

An hourglass-shaped graphic with a globe in the top bulb and a smaller globe in the bottom bulb. The hourglass is light blue, and the globes are a darker blue. The top bulb is wider than the bottom bulb, and the narrow neck in the middle has a single drop of liquid falling from it. The entire graphic is centered on the page.

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Report 94-408

*The Davis-Bacon Act: Institutional Evolution and Public Policy*

William G. Whittaker, Domestic Social Policy Division

November 30, 2007

**Abstract.** This report examines policy issues the Davis-Bacon Act has sparked through the years and which remain a part of the Davis-Bacon debate of the 1990s. These include such questions as: wage rate determination procedures, reporting requirements under the Copeland Act, an appropriate threshold for activation of the statute, interagency relationships with respect to Davis-Bacon enforcement and compliance activity, administrative or judicial appeals procedures, the use of "helpers" and other low-skilled workers on covered projects, and the right of a President to suspend the statute as well as the conditions under which such a suspension may occur. That the fundamental premise of the Act remains in contention after 60 years may be, itself, part of the public policy debate.

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# CRS Report for Congress

## The Davis-Bacon Act: Institutional Evolution and Public Policy

Updated November 30, 2007

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Prepared for Members and  
Committees of Congress

# The Davis-Bacon Act: Institutional Evolution and Public Policy

## Summary

In 1931, at the urging of the Hoover Administration, Congress adopted the Davis-Bacon Act. The measure set certain minimum labor standards for workers employed in federal contract construction: notably, that contractors must pay their employees *not less than* the locally prevailing wage. The threshold for coverage is currently \$2,000 and up. Construction crafts are divided into four components: commercial buildings, highways, residential, and heavy construction. Locality, in this case, is normally the equivalent of a county, though other options are possible. In addition, the Copeland “anti-kickback” Act of 1934 sets reporting requirements intended to aid in Davis-Bacon enforcement and compliance. Through the years, the Davis-Bacon requirements have been applied to dozens of program statutes that involve federal and federally assisted construction.

Davis-Bacon has been amended over the years to expand its coverage and to strengthen enforcement. It has generally enjoyed strong bipartisan support throughout its history; but, the act has also sparked continuing controversy and opposition, especially from non-union contractors. Issues of policy concerning the act, raised initially in the 1920s and 1930s, continue to be debated into the 21<sup>st</sup> century. Seventy-five years after its enactment, questions remain about its economic impact, its scope and pattern of coverage, and its administration. Since the early 1950s, the act has been variously the focus of rulemaking, litigation, and legislative interest and, through the past quarter century, of all three.

In 1934 and in 1971, the act was generally (but temporarily) suspended by Presidents Roosevelt and Nixon. From October 1992 until March 1993, it was suspended by President George H.W. Bush, but only for locations affected by Hurricanes Andrew and Iniki. From September into November 2005, it was suspended by President George W. Bush for areas affected by Hurricane Katrina.

Into the early 1990s, bills were introduced that would have repealed the Davis-Bacon and Copeland Acts outright, had they been adopted, eliminating the prevailing wage and reporting requirements from program statutes into which they have been incorporated. In the mid-1990s, a shift in political control in Congress seemed to forecast victory for those favoring repeal. But ultimately, the prevailing wage issue proved to be bipartisan and the statutes (Davis-Bacon and Copeland) remained unchanged. Prevailing wage/Davis-Bacon provisions have continued to be included in federal program statutes where construction has been a program component.

With the advent of the 21<sup>st</sup> century, the Davis-Bacon debate has continued sporadically, but its focus, increasingly, has been upon the prevailing wage standards of program legislation. Given the experience of the past seven decades, it seems likely that Davis-Bacon will remain an issue of public policy for the immediate future.

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# The Davis-Bacon Act: Institutional Evolution and Public Policy

The Davis-Bacon Act was adopted in early 1931. It was amended during the middle 1930s and, then, quietly became a part of federal contract practice. During the middle 1950s, however, it gained more visibility as the Davis-Bacon “prevailing wage principle” was added to various federal program statutes. For more than 4 decades now, and continuing into the 21<sup>st</sup> century, Davis-Bacon has been almost constantly a focus of public policy concern: as legislation, through administrative rulemaking, and in litigation before the courts.<sup>1</sup>

As amended, the Davis-Bacon Act of 1931 requires, among other things, that construction contracts entered into by the federal government specify minimum wages to be paid to the various classes of laborers employed under those contracts.<sup>2</sup> *Minimum wages* are defined as those determined by the Secretary of Labor (a) to be prevailing (b) in the locality of the project (c) for similar crafts and skills (d) on comparable construction work. The concept of wage was expanded in 1964 to include a fringe benefit component. The act has a coverage threshold of \$2,000.

In addition to direct federal construction contracts, the Davis-Bacon prevailing wage “principle” has been written into more than 50 federal program statutes. The act is supplemented by the 1934 Copeland “anti-kickback” Act (which requires weekly reporting of wages actually paid and an affirmation from employers that any deductions from wages due to employees have been proper) and by federal overtime pay and health and safety standards statutes. Further, some states have enacted “little Davis-Bacon” acts within their respective jurisdictions.

The rhetoric, for and against the act, has changed little through the years. Does the act protect workers, help stabilize the construction industry, and serve the federal contracting community? Or, is it anti-competitive, preventing flexible workforce utilization? Has it been administered effectively and, if not, can it be administered in an equitable fashion? Is there sufficient objective information concerning the act to allow for fair assessment of the statute and its impact?

This report examines policy issues the act has sparked through the years and which remain a part of the Davis-Bacon debate into the 21<sup>st</sup> century. These include such questions as: wage rate determination procedures, reporting requirements under the Copeland Act, an appropriate threshold for activation of the statute, interagency

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<sup>1</sup> See 40 U.S.C. 276a-276a-5. See, also, 40 U.S.C. 3141-3148, as re-codified.

<sup>2</sup> Alongside the Davis-Bacon Act are two other statutes governing labor standards in federal contracts for goods and services respectively: the Walsh-Healey Act (1936), 41 U.S.C. 35-45; and the McNamara-O’Hara Act (1965), 41 U.S.C. 351-358.

relationships with respect to Davis-Bacon enforcement and compliance activity, administrative or judicial appeals procedures, the use of “helpers” and other low-skilled workers on covered projects, and the right of a President to suspend the statute as well as the conditions under which such a suspension may occur. That the fundamental premise of the act remains in contention after 75 years may be, itself, part of the public policy debate.

## **Controversy Concerning the Davis-Bacon Act**

Historically, the act has enjoyed strong bipartisan support; but, at the same time, especially since the middle 1950s, it has provoked militant criticism. Federal agencies have disagreed, publicly, concerning the usefulness and administration of the act. It has been subjected to judicial review and interpretation, each new application becoming, in turn, a matter for further examination.

Although the Department of Labor (DOL) has made certain changes in the act’s administration, the statute itself has remained largely unchanged since 1935. Through the years, however, Congress has extended the act’s provisions to cover an ever wider segment of federal and federally assisted construction; and, at least during the past several decades, such extensions of coverage have provided an opportunity for renewed debate concerning the act and its impact.

### **On the One Hand**

Critics of the act argue, even were the statute justified in 1931, that it has now been rendered obsolete through market changes and enactment of other federal labor standards laws — notably, the Fair Labor Standards Act of 1938. Further, they argue that the act is inflationary, adding to the cost of public construction and, thereby, potentially reducing the volume of construction and the number of federal construction jobs. Finally, they suggest that it is anti-competitive, discriminates against smaller firms, and is difficult to administer. Repeal or significant modification of the act, they note, would reduce the paperwork burden of doing business with the federal government and would allow contractors more flexibility in manpower utilization.

### **On the Other Hand**

The act’s defenders hold that Davis-Bacon is as important now as it was in the 1930s. It prevents, they assert, competition from “fly-by-night” firms that undercut local wages and working conditions and compete, unfairly, with local contractors for federal work. It helps stabilize the industry, an advantage, they suggest, to workers and to employers. In addition, Davis-Bacon may assure the consuming agency of better craftsmanship (if, when firms are required to pay not less than the locally prevailing wage, they tend to employ more highly skilled workers); and, supporters of the act add, it may reduce both the initial cost of federal construction through greater efficiency and decrease the need for repair and/or rehabilitation. At the same time, they point out, it deters contractors from fragmenting work and utilizing low-

skill/low-wage “pick-up” crews and “helpers” and promotes skill transfer through formal apprenticeship programs.

## The Davis-Bacon Literature

The Davis-Bacon literature is extensive and diverse. Generally, it falls into three categories: public materials (i.e., legislative hearings, agency reports and analyses), journalistic pieces, and academic studies. Of the latter, some are products that have been commissioned by interest groups (though they may be scholarly, nonetheless); others are putatively independent academic work. In some cases, there has been a merger of scholarship with journalism.

Through the years since the prevailing wage legislation was first considered at the federal level, there have been numerous congressional hearings that have reviewed the statute. However, these seem, often, to have focused broadly upon policy concerns rather than upon specific economic impact and its assessment.

As the Davis-Bacon debate has evolved, arguments have progressed through several levels of affirmation and rebuttal, most of which, pro and con, are subject to further oft-repeated counter arguments. At large, there appear to be significant gaps in our knowledge of the act, its administration and impact. Few studies of the statute, whether public or private, have escaped criticism on the grounds of flawed methodology or inadequate sample size.

## Origins of the Davis-Bacon Act

Prevailing wage protection, under public contracts, seems to have commenced at the state level and, later, to have been adopted by the federal government.<sup>3</sup>

### Preliminary Initiatives, 1927-1930

Congressional interest in federal prevailing wage legislation predates both the “New Deal” and the economic collapse of 1929. Indeed, it emerged during a time of relative prosperity in the construction industry. The building industry, observed William Tracy of the Building Trades Department, AFL, was “enjoying the greatest prosperity in its history — with wages and hours of labor and improved working conditions better than ever before.”<sup>4</sup> But, it appears also to have been a period of turbulence and intense competition within the contracting community.<sup>5</sup>

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<sup>3</sup> David B. Johnson, “Prevailing Wage Legislation in the States,” *Monthly Labor Review*, August 1, 1961. pp. 839-845.

<sup>4</sup> William J. Tracy, “The Building Trades,” *American Federationist*, January 1927, p. 39. The American Federation of Labor (AFL) joined with the Congress of Industrial Organizations (CIO) in 1955 to form the AFL-CIO. The CIO was organized only in the middle 1930s.

<sup>5</sup> See, for example Lloyd Smith, “To Eliminate Irresponsible Bidders,” *The Constructor*, (continued...)

During hearings before the House Committee on Labor in February 1927, Representative Robert L. Bacon (R-N.Y.) echoed Tracy's views. In New York, he noted, "wages are fair and there has been no difficulty in the building trades between employee and employer ... for some time." Bacon wanted to keep it that way: in 1927, he introduced legislation to require that locally prevailing wage standards be met in federal construction work.

Problems, however, had emerged with respect to construction of a federal hospital in Bacon's New York district. Local contractors, he explained, had submitted bids on the project that reflected local standards. But the contract was awarded to an Alabama firm. The latter, Bacon noted, "... brought some thousand non-union laborers from Alabama into Long Island, N.Y.; ... They were herded onto this job, they were housed in shacks, they were paid a very low wage and the work proceeded." In Bacon's view, the least government could do, when contracting, was "to comply with the local standards of wages and labor prevailing in the locality where the building construction is to take place." His measure did not seek to inflate wages artificially but, rather, to assure that government respected the existing local standard.<sup>6</sup> The bill was not adopted.

Similar legislation was introduced in 1928 and, this time, Bacon won strong support from the U.S. Department of Labor (DOL). In a note to Labor Secretary James J. Davis, Commissioner of Labor Statistics Ethelbert Stewart pointed out: "The essence of the thing as I see it is: Is the Government willing for the sake of the lowest bidder to break down all labor standards and have its work done by the cheapest labor that can be secured and shipped from State to State?"<sup>7</sup> Stewart expressed his full support for the Bacon bill, as did Davis. Indeed, to this point, the hearings had brought forth a body of testimony generally supportive of the prevailing wage concept, if not always of the specific provisions of the several differing proposals. But, once again, the proposal died when Congress adjourned.

## An Enactment Emerges, 1931

Late in 1930, after nearly a decade as Secretary of Labor (through the Administrations of Warren Harding, Calvin Coolidge and Herbert Hoover), Davis moved on to become a United States Senator. Among the first acts of the

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<sup>5</sup> (...continued)

January 1925, pp. 23, 64; Frank N. Watson, "Diagnosing the Ills of Construction," *The Constructor*, November 1927, pp. 27-28, 47, 49, 51, 53, and 55; "When Low Bids Are Too Expensive," *The Constructor*, February 1930, pp. 40-41 and 58; and "Constructive Policies Are Adopted by A.G.C.," *The Constructor*, February 1931, pp. 24-25, and 53. The *Constructor* is published by the Associated General Contractors.

<sup>6</sup> U.S. Congress, House Committee on Labor, *Hours of Labor and Wages on Public Works*, hearings on H.R. 17069, 69<sup>th</sup> Cong., 2<sup>nd</sup> sess., February 18, 1927 (Washington: GPO, 1927,) p. 2.

<sup>7</sup> U.S. Congress, House Committee on Labor, *Preferences in the Employment of Labor on Federal Construction Works*, hearings on H.R. 11141, 70<sup>th</sup> Cong., 1<sup>st</sup> sess., March 19, 1928, pp. 4-5.

Pennsylvania Republican was introduction of prevailing wage legislation. Representative Bacon offered a companion bill.

The language of the Davis-Bacon proposals had been worked out by a committee “representing all of the departments” of the Hoover Administration and “unanimously agreed on.” William N. Doak, Davis’s successor as Labor Secretary in the Hoover cabinet, testifying in support of the Davis-Bacon legislation, noted that current contracting practices were “not only disturbing to labor but disturbing to the business community as well.”<sup>8</sup> When the legislation was taken up in the Senate, Senator Robert LaFollette (Progressive Republican-Wisc.), chairman of the Committee on Manufactures, urged that the measure “be speedily enacted.”<sup>9</sup>

The report, submitted for the Committee by Senator Davis, stated that the “measure does not require the Government to establish any new wage scales in any portion of the country.” Instead, the report pointed out, “[i]t merely gives the Government the power to require its contractors to pay their employees the prevailing wage scales in the vicinity of the building projects. This is only fair and just,” it noted, “to the employees, the contractors, and the Government alike.”<sup>10</sup> A similar report was filed by Representative Richard J. Welch (R-Calif.) for the House Committee on Labor.<sup>11</sup>

Neither report recorded dissent; but, when the measure was considered in the House, reservations were voiced. Representative Thomas L. Blanton (D-Texas), noted that the measure was “the most ridiculous proposition I have ever seen brought before a legislative body.” Observing that the bill imposed a wage floor (that not less than the locally prevailing wage be paid), Blanton objected that workers and contractors ought to be free to bargain for as high or low a wage as they might choose. “You are taking away from American citizens, contractors, and laborers alike the sacred, inherent right of contract — the right to make their own contracts for themselves,” the Texan observed. “We are thus proposing by this pernicious bill to interfere with a sacred, inalienable right that has given initiative and independence to men for ages past.”<sup>12</sup>

In addition, Representative Blanton placed in the *Record* a letter from Comptroller General J. R. McCarl who raised questions of a different sort. Since the specific determination of prevailing wage rates was to be made after bids had been submitted, McCarl argued that none of the parties to the agreement “could know at

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<sup>8</sup> U.S. Congress, Senate Committee on Manufactures, *Wages of Laborers and Mechanics on Public Buildings*, hearings on S. 5904, 71<sup>st</sup> Cong., 3<sup>rd</sup> sess., February 3, 1931, pp. 2-3.

