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Labor Standards and International Competition: Section 4(e) of the Fair Labor Standards Act

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Summary

Section 4(e) of the Fair Labor Standards Act (FLSA) was added to the statute in 1961. It provides that if the Secretary of Labor has reason to believe that the Act has had an adverse effect upon the competitive position of covered industries, he will conduct an investigation and, if an adverse impact is found, report that finding to the President and the Congress. Section 4(e) has rarely been utilized. It is not entirely clear what action, if any, the President or the Congress would take were such a report made by the Secretary: no further action is mandated by the statute. This report briefly sketches the origins of Section 4(e), examines its provisions, and the potential for its implementation.

The Context of Enactment

During the 1937-1938 debates on the federal wage/hour legislation which would be enacted as the Fair Labor Standards Act, some Members of Congress expressed concern that improving conditions of labor for American workers (i.e., setting minimum wage and overtime pay standards, restricting child labor, etc.) would make it more difficult for American firms to compete with foreign production. However, language dealing with global competition was not then written into the Fair Labor Standards Act.[1]

Through the years, the interrelationship of trade and U.S. domestic labor standards remained an issue, reemerging in a policy context during the early 1960s. In 1961 (the 87th Congress), the House created a special *ad hoc* Subcommittee on the Impact of Imports on Employment, with Representative John Dent (D-Pa.) to serve as chair. Congressman Dent

[1] See *Congressional Record*, July 28, 1937. p. 7744, 7747 and 7749; and CRS Report 89-568, *The Fair Labor Standards Act: Analysis of Economic Issues in the Debates of 1937-1938*, by William G. Whittaker, p. 65-68.

had frequently voiced concerns about this issue and, as a member of the full Committee on Education and Labor, was able closely to monitor the development of the new Section 4(e).

In the context of the 1960-1961 recession, President Kennedy (February 2, 1961) proposed a "Program for Economic Recovery and Growth." As part of the program, he urged that the minimum wage be increased to $1.25 per hour, in steps, over 2 years. Such an increase, he affirmed, "can actually increase productivity and hold down unit costs, with no adverse affects on our competition in world markets and our balance of payments."[2] Implementing legislation was promptly introduced in the House and Senate.[3]

Consideration in the House

While trade was not a primary focus of congressional debate on the minimum wage in 1961, it was part of the general consideration of that issue. In reporting H.R. 3935, the House Committee on Education and Labor declared itself in agreement with the President's views but added that it was "concerned about the upward trend in imports of types of products which are produced in the United States by relatively low wage firms." It continued:

> In order to provide the information necessary for evaluating the matter, the bill contains a new provision, Section 4(e), which directs the Secretary of Labor to make investigations whenever he has reason to believe that in any industry under the act the competition of foreign producers has resulted or is likely to result in increased unemployment. If he finds that increased unemployment has in fact resulted or is likely to result from such competition, he will make a report of his findings to the President and to the Congress.[4]

Representative Paul Kitchin (D-N.C.) noted that it is "paradoxical to me that we say in one breath the wage differential on foreign imports is killing our local industries by creating a wage and price differential we cannot compete with, and in another breath say that we ought to raise the minimum wage ...."[5]

Although several versions of the 1961 FLSA amendments were considered by the House, each contained the Section 4(e) provision. On March 24, 1961, the FLSA amendments were passed the House on a 341-78 roll-call vote.[6]

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[2] Public Papers of the President of the United States: John F. Kennedy, January 20 to December 31, 1961. Washington, U.S. Govt. Print. Off., 1962. p. 49. The Federal minimum wage was then $1.00 per hour.

[3] H.R. 3935 (Roosevelt) and S. 895 (McNamara). See *Congressional Record*, February 7, 1961, p. 1834, 1837-1838, and February 9, 1961, p. 1847, 1893-1895.

[4] U.S. Congress. Committee on Education and Labor. *Fair Labor Standards Amendments of 1961*. Report to Accompany H.R. 3935. H.Rept. 87-75, 87th Cong., 1st Sess. Washington, U.S. Govt. Print Off., 1961. p. 22.

[5] *Congressional Record*, March 24, 1961. p. 4787.

[6] *Ibid*., p. 4812-4813.

Consideration in the Senate

In the Senate, the Committee on Labor and Public Welfare worked from the House-passed measure, reporting an amended version of H.R. 3935. In general, the Committee appeared to concur in the position taken by President Kennedy.

