statement of the arguments of counsel and, above all, the judgment of the court. The technique of these "private" reports tended to improve as time went on, and by the close of the eighteenth century they had attained a degree of relevance and accuracy approximating to that of the modern reports. The most renowned reports of this type are those of Sir Edward Coke, 30 the greatest of our judges (1552-1634); they cover the years 1572-1616 and are to this day accorded the distinction of being referred to as "The Reports" by reason of their author's unrivalled eminence. Sir George Burrow's Reports (1756-1772) are also held in high esteem. At about the close of the eighteenth century certain of the reporters became "authorized"; this meant that the judges who decided the cases noted by these 35 reporters themselves examined and, where necessary, amended the reports before publication. Many of the "private" reports are still in use, and most of them have been reprinted in a series of a hundred and seventy-six volumes, called the English Reports.

The modern period of law reporting began after 1865, when, as the result of a general demand from the legal profession, the General Council of Law Reporting was set up. 40 This body is constituted as a self-supporting commercial enterprise and it had, and still has, the function of issuing a series of Law Reports which are "authorized" in the sense

just explained. The old private reporting ceased soon after this Council came into being.

The Law Reports continue to be issued at the present time and they are now
45 supplemented by a series of Weekly Law Reports. But this does not mean that the Council enjoys a monopoly in the field of reporting; for numerous other reports are issued by commercial concerns. The All England Reports, a most useful series, first issued in 1936, afforded an outstanding example. The names of most of the Reports, past and current, are commonly abbreviated when they are referred to in legal
50 literature, and the usual abbreviations will be used in this book. A complete key to them is to be found in Halsbury's Laws of England, but even without consulting this or any other key, the student who cares to spend some of his time in a law library will find it quite a simple matter to familiarize himself with all of the more important of them.

A. Leer el texto e indicar con una X cuál de los siguientes términos corresponde al título.

	1	REPORTE JURÍDICO
	2	REPERTORIO JURISPRUDENCIAL
	3	DIGESTO
	4	INFORME JUDICIAL

B. Responder citando renglón/nes en los que se encuentra al información.

1. ¿A qué decisiones judiciales se hace referencia en la primera oración y por qué se incluye esa información?

Renglón/nes:

2. ¿Qué fundamenta la referencia al Siglo XIII en la segunda oración?

Renglón/nes:

3. ¿Cómo se denomina el primer período y qué tipos de documentos incluye?

Renglón/nes:

4. ¿Qué caracteriza a las versiones actuales de dicho período?

Renglón/nes:

5. ¿Por qué en la actualidad, en general, las versiones de esos documentos carecen de relevancia jurídica?

Renglón/nes:

6. ¿Por qué se incluye la referencia a Sir James Dyer?

Renglón/nes:

7. ¿Qué contenían los primeros documentos de esa época?

Renglón/nes:

8. ¿En qué caso se considera que los hechos se niegan?

Renglón/nes:

7. ¿Qué debe contener un escrito que sirva de contestación a otro? Incluir los ejemplos 4, 8, 11, 18 y 19.

Renglón/nes:

8. ¿Qué se dice sobre la técnica y el Siglo XVIII?

Renglón/nes:

9. ¿Qué se dice respecto de Sir Edward Coke y de su producción?