<sup>9</sup> *Congressional Record*, February 4, 1931, p. 3918.

<sup>10</sup> U.S. Congress, Senate, *Regulation of Wages Paid to Employees by Contractors Awarded Government Building Contracts*, report to accompany S. 5904, 71<sup>st</sup> Cong., 3<sup>rd</sup> sess., S.Rept. 1445 (Washington: GPO, 1931), pp. 1-2.

<sup>11</sup> U.S. Congress, House Committee on Labor, *Regulation of Wages Paid to Employees by Contractors Awarded Government Building Contracts*, report to accompany H.R. 16619, 71<sup>st</sup> Cong., 3<sup>rd</sup> sess., H.Rept. 2453 (Washington: GPO, 1931), pp. 1-2.

<sup>12</sup> *Congressional Record*, February 28, 1931, pp. 6508-6509.

the time of contracting the prevailing rate of wages which the contractors must pay during the progress of the work.”<sup>13</sup> A. P. Greensfelder, President of the Associated General Contractors of America, seemed to concur in McCarl’s judgment. He emphasized the uncertainty that would result, though agreeing, in principle, that contractors should pay not less than the locally prevailing wage rate.<sup>14</sup>

At the same time, Representative Anning Prall (D-N.Y.) suggested that the enforcement provisions of the legislation were insufficiently strong. But, he supported the bill and observed: “If we find unscrupulous contractors attempting to beat the law, we can quickly amend it by putting teeth in it.”<sup>15</sup>

In the end, the act was adopted without a roll call and, on March 3, 1931, signed into law by President Hoover.<sup>16</sup>

## Modifying the Davis-Bacon Act, 1931-1961

Dissatisfaction with the act was soon rife, both with labor and contractors. The initial enactment had been a brief and relatively simple statement of policy. Armand Thieblot, who has written extensively about the act, suggests that it “lacked effective mechanisms for either policing or enforcing” its requirements, and that “no provisions were made for informing laborers of the protections afforded them” under the new statute.<sup>17</sup> Trade unionists were concerned that the scope of the act might leave too many workers unprotected. The threshold had initially been set at \$5,000, sparking labor’s fear that contracts might be fragmented in order to escape the act’s requirements — a matter of special concern for the painting and decorating crafts. The AFL’s Executive Council noted that the Davis-Bacon Act “will prove a great benefit *so far as it goes*,” adding that “[a]mendments to further benefit the building trades will be submitted at future sessions of Congress.”<sup>18</sup>

Among industry objections, perhaps the most critical was the fact that wage rate determinations were made after bids were submitted. Thieblot, joining in the early reservations of Comptroller General McCarl, noted above, explains: “Postdetermination of wages meant that a contractor could be forced to pay wages which, upon determination by the secretary of labor, were higher than the rate on

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<sup>13</sup> *Congressional Record*, February 28, 1931, p. 6505.

<sup>14</sup> *Ibid.*, p. 6508. Rep. Blanton placed Mr. Greensfelder’s comments in the Record.

<sup>15</sup> *Ibid.*, p. 6520.

<sup>16</sup> *Congressional Record*, February 4, 1931, pp. 3918-3919; February 28, 1931, pp. 6504-6521; and March 3, 1931, p. 6906.

<sup>17</sup> Armand J. Thieblot, Jr., *The Davis-Bacon Act* (Philadelphia: The Wharton School, University of Pennsylvania, 1975), p. 11. (Hereafter cited as Thieblot, *The Davis Bacon Act*.)

<sup>18</sup> Proceedings of the Annual Convention of the American Federation of Labor, Vancouver, British Columbia, October 5, 1931, p. 104. Emphasis added.

which his bid was based.”<sup>19</sup> In effect, contractors (and, perhaps, especially those from outside of the area of work) were bidding blindly: agreeing to pay whatever wage rate the Secretary might determine to be prevailing in the locality. And, in the beginning, it may not have been entirely clear what was meant by “prevailing” and certain other terms used in the act.

## The Executive Order of 1932

Changes in the act were quickly proposed. In January 1932, the House Committee on Labor commenced oversight hearings. Almost immediately, however, President Hoover responded with an executive order tightening the act’s administration.<sup>20</sup>

**President Hoover Acts Administratively.** Behind-the-scenes negotiations concerning amendment of the act appear to have been intense. At first, organized labor seems to have urged Members of Congress to add a strengthened penalty structure to the statute. Oversight hearings commenced in the House early in January 1932. But, no sooner had they gotten underway than President Hoover issued Executive Order No. 5778, dated January 19, 1932, but made public two days later. Representative William Connery (D-Mass.), in an analysis not immediately challenged, recalled that “representatives of the building trades, after a conference with Secretary Doak, made a deal with the Secretary whereby, if the President ... would issue an executive order on the Davis-Bacon bill they would be against any further legislation on the matter by the Committee on Labor.”<sup>21</sup>

President Hoover’s Executive Order provided that all Davis-Bacon contracts contain the following stipulations:

- That wages be paid in full not less than once a week, “in lawful money of the United States ... and without subsequent deduction or rebate on any account.”
- That “every person, while performing work of a laborer or mechanic on the public work covered by this contract, is to be regarded as employed as a laborer or mechanic by the contractor or subcontractor, regardless of any contractual relationship alleged to exist between the contractor or subcontractor and such laborer or mechanic.”
- That payroll records “are to be open to inspection by the contracting officer at such times as the latter may elect, provided that such inspection shall not interfere with the proper and orderly prosecution of the work,” and that the rates payable under the contract “shall be posted by the contractor in a prominent and easily accessible place at the site of the work” where workers can view them.

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<sup>19</sup> Thieblot, *The Davis Bacon Act*, p. 11.

<sup>20</sup> Proclamations and Executive Orders: Herbert Hoover, March 4, 1929 to March 4, 1933 (Washington: GPO, 1974), vol. II, pp. 1066-1067.

<sup>21</sup> *Congressional Record*, June 8, 1932, pp. 12380-12381.

- Should it be found that a contractor or subcontractor has paid his workers less than the stipulated prevailing rate of wages, the government may terminate the contract and “may take over the work and prosecute the same to completion by contract or otherwise, and that the contractor and his sureties shall be liable to the Government for any excess cost occasioned the Government thereby.”<sup>22</sup>

Appearing in the midst of congressional oversight hearings on the act, Executive Order No. 5778 seems to have caused the several parties to pause and regroup. That the Order had been issued unilaterally by the President and could be withdrawn or altered at subsequent presidential discretion have caused some uneasiness and, perhaps, contributed to a movement for codification by statute.

**Reaction to the Order.** Feelings were mixed with respect to the Executive Order. Labor, which seems to have feared that review of the statute would have endangered “whatever benefits we have secured through the present legislation,” tended to view the Hoover initiative with approval. Representative Bacon noted that the Order “simply carries out in the Government contract form what Congress intended by the law.” Secretary Doak observed that the act had “worked out much more satisfactorily than many of us believed possible when the legislation was enacted,” predicting that the Order would “prove most helpful in further stabilizing the wage rates and conditions in the construction of Federal buildings,” and adding that there was no “necessity of further legislation ... at the present time.”<sup>23</sup>

Industry was less pleased, arguing that wage rates should be made known prior to the submission of bids. Legislation to achieve industry’s objectives, introduced by Senator Jesse Metcalf (R-R.I.), provided for predetermination of wage rates, allowed for reopening of contracts which covered extended periods, established an “anti-kickback” provision, and set forth procedures for enforcement and the imposition of penalties for violators. Following hearings,<sup>24</sup> the measure was adopted by the Senate with minimum discussion and on a voice vote.<sup>25</sup>

By the time the Metcalf bill was called up in the House (June 1932), opinion had been solidly formed. Labor opposed it; industry urged its passage. It was significantly modified on the floor, in part to make it more nearly acceptable to labor, but it remained controversial.<sup>26</sup>

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<sup>22</sup> U.S. President Hoover, Executive Orders, 5735-6070, October 1931-March 1933. Collected set, bound by the Library of Congress.

<sup>23</sup> U.S. Congress, House Committee on Labor, *Regulations of Wages Paid to Employees by Contractors Awarded Government Building Contracts*, hearings, 72d Cong., 1<sup>st</sup> sess., January 13-15, 19-22, 27, 1932 (Washington: GPO, 1932), pp. 155, 164, and 179.

<sup>24</sup> U.S. Congress, Senate Committee on Education and Labor, *Rate of Wages for Laborers and Mechanics Employed by Contractors and Subcontractors on Public Buildings*, hearings on S. 3847, 72d Cong., 1<sup>st</sup> sess., March 17, 1932.

<sup>25</sup> *Congressional Record*, April 18, 1932, pp. 8364-8365.

<sup>26</sup> U.S. Congress, Committee on Labor, *Regulation of Wages Paid to Employees by* (continued...)

During hearings and floor debates, issues were raised that would continue to be a focus of controversy through the next six decades. For example: What constitutes a *prevailing wage*? How is a prevailing wage to be determined and when? Should there be regional variations in standards? Would wages, under Davis-Bacon, be comparable for private and public construction? What constitutes an appropriate *locality* for purposes of wage determinations? How should problems of abuse under the act (notably, kickbacks) be dealt with? Should the protections of the act extend to production of prefabricated materials to be used in construction? Was the act only of advantage to employed construction workers, a class that might not be in need of federal protection? Does the act restrict employment opportunities in construction? These questions were not to be resolved in the near term.

As amended, the measure passed the House and, after conference, was approved by the Senate.<sup>27</sup> On July 1, 1932, however, President Hoover vetoed the proposed amendments to the Davis-Bacon Act. No further action was taken by the 72<sup>nd</sup> Congress. While the President did not explain his views, he attached to his veto message a memorandum from Secretary Doak which branded the legislation as “obscure and complex” and noted that it “would be impracticable of administration” and “would stretch a new bureaucracy across the country.”<sup>28</sup>

## Congressional Action, 1934-1935

Hearings continued on federal construction wage policy through the next several years. These provided the basis for adoption of the Copeland “anti-kickback” Act (1934) and for major amendments to the Davis-Bacon Act in 1935.

**The Copeland “Anti-Kickback” Act (1934).** While Davis-Bacon required payment of not less than the locally prevailing wage on federal contract construction, it remained to be enforced. Some employers, paying the requisite wages, it was alleged, would then institute deductions and/or “kickbacks,” thus recovering portions of those wages.

Senator Royal Copeland (D-N.Y.), whose Subcommittee on Crime had been exploring this abuse, reported that perhaps as much as “25 percent of the money which is supposed to be paid for labor under the prevailing rates of wage is unlawfully, unjustly, and indecently returned to contractors, subcontractors, or officials on the job.” Senator Davis of Pennsylvania, drawing upon his DOL experience, concurred.<sup>29</sup>

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<sup>26</sup> (...continued)

*Contractors Awarded Government Building Contracts* hearings on S. 3847 and H.R. 11865, 72d Cong., 1<sup>st</sup> sess., April 28, May 3, 9, 11, 12, 1932 (Washington: GPO, 1932).

<sup>27</sup> *Congressional Record*, June 8, 1932, pp. 12363-12390; and June 20, 1932, p. 13471.

<sup>28</sup> Public Papers of the Presidents of the United States: Herbert Hoover, 1932-1933 (Washington: GPO, 1977), p. 286.

<sup>29</sup> U.S. Congress, Senate Subcommittee of the Committee on Education and Labor, *Investigation of the Relationship Existing Between Certain Contractors and Their* (continued...)

A legislative solution was promptly found. Supported by the Roosevelt Administration, the Copeland bill was called up in the Senate (April 26, 1934) and, with a brief statement by the Senator, passed.<sup>30</sup> The House similarly acted without debate. On June 13, 1934, President Roosevelt signed the measure.<sup>31</sup>

The Copeland “anti-kickback” Act, which supplements Davis-Bacon, orders a fine of not more than \$5,000 or imprisonment of not more than five years, or both, for anyone who induces any person engaged in federal or federally financed construction “to give up any part of the compensation to which he is entitled under his contract of employment, by force, intimidation, threat of procuring dismissal from such employment, or by any other manner whatsoever.” The act authorized the administering agencies to “make reasonable regulations” for its enforcement, but specifically required that “each contractor and subcontractor shall furnish weekly a sworn affidavit with respect to the wages paid each employee during the preceding week.”<sup>32</sup> (See discussion later in this report of proposals by the Reagan Administration to modify the reporting requirements of the Copeland Act.)

**The Davis-Bacon Amendments (1935).** During a general review of federal contracting policy, Senator David Walsh (D-Mass.) had conducted oversight of the Davis-Bacon Act.<sup>33</sup> He found that the statute was “inadequate to cope with many of the practices to which contractors have resorted,” a finding concurred in by the various departments involved with the Davis-Bacon Act.<sup>34</sup>

By the spring of 1935, Senator Walsh had ready significant amendments to the act. In addition to anti-kickback proposals which had been dealt with separately, Walsh now proposed the following. *First.* The dollar volume threshold for coverage under the act should be reduced from \$5,000, as in the original law, to \$2,000. *Second.* Coverage should be extended to all federal contract construction of whatever character to which the United States and the District of Columbia may be a party (“construction, alteration, and/or repair, *including painting and decorating*, of public buildings or public works”).<sup>35</sup> (Emphasis added.) *Third.* There may be withheld from the contractor by the contracting agency funds sufficient to pay the appropriate wages to any workers underpaid by the contractor or by one of the

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<sup>29</sup> (...continued)

*Employees in the United States*, hearings on S.Res. 228, 73d Cong., 2<sup>nd</sup> sess., Part 1, May 4, 7, and June 21-23, 1934 (Washington: GPO, 1934), p. 3.

<sup>30</sup> *Congressional Record*, April 26, 1934, p. 7401.

<sup>31</sup> *Congressional Record*, June 7, 1934, p. 10759; and June 15, 1934, p. 11624.

<sup>32</sup> *Congressional Record*, June 7, 1934, p. 10759.

<sup>33</sup> U.S. Congress, Senate Committee on Education and Labor, *Relationship Between Employees and Contractors on Public Works*, report to accompany S.Res. 222, 35<sup>th</sup> Cong., 1<sup>st</sup> sess., S.Rept. 332, Part 2 (Washington: GPO, 1935), 10 p.

<sup>34</sup> *Congressional Record*, July 30, 1935, p. 12073.