Concerning global competition, the Committee's report noted that "[a]n analysis of available data does not support the view that a moderate increase in the minimum wage will have a substantial adverse effect on the ability of American producers to compete with foreign producers in either the domestic or foreign markets." It observed that most U.S. firms pay wages "far in excess of the minimum rate" and would not be affected by an increase in the wage floor. While conceding that the "position of low wage firms competitive with foreign producers may tend to be adversely affected if a minimum wage change were to result in higher prices," it noted that Department of Labor (DOL) studies have indicated that minimum wage increases "did not result in any general pattern of increases in the prices of products of low wage industries." Therefore, it concluded that "a moderate increase in the minimum wage will not have extensive adverse effects on the ability of U.S. firms to compete with foreign producers."[7] However, since the question had been raised, the Committee agreed to include the new Section 4(e) provision in the reported legislation.[8]

In dissent, Senators Barry Goldwater (R-Ariz.) and Everett Dirksen (R-Ill.), voiced general opposition to the wage/hour legislation. They noted, in part, that "[t]he American economy is faced with increasing foreign competition which requires that every effort be exerted to increase efficiency in manufacturing and similar occupations." They argued that "it is essential that job opportunities be created in the other segments of our economy ... so that workers displaced by automation and improving technological processes will not join the ranks of the unemployed." Raising the minimum wage, they averred, was inconsistent with expansion of job opportunities in the low-wage sector.[9]

Senator Goldwater thereafter proposed a substitute for Section 4(e) which provided more extensive direction to the Secretary of Labor and other officials for dealing with global competition. The Goldwater amendment sparked immediate opposition. Senator Hubert Humphrey (D-Minn.) pointed to the uncomplicated character of the House language. "The committee bill," he observed, "simply authorizes the Secretary of Labor to study the employment effects of the import and export trade in industries covered by the act and to report such studies to the President and to Congress." Senator Goldwater, on the other hand, suggested that the House language was *too* simple. He countered that if Section 4(e) were to be left in the bill at all, then "[l]et us make it effective, because either we must have effective language to accomplish the purpose, or we will admit that

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[7] U.S. Congress. Senate Committee on Labor and Public Welfare. *Fair Labor Standards Amendments of 1961*. Report to Accompany H.R. 3935. S.Rept. 87-145, 87th Cong., 1st Sess. Washington, U.S. Govt. Print. Off., 1961. p. 21. There is, it should be noted, extensive literature concerning the impact of changes in the minimum wage, marked by variations in professional opinion. See CRS Report 95-202, *The Federal Minimum Wage and Select Bibliography*, by William G. Whittaker.

[8] S.Rept. 87-145, p. 22.

[9] *Ibid.*, p. 93.

we are fooling the people of the country." He added: "Either we mean what we say or infer in the amendment, or we do not. I do not like to be privy to any action which will fool the American workers or the American public."[10]

The Goldwater amendment was rejected (55 nays to 39 yeas): H.R. 3935 was agreed to and dispatched to conference. Section 4(e) was retained and approved with a final provision added by the Senate Committee.[11]

Section 4(e) of the FLSA

As adopted in 1961 (and as it stands in current law), Section 4(e) of the FLSA reads as follows:

> (e) Whenever the Secretary [of Labor] has reason to believe that in any industry under this Act the competition of foreign producers in United States markets or in markets abroad, or both, has resulted, or is likely to result, in increased unemployment in the United States, he shall undertake an investigation to gain full information with respect to the matter. If he determines such increased unemployment has in fact resulted, or is in fact likely to result, from such competition, he shall make a full and complete report on his findings and determinations to the President and to the Congress: *Provided*, that he may also include in such report information on the increased employment resulting from additional exports in any industry under this Act as he may determine to be pertinent to such report.

From the legislative history of Section 4(e), its focus would seem to have been upon competitive disadvantage flowing from FLSA coverage. But, from the wording of Section 4(e) alone, that interpretation is not clear.

Section 4(e) is permissive, leaving implementation first to the Secretary and, thereafter, any supplemental action to the President and the Congress. The factors that the Secretary might take into account in shaping his *belief* that foreign competition might have an adverse employment impact are not specified. Nor is it clear, from the language of the statute, upon what evidentiary standard that *belief* should rest. Similarly vague is the phrase: "has resulted, *or is likely to result*, in increased unemployment in the United States." (Emphasis added.) Different criteria would seem to be required when dealing with an actual rather than a potential adverse employment impact.

One might read the phrasing, "in any industry under this Act," to suggest that the Secretary consider each industry individually. Some might argue, however, that an adverse impact for one industry could be offset by a positive impact in another — and, thus, that the Secretary should consider the economy as a whole. Were a Secretary disinclined to act under Section 4(e), he would seem to have ample justification for his or her inaction.

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[10] *Congressional Record*, April 19, 1961. p. 6227-6229.

[11] *Congressional Record*, April 20, 1961, p. 6372, May 3, 1961, p. 7077-7108, 7172-7195. A provision was added allowing the Secretary to report employment growth resulting from the export trade in industries covered by the Act.