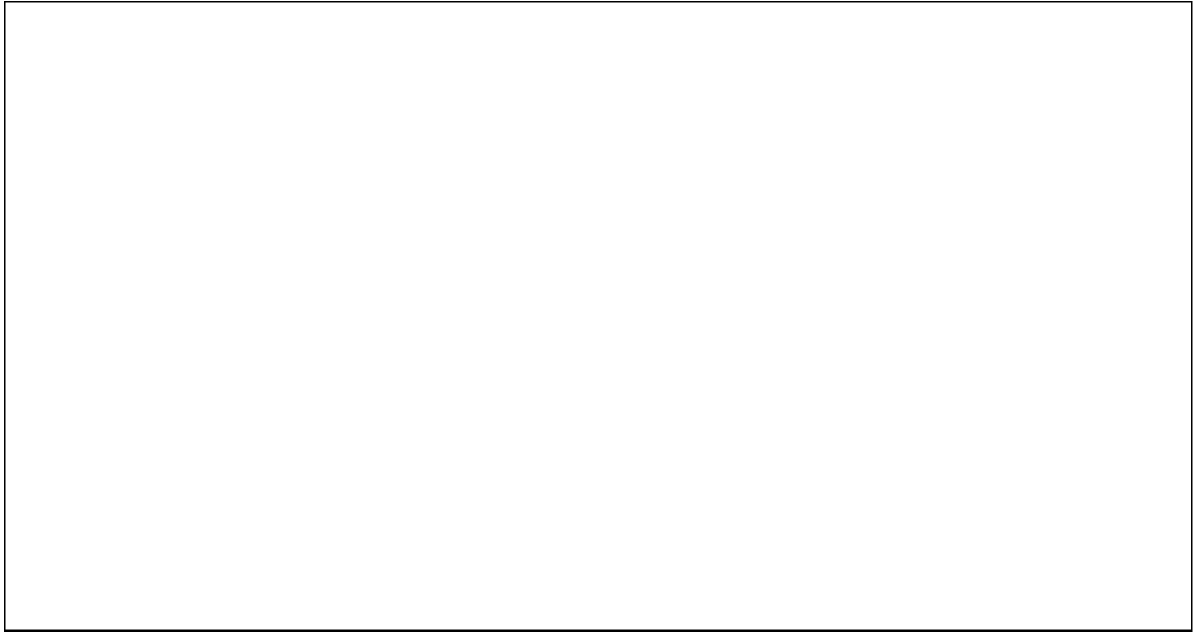
Renglón/nes:

5

10. ¿Qué indicaba la denominación “authorized”?

Renglón/nes:

C. Resumir la información de los dos últimos párrafos (renglones 36 a 50).



Fuente: http://www.clarionreview.org/main/article.php?article_id=39
Autor: Robert P. George. Robert P. George is McCormick Professor of Jurisprudence and Director of the James Madison Program at Princeton University.

Reason, Freedom, and the Rule of Law: Their Significance in Western Thought

The idea of law and the ideal of the rule of law are central to the Western tradition of thought about public (or "political") order. St. Thomas Aquinas went so far as to declare that "it belongs to the very notion of a people [*ad rationem populi*] that the people's dealings with each other be regulated by just precepts of law." In our own time, Pope John Paul II forcefully reaffirmed the status of the rule of law as a requirement of fundamental political justice. For all the romantic appeal of "palm tree justice" or "Solomonic judging," and despite the sometimes decidedly unromantic qualities of living by pre-ordained legal rules, the Western tradition affirms that justice itself requires that people be governed in accordance with the principles of legality.

Among the core concerns of legal philosophers in the second half of the twentieth century was the meaning, content, and moral significance of the rule of law. The renewal of interest in this very ancient question (or set of questions) has had to do above all, I think, with the unprecedented rise and fall of totalitarian regimes. In the aftermath of the defeat of Nazism, legal philosophers of every religious persuasion tested their legal theories by asking, for example, whether the Nazi regime constituted a legal system in any meaningful sense. In the wake of communism's collapse in Europe, legal scholars and others have been urgently trying to understand the role of legal procedures and institutions in creating and sustaining decent democratic regimes. It was in this particular context that Pope John Paul II had occasion to stress the moral importance of the rule of law.

One of the signal achievements of legal philosophy in the twentieth century was Lon L. Fuller's explication of the content of the rule of law.[4] Reflecting on law as a "purposive" enterprise—the subjecting of human behavior to the governance of rules—Fuller identified eight constitutive elements of legality. These are (1) the prospectivity (i.e., non-retroactivity) of legal rules; (2) the absence of impediments to compliance with the rules by those subject to them; (3) the promulgation of the rules; (4) their clarity; (5) their coherence with one another; (6) their constancy over time; (7) their generality of application; and (8) the congruence between official action and declared rule. Irrespective of whether a legal system (or a body of law) is good or bad, that is to say, substantively just or unjust, to the extent that it truly is a legal system (or a body of law) it will, to some significant degree, exemplify these elements.