<sup>35</sup> In administering the act of 1931, there had been some dispute as to the inclusion of painting and decorating within the purposes of Davis-Bacon coverage. The Walsh amendments made clear that such work was covered.

subcontractors. *Fourth.* The Comptroller General would be directed to prepare a list of contractors who have “disregarded their obligations to employees and subcontractors.” Listed violators *would be barred* from federal contracts for a period of three years. *Fifth.* Laborers would be provided a “right of action and/or of intervention” in court against a contractor “and in such proceedings it shall be no defense that such laborers and mechanics accepted or agreed to accept less than the required rate of wages or voluntarily made refunds.” *Sixth.* Davis-Bacon contracts were to state “the minimum wages to be paid various classes of laborers and mechanics.” Thus, there would be a predetermination of the Davis-Bacon wage rate: i.e., prior to the submission of bids by a contractor.

Although certain of the provisions might have seemed controversial, the Walsh amendments were agreed to in the Senate without discussion.<sup>36</sup> In the House, they were reported favorably without change. The Committee on Labor noted that the bill “is merely a logical development of a policy consistently expressed by Congress for the past four years with respect to minimum wages on public construction.”<sup>37</sup> In the House, the bill was called up and, again, passed without discussion.<sup>38</sup> A week later, the measure was signed by the President.<sup>39</sup>

## A Period of Relative Quiet, 1935-1952

For 2 decades after 1935, the Davis-Bacon Act seems to have become, quietly, a standard part of federal contract policy. The history of the act during this period, however, remains largely to be explored.

**Changing Realities, New Perspectives.** Underlying the Davis-Bacon Act was the concept that the United States, as a consumer, has the right to require certain standards, by contract, when doing business. If a contractor chose to engage in federal construction work, then he had to abide by the stated specifications — including labor standards. In 1936, this principle was extended to the contract purchase of goods with enactment of the Walsh-Healey Public Contracts Act. (The principle was further extended, in 1965, with adoption of the McNamara-O’Hara Service Contract Act, the final segment of federal contract labor standards law.)

In 1938, Congress established a general minimum wage and overtime pay structure for the private sector with adoption of the Fair Labor Standards Act (FLSA).<sup>40</sup> Enactment of this broad wage/hour legislation may have lessened interest in the Davis-Bacon and Walsh-Healey Acts. Indeed, some, later, have suggested that

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<sup>36</sup> *Congressional Record*, July 30, 1935, pp. 12073-12074.

<sup>37</sup> U.S. Congress, House Committee on Labor, *Amend the Act Approved March 3, 1931, Relating to Rate of Wages for Laborers and Mechanics Employed on Public Buildings*, report to accompany S. 3303, August 9, 1935 (Washington: GPO, 1935), p. 1.

<sup>38</sup> *Congressional Record*, August 23, 1935, p. 14384.

<sup>39</sup> *Congressional Record*, August 30, 1935, p. 14753.

<sup>40</sup> See Elizabeth Brandeis, *Organized Labor and Protective Labor Legislation*, in Milton Derber and Edwin Young (eds.), *Labor and the New Deal* (Madison: The University of Wisconsin Press, 1961), pp. 195-237.

the Davis-Bacon Act was no longer needed at all in view of the general labor standards protections guaranteed by the FLSA.<sup>41</sup>

In 1940, the protections of the Davis-Bacon Act were extended to the territories of Hawaii and Alaska. In 1941, its provisions were made to apply to construction contracts arranged on a cost-plus/negotiated basis.<sup>42</sup>

**World War II and the Truman Era.** With the outbreak of World War II, federal contracting entered a new era. In the early 1940s, “government procurement agencies and the international unions” entered into a series of agreements that “provided for stabilization of wages and conditions at a time when we were at the critical tooling up stage of the war effort. The machinery established by those agreements,” President Harry Truman later recalled, “... served us well during the war” and he pointed with pride to “[t]he splendid record of cooperation with the Davis-Bacon Division of the Department of Labor.” But, by 1947, most war-time controls were gone.<sup>43</sup>

**Establishing Administrative Order.** Throughout the evolution of the Davis-Bacon Act, there has been a lingering issue of where ultimate responsibility for its administration resided. Did authority rest with DOL, with the contracting agencies or, perhaps, with the General Accounting Office (GAO)? As part of a program of post-New Deal/post-World War II administrative reforms, President Truman sought to establish enhanced order, cooperation and efficiency.<sup>44</sup>

In 1947, Mr. Truman noted that administration of the Davis-Bacon and Copeland Acts had been divided between DOL and the contracting agencies. “As a result,” he observed, “enforcement has been very uneven and workers have not had the protection to which they were entitled.” Therefore, he developed Reorganization Plan No. 2, which consolidated certain labor standards activities under the Secretary of Labor. The Reorganization Plan authorized the Secretary of Labor “to coordinate the administration of the acts for the regulation of wages and hours on Federal public works by establishing such standards, regulations, and procedures” as will make enforcement more effective.<sup>45</sup>

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<sup>41</sup> U.S. General Accounting Office, *The Davis-Bacon Act Should Be Repealed*, HDR-79-18, April 27, 1979, pp. 19-34. Not infrequently (though certainly not always), critics of the Davis-Bacon and Walsh-Healey Acts have also been critical of the FLSA and have sought to diminish its requirements.

<sup>42</sup> Thieblot, *The Davis-Bacon Act*, p. 15.

<sup>43</sup> Letter to Leaders of Labor and Management in the Building and Construction Industry. Public Papers of the Presidents of the United States: Harry Truman, January 1 to December 31, 1947 (Washington: GPO, 1963), pp. 117-118.

<sup>44</sup> Despite President Truman’s administrative reorganization, inter-agency tension with respect to Davis-Bacon administration would continue through the end of the century.

<sup>45</sup> Message to the Congress Transmitting Reorganization Plan 2 of 1947, May 1, 1947. Public Papers of the Presidents of the United States, Harry Truman, January 1 to December 31, 1947 (Washington: GPO, 1963), pp. 227-229.

Three years later (March 1950), President Truman issued Reorganization Plan No. 14 in which he took note of the confusion caused by interagency involvement in enforcement of the “several laws regulating wages and hours of workers employed on Federal contracts for public works or construction.” He pointed specifically to the Davis-Bacon and Copeland Acts, together with certain federal overtime pay laws, and to *the labor standards provisions that had been added to program statutes* involving construction “financed in whole or in part by loans or grants from the Federal Government or by mortgages guaranteed by the Federal Government.” Mr. Truman noted that “[t]he methods adopted by the various agencies for the enforcement of labor standards vary widely in character and effectiveness. As a result, uniformity of enforcement is lacking and the degree of protection afforded workers varies from agency to agency.” To give order to this patchwork, the President authorized the Secretary of Labor “to coordinate the administration of legislation relating to wages and hours *on Federally financed or assisted projects*.”<sup>46</sup> (Emphasis added.)

**Change and Priorities.** In presenting the plan to the Congress, the President acknowledged: “Since the principle objective of the plan is more effective enforcement of labor standards, it is not probable that it will result in savings. But,” he added, “it will provide more uniform and more adequate protection for workers through the expenditures made for the enforcement of the existing legislation.”<sup>47</sup>

Coverage issues, however, raised during the Truman Era reorganization — on the one hand, direct construction by the federal government; and, on the other, construction financed through grants and loans — have continued to be a point of controversy into the 21<sup>st</sup> century. Similarly, legislative proposals continue to explore the primacy of the Secretary of Labor with respect to the administration of the Davis-Bacon Act. These issues remain unresolved.

## The Eisenhower Era: A Pivotal Period?

Prevailing wage requirements (the Davis-Bacon *principle*) had been added to a number of program statutes by the close of the Truman Era: moving from Davis-Bacon coverage for direct federal construction to projects financed entirely or in part with federal funds. During the Eisenhower Administration, such extensions of prevailing wage coverage became more frequent.<sup>48</sup>

**Some Issues of Policy.** The Davis-Bacon debates of the middle 1950s reiterated many of the earlier arguments for and against the act, and added a few new concerns. But the debates appear to have resolved little.

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<sup>46</sup> Special Message to the Congress Transmitting Reorganization Plan 14 of 1950, March 13, 1950, Public Papers of the Presidents of the United States, Harry S. Truman, January 1 to December 31, 1950 (Washington: GPO, 1965), pp. 210-211.

<sup>47</sup> Ibid.

<sup>48</sup> U.S. Congress, House Committee on Public Works, *Federal Highway and Highway Revenue Acts of 1956*, report to accompany H.R. 10660, 84<sup>th</sup> Cong., 2<sup>nd</sup> sess., H.Rept. 2022 (Washington: GPO, 1971), p. 13.

In a 1955 dissent from prevailing congressional policy, several Senators argued that adding a Davis-Bacon provision to program legislation would expand the federal bureaucracy, create paperwork and litigation, increase the control of the federal agencies, and pose definitional problems with respect to classification, locality and prevailing rates — all issues that would reemerge during the Reagan/Bush Era.<sup>49</sup> Similarly, in 1958, Senator Strom Thurmond (then, D-S.C.) contended that DOL had failed to administer the act properly, suggested that Davis-Bacon wage standards were being imported from urban to rural areas (thus, raising rural wage rates), and decried the usurpation by Washington of the rights of the States.<sup>50</sup> The South Carolinian raised arguments that, for the most part, would be the subject both of debate and litigation for many decades thereafter.

Speaking from a somewhat different philosophical perspective, Senator Clifford Case (R-N.J.) stated that the Davis-Bacon Act protects “fairminded and responsible contractors against unfair competition from contractors who base their bids on wage levels lower than those actually prevailing in the area.” But, he also took note of the protections that the act affords workers. His views were concurred in by Senator Jacob Javits (R-N.Y.) who, seemingly harkening back to the concerns of the 1930s, warned that “we must guard against ... the breaking down of the wage pattern in a particular area.”<sup>51</sup>

Whatever the diversity of opinion may have been during the 1950s with respect to the prevailing wage statute (and, however vigorous opposition to the act may have been), Congress continued to preserve the act and to extend Davis-Bacon coverage through the provisions in various federal program statutes.

**A Changing Perspective on the Davis-Bacon Act?** From a quick review of legislative activity during the Eisenhower Era, one might reach several tentative, preliminary, observations.

*First.* Attaching Davis-Bacon provisions to program statutes *seems* to have been more controversial and to have sparked more heated debate than had passage of the Davis-Bacon Act, per se.

*Second.* As late as the mid-1950s, many Republicans in Congress continued to claim credit for the statute. For example, Representative Russell Mack (R-Wash.) affirmed:

The two authors of the Davis-Bacon law were Senator Davis, a Republican of Pennsylvania, and Representative Bacon, a very conservative Republican Congressman from the State of New York. A Republican House and a Republican Senate passed the Davis-Bacon law and a Republican President, Herbert Hoover, signed it.

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<sup>49</sup> U.S. Congress, Senate, *Federal-Aid Highway Act of 1955*, report to accompany S. 1048, 84<sup>th</sup> Cong., 1<sup>st</sup> sess., S.Rept. 350 (Washington: GPO, 1955), pp. 40-41.

<sup>50</sup> *Congressional Record*, April 15, 1958, pp. 6417-6427.

<sup>51</sup> *Ibid.*

So the Davis-Bacon provision we are talking about today is a 25-year-old Republican law.<sup>52</sup>

The claim of Representative Mack notwithstanding, Davis-Bacon was not regarded as a partisan enactment. The debate, both in committee and on the floor, involved Democrats and Republicans on each side of the issue.

*Third.* At least some Members supported the act in terms of the benefits that it held for contractors. The act, recalled Representative Thor Tollefson (R-Wash.), “has been valuable as a remedial measure to protect contractors and craftsmen from unfair contract bids.” He added that a Davis-Bacon provision was necessary to eliminate existing unfair bidding advantages of contractors who pay low wages in areas where union rates prevail.” The Tacoma Republican affirmed that the Davis-Bacon Act had assured all contractors “[e]quality of bidding opportunity.” It protects contractors “against unfair competition and restricts the area of competition to economy and efficiency.”<sup>53</sup>

*Fourth.* The issue of the cost impact of Davis-Bacon sparked a divided opinion. In a 1956 report on highway legislation, five Members dissented voicing complaints about the act based upon economy.

How about the increased cost of highways if the Davis-Bacon [provision] were added? It is variously estimated at \$2 to \$4 billion, which means less highway for the money expended. The unfortunate part is that the administrative and bureaucratic redtape, which Federal wage fixing entails, causes waste from which no one benefits and for which the taxpayer must bear the burden.<sup>54</sup>

No source was provided for the projected cost estimate. And, conversely, Representative Mack of Washington declared that the act simply “keep[s] wages ... at the prevailing rate.” The act, he argued, “does not raise wages but it does prevent wage cutting and it is wage cutting and labor standard lowering that we wish to prevent.”<sup>55</sup> Mr. Mack stated that the Washington State Highway Commission had endorsed the Davis-Bacon provision.

Promptly, Gardner Withrow (R-Wisc.) declared his complete agreement with Mack that Davis-Bacon would not make the cost of highway construction “any greater than it is now.” Representative Withrow affirmed that “the responsible road people in the State of Wisconsin declare that the cost under the Davis-Bacon Act as it is at the present time would not be any more than it is now. So,” he concluded,

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<sup>52</sup> *Congressional Record*, April 27, 1956, pp. 7187-7188.

<sup>53</sup> *Congressional Record*, February 6, 1956, pp. 2098-2099.

<sup>54</sup> U.S. Congress, House Committee on Public Works, *Federal Highway and Highway Revenue Acts of 1956*, report to accompany H.R. 10660, 84<sup>th</sup> Cong., 2<sup>nd</sup> sess., H.Rept. 2022 (Washington: GPO, 1956), p. 30. The dissenting Members were Reps. George Dondero (R-Mich.), J. Harry McGregor (R-Ohio), Bruce Alger (R-Texas), Donald W. Nicholson (R-Mass.), and Brady Gentry (D-Texas).

<sup>55</sup> *Congressional Record*, April 27, 1956, pp. 7187-7188.

“the argument that it would greatly increase the cost of building roads is entirely a ghost and a phantom and is not substantiated by the facts.”<sup>56</sup>

Similarly, a division of opinion had developed in the Senate. The initial highway legislation (1955) had been silent on the matter of Davis-Bacon coverage. Organized labor, during hearings, had urged that prevailing wage coverage be specifically provided;<sup>57</sup> and, when the legislation was reported, a Davis-Bacon provision had been added. Senators Edward Martin (R-Pa.), Prescott Bush (R-Conn.), and Norris Cotton (R-N.H.) dissented from the report of the Committee on Public Works, arguing that this extension of Davis-Bacon requirements would expand the Federal bureaucracy, create paperwork and litigation, increase the control of the federal agencies, and pose definitional problems with respect to classification, locality and prevailing rate.<sup>58</sup> On the floor, debate was extensive; and, at the initiative of Senator Dennis Chavez (D-N.M.), the prevailing wage language was dropped.<sup>59</sup> Subsequently restored by the House, the provision was retained in conference and became law (1956).<sup>60</sup>

*Fifth.* The Eisenhower Era may have been a transitional era where Davis-Bacon was concerned. Some Members seemed bewildered that the act should be controversial. Representative Katharine St. George (R-N.Y.), for example, queried “whether it is not a fact that the Davis-Bacon provision has been in the law for many years, and we have never heard any objecting to it until now.” Similarly, Representative Frank Smith (D-Miss.) noted that “[a]ll of our committee ... has voted many times for bills which include Davis-Bacon....”<sup>61</sup>

## Davis-Bacon During the 1960s

Early in the 1960s, major federal construction programs commenced in defense and space and federal contract labor standards requirements took on a new importance. There was also a perception, whether or not justified, that the federal construction program was beset with labor-management problems. Some argued that vital projects were being delayed by clashes between rival unions with jurisdictional disputes erupting into strikes or walkouts. And it was argued that such labor troubles were adding, unnecessarily, to the cost of public construction. There were allegations

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<sup>56</sup> *Congressional Record*, April 27, 1956, p. 7191.