Section 4(e) refers to "the competition of foreign producers" either "in United States markets or in markets abroad, or both." Given the context of the Section, did Congress intend that DOL investigate *only* where a competitive disadvantage appears to be based upon differences in wages and working conditions? Further, did the Congress intend that DOL conduct an investigation within other countries? How extensive should such an investigation be? Where a host country of a competing industry enforces its own labor laws, however inadequate they may be by U.S. standards, should the industry be deemed a *fair* competitor?[12]

How might DOL measure adverse competitive impact in both domestic and foreign markets? To what extent might a competitive advantage be based *solely* upon labor standards? Might it result from better management? Economies of scale? Considerations of style, quality, or consumer taste? Absence of environmental requirements?

Finally, if the Secretary were convinced that a negative employment impact had occurred or was likely to take place, he would be obligated to make a study. If the results of that study showed that his initial belief had been correct, then he would be obligated to report his findings to Congress and the President. But, here again, Section 4(e) is permissive. There is no requirement that either the President or the Congress act upon the Department's findings — and no authority is granted in Section 4(e) for further action by the Secretary.

Implementation of Section 4(e) by the Labor Department

It would appear that the Secretary of Labor, recognizing the permissive character of Section 4(e), has rarely taken action under its provisions.[13] During the mid-1960s, a study of international competition in the jewelry and silverware industry was made.[14] The resulting report appears to have shown no negative competitive impact stemming from the FLSA. It is not now clear that any subsequent use has been made of Section 4(e).

Recalling the concerns voiced during the debates of 1961 and from 40 years of experience with the provision, some might question the utility of Section 4(e). Problems associated with documenting the impact of foreign labor standards notwithstanding, would it be useful for the Secretary to take action *under Section 4(e)*? **First.** DOL has no authority to go beyond a study and report. Were it to find evidence of an adverse impact, Section 4(e) contains no avenue for redress beyond a report to Congress and the White House. For example, the Secretary has no power to waive the application of the FLSA

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[12] During the debates of 1937, Senator Henry Cabot Lodge (R-Mass.) questioned who would certify the conditions under which goods were produced abroad. Senator William Borah (R-Ida.), doubting the utility of certification by a foreign country, responded: "I could mention countries whose certificate I would not regard as of any importance whatever." *Congressional Record*, July 28, 1937. p. 7747.

[13] This concluding segment of the report is based upon a series of discussions with staff of the Department of Labor conducted over a period of nearly 20 years as questions have been raised concerning the operation of Section 4(e). The observations and findings above are a composite of these discussions.

[14] U.S. Department of Labor. Report Submitted to the Congress in Accordance with the requirements of Section 4(d) of the Fair Labor Standards Act. Mimeographed. 1962. p. 2.

even were an adverse competitive impact observed. Nor, based on Section 4(e), has DOL the independent authority (or ability) to assist a distressed industry or its employees.[15] **Second.** Taking into account diverse concerns, it may be that DOL has viewed any assessment of adverse competitive impacts on trade flowing from labor standards requirements as more of a trade issue than one of labor standards, *per se*.

Concluding Comment

Do domestic labor standards protections have a negative impact upon the competitive viability of U.S.-produced goods? And, if so, can a remedy be found through the FLSA? Should an effort be made to impose U.S. labor standards protections upon off-shore and foreign production? Is there a clear trade/labor standards linkage? Might a more appropriate vehicle for effecting worker protection be found in the International Labor Organization (ILO) or the World Trade Organization (WTO)? Debate on this general issue has continued through the years and in ongoing.[16]

If not actually implemented, Section 4(e) remains a part of the FLSA. A Secretary of Labor could utilize the section were he or she inclined to do so. If a useful purpose is to be served by Section 4(e), it may be that its wording will need to be made clearer and more comprehensive. Or, it may be that the time has come to remove the section from the statute as superfluous language.

[15] It may be useful to explore the relationship, if any, of Section 4(e) of the FLSA to other worker assistance and retraining initiatives — for example, those associated with the Trade Adjustment Assistance program or the North American Trade Agreement.

[16] In this context, see Cappuyns, Elisabeth. Linking Labor Standards and Trade Sanctions: An Analysis of Their Current Relationship, *Columbia Journal of Transnational Law*, v. 36, no. 3 (1998), p. 659-686. Two CRS reports by Mary Jane Bolle may also be of interest: CRS Report 96-661, *Worker Rights Provisions and Trade Policy: Should They Be Linked?*, and CRS Report 97-861, *NAFTA Labor Side Agreement: Lessons for the Worker Rights and Fast Track Debate.*