It was a mark of Fuller's sophistication that he noticed that the rule of law is a matter of degree. Its constitutive elements are exemplified to a greater or lesser extent by actual legal systems or bodies of law. Legal systems exemplify the rule of law to the extent that the rules constituting them are, prospective, susceptible of being complied with, promulgated, clear, and so forth.

A. Responder según el texto.

1. ¿A qué idea e ideal refiere el comienzo del texto y por qué?

2. ¿Por qué se mencionan a Santo Tomás y al Papa Juan Pablo II?

3. ¿Qué afirma la última oración del primer párrafo?

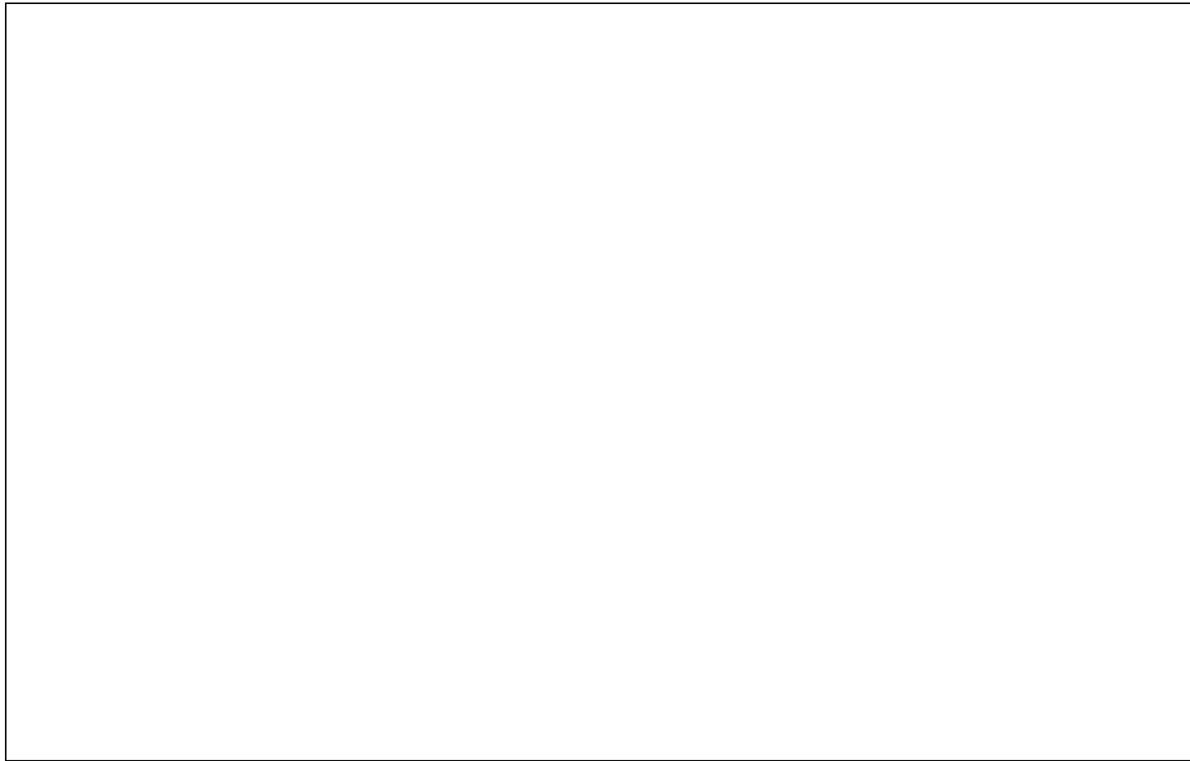
4. ¿A qué tipo de filósofos se hace referencia en el segundo párrafo y por qué?

5. ¿A qué renovado interés alude el texto y por qué?