<sup>57</sup> U.S. Congress, Senate Subcommittee of the Committee on Public Works, *National Highway Program*, hearings on S. 1048, S. 1072, S. 1160, and S. 1573, 84<sup>th</sup> Cong., 1<sup>st</sup> sess., February 21, 1955 (Washington: GPO, 1955), pp. 92-94, 102-103.

<sup>58</sup> U.S. Congress, Senate Committee on Public Works, *Federal-Aid Highway Act of 1955*, report to accompany S. 1048, 84<sup>th</sup> Cong., 1<sup>st</sup> sess., S.Rept. 350 (Washington: GPO, 1955), pp. 40-41.

<sup>59</sup> *Congressional Record*, May 25, 1955, p. 6969.

<sup>60</sup> *Congressional Record*, June 26, 1956, pp. 10961-10969, and 10984-11004.

<sup>61</sup> *Congressional Record*, April 27, 1956, p. 7186.

of disputes over turf, involving both workers and contracting or supply firms, which, in turn, affected the applicability of federal contract labor standards laws.

## Industry Classification and Labor Standards

Since the wage requirements under Davis-Bacon were generally higher than those under Walsh-Healey, an employer might have preferred to classify as much of the work as possible as “manufacturing” rather than as construction per se and, thereby, to reduce his labor costs. With defense and aerospace construction, the work was more than simply bricks and mortar. Were a worker to install technical electronic equipment, for example, was the work part of the process of “manufacturing” and covered by the Walsh-Healey Act? Or, was it “construction” and subject to the somewhat higher wage requirements of the Davis-Bacon Act? The issue was further complicated by prefabrication of components for general construction. Was a “batch plant” some distance from a construction site still part of the “site of work” for Davis-Bacon purposes? These issues were not to be easily resolved.

Complicating matters further, Congress adopted the McNamara-O’Hara Service Contract Act in 1965 mandating labor standards for service workers — but standards different from those in either Davis-Bacon or Walsh-Healey. Thus, a technical installation might be construction or manufacturing, or it could be a service operation.<sup>62</sup> In this way, both employers and employees could suddenly find themselves on unfamiliar regulatory ground. There were also collective bargaining agreements to consider. How work was defined (as to craft or skill) might determine which union had jurisdiction.

## The Roosevelt Subcommittee

In 1962, a Special Subcommittee on Labor, chaired by Representative James Roosevelt (D-Calif.), was created which would provide the first full-scale hearing on the act in nearly 30 years. Roosevelt promptly led the Subcommittee into the field for a tour of defense and space installations in order “to gain firsthand knowledge of the administration of the Davis-Bacon Act.” Then, formal hearings commenced. The agenda was threefold.

... (1) How the Secretary of Labor makes his determinations as to prevailing wages and what criteria he uses in making these determinations; (2) whether some type of review should be provided for prevailing wage rate determinations made by the Secretary of Labor; and (3) any other constructive proposals as to how the act may be improved or made more explicit.<sup>63</sup>

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<sup>62</sup> See, for example the discussion in John R. Van de Water, “Applications of Labor Law to Construction and Equipping of United States Missile Bases,” *Labor Law Journal*, November 1961, pp. 1003-1024. Legislation that would become the Service Contract Act had been under consideration during the early 1960s.

<sup>63</sup> U.S. Congress, House Committee on Education and Labor, Special Subcommittee on Labor, *Administration of the Davis-Bacon Act*, hearings, 87<sup>th</sup> Cong., 2<sup>nd</sup> sess., Part 1, June (continued...)

Although Chairman Roosevelt tried to maintain the stated focus, a wide range of complaints and suggestions were brought before the Subcommittee which met, intermittently, through three years. In large measure, they laid the foundation for most subsequent Davis-Bacon hearings, setting forth a 30-year agenda.

**Creation of the Wage Appeals Board.** When an interested party was aggrieved by a DOL decision related to Davis-Bacon, there was little that could be done other than to approach the Department, ask that it reconsider its findings, and hope for the best. Creation of a formal review procedure had been suggested at least as far back as the middle 1950s, but nothing had been set in place.

Labor Secretary Arthur Goldberg appeared before the Roosevelt Subcommittee on June 7, 1962, and pointed to an “important innovation ... that we have under consideration right now” but which had been deferred “pending these hearings, so as to get the benefit of the viewpoints expressed here.” The proposal was for the creation of “some *internal review* machinery within our own structure to review some of the determinations that are challenged.”<sup>64</sup>

It quickly became apparent that creation of a review mechanism would be controversial. Various proposals, each with a constituency of its own, were presented. Some thought review by a panel within DOL would be adequate. Others argued that such a system would never be wholly free from the hand of the Secretary whose staff’s decisions were being reviewed. Judicial review was urged, but it was argued that it would be unworkable: that it would be cumbersome and costly, and that decisions would not be timely, an inconvenience to all involved and, possibly, causing delay of vital federal projects. Review by GAO was yet another option; but that, in itself, became a matter of controversy since the Comptroller General and DOL seem frequently to have been at odds over Davis-Bacon administration. If there were to be an in-house board, various practical administrative questions would need to be dealt with. For example, who would appoint its members? Where would it be housed? What would be its relationship to the Secretary, to the Administrator of the Wage and Hour Division within DOL, and to the Office of the Solicitor within DOL? If internal administrative appeal and review did not resolve a matter in dispute, would there be further options?

As hearings continued through 1962 and 1963, no legislated review procedure had been finalized. Then, on January 3, 1964, Labor Secretary Willard Wirtz, dissenting from certain of the pending proposals, created administratively a Wage Appeals Board (WAB) which, he noted, would be “directly responsible to the Secretary of Labor.” The three member Board was “appointed by the Secretary of Labor” with one of the members to be designated chairman.

The Secretary’s order affirmed that the Board “shall act as the authorized representative of the Secretary of Labor in deciding appeals, concerning questions of

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<sup>63</sup> (...continued)

6-8, 11, and 12, 1962 (Washington: GPO, 1962), p. 1. (Hereafter cited as Special Labor Subcommittee, *Administration of the Davis-Bacon Act*.)

<sup>64</sup> *Ibid.*, pp. 50-51. Emphasis added.

fact and law, *taken in the discretion of the Board*, from wage determinations issued under the Davis-Bacon Act and its related minimum wage statutes....” On questions of law, the order decreed, the WAB would act on the advice of the Solicitor at DOL who would also represent the Department at each proceeding.<sup>65</sup>

Six months later, when Labor Solicitor Charles Donahue appeared before the Subcommittee (June 23, 1964), he assured the Members that DOL’s review process was in place and functioning.<sup>66</sup> Some viewed the Secretary’s action as a preemptive strike, since legislation to create a review procedure had been under active consideration by the Subcommittee through several years. Representative Roman Pucinski (D-Ill.) noted: “I think that the Department just saw the handwriting on the wall.”<sup>67</sup> Ultimately, when the 1964 Davis-Bacon amendments were enacted, Congress did not include language dealing with a review procedure, the arrangement initiated by the Secretary remaining in place.<sup>68</sup>

**The Fringe Benefits Amendment (1964).** Stability and fairness within the construction market had been primary considerations of the Davis-Bacon Act in 1931. It was alleged that, in the absence of a prevailing wage requirement, contractors would bid for public work on the basis of low wages and adverse working conditions that were inconsistent with those prevailing locally. In 1964, upon that same assumption, Congress extended the definition of “prevailing wage” to include fringe benefits.<sup>69</sup>

Members supporting a fringe benefit component argued that contractors, working under a collective bargaining agreement, can normally be expected to provide unit members with fringe benefits: health insurance, paid vacation time, etc. Non-union firms may offer similar benefits but they are under no contractual obligation to do so. Thus, some reasoned, non-union contractors who offer few or no fringe benefits to their employees might be able unfairly to underbid union or other non-union employers who offer a portion of their total compensation package in the form of such benefits.

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<sup>65</sup> *Federal Register*, January 4, 1964, pp. 118-119. Emphasis added.

<sup>66</sup> U.S. Congress, House Committee on Education and Labor, General Subcommittee on Labor, *Amendments to the Davis-Bacon Act*, hearings on H.R. 7075, 88<sup>th</sup> Cong., 2<sup>nd</sup> sess., January 22, June 23, 24, 26, August 4 and 5, 1964 (Washington: GPO, 1964), pp. 42-43. (Hereafter cited as Committee on Education and Labor, *Amendments to the Davis-Bacon Act*.)

<sup>67</sup> *Ibid.*, p. 121.

<sup>68</sup> *Congressional Quarterly Almanac*, 1964 (Washington: Congressional Quarterly, Inc., 1965), pp. 576-577.

<sup>69</sup> William Naumann of Tucson, speaking for the Associated General Contractors, observed that inclusion of fringe benefits within the concept of wage “actually can have some stabilizing effect, because it then meant that every contractor, regardless of what his position was, who marched in to bid or perform on any Government work within an area where fringe benefits were, as a matter of fact, prevailing, that everybody came on the same basis.” Committee on Education and Labor, *Amendments to the Davis-Bacon Act*, p. 144.

Critics suggested that addition of a fringe benefit component would increase the cost of public construction. They argued that it would be difficult to calculate the value of fringe benefit packages that often varied greatly from one firm or employment situation to another. Finally, some asserted that, even were a fringe benefit component justified, it ought not to be considered as a free-standing issue but, rather, as part of general Davis-Bacon reform.

When the Roosevelt Subcommittee reported legislation adding a fringe benefit component to Davis-Bacon wage calculations, it seems to have generated little controversy. The provision was supported by the Johnson Administration. Called up in the House on January 28, 1964, it was approved by a vote of 357 yeas to 50 nays. The Senate approved the bill by a voice vote on June 23, 1964.<sup>70</sup>

## Suspension of the Davis-Bacon Act, 1971

The original Davis-Bacon Act of 1931 contained a provision which “[i]n the event of a national emergency” authorized the President to suspend the statute. But, the authors of the Davis-Bacon Act had legislated in broad terms. The concept of “national emergency” was not defined, nor was it clear how long a suspension might last. Before considering the Nixon suspension of the Davis-Bacon Act in 1971, it may be useful to review, briefly, Franklin Roosevelt’s suspension of the act in 1934.

### The Roosevelt Precedent (1934)

On June 5, 1934, President Roosevelt, acting upon the advice of the Secretary of Labor and the Administrator of Public Works, suspended Davis-Bacon as a matter of administrative convenience: to allow various New Deal statutes to function more smoothly.<sup>71</sup> He made no attempt to define “national emergency” other than noting that concurrent operation of the two laws (the Davis-Bacon Act and the National Industrial Recovery Act) caused “administrative confusion and delay” which could be avoided were Davis-Bacon suspended.

What transpired thereafter is not immediately clear; but, on June 30, 1934 (just three weeks later), President Roosevelt issued another proclamation. He stated that a revocation of the June 5 proclamation “would be in the public interest” and reinstated Davis-Bacon.<sup>72</sup> The President does not appear to have offered any further public explanation for his actions.<sup>73</sup>

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<sup>70</sup> *Congressional Quarterly Almanac*, 1964, Congressional Quarterly, Inc., Washington 1965, pp. 576-577.

<sup>71</sup> *The Statutes at Large of the United States of America from March 1933 to June 1934*, vol. XLVIII, Part 2 (Washington: GPO, 1934), pp. 1745-1746.

<sup>72</sup> *The Statutes at Large of the United States of America from January 1935 to June 1936*, vol. XLIX, Part 2 (Washington: GPO, 1936), p. 3400.

<sup>73</sup> More light might be shed upon the suspension of the Davis-Bacon Act and the administrative history of the statute through archival research. Any conclusions, here, ought  
(continued...)

## The Nixon Suspension (1971)

Through 1970 and 1971, President Richard Nixon, among other inflation-related concerns, expressed an intense interest in the wage-price structure in the construction industry. On January 18, 1971, he conferred with the tripartite Construction Industry Collective Bargaining Commission,<sup>74</sup> chaired by labor economist John Dunlop, and urged that body “to do something about curbing the wage-price spiral in construction.” Various options were discussed, Labor Secretary James Hodgson reported, including suspension of Davis-Bacon.

Seeming to prefer a private sector solution, Mr. Nixon set a 30-day period during which the Commission should deal with the concerns he had raised.<sup>75</sup> Negotiations followed.<sup>76</sup> Despite meetings between AFL-CIO President George Meany, spokespersons for the Building and Construction Trades Department (BCTD, AFL-CIO), OMB Director George Shultz, Secretary Hodgson, Dunlop and others, no concrete solution was found.

**Lifting the Davis-Bacon Requirements.** On February 23, 1971, Mr. Nixon, suspended Davis-Bacon.<sup>77</sup> He noted that the nation “is now confronted by a set of conditions involving the construction industry which, taken together, create an emergency situation.” He noted that collective bargaining settlements “are excessive and show no signs of decelerating.” He pointed to unemployment, to “more frequent and longer work stoppages,” to a wage/price spiral in the construction industry and to their impact upon the general economy. Therefore, he suspended the act and, with it, “any Executive Order, proclamation, rule, regulation or other directive providing for the payment of wages, which provisions are dependent upon determinations by the Secretary of Labor under the Davis-Bacon Act.”<sup>78</sup>

While President Nixon admitted that his action was directed at organized labor, he also stated that “wage rates on Federal projects have been artificially set by this law rather than by customary market forces.” He affirmed his belief that “this preferential arrangement does not serve the best interests of either the construction industry or the American public at a time when wages are under severe upward pressures.”

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<sup>73</sup> (...continued)  
to be regarded as tentative.

<sup>74</sup> John Herling’s Labor Letter, January 16, 1971, p. 1. The Commission was created by President Nixon under Executive Order 11482, September 22, 1969.

<sup>75</sup> John Herling’s Labor Letter, February 13, 1971, p. 1.

<sup>76</sup> Public Papers of the President of the United States: Richard Nixon, Containing the Public Messages, Speeches, and Statements of the President, 1971 (Washington: GPO, 1971), p. 165. (Hereafter cited as *Nixon Papers*.)

<sup>77</sup> CRS Report 79-249, *The Davis-Bacon Act Suspension of 1971: The Nixon Administration, Organized Labor and the Prevailing Wage Statute in Federal and Federally Assisted Construction*, by William G. Whittaker. (archived report)

<sup>78</sup> Weekly Compilation of Presidential Documents, March 1, 1971, p. 286.