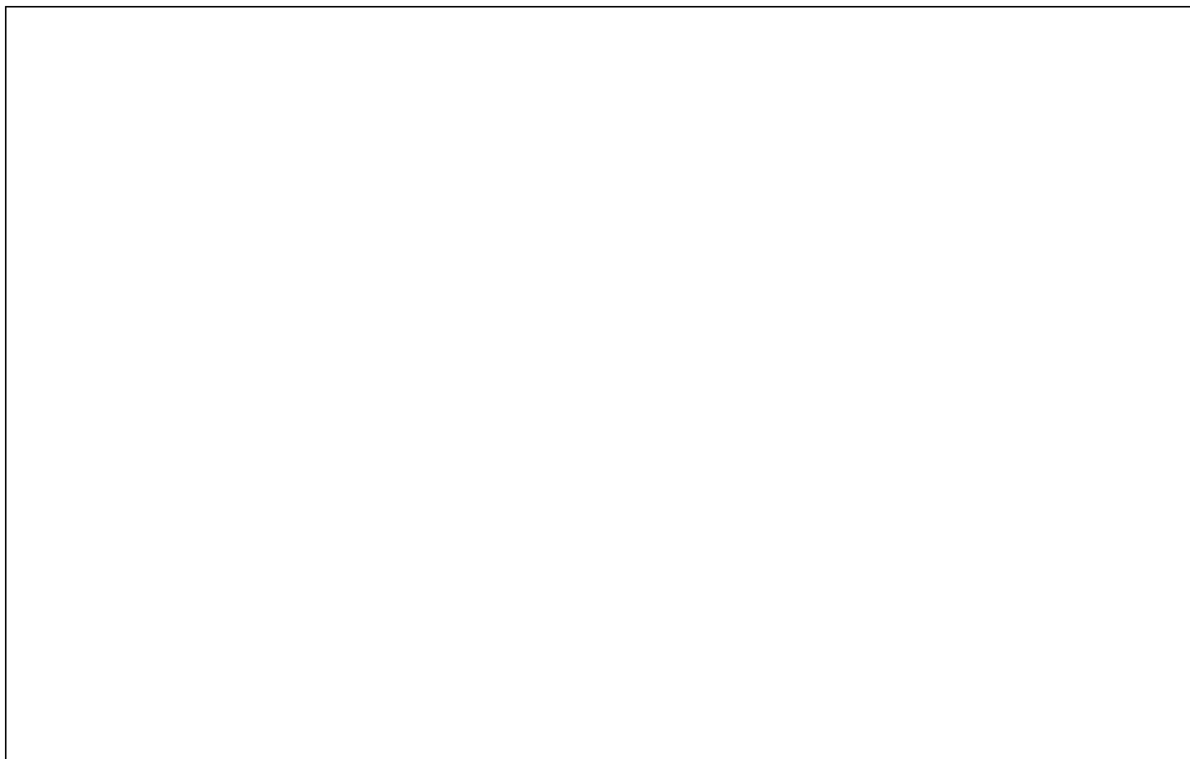
6. ¿Qué fundamenta la referencia al nazismo?

7. ¿Por qué se hace referencia al comunismo y al Papa Juan Pablo II en este contexto político?

B. Detallar el razonamiento de Lon L. Fuller descripto en el tercer párrafo.



C. Resumir el contenido del párrafo IV (renglones 11 - 21).



Fuente: http://www.irri-kiib.be/papers/07/eu/Legal.Personality.EU-PDS-SA.pdf

The Legal Personality of the European Union

By Philippe de SCHOUTHEETE and Sami ANDOURA in Studia Diplomatica Vol. LX: 2007, n°1
(Philippe de Schoutheete is Director of European Studies at EGMONT - Royal Institute for International Relations, and former Belgian Representative to the EU. Sami Andoura is researcher at the European Affairs Programme and deputy Editor-in-chief at EGMONT)

European treaties are notorious for legal ambiguities and internal contradictions resulting from precarious compromises between opposing views. The matter of the legal personality of the European Union is a good example of this and, given its potential importance, it is worthy of some attention.