In addition, the President set aside the Davis-Bacon provisions that had been written into the various program statutes (then, more than 50 of them) and declared, further: “I am calling upon States and other governmental bodies with similar statutes to take similar action.”<sup>79</sup>

**Some Questions and Reactions.** The suspension appears to have been less an attack upon the act, per se, than an effort to encourage labor and management (but, primarily labor) to adopt what the President believed was a more responsible wage/price policy. He observed: “It is evident now ... that decisive Government action is needed to protect the public interest while labor and management continue their efforts to attack the causes of this problem.”<sup>80</sup>

Many questions arose. Were inflationary wage settlements in the construction industry (of which federal construction was only a part) what Congress had in mind in crafting the act’s “national emergency” provision? Did the President have authority, under that provision, to set aside not only Davis-Bacon but also the prevailing wage provisions of the federal program statutes enacted by the Congress through several decades? And, could the President preempt the various “little Davis-Bacon Acts” of the states?

“We believe,” Hodgson noted, that the “suspension should help produce more reasonable settlements throughout the industry and restore a better balance to the bargaining process.” While he defined neither “reasonable” nor “a better balance,” his intent seemed clear. If the unions would moderate their demands and accept less costly wage settlements, then balance could be restored and with it, perhaps, Davis-Bacon. Meany branded the suspension as “punitive against workers” and “an open invitation to unscrupulous employers to exploit workers.”<sup>81</sup> And labor analyst John Herling wrote that suspension had “brought cheer to the U.S. Chamber of Commerce” which for decades “has battled to remove Davis-Bacon ... from the Statute Books.”<sup>82</sup>

Some of the state prevailing wage laws predated enactment of the federal statute. How would the suspension affect the practices of the several states? Peter G. Nash, then-U.S. Solicitor of Labor, declared: “The weight of authority supports the conclusion that States are now preempted (in effect a ‘negative’ preemption) from applying their prevailing wage standards laws to Federally-assisted construction work subject to DBRA [Davis-Bacon and Related Acts] wage protections prior to February 23, 1971.”<sup>83</sup> But not everyone agreed. In New York, for example, Commissioner of

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<sup>79</sup> *Nixon Papers*, p. 199-200.

<sup>80</sup> *Ibid.*, p. 200.

<sup>81</sup> John Herling’s Labor Letter, February 27, 1971, p. 1.

<sup>82</sup> John Herling’s Labor Letter, March 6, 1971, p. 1.

<sup>83</sup> See Peter G. Nash Solicitor of Labor, *Memorandum of Law*, dated February 26, 1971.

Labor Louis Levine affirmed that wages on public construction work would “continue to be based on the State Prevailing wage rate law.”<sup>84</sup>

**Restoration of the Act.** At the Administration’s urging, labor and management in the construction industry continued to meet under Dunlop’s guidance.<sup>85</sup> On March 29, 1971, just over a month after the suspension, Mr. Nixon, in Executive Order 11588, declared that the suspension was no longer necessary “due to the establishment of an equitable stabilization plan.” Having created the Construction Industry Stabilization Committee (a tripartite body appointed by the Secretary of Labor and directed by John Dunlop, part of a larger regulatory wage/price apparatus for the construction industry), he now restored the Davis-Bacon Act, together with the various supplemental regulations governing its implementation and enforcement.<sup>86</sup>

## **The Carter Era: New Conflicts Concerning the Davis-Bacon Act**

Davis-Bacon had been more-or-less continuously a focus of attention for the policy community since the middle 1950s. During and shortly after the Carter Administration, however, the act passed through a period of somewhat higher visibility with arguments, pro and con, voiced with unusual vigor. The basis of this period of tension extends back to the original debates over the prevailing wage legislation.

### **GAO Enters the Fray**

The bills that evolved into the Davis-Bacon Act of 1931 were crafted in part in response to rulings from then Comptroller General J. R. McCarl of the General Accounting Office (GAO) to the effect that the federal government, when contracting for construction work, was forced to accept the lowest responsible bid. The concept of “responsibility” during the period generally related to fiduciary matters and the ability of the bidder to produce the work for which a contract was let. Wages and working conditions were not factors to be considered. Given this interpretation, as Labor Secretary Doak explained, “the only course we had was to resort to legislation.”<sup>87</sup>

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<sup>84</sup> John Herling’s Labor Letter, March 6, 1971, p. 1.

<sup>85</sup> In John Herling’s Labor Letter, April 3, 1971, pp. 2-3, Herling suggests that the Administration quickly came “to comprehend the legal quagmire into which it might sink as a result of the suspension.”

<sup>86</sup> Weekly Compilation of Presidential Documents, April 5, 1971, pp. 581-585.

<sup>87</sup> U.S. Congress, Senate Committee on Manufactures, *Wages of Laborers and Mechanics on Public Buildings*, hearings, 71<sup>st</sup> Cong, 3<sup>rd</sup> sess., February 3, 1931 (Washington: GPO, 1931), p. 2.

Comptroller General McCarl had reviewed early versions of the Davis-Bacon legislation (not altogether favorably) and had suggested certain refinements. Although his advice was not immediately acted upon, the issues he raised remained and provided a basis for continuing GAO interest in the statute.<sup>88</sup>

Under Davis-Bacon, the General Accounting Office has responsibilities with respect to debarment of contractors found to be in violation of the statute and, in that context, with management of certain aspects of Federal expenditures. (40 U.S.C. 276a(2)) In addition, it has functions related more broadly to oversight of federal spending. Thus, beyond historical circumstance, the agency has reason to be interested in the act.

**Oversight Testimony (1962).** On June 12, 1962, J. E. Welch, GAO Deputy General Counsel, appeared before the Roosevelt Subcommittee which was then conducting oversight hearings on the Davis-Bacon Act. Welch affirmed that since 1935, “we [GAO] have examined or passed upon practically every Davis-Bacon Act case in which irregularities have been reported.” He stated that GAO’s “experience indicates” that the methods and procedures adopted by DOL for administration of the act “have not kept pace” with the requirements of the period. But, he assured the panel that GAO was neutral on whether “the Davis-Bacon Act should be either continued or repealed.”<sup>89</sup>

A lengthy exchange attempted to clarify the relationship between GAO and DOL where Davis-Bacon was concerned. Though no precise conclusion seems to have been reached, it quickly became clear that the two agencies were not operating in complete harmony. Welch pointed to an ongoing series of negotiations between the Comptroller, the Solicitor at DOL, and their aides which had seemed more nearly to define areas of disagreement than to resolve conflicts. “We feel,” Welch concluded, “that if the Department of Labor is to be given final responsibility [with respect to Davis-Bacon] that should be accomplished by appropriate amendment to the act.”<sup>90</sup>

Both GAO and the Subcommittee appear to have set the issue aside at this point. However, GAO added as a supplement to its oral testimony extended documentation questioning DOL’s administration of the act.<sup>91</sup>

**GAO Urges Repeal of Davis-Bacon (1979).** Beginning in the early 1960s,<sup>92</sup> GAO issued a series of reports that were generally critical of the Department of Labor’s administration of the Federal prevailing wage law. With each report in turn, GAO’s impatience with what it regarded as the flawed administration of the act

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<sup>88</sup> *Congressional Record*, February 28, 1931, pp. 6504-6508.

<sup>89</sup> Special Labor Subcommittee, *Administration of the Davis-Bacon Act*, 1962.

<sup>90</sup> *Ibid.*, pp. 319-322.

<sup>91</sup> *Ibid.*, pp. 325-454.

<sup>92</sup> The record of GAO through the first 3 decades of Davis-Bacon history might usefully be reviewed. The period from the early 1960s to the early 1980s, however, seems to constitute a discernable period.

seemed to grow.<sup>93</sup> Finally, on April 27, 1979, it issued an extended summary review titled bluntly, *The Davis-Bacon Act Should Be Repealed*.

The report was immediately controversial: the scholarship upon which it was based was questioned by some supporters of the act. Some wondered whether it was appropriate for the General Accounting Office to challenge, in so direct a manner, a policy which Congress had reaffirmed through nearly half a century.<sup>94</sup> Nonetheless, this latter study, together with the several earlier reports, provided a rich resource for critics of the statute to draw upon.<sup>95</sup>

In urging Congress to reverse its support for Davis-Bacon, GAO set out a series of arguments. *First*. “Significant changes in economic conditions, and the economic character of the construction industry since 1931, plus the passage of other wage laws, make the act unnecessary.” *Second*. After nearly 50 years, DOL “has not developed an effective program to issue and maintain current and accurate wage determinations; it may be impractical to ever do so.” *Third*. “The act results in unnecessary construction and administrative costs of several hundred million dollars annually (if the construction projects reviewed by GAO are representative) and has an inflationary effect on the areas covered by inaccurate wage rates and the economy as a whole.”<sup>96</sup>

Although the 1979 GAO report was influential, judging from the frequency with which it has been cited, it did not win universal acclaim. During hearings in June 1979, several Members of Congress puzzled over GAO’s activist stance. Representative Frank Thompson (D-N.J.), for example, asked Comptroller General Elmer Staats how much of GAO’s work was undertaken at its own initiative. Staats responded, in part, by saying that he believed that “all of these” Davis-Bacon studies had been undertaken at GAO’s own initiative.<sup>97</sup>

Ray Marshall, University of Texas economist and Secretary of Labor when the GAO study was released, charged that, as economic analysis, the report was “very sloppy” and had “little credibility.”<sup>98</sup> GAO defended its analysis but noted that

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<sup>93</sup> A listing of the various GAO reports appears in U.S. General Accounting Office, *The Davis-Bacon Act Should Be Repealed: Report to the Congress by the Comptroller General of the United States*, HRD-79-18, April 27, 1979, p. 115. (Hereafter cited as GAO, *The Davis Bacon Act Should Be Repealed*.)

<sup>94</sup> See *Business Week*, July 9, 1979, p. 62; *Congressional Quarterly Weekly Report*, November 29, 1979, p. 2648; *Federal Times*, May 26, 1980, p. 9; and *The Wall Street Journal*, July 16, 1986, p. 22.

<sup>95</sup> See CRS Report 94-908, *Davis-Bacon: The Act and the Literature*, by William G. Whittaker.

<sup>96</sup> GAO, *The Davis Bacon Act Should Be Repealed*, front cover.

<sup>97</sup> U.S. Congress, House Committee on Education and Labor, Subcommittee on Labor Standards, Oversight hearings on the Davis-Bacon Act, 96<sup>th</sup> Cong., 1<sup>st</sup> sess (Washington: GPO, 1979), pp. 219-220, 52-53.

<sup>98</sup> Press Briefing by Secretary of Labor F. Ray Marshall, July 17, 1979, p. 44. (A (continued...))

“[w]ith minor exceptions [DOL] ... disagreed with almost everything presented in this report.”<sup>99</sup> Three congressional committees conducted hearings on Davis-Bacon during the period, focusing heavily upon the GAO report. At each, DOL and GAO representatives voiced areas of disagreement concerning the report and the act. Although the hearings did not resolve the methodological and interpretative conflicts that had come to surround the act, they did give higher visibility to the issue of Davis-Bacon reform.<sup>100</sup>

## Inter-Agency Relations and Contract Labor Standards

Coverage disputes of the early 1960s (whether to apply Davis-Bacon or Walsh-Healey labor standards protections) were never fully resolved.<sup>101</sup> As mentioned previously, Congress passed the McNamara-O’Hara Service Contract Act (SCA) in 1965. It extended labor standards requirements to federal service contracts. Amendments to the SCA were adopted in 1972 and 1976 — in each instance, over contractor objections. The jurisdictional issue, thus, became a three-way contest.<sup>102</sup>

**Bureaucratic Controversy.** The three statutes, similar and complimentary but not identical, have different regulatory and economic impacts. Thus, which of the statutes applied to a particular project was of some considerable interest to employers, to workers, to the federal agencies as consumers of construction and goods and services — and to the taxpayer.

In 1974, the Office of Management and Budget (OMB) formed an inter-agency task force to review implementation of McNamara-O’Hara; but, when the review was complete, DOL refused to concur in its findings and a stalemate resulted. Again, in January 1977, during the transition from the Ford to Carter Administrations, OMB acted unilaterally, mandating administrative change by directive. This move was reversed two weeks later when the OMB’s Office of Federal Procurement Policy

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<sup>98</sup> (...continued)  
mimeographed press release.)

<sup>99</sup> GAO, *The Davis Bacon Act Should Be Repealed*, pp. 16-17.

<sup>100</sup> See U.S. Congress, Senate Committee on Banking, Housing, and Urban Affairs, Subcommittee on Housing and Urban Affairs, *Davis-Bacon Legislation*, hearing, 96<sup>th</sup> Cong., 1<sup>st</sup> sess., May 2, 1979 (Washington: GPO, 1979); and U.S. Congress, Senate Committee on Labor and Human Relations, *Military Construction Authorization Act, 1980*, hearings, 96<sup>th</sup> Cong., 1<sup>st</sup> sess., July 17 and 19, 1979 (Washington: GPO, 1979).

<sup>101</sup> The Walsh-Healey Public Contracts Act (1935) provides basic labor standards protections for workers employed in the fabrication of goods purchased, under contract, by the federal government.

<sup>102</sup> Concerning the evolution of the McNamara-O’Hara Act, see Brian M. Kingston, “The Service Contract Act of 1965: A Review,” *The Air Force Law Review*, vol. 20, no. 3 (1978), pp. 286-315; and Beverly Hall Burns, “The Service Contract Act of 1965,” *Villanova Law Review*, April 1984, pp. 435-476.

(OFPP) withdrew the directive “in view of the need of the new Administration to consider the issues involved.”<sup>103</sup> Strains persisted.

During the summer of 1978, a disagreement developed between OFPP and DOL. The OFPP Administrator advised the Department of Defense (DOD) that contracts for overhaul and rebuilding of certain aircraft engines would fall under Walsh-Healey (effectively, the federal minimum wage) rather than the locally prevailing rate under McNamara-O’Hara.<sup>104</sup>

At once, the House Subcommittee on Labor-Management Relations commenced hearings on the issue (August 1978);<sup>105</sup> and, at the request of several key Members of Congress, OFPP stepped back, the matter being referred to Attorney General Griffin Bell for a legal decision concerning the OFPP’s authority. In March 1979, Bell found in behalf of DOL. Whether a particular class of contracts is covered by Walsh-Healey or the SCA, Bell affirmed, is up to the Secretary of Labor. But he reminded President Carter that the Secretary was “subject, of course, to your supervision and direction as Chief Executive.”<sup>106</sup>

Another interagency dispute developed in June 1979 when DOL notified the General Services Administration (GSA) that automatic data processing contracts, in which services were provided, would be subject to SCA. DOD objected that meeting SCA prevailing wage standards would raise wages and disturb the salary structure in the industry. Spokesmen for industry agreed. The contractor and the contracting agency found themselves in conflict with DOL.

At this juncture, GAO issued a report arguing that McNamara-O’Hara should not be applied to service employees of data processing and high-technology firms.<sup>107</sup> Industry, taking a firmer stance, threatened not to enter into federal automatic data processing contracts at all if DOL continued to insist that SCA applied to workers in

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<sup>103</sup> Bureau of National Affairs, *Daily Labor Report*, January 26, 1977, p. A9; and February 10, 1977, p. A10. (Hereafter cited as *DLR*.)

<sup>104</sup> Since 1964, *Wirtz v. Baldor Electric Company* (337 F 2d 518 (D.C. Cir. 1964)), DOL has relied on the minimum wage under the FLSA for Walsh-Healey purposes.

<sup>105</sup> U.S. Congress, House Committee on Education and Labor, Subcommittee on Labor-Management Relations, *Oversight Hearing on the Implementation of the Service Contract Act*, hearing, 95<sup>th</sup> Cong., 2<sup>nd</sup> sess., August 10, 1978 (Washington: GPO, 1978).

<sup>106</sup> *DLR*, March 23, 1979, pp. D1-D3.

<sup>107</sup> U.S. General Accounting Office, *Service Contract Act Should Not Apply to Service Employees of ADP and High-Technology Companies*, GAO/HRD-80-102, September 16, 1980. In early 1983, GAO moved a step further with its report, *The Congress Should Consider Repeal of The Service Contract Act*, GAO/HRD-83-4, January 31, 1983.

that field.<sup>108</sup> An outright clash was avoided for the moment. Given the Bell decision (noted above), such policy conflicts were left in the hands of President Carter.<sup>109</sup>

**A Task Force Formed (1978-1980).** In August 1978, OFPP convened an Inter-Agency Task Force to review Davis-Bacon and SCA operation. However, the Task Force seems to have been overtaken by events: the independent but somewhat parallel oversight by the House Subcommittee on Labor-Management Relations (summer 1978) and the determination rendered by Attorney General Bell (spring 1979), each discussed above. In addition, there were changes in staff within the several agencies which seems to have contributed to a shift both of focus and of priorities.<sup>110</sup>

The only product resulting from the work of the Inter-Agency Task Force may have been a listing of policy options and even this seems to have been “essentially shelved for two years.”<sup>111</sup> During hearings (summer 1979), Senator Orrin Hatch (R-Utah) requested from Labor Secretary Ray Marshall copies of all the recommendations of the Task Force and asked, as well, for copies of any policy options that were rejected. DOL agreed to ascertain what could be made available to the Committee on Labor and Human Resources.<sup>112</sup>

If the Task Force report (with the related documents) was made available to the Senate, it does not appear to have been generally available to the public. Early in 1980, the U.S. Chamber of Commerce filed for the materials under the Freedom of Information Act (FOIA). When the FOIA action failed to produce the documents, the Chamber brought suit in the U.S. Court for the District of Columbia (June 1980), seeking an order for their release. Legal action by the Chamber continued into 1981; but, in the wake of the 1980 elections and with the advent of the Reagan Administration, the issue may have been rendered moot.<sup>113</sup> On March 18, 1981, Senator Hatch released a document titled: *Options Paper, Inter-Agency Review of Contract Wage Laws*. A brief statement of the issues, the *Options Paper* offered few

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<sup>108</sup> Lawrence Mosher, “Computer Firms Say to the Feds: Fix the Machines Yourself,” *National Journal*, August 4, 1979, pp. 1287-1288.

<sup>109</sup> *DLR*, October 7, 1980, pp. A8-A9.

<sup>110</sup> U.S. Congress, Senate, Committee on Labor and Human Resources, Subcommittee on Labor, *Oversight on the Davis-Bacon Act*, hearings, 97<sup>th</sup> Cong., 1<sup>st</sup> sess., April 28 and 29, 1981 (Washington: GPO, 1981), pp. 40-41.

<sup>111</sup> *Ibid.*

<sup>112</sup> U.S. Congress, Senate Committee on Labor and Human Resources, *Military Construction Authorization Act, 1980*, hearings, 96<sup>th</sup> Cong., 1<sup>st</sup> sess., July 17 and 19, 1979 (Washington: GPO, 1981), pp. 211-237.

<sup>113</sup> From the outside, the extent of the work of the Task Force is not clear; nor are the maneuvers or motivations of the several parties involved. But, with the change of Presidential administrations, there was also adopted a change of policy toward the Davis-Bacon Act. See discussion below.

new insights, no new documentation and little information about the work of the task force.<sup>114</sup>

## “Reforming” the Davis-Bacon Act Administratively

With growing Davis-Bacon reform pressure, the Carter Administration (December 1979) published proposed regulations governing the act.<sup>115</sup> DOL then reviewed, through many months, the comments that it received and, on January 16, 1981, during the closing days of the Carter Presidency, published the regulations in final form to take effect on February 14, 1981.<sup>116</sup>

## The Initial Reagan Administration Proposals

Once in office, President Reagan decided to review all pending regulations, rather than to allow them to go into effect as they stood. The Carter regulations were withdrawn for further study. Newly developed Reagan Administration Davis-Bacon regulations were proposed in August 1981 with a call for comment.<sup>117</sup> On May 28, 1982, final regulations were published to take effect on July 27, 1982.<sup>118</sup>

In a memorandum to Vice President George Bush (and to members of the President’s Task Force on Regulatory Relief which the Vice President chaired), Labor Secretary Raymond Donovan affirmed that “the final rule should be very well received by contractor groups.” He also acknowledged that labor may react unfavorably.<sup>119</sup> Secretary Donovan was right on both counts.

Organized labor charged that the new regulations were a “back door attempt to nullify the law.” The AFL-CIO’s Executive Council added that the regulations are “a laundry list of virtually every proposal offered over the years” by contractor associations.<sup>120</sup>

In contrast, the Chamber of Commerce’s *Washington Report* termed the regulations a “major improvement,” noting that the business community “including construction trade associations ... has been working for years to abolish or amend the Davis-Bacon law and the regulations that implement it.” The Associated Builders

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<sup>114</sup> *DLR*, June 5, 1980, pp. A6-A7, and E1-E6, and March 30, 1981, pp. A2-A6.

<sup>115</sup> *Federal Register*, December 28, 1979, p. 77026.

<sup>116</sup> *Federal Register*, January 16, 1981, p. 4306.

<sup>117</sup> *Federal Register*, August 14, 1981, p. 41428.

<sup>118</sup> *Federal Register*, May 28, 1982, p. 23644.

<sup>119</sup> *DLR*, May 28, 1982, p. A6.

<sup>120</sup> *DLR*, May 27, 1982, pp. A1 and F1.

and Contractors noted approvingly: “These new regulations will definitely make it easier and more desirable for contractors to bid on federal projects.”<sup>121</sup>

The regulations issued on May 28, 1982, may be viewed as a distillation of policy questions remaining from the initial discussion of the act in the 1920s and 1930s and reviewed, variously, since that time. They dealt primarily with five areas.

*First.* Under the pre-Reagan system, a wage rate paid to 30% of the workers in a craft in a locality, absent a more broadly-based rate, could be termed “prevailing” for Davis-Bacon purposes. The “30 percent” rule was now to be replaced by a “50 percent” rule.

*Second.* It had been charged that DOL, in setting locally prevailing wage rates, had been “importing” urban rates for projects in rural areas. The new regulations placed strict limits upon this practice.

*Third.* In determining Davis-Bacon wage rates, DOL was said to have included within its data base wages paid on other federal (Davis-Bacon-covered) projects which, it was charged, could have the effect of ratcheting up the base rate.

*Fourth.* The new regulations expanded the potential use of “helpers” (unskilled, general utility workers) on federal construction projects. (Industry argued that this would reduce the cost of federal construction, open work options for the unskilled, and allow employers greater flexibility. Labor argued that it could lead to craft fragmentation, decrease employment of trained workers, and reduce the pay of workers employed on federal contract construction work.)

*Fifth.* Under the Copeland “anti-kickback” Act of 1934, contractors are required to file weekly payroll reports and an affirmation of compliance with the Davis-Bacon pay requirements. The new regulations retained the affirmation of compliance but required submission of payroll records only in enforcement/compliance actions.

All of the changes were opposed by organized labor. But, it appears, the provisions dealing with the “helper” regulations and the Copeland Act’s reporting requirements were of primary importance to the unions.<sup>122</sup>

## The New Regulations Challenged in Court

On June 11, 1982, the Building and Construction Trades Department (BCTD) of the AFL-CIO (with others) filed suit to block implementation of the new regulations.<sup>123</sup> On July 22, 1982, just as the regulations were to be given effect, Judge Harold Greene of the U.S. District Court for the District of Columbia granted

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<sup>121</sup> *Washington Report*, June 8, 1982, pp. 1 and 20.

<sup>122</sup> See *Davis-Bacon Act and New Department of Labor Regulations*, by Vincent Treacy. January 18, 1985, 6 p.

<sup>123</sup> *DLR*, June 11, 1982, pp. A9-A10, E1-E5.

a preliminary injunction. Then, on December 23, 1982, Judge Greene issued a final decision, essentially favorable to the union position.

On one point, Judge Greene ruled in favor of Secretary Donovan: that the Secretary had acted properly in substituting a new “50 percent” rule for the longstanding “30 percent” rule. With that single exception, however, he declared the regulations invalid and “permanently enjoined [the Secretary and his agents] from enforcing or giving any effect to” the new rules. “[F]ifteen Secretaries of Labor serving eight Presidents have never altered the regulatory scheme. The present Secretary’s claim to have discovered a wholly different congressional intent,” Judge Greene affirmed, “rings hollow in the light of history.”<sup>124</sup>

Both parties appealed. In January 1983, the Department of Justice, on behalf of the DOL, challenged Judge Greene’s decision. In a parallel move, the BCTD announced that it would appeal that portion of Judge Greene’s decision that was favorable to the Secretary: i.e., the issue of the “30 percent” rule.<sup>125</sup>

On July 5, 1983, the U.S. Court of Appeals for the District of Columbia issued a split decision. It stated that the legislative history of the act, though “not crystal clear,” “suggests that Congress contemplated that the Secretary’s authority to determine prevailing wages extended to finding the best way to do so.”

In general, the Court deferred to the authority of the Secretary. *First*. The Secretary was permitted to implement the “50 percent” rule and/or an averaging procedure. *Second*. The right of the Secretary to exclude distant urban data from rural wage rate calculations was sustained. *Third*. The Secretary was allowed to exclude wage data from federal projects except in cases where no suitable alternative data were available. *Fourth*. The Appeals Court partially approved and partially denied the new rules on the use of “helpers” — directing that DOL amend the proposed regulation. DOL promulgated a revised final rule dealing with “helpers” on January 24, 1989, which won court approval. Congress, however, then refused to fund implementation of the “helper” rule and it remained as an open issue. *Fifth*. The Appeals Court concurred with the District Court that the changes in the reporting requirements of the Copeland Act would weaken Davis-Bacon enforcement, would conflict with statutory intent, and, therefore, would be beyond the authority of the Secretary. The Department continued to experiment with language to alter the Copeland reporting requirements and the issue became the subject of various legislative proposals, none of them enacted. Gradually, the Copeland reporting issue seemed to disappear from the policy agenda, the prior requirements remaining in tact.<sup>126</sup>

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<sup>124</sup> *DLR*, December 27, 1982, pp. A9-A10, E1-E2.

<sup>125</sup> *DLR*, January 24, 1983, pp. A6-A7.

<sup>126</sup> *DLR*, July 6, 1983, pp. A12-A14 and D1-D14.

The U.S. Supreme Court, in January 1984, declined to hear a further appeal by the Building Trades.<sup>127</sup> Thus, after five years of active consideration, DOL's "reform" efforts had been sustained in three of five areas. But in two areas, the "helper" issue and the Copeland reporting requirements, the position of the Department had been denied.

## Suspension of the Davis-Bacon Act, 1992-1993

As was discussed above, two suspensions occurred during the first 6 decades of the act's history. In 1934, President Roosevelt suspended the act, briefly, for reasons that seem to have amounted to administrative convenience. In 1971, President Nixon suspended the act, again briefly, justifying his action in economic terms: to apply pressure upon construction contractors and building trades unions as part of his wage/price control strategy.

In early 1992, there were published reports that a third suspension of the statute might be under consideration: this time under the authority of President George Bush. Such consideration seems to have commenced during the first months of that year. In June, it was reported that a nationwide suspension was "more likely than not."<sup>128</sup> But, months passed and the issue seemed to drop from view.

### The Bush "Partial" Davis-Bacon Suspension

On October 14, 1992, President Bush, by Proclamation 6491, ordered Davis-Bacon suspended for certain jurisdictions in the states of Florida, Louisiana and Hawaii. Taking note of hurricanes that had recently struck those states, the President declared: "... I find the conditions caused by Hurricanes Andrew and Iniki to constitute a 'national emergency' within the meaning of Section 6 of the Davis-Bacon Act." The suspension was to continue "until otherwise provided."<sup>129</sup>

In suspending the act, President Bush added several elements to the concept of "national emergency" which, variously defined, had served as the basis for presidential action. *First*, suspension might enhance employment opportunities. The DOL, it was noted, had estimated that suspension "could result in the creation of as many as five to eleven thousand new jobs in the construction industry in these States." (No explanation of the basis for this estimate was given.) *Second*, suspension might be viewed as an economy measure. Payment of the locally prevailing wage (the Davis-Bacon rate, set by the Administration's Secretary of Labor) would "increase the costs" of rebuilding facilities in the several areas. Again, "more construction companies will be able to bid on Federal construction contracts"

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<sup>127</sup> *DLR*, January 17, 1984, pp. A11-A12.

<sup>128</sup> *DLR*, April 22, 1992, p. A10. See also *DLR*, April 23, 1992, p. A15, and June 5, 1992, p. A12.

<sup>129</sup> Proclamation 6491, reproduced in *Weekly Compilation of Presidential Documents*, vol. 28, no. 42, October 19, 1992, pp. 1936-1937.

if Davis-Bacon were suspended. *Third*, there might be racial/ethnic considerations. In the Administration's opinion:

For more than half a century, the Davis-Bacon Act has imposed non-market wage rates in the construction industry. Unfortunately, the Davis-Bacon Act has historically operated to exclude semi-skilled workers, including many African-Americans, Hispanics, and new immigrants, from work on Federal contracting projects.

*Fourth*, there was the issue of the federal deficit. "In addition, by having the Government adhere to costly local wage settlements in the construction industry, the Davis-Bacon Act has added billions of dollars to the cost of Federal construction," the White House statement asserted.<sup>130</sup>

The assumptions set forth in the suspension order and accompanying documents were contestable and, almost at once, sparked dissent. But, laying aside such policy debate, some observers felt that Hurricanes Andrew and Iniki may have been less a reason for the suspension than a justification for an action already under consideration.<sup>131</sup>

## Reaction and Reinstatement

Opinion was divided on the suspension. Segments of the construction industry, especially those associated with non-union (or anti-union) policies, applauded the suspension, some suggesting the economy could be strengthened were the act suspended everywhere.<sup>132</sup> Organized labor was distressed by the President's action, suggesting that it was "a desperate attempt to win business support in electoral-rich Florida and Louisiana."<sup>133</sup> AFL-CIO President Lane Kirkland suggested that residents of the affected states would be "victimized again" as "[u]nqualified contractors" become involved in the reconstruction process.<sup>134</sup>

Representative William Ford (D-Mich.), Chairman of the House Committee on Education and Labor, was critical of the Bush proclamation. Mr. Ford charged the President with using the "desperation" of residents of the affected areas "as an opening to cut wages and please his U.S. Chamber of Commerce campaign contributors."<sup>135</sup> Reportedly, Mr. Ford pledged to "look into the President's action

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<sup>130</sup> Press Release, The White House, Office of the Press Secretary, *Emergency Suspension of the Davis-Bacon Act*, October 14, 1992, 2 p. A careful review of the economic data upon which these factors rest might be useful.