5 **1. What the treaties say**

The words 'European Union' began to circulate widely in the mid seventies when the Belgian Prime Minister, Leo Tindemans, was tasked to draft a report on the concept. He described the Union as a "*new phase in the history of the unification of Europe*" to be achieved by a "*qualitative change*" resulting from strengthened institutions bringing
10 together the various strands of intergovernmental cooperation and community matters. But it is only through the treaty of Maastricht, in 1992, that the concept was introduced in the European legal order.

The 'Treaty on European Union' (the official title of the treaty of Maastricht) does indeed establish a European Union as a "*new stage in the process of creating an ever closer union*
15 *among the peoples of Europe*" (article A, now article 1 TEU) and gives it as one of its objectives "*to assert its identity on the international scene, in particular through the implementation of a common foreign and security policy*" (article B, now article 2 TEU).

Common sense suggests that in order to assert identity on the international scene one needs, first, to be recognised as an international legal entity. And to implement a
20 common foreign policy, one obviously needs the ability to act, to contact and to contract with other international actors. Such was not the view that prevailed at Maastricht. Some considered that giving legal personality to the Union would compromise national sovereignty in foreign affairs. Others considered that it might impinge on the legal personality of the Community.

25 Together they agreed, with little debate, that the Union would not have legal personality and that position, however contradictory, was not disputed.

In the negotiations that were to lead to the treaty of Amsterdam, the inherent contradiction in the position taken at Maastricht was widely recognised. The report of the Reflection Group preparing the intergovernmental conference stated that "*the fact that*
30 *the Union does not exist is a source of confusion outside and diminishes its external role*". The European Parliament and the Irish and Dutch presidencies suggested that the Union should have legal personality, preferably absorbing the legal personalities of the three existing Communities. Those proposals found majority support but they failed in front of determined British and French opposition.

35 However the same treaty deepened the paradox by giving the Union a form of treaty-making power. It introduced what are now articles 24 and 38 TEU which allow agreements to be concluded in the field of common foreign and security policy (title V) and in the

field of police and judicial cooperation (title VI). Those agreements are negotiated by the Presidency and concluded by the Council. The Council is an institution of the Union, not
40 an intergovernmental conference, and it is therefore the Union, not a conglomeration of member states, which is bound by those agreements. Even if article 24 TEU foresees the possibility for a member state to request a national ratification procedure in exceptional cases, and even if Declaration annexed to the treaty specifies (unnecessarily) that the same article does not imply a transfer of competence, the fact remains that member
45 states, while refusing formally to recognise the legal personality of the Union, were giving it a form of treaty-making power which is one of the main characteristics of international legal personality.

The treaty of Nice, which some have called "*the culmination of confusion*", made the implicit ambiguity even more apparent by adding two modalities to article 24. Paragraph
50 3 indicates that, in given circumstances, an agreement can be approved in Council by a qualified majority. Paragraph 6 states the obvious in saying that agreements concluded bind the institutions of the Union. Both paragraphs cannot be explained without implying the existence of a legal entity having the capacity to conclude agreements which bind the institutions and, in some cases, even the member states who voted against it.

55 Such was the situation when the European Convention met in Brussels in the spring of 2002. One of its first decisions was to create a working group on legal personality, chaired by Giuliano Amato, which delivered its final report on 1 October . Its main conclusion was "*that there was a very broad consensus (with one member against) that the Union should in future have its own explicit legal personality. It should be a single legal personality*
60 *and should replace the existing personalities*".

A. Responder según el texto.

1. ¿Qué se dice de la Unión Europea en el primer párrafo?

2. ¿Por qué se menciona al Primer Ministro Leo Tindemans?

3. ¿En qué términos describió Leo Tindemans el concepto de Unión Europea y cuándo se impuso legalmente dicho concepto?

4. ¿Por qué se menciona al *Tratado* de la Unión Europea (TUE) o *Tratado de Maastricht?*

5. ¿Por qué se hace referencia al sentido común en el renglón 18?

6. ¿Qué opiniones se sustentaban mayormente en *Maastricht?*

7. ¿Qué postura prevaleció?

8. ¿A qué negociaciones se hace referencia y por qué?

9. ¿Por qué fue importante la Convención de Bruselas?

B. Asignar un título a los párrafos 6, 7 y 8 y resumir sus contenidos.

Párrafo 6	**Título:**
Contenido:	

Párrafo 7	Título:
Contenido:	

Párrafo 8	Título:
Contenido:	

Fuente: http://www.fff.org/comment/com0312c.asp

Commentaries

Freedom without Due Process of Law?

by Jacob G. Hornberger, December 8, 2003

No American should be too enthusiastic about the Pentagon's decision to permit accused terrorist Yaser Hamdi to speak to an attorney after some two years of incarceration in a military brig here in the United States. While some people might be tempted to be grateful to the Pentagon for finally permitting Hamdi, an American citizen, to consult with an attorney, make no mistake about it: the only reason Hamdi is now speaking to a lawyer is that Pentagon officials, in an act of pure discretion, are permitting him to do so.

We live in a country in which the military authorities are continuing to claim and exercise the same type of omnipotent power over the citizenry that the military does in China, Burma, and many Latin American countries — the arbitrary power to seize any citizen, either here or abroad, and punish him. All that is now needed here in our country is the mere assertion by military officials that a particular citizen is an "illegal combatant" in the government's metaphorical "war on terrorism," and that now means: no attorney, no jury trial, no due process of law. And for any American accused by the Pentagon of being an "illegal terrorist," no appeals. Just arrest and punishment.

That's in fact what the cases of Hamdi and Jose Padilla, another American accused of terrorism by the Pentagon, are all about. Americans would be well-served to take notice before it is too late, because what the government is doing in these cases quite possibly constitutes the most dangerous and audacious attack on the freedom of the American people in our lifetime.

This is especially true given that the government is also claiming the power to arbitrarily remove a criminal defendant accused of terrorism from the jurisdiction of the federal courts and to transfer him to the control of military tribunals run by the Pentagon — as they have done with accused terrorist Ali S. Marri and as they are threatening to do to accused terrorist Zacarias Moussaoui — if the civil courts don't go along with what the Pentagon wants. While at the moment the Pentagon is still applying military tribunals only to foreigners and not Americans, that decision, again, is an act of pure discretion and thus could be changed at the whim of Pentagon officials.

What's so bad about a military tribunal? It is nothing more than a kangaroo judicial proceeding to provide cover for the military to incarcerate or execute under pretense of law any person accused of terrorism by military officials. That's in fact why the criminal defense bar has chosen to boycott the Pentagon's military tribunals

35 in Cuba, rather than participate in a sham defense of the accused terrorists being held at Guantanamo Bay.

If the Pentagon has the power to do to Americans what it is doing to Padilla, Hamdi, and Marri, then what good are any other freedoms that we enjoy as Americans? Do they not all effectively become dead letters? After all, what good is freedom of
40 speech, for example, if the Pentagon has the omnipotent power to accuse anyone and everyone, including critics and dissenters, of being "illegal combatants" in the "war on terrorism," incarcerate them in a military brig for any period of time, or even execute them after a sham judicial proceeding? What person would feel safe to speak the truth in the face of that kind of governmental power?

45 <u>Ironically, even though the Pentagon is maintaining that the "war on terrorism" has subordinated our Constitution and Bill of Rights to military command, U.S. officials continue to assure us that the troops in Iraq are fighting to protect our "freedom." But to which freedom exactly are they referring? The "freedom" of living in a country where the military authorities have the omnipotent power to arbitrarily
50 arrest and punish people and deny them such fundamental rights as the right to counsel and due process of law? Or the freedom of living in a country whose Constitution and Bill of Rights guarantees such rights to everyone, citizen and noncitizen alike?</u>

In 1961, President Dwight Eisenhower warned us to "guard against the acquisition of
55 unwarranted influence, whether sought or unsought, by the military-industrial complex" and advised us to "never let the weight of this combination endanger our liberties or democratic processes." The American people would have done well to heed Eisenhower's warning.

Mr. Hornberger is founder and president of The Future of Freedom Foundation.

A. Responder:

1. ¿Qué opinión expresa el autor en el primer párrafo respecto de la decisión que tomó el Pentágono?