<sup>131</sup> *DLR*, April 22, 1992, p. A10; April 23, 1992, p. A15; and June 5, 1992, p. A12.

<sup>132</sup> On this general issue, see Donald Lambro, "Some Sound Advice for the President-Elect," *Human Events*, January 23, 1993, p. 17.

<sup>133</sup> AFL-CIO News, October 26, 1992, p. 1.

<sup>134</sup> *DLR*, October 19, 1992, p. A11.

<sup>135</sup> *DLR*, October 19, 1992, pp. A10-A11.

when the new 103<sup>rd</sup> Congress convenes.”<sup>136</sup> Early in the 103<sup>rd</sup> Congress, Senator Daniel Inouye (D-Hawaii), a state the suspension was putatively intended to assist, introduced legislation which called upon the President to amend the suspension proclamation “to eliminate all references to the State of Hawaii and Hurricane Iniki.”<sup>137</sup>

Through the years, many Members of Congress had been critical of the entire premise upon which the Davis-Bacon Act rested. If a suspension were useful, total repeal might be even better, some reasoned. Early in the 103<sup>rd</sup> Congress, Senator Larry Craig (R-Ida.) proposed the latter. “Now, at a time when this President [William Clinton] is driving toward deficit reduction,” Senator Craig affirmed, “... let me suggest to this President that, if he truly means to make meaningful cuts in the budget, bring down the deficit, bring down the debt, one of the ways to do it is to put Federal construction and private construction on an equal footing.”<sup>138</sup>

Early in the 103<sup>rd</sup> Congress, the concerns of Representative Ford and of Senator Inouye were addressed. On March 6, 1993, President Clinton issued a proclamation reversing that of his predecessor, George Bush. The Clinton proclamation (No. 6534) was a simple restoration of the full force of the Davis-Bacon Act with no explanation cited.<sup>139</sup>

## Some Questions Remain

The 1992-1993 Davis-Bacon suspension had been urged upon President Bush as a matter of policy through the spring of 1992 long before the hurricanes struck. His early reaction, reportedly, had been mixed.<sup>140</sup> Whether his ultimate decision to suspend the act was primarily a response to storm-related developments or a reflection of broader policy considerations may now be a moot point. Other issues, however, remain.

- What constitutes a “national emergency” for purposes of suspension of the Davis-Bacon Act? What was the intent of Congress in this area?
- Does the concept of “national emergency” under Davis-Bacon allow the President to suspend the act for regional or local emergencies that may have only a tenuous impact upon the Nation at large: for example, an earthquake or a flood?

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<sup>136</sup> AFL-CIO News, October 26, 1992, p. 1.

<sup>137</sup> See S. 138 of the 103<sup>rd</sup> Congress. Senator Daniel Akaka (D-Hawaii) was a co-sponsor of the measure.

<sup>138</sup> *Congressional Record*, March 22, 1993, p. S3323. By a vote of 69 to 29, the Senate voted to table the Craig amendment. See *Congressional Record*, March 24, 1993, pp. S3625-S3626.

<sup>139</sup> *Federal Register*, March 10, 1993, p. 13189.

<sup>140</sup> *DLR*, April 22, 1992, p. A10; April 23, 1992, p. A15; and June 5, 1992, p. A12.

- Is the presidential suspension authority limited to the Davis-Bacon Act, per se, or can it be extended to the various program statutes into which Davis-Bacon provisions have been incorporated?<sup>141</sup>
- In areas where there are state and local prevailing wage requirements, how might these be affected, if at all, by a presidential suspension of Davis-Bacon?
- Were a President to suspend the act, how long could that suspension remain in effect? Traditionally, such suspensions have been short, but might they remain in effect so long as the suspending President remained in office?

The crucial questions concerning suspension of Davis-Bacon may be legal and a likely subject of litigation, especially so were the duration of a suspension to be greater.

## **Davis-Bacon in the 1990s: The Hatfield/Weldon Proposals**

The Davis-Bacon Act would continue as a source of contention through the 1990s. Some aspects of the Reagan administrative changes remained unresolved, notably the “helper” issue. Questions continued to be raised concerning the wage rate determination process. Simultaneously, some urged that the statute be repealed while others argued that it needed to be strengthened. And, with each Congress, the issues were raised anew.

### **A Growing Momentum for Repeal of Davis-Bacon**

With the election of 1994, the Republicans found themselves in control of both houses of the Congress and Davis-Bacon became an immediate priority. As bills, pro and con, were introduced in each house, the *Engineering News-Record (ENR)* summarized:

Senate and House Republicans are mapping simultaneous assaults on the Davis-Bacon Act in hearings on two bills to repeal the 64-year-old federal prevailing-wage law.

Battle lines were clearly drawn.... On one side, lawmakers and interest groups are pushing for immediate repeal of the law. On the other side, labor and industry groups who see the GOP’s strategic advantage are ready to discuss wholesale reform.<sup>142</sup>

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<sup>141</sup> The issue could be complicated by the specific wording through which the Davis-Bacon requirement has been added to the various program statutes. The mechanism is not always consistent from one statute to another.

<sup>142</sup> *Engineering News-Record*, February 27, 1995, p. 12. (Hereafter cited as *ENR*.) See also editorial comment, “GOP aims at Davis-Bacon Act,” *ENR*, January 23, 1995, p. 7.

Committees and subcommittees promptly scheduled hearings. Some forecast decisive action: either significant modification of the statute or, possibly, something more.

On January 4, 1995, Senator Nancy Kassebaum (R-Kan.), the new chair of the Senate Committee on Labor and Human Resources, introduced S. 141, an uncomplicated proposal that would have repealed both of the Davis-Bacon and Copeland Acts. Terming Davis-Bacon “outmoded,” Senator Kassebaum opined that the public “is ill-served” by the act’s “wage rate and work rule restrictions.”<sup>143</sup> A hearing was conducted on February 15 and, on March 29, the bill was marked-up and ordered to be reported.<sup>144</sup>

Meanwhile, companion legislation appeared in the House. On January 13, 1995, Representative Cass Ballenger (R-N.C.) had introduced H.R. 500, a proposal not only to repeal the Davis-Bacon and Copeland Acts per se but, also, to remove Davis-Bacon requirements from all federal laws into which they had been incorporated. Mr. Ballenger charged that Davis-Bacon “adds billions of dollars to Federal construction costs” and that repeal of the act — permitting payment of lower wages to construction workers — “would allow the Federal Government to fund more construction projects with the money which is being spent, or to get the planned construction done for less money.”<sup>145</sup> The bill was referred to the Subcommittee on Workforce Protections, of which Representative Ballenger was then chair. On March 2, the Subcommittee marked-up the bill and reported it to the full Committee on Economic and Educational Opportunities.<sup>146</sup>

Momentum, it seemed, was building;<sup>147</sup> but support for repeal was not as clear-cut as it might at first have appeared. Nor were the lines, pro and con, drawn sharply along partisan lines.

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<sup>143</sup> *Congressional Record*, January 4, 1995, pp. 407-408. The bill was initially cosponsored by 14 Republican Senators.

<sup>144</sup> U.S. Congress, Senate Committee on Labor and Human Resources, *Repeal of the Davis-Bacon Act*, report to accompany S. 141, 104<sup>th</sup> Cong., 1<sup>st</sup> sess., S.Rept. 104-80 (Washington: GPO, 1995), p. 11. The vote was 9 to 7 along party lines: Republicans for repeal; Democrats, against.

<sup>145</sup> *Congressional Record*, January 13, 1995, p. 1254.

<sup>146</sup> At the Subcommittee hearing, Democratic Members objected to the mark-up as a violation of committee rules. Overridden on a straight party-line vote, they walked out of the hearing. Republican Members, with no Democratic Members present, then voted to support H.R. 500 for repeal of the Davis-Bacon and Copeland Acts.

<sup>147</sup> *ENR* opined: “At long last, it appears that the planets and stars are in an alignment that at least offers hope that Congress will finally do in the Davis-Bacon Act.” See editorial comment “Congress Should Kill the Davis-Bacon Act,” *ENR*, March 27, 1995, p. 114. In an article by Hazel Bradford, “Unions Pulling Together,” *ENR*, April 17, 1995, p. 14, it was observed that the movement for repeal had “cooled somewhat.”

## The Hatfield Proposal

On August 11, 1995, Senator Mark Hatfield (R-Ore.), chair of the Appropriations Committee, with five other Republican Senators, introduced S. 1183, the “Davis-Bacon Act Reform Amendments of 1995.”<sup>148</sup> The Senator presented the legislation as a compromise “that would be acceptable to the two major parties, namely the building construction trade unions and the contractors’ coalition.” He reviewed the history of the act and recalled that, as Governor of Oregon, he had signed that state’s “little Davis-Bacon Act.” Affirming his support for the prevailing wage concept, he stated:

... the Davis-Bacon Act, as it now stands, indeed deserves some of the criticism that my distinguished associates level against it. Nevertheless, its purpose of protecting the jobs of our Nation’s construction workers must persuade us to reform, rather than repeal, the act.

Senator Hatfield explained that the bill was the product of “long and arduous” discussions that had commenced in Oregon among representatives of industry and labor and had continued in Washington during the summer of 1995. He proposed three amendments to the existing statute.

First, the threshold at which the act becomes applicable to Federal projects would be raised from \$2,000 to \$100,000. Second, the frequency with which contractors are required to file wage and benefit schedules would be changed from weekly to monthly. Third, trainees and apprentices would be excluded from the prevailing wage standard if they are enrolled in a training program that is registered with the Department of Labor.

The bill contained other provisions as well: tightening here, expanding or redefining coverage there. Rather than repeal Davis-Bacon, he suggested, S. 1183 would rewrite that measure “so that it can serve its original and laudable purpose.”<sup>149</sup>

## Companion Legislation Offered in the House

As the summer of 1995 wore on, consideration of Davis-Bacon continued as Congress took up budget and appropriations measures and a variety of program

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<sup>148</sup> Co-sponsors of S. 1183, with Senator Hatfield, were Senators Robert Packwood (R-Ore.), Alfonse D’Amato (R-N.Y.), Ben Nighthorse Campbell (R-Colo.), Arlen Specter (R-Pa.), and Rick Santorum (R-Pa.). *Congressional Record*, August 11, 1995, p. 23216. Others would later add their names as co-sponsors.

<sup>149</sup> *Congressional Record*, August 11, 1995, pp. 23217-23218. Senator Hatfield argued that the alleged costs of the act had been “grossly overestimated” and suggested a series of flaws in the standard CBO estimates of savings were repeal to take place. In *ENR*, September 11, 1995, p. 5, Rep. Jim Kolbe (R-Ariz.) suggested that he saw “well over a dozen [Senate] Republicans getting behind this bill.” Further, *ENR* opined that the co-sponsors of the Hatfield bill “would make a formidable force against repeal if they join prolabor Democrats.” See *ENR*, September 4, 1995.

statutes.<sup>150</sup> Then, on October 12, Representative Curt Weldon (R-Pa.) introduced H.R. 2472: companion legislation to the Hatfield bill. And, like the Hatfield bill, it was initially proposed by Republican Members of the House. As Representative Weldon explained, the bill has the “cosponsorship of 27 Republicans and the support of organized labor across the country as well as many of the largest contracting corporations in America.”<sup>151</sup> He enumerated the advantages of Davis-Bacon both for workers and for industry and asserted that repeal “would jeopardize the quality of life of every construction worker in this country.”<sup>152</sup>

Although both bills (S. 1183 and H.R. 2472) died at the close of the 104<sup>th</sup> Congress, the movement for repeal of the Davis-Bacon and Copeland Acts came to an abrupt halt. It was reported that, when repeal had actually seemed possible, more than “14,000 contractors have joined a coalition with construction unions seeking reform rather than repeal.”<sup>153</sup> Thereafter, through the end of the 20<sup>th</sup> century, though repeal proposals continued to be introduced, they were not acted upon. Some limited oversight hearings were conducted but Congress now concerned itself primarily with the Davis-Bacon provisions of program statutes. Even with that more focused agenda, no change was made in the prevailing wage statute.

## Suspension of the Davis-Bacon Act, 2005

In late August 2005, Hurricane Katrina gathered strength in the Caribbean and moved toward Florida and the Gulf Coast. The result was one of the greatest natural disasters in the history of the United States. Gradually, the impact of the hurricane was assessed. New Orleans had been especially hard hit. Diverse public and private funding was made available to the areas affected, while thousands of people were displaced from their homes, often to other states.

### Reaction from President Bush

“Year after year,” observed Representative George Miller, the ranking Democrat on the House Committee on Education and the Workforce, “Republicans have tried to erase this law [the Davis-Bacon Act] ... But they do not have the votes in Congress

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<sup>150</sup> An effort had been made (later abandoned) to delete the Davis-Bacon requirement from the “National Highway System Designation Act of 1995” (S. 440). It was proposed that Davis-Bacon not apply to construction of the National Museum of the American Indian. But, although approved (H.R. 1158), the measure, an appropriations bill, was vetoed. An amendment authored by Representative Don Young (R-Alaska) added a Davis-Bacon provision to the “Native American Housing Assistance and Self-Determination Act” (H.R. 2406, later substituted for S. 1260). And Davis-Bacon was considered in connection with budget and appropriations measures. The bills are of the 104<sup>th</sup> Congress. See *ENR*, April 10, 1995, p. 7 and May 22, 1995, p. 38.

<sup>151</sup> *Congressional Record*, October 12, 1995, p. 27922. Other Members would later join as co-sponsors. S. 1183 and H.R. 2472 were not identical, but very similar.

<sup>152</sup> *Congressional Record*, October 12, 1995, p. 27922.

<sup>153</sup> *Engineering News-Record*, February 27, 1995, p. 12.

to do it.”<sup>154</sup> The hurricane, however, may have made a difference. A *Washington Post* headline on September 10, 2005, serves as an illustration: “In the Floods, Parties’ Agendas Surface.”<sup>155</sup>

There had been large pockets of poverty in the New Orleans area. When the announcement was made to vacate the city as the storm approached, the poor apparently had few resources to rely on. Further, a lack of transportation may have been critical and, perhaps equally important for these people, there was a lack of any acceptable destination for them. After the storm passed, many poor remained amid the ruins of a once thriving city: still without resources, but now without homes or jobs.