2. ¿Qué les ocurrió a los ciudadanos Hamdi y José Padilla?

3. ¿Qué peligro se visualiza ante el avance de la Justicia Militar?

4. ¿Qué ocurre si, para el gobierno, la justicia ordinaria no procede acorde a lo esperado por el pentágono?

5. ¿Quiénes boicotearon los procesos de los Tribunales Militares del Pentágono en Cuba y por qué?

6. ¿Qué sucede en materia de garantías constitucionales si el tratamiento a que están sujetos Padilla, Hamdi y Marri se hace extensivo al resto de los ciudadanos estadounidenses?

7. ¿Qué contradicciones plantea el autor en el texto subrayado respecto del concepto de libertad?

Fuente: http://law.jrank.org/pages/12516/Legislative-Powers.html

Legislative Powers and the President

In *Immigration and Naturalization Service v. Chadha* (1983) the range of legislative power in relation to that of the executive came under review. The case called into question the power of Congress to include legislation provisions that would enable the legislature to negate the president's or others' enforcement of legislation should the executive deviate from what Congress considered to be the design of the law. This practice, known as the "legislative veto," was declared unconstitutional in *Chadha* on the ground that it overstepped the boundaries of congressional authority in the realm of law making. The Immigration and Naturalization Act had granted the Attorney General the authority to make decisions concerning whether deportable aliens could be permitted to remain in the country. However, the act also included a provision that enabled Congress to override the decisions made by the Attorney General. In this case the Attorney General had permitted *Chadha* to remain in the country while Congress elected to deport him. The Court ruled that Congress did not have the authority to veto enforcement decisions after legislation had been passed. Despite the efforts by the Court to curtail the use of the legislative veto it is still commonly practiced by Congress today.

The relationship of power between the president and Congress has also been defined by the ability of Congress to delegate power to the executive. Delegation power pertains to the activities of which Congress authorized the president and agencies to engage in to meet the objectives of a given piece of legislation. In the Tariff Act of 1922 Congress had delegated to the president the discretion to raise or lower tariffs in accordance with U.S. foreign trade interests. J. W. Hampton Jr., and Company, a victim of a tariff increase, challenged the constitutionality of this act on the basis that it authorized too much power to the president. In *J. W. Hampton Jr., and Co. v. United States* (1928) the Court found no constitutional indiscretion with Congress delegating authority to the president to fix tariff rates.

Although the justification for congressional delegation of power to the president was apparent in this case, the Court would later place limits on this power. In *Panama Refining Co. v. Ryan* (1935) the Court held that specific parameters must be laid down in the delegation of power to the president to enforce legislative statutes. In this case the president was given the discretion to set ceilings on crude oil production in order to equalize supply and demand fluctuations between states. Because of the Great Depression Congress seemed justified in granting such broad latitude to the president to regulate interstate oil transactions. The Court, however, did not see it this way finding that Congress must set specific parameters on the delegation of power to the president and agencies to enforce laws.

The delegation power of Congress recently came under the scrutiny of the Court in a case involving the constitutionality of the line-item veto. The Line Item Veto Act, which granted the power to the president to alter legislation after passage,

was challenged by Senator Robert Byrd in *Raines v. Byrd*(1997). Although the act only granted the president authority to strike certain sections of appropriations bills, those who voted against the measure feared an overextension of executive
45 power over the legislature. Senator Byrd and others argued that the act violated their Article I voting power in that laws that they had approved could be subsequently nullified by the president under the act.

A. Responder las siguientes preguntas:

1. ¿A qué se denomina en el texto "legislative veto" y qué se resolvió en el caso *Immigration and Naturalization Service v. Chadha* (1983)?

2. Según el texto, ¿cómo es la relación entre el Ejecutivo y el Legislativo?

3. ¿Cuál fue el efecto de la “Tariff Act de 1922”, qué cuestión debió resolver la Corte y cómo falló?

4. ¿Cuál fue el fallo de la Corte en el caso *Panama Refining Co. V. Ryan*?

5. ¿Qué fundamenta la referencia a la Gran Depresión?

6. ¿Qué iniciativa impulsó Robert Byrd?