It was reported that on Wednesday, September 7, when Budget Director Joshua Bolten briefed House Republicans on the President’s supplemental spending request, “conservative lawmakers urged him to lift the wage rules” tied to Davis-Bacon.<sup>156</sup> That same day, Representatives Tom Feeney (R-FL), Jeff Flake (R-AZ), and Marilyn Musgrave (R-CO) organized a letter to President George W. Bush urging him to use his presidential power to waive Davis-Bacon requirements.<sup>157</sup> Signed by 35 Members of the House, the letter affirmed that compliance with the wage processes of the Davis-Bacon Act could delay reconstruction and may “even raise total construction costs by up to 38%.” The letter closed with a call for suspension of the act: “Faced with the massive rebuilding challenges ahead, we respectfully urge you to make a presidential proclamation to suspend Davis-Bacon until our country is once again whole.”<sup>158</sup>

On September 8, 2005, President Bush suspended the Davis-Bacon Act as it relates to specific segments of the country: i.e., to portions of Florida, Alabama, Mississippi, and Louisiana.<sup>159</sup> He specified both the act and “the provisions of all other acts providing for the payment of wages, which provisions are dependent upon determinations by the Secretary of Labor” under the Davis-Bacon rules. The suspension would continue “until otherwise provided.”<sup>160</sup>

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<sup>154</sup> George Miller, Statement to the Press, September 8, 2005.

<sup>155</sup> Jonathan Weisman and Amy Goldstein, “In the Floods, Parties’ Agendas Surface,” *Washington Post*, September 10, 2005, A4. (Cited hereafter as Weisman and Goldstein, “In the Floods.”)

<sup>156</sup> Ibid.

<sup>157</sup> Tom Feeney, Statement to the Press, September 7, 2005.

<sup>158</sup> Rep. Jeff Flake, Statement to the Press, September 7, 2005. The statement includes the letter to the President.

<sup>159</sup> Concerning the procedure for suspension of such acts as the Davis-Bacon Act, see CRS Report 98-505, *National Emergency Powers*, by Harold C. Relyea.

<sup>160</sup> See White House press releases, September 8, 2005. See [<http://www.whitehouse.gov/news/releases/2005/09/20050908-5.html>]. Concerning the duration and/or termination of suspension of an act such as the Davis-Bacon Act, see Relyea, *National Emergency Powers*, op cit.

## Reaction to the Promulgation

Representative Charlie Norwood (R-GA) praised the President for his “quick action to strip away unnecessary bureaucracy that may hamper our ability to recover....” Davis-Bacon rules “are onerous and drive up the cost of any project to which they are applied....” The nation, he stated, “can’t afford that kind of inefficiency, red tape, and inflated costs when we have an entire region to rebuild, largely at taxpayer expense.”<sup>161</sup> The *Daily Labor Report*, quoting the President, suggested that suspension “will result in greater assistance to these devastated communities and will permit the employment of thousands of additional individuals....”<sup>162</sup> Or, as Representative Feeney reportedly stated: “Lots of people in Louisiana are willing to go to work tomorrow, and the market will set the wage....”<sup>163</sup>

Organized labor opined that the President’s order “would allow contractors to pay substandard wages to construction workers in the affected areas.” John Sweeney, the AFL-CIO president, opined that “employers are all too eager to exploit workers. This is no time to make that easier.” Further, he asserted, “Taking advantage of a national tragedy to get rid of a protection for workers that corporate backers of the White House have long wanted to remove is nothing less than profiteering.” Edward Sullivan, president of the Building and Construction Trades Department, likened the effect to “legalized looting.”<sup>164</sup> The *New York Times* editorialized that “By any standard of human decency, condemning many already poor and now bereft people to sub-par wages — thus perpetuating their poverty — is unacceptable.”<sup>165</sup>

## Legislation Introduced

Somewhat anticipating the President’s action, Representative Flake introduced the “Cleanup and Reconstruction Enhancement Act (CARE Act)” on September 7, 2005. The Flake bill (H.R. 3684) would, whenever a “major disaster” has been proclaimed under the Stafford Act governing such matters, automatically suspend the Davis-Bacon Act for one year in the area of concern. A companion bill (S. 1817) was subsequently introduced by Senator Jim DeMint (R-SC).

In the wake of the President’s action, several bills were introduced that would have had the effect of overturning the President’s Davis-Bacon proclamation: H.R. 3763 (George Miller), H.R. 3834 (Frank Pallone, D-NJ), and S. 1739 (Edward Kennedy, D-MA). Senator Barbara Boxer (D-CA) had introduced a two-pronged bill (S. 1763): first, to give employment preference to workers who have been displaced

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<sup>161</sup> Rep. Charlie Norwood, Statement to the Press, September 8, 2005. Reps. Norwood and Charles W. Boustany (R-LA) had written to the President, September 8, 2005, urging suspension of the act.

<sup>162</sup> *Daily Labor Report*, September 9, 2005, p. AA1.

<sup>163</sup> Rep. Feeney is cited in Weisman and Goldstein, “In the Floods,” p. A4.

<sup>164</sup> *AFL-CIO: News for Working Families*, September 10, 2005.

<sup>165</sup> “A Shameful Proclamation,” editorial, *New York Times*, September 10, 2005, p. A26.

by Hurricane Katrina; and second, to restore the impact of the Davis-Bacon Act in the areas in which it had been suspended.

In addition to legislation dealing specifically with the Davis-Bacon Act, two bills seemed to challenge Administration policy in that regard. Representative Miller had introduced H.Res. 467, a bill “[r]equesting that the President transmit to the House of Representatives information in this possession relating to contracts for services or contraction related to Hurricane Katrina recovery that relate to wages and benefits to be paid to workers.” The bill was referred to the Committee on Education and the Workforce — where, ultimately, it was rejected by a vote of 25 to 20.<sup>166</sup> A separate measure, but of similar intent, had been introduced by Representative Steve LaTourette (R-OH) and forwarded to the Committee on Transportation and Infrastructure, chaired by Representative Young of Alaska.<sup>167</sup>

## Davis-Bacon Reinstated

Gradually, conditions in the Gulf region became clearer and, in that context, a movement was discerned for re-institution of the Davis-Bacon Act. In late September, some 37 Republicans “signed on to a letter” to President Bush urging that his proclamation be rescinded. In a more varied appeal, LaTourette stated, “When you suspend Davis-Bacon, you also suspend the Copeland Anti-Kickback prohibitions” of the act “so you have no more certified payrolls.” For those who are “... worried about profiteering and other things, reinstating Davis-Bacon is a good idea.”<sup>168</sup>

In late October, about 20 Republicans reportedly attended a meeting with White House Chief of Staff Andrew Card at the office of Speaker Dennis Hastert. Card was described as “more than receptive” to suggestions from those supportive of Davis-Bacon and acknowledged that “they weren’t saving any money” through the suspension.<sup>169</sup> On October 25, Card called Representative LaTourette to invite him to a meeting at the White House the following day — October 26. During the White House meeting, Card was quoted as having said, according to LaTourette, that “there appeared to be no savings garnered from suspending the Davis-Bacon Act.”<sup>170</sup>

On October 26, 2005, word began to surface that a change of policy was in the works; and, by late afternoon, it seemed to have been confirmed. The Bush Administration said, the *Daily Labor Report* reported, “... that it would reinstate on November 8 Davis-Bacon Act prevailing wage requirements for reconstruction projects in the hurricane-battered Gulf Coast region.” The article continued, quoting

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<sup>166</sup> See CRS Report RL31909, “House Resolutions of Inquiry,” by Louis Fisher.

<sup>167</sup> *Daily Labor Report*, October 21, 2005, pp. A1 ff. Representative Young had been a signatory to a pro-Davis-Bacon letter to the White House signed by 37 members of the Republican Party.

<sup>168</sup> *Daily Labor Report*, October 11, 2005, p. A2.

<sup>169</sup> *Daily Labor Report*, October 21, 2005, pp. A1 ff.

<sup>170</sup> *Daily Labor Report*, October 27, 2005, pp. AA1 ff.

Labor Secretary Elaine Chao, that “[u]pon review of current conditions in the declared areas, the administration will reinstate Davis-Bacon...”<sup>171</sup>

## Issues Remaining for the New Century

Although the Davis-Bacon Act has been in place for 75 years, it remains a focus of controversy. Through the closing years of the 20<sup>th</sup> century and into the 21<sup>st</sup> century, aspects of its administration remain in contention, but most areas of dispute have roots in the enactments of 1931 and 1935.

When the initial Davis-Bacon legislation was under consideration, few appeared to have entertained doubts that the Department of Labor would be able, rather easily, to render wage rate determinations whenever the stakeholders, employers and workers, were unable to agree with respect to what the locally prevailing wage actually was. In practice, wage rate determination has remained a core issue with respect to the Davis-Bacon Act — and remains as yet unresolved.

Similarly, classification of workers has remained an issue, emerging most notably with proposals from the late 1970s to define treatment of “helpers” and to assess an appropriate pattern of utilization of apprentices: two quite distinct groups of workers. How workers are classified largely determines the rate at which they will be paid. It may also reflect the attitude of the employing firm toward trade unions and collective bargaining.

Other classification issues have arisen along with the definition of various statutory provisions. What, for example, is meant by the “site of the work” for Davis-Bacon purposes? How should “off-site” work, however defined, be treated? Should truck drivers be Davis-Bacon covered? What ought to be the inter-relationship between Davis-Bacon and the other procurement statutes: i.e., the Walsh-Healey Act (setting labor standards for goods produced under federal contracts) and the McNamara-O’Hara Act (setting labor standards for service workers engaged under federal contracts)?

Annexation of the Davis-Bacon Act to a variety of program statutes (or inclusion of a Davis-Bacon prevailing wage provision within such statutes) has added further complexities and opportunities for dispute, pro and con. For example, does a Davis-Bacon prevailing wage provision, added to a program statute, insure protection for the workers involved? It may or it may not, depending upon the phrasing of coverage and the relationship of the Davis-Bacon provision to the core statute. When project funding is not directly provided to a grant/loan recipient through appropriated funds but through a revolving fund or tax credits, etc., is Davis-Bacon coverage modified or might the work be completely Davis-Bacon exempt?

Finally, through the 1990s and beyond, dispute remains about the economic impact of the Davis-Bacon Act. Were Davis-Bacon repealed, how much might the

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<sup>171</sup> *Daily Labor Report*, October 27, 2005, p. AA1.

federal agencies save — presumably by paying construction workers at lower rates? Or, would elimination of Davis-Bacon have implications that could augment both labor and total project costs? Does Davis-Bacon, with its associated regulations, encourage a higher quality of workmanship, enhanced productivity, and a reduced need for remedial work? Is there a connection between skill-transfers (apprenticeship training) and Davis-Bacon? How are various groups of workers — women, minorities, the unskilled, non-union workers — affected by the operation of the statute?

After 75 years, as one reads through the hearings and floor discussions, it would seem that the verdict is still out. Indeed, there would also seem to be very little solid data upon which to base an assessment. Still (often, normally, on several occasions during each session of the Congress), the issue of Davis-Bacon is raised anew amid largely unqualified assertions of impact, pro and con, frequently without supporting empirical evidence.

## Concluding Comment

Since the 1930s, doubts have been raised about the need for the Davis-Bacon Act and about the ability of the Department of Labor to implement the statute in a reasonable manner. Through most of its history, however, such criticism seems to have been muted. In the 1950s, as Davis-Bacon provisions were increasingly added to program statutes, critics became more vocal, and increasingly so during the 1960s through the 1980s. In the mid-1990s, there seemed to be some suggestion that critics were making inroads on the act, and that repeal (or significant revision) was likely. Then, suddenly, the climate changed, and through the past dozen years, debate has cooled, though criticism has not entirely disappeared.

The act has been the focus of numerous hearings, scores of floor debates, and has sparked an extended body of literature: studies, reports, analyses. But, the thrust of congressional policy has been consistently toward expanded coverage and a strengthening of the act.

Through the years, certain policy issues with respect to Davis-Bacon have remained under discussion; and, to the extent that these questions continue to be raised, they can be said to be unresolved. Indeed, some issues that were subjects of debate in the 1930s continued to be debated, largely in the same terms, and to provoke similar demands for administrative and/or legislative action. The growing Davis-Bacon literature, pro and con, with refutations and counter-critiques, seems to offer little that is new and appears to have left critical aspects of the act, its administration and its impact, unilluminated.<sup>172</sup>

The Davis-Bacon Act has now become an institutional part of wage structure and contracting practice within the construction industry. What the impact of repeal or significant modification of the act might be is not entirely clear. Should any

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<sup>172</sup> Concerning these and other issues, see CRS Report 94-908, *Davis-Bacon: The Act and the Literature*, by William G. Whittaker.

change with respect to Davis-Bacon, whether pro or con, be extended to the related Federal contract labor standards statutes: the Walsh-Healey Act and the McNamara-O'Hara Act? This may be an area in which further study could be productive.

As the 21<sup>st</sup> century advances, several additional elements may be added to the debate over Davis-Bacon or have an effect upon the character of that debate.

**First.** Some perceive a gradual weakening of the trade union movement, both in actual membership and in political influence. This could translate into a diminished public and congressional support for Davis-Bacon. And, if that perception is accurate, it could result in some refocusing of labor's legislative priorities.

At the same time, it should be recalled that the Davis-Bacon Act was intended to promote stability within the construction industry as well as to protect labor standards. Might elimination of Davis-Bacon adversely impact industry, producing uncertainties with respect to wages as an element of the bidding process, alter manpower utilization patterns, increase the risk of accidents in the workplace, or render less effective skill development and transfer now commonly resolved through apprenticeship programs where there is Davis-Bacon coverage?<sup>173</sup>

**Second.** There has been a gradual change, over time, in demographics. Members of Congress, policy analysts, trade union leaders, with others, may no longer fully share or appreciate the experience of the pre-World War II era.

With the retirement of the generations of the 1930s and 1940s (and attendant loss of certain historical perspectives), there may no longer be a broad understanding of the rationale for certain statutes — for protection of workers — that an older generation may have taken for granted. Thus, if these labor standards statutes (such as Davis-Bacon) are to survive, they may need to be justified anew, either through education or through experience, some of it perhaps painful. But, on the other hand, might it be that *there may really be* no longer a need for statutes such as the Davis-Bacon Act? Or, might it be feasible to re-codify Davis-Bacon (with the several related statutes) as a more general federal contract labor/management standards enactment?

**Third.** The reemergence of the federal deficit and budgetary constraints resulting from security concerns may provoke a more critical review of assumptions made during earlier periods of our national experience. As a result, where certain statutes are criticized as imposing unnecessary costs or as presenting significant enforcement and compliance problems, there may be increased willingness to alter or to dispense with these older, perhaps less well understood, laws and to replace them with programs and regulations judged to be more vital to a younger constituency.

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<sup>173</sup> Implications of repeal of the Davis-Bacon Act are suggested in Philips, Peter, Garth Mangum, Norm Waitzman, and Anne Yeagle, *Losing Ground: A Report on the Repeal of Nine Little Davis-Bacon Acts* (Salt Lake City: University of Utah Press, 1995).

For all of these reasons, it may be useful to review the evolution of the Davis-Bacon Act (and of other federal contract labor standards statutes as well) in order to provide a rational foundation for their reassessment and for the development of future directions of public policy.<sup>174</sup>

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<sup>174</sup> See also CRS Report RL32086, *Federal Contract Labor Standards Statutes: An Overview*, September 22, 2003, by William G. Whittaker.