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The Davis-Bacon Act: Issues and Legislation During the 109th Congress

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Summary

The Davis-Bacon Act (1931, as amended) requires, among other things, that *not less than* the locally prevailing wage be paid to workers employed in federal contract construction. Through recent decades, the act has become a continuing source of contention. Some raise questions: Should the act be modified? Strengthened? Repealed? Can it be administered effectively and fairly?

Adopted in 1931 at the urging of the Hoover Administration, the act was regarded as an emergency measure intended to help stabilize the construction industry and to encourage employment at *fair* wages — i.e., not less than those prevailing in the locality of the covered work. It was amended in 1935 and its scope broadened. In 1964, a fringe benefit component was added. Subsequently, Davis-Bacon provisions have been incorporated within numerous federal program statutes.

The original Davis-Bacon Act was a relatively simple statute which, it was assumed, the Secretary of Labor would have little difficulty administering. However, the nature of the statute, changes within the construction industry, and extension of the act to a wide range of program statutes seem to have created complications. By the 1950s, some had begun to urge major amendment or repeal of the act. Through the rulemaking process, the Department of Labor has modified application of the statute — but controversies continue. Serious oversight of the statute commenced during the early 1960s and continued through the mid-1990s. Since then, there seems to have been a general acquiescence toward the statute. During the fall of 2005, the act was suspended for two months in the wake of Hurricane Katrina — but then restored to its full effect.

Among issues raised with respect to Davis-Bacon have been the following: revision of the database upon which prevailing wage rates are based; expansion of the conditions under which "helpers" (generally, unskilled or semi-skilled workers) can be employed on Davis-Bacon projects; revision of the operational concept of "site of the work" for Davis-Bacon purposes; and updating of the "prevailing wage" determination process and the coverage threshold.

Oversight has not resulted in conclusive resolution of issues surrounding the Davis-Bacon Act. Debate continues with respect to the application of the act to specific program statutes. Should all (or most) federal and/or federally assisted contract construction be covered by a prevailing wage requirement? Should the act apply in cases where indirect federal funding mechanisms are used — i.e., tax credits and/or revolving loan funds? What is (or has been) the economic impact of the prevailing wage requirement?

This report has been written from the perspective of a labor economist. It suggests certain occasions during which the Davis-Bacon Act has become a legislative issue. As these develop during the 109th Congress, the report will be revisited.

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The Davis-Bacon Act of 1931 (as amended) requires that *not less than* the locally prevailing wage be paid to workers employed under federal construction contracts.[1] It also affects manpower utilization on such projects: for example, the employment of *helpers* or unskilled/semi-skilled general utility workers. With respect to the implementation of the act, Congress has assigned wide administrative responsibility to the Secretary of Labor, but legislative oversight has continued more or less continuously at least since the 1950s.

Through the years, Davis-Bacon provisions have been written into numerous program statutes. Application of the act to these (and to new legislative programs) has continued to spark congressional interest. Some have urged that the prevailing wage statute is as important now as it was in the 1930s. Others contend that the requirement should be set aside in order to stretch construction dollars by permitting payment of less than locally prevailing rates. Frequently, the Davis-Bacon or prevailing rate question has been contested within the context of program statutes in which wages were not a central focus — though, nonetheless, of considerable importance.

Introducing the Davis-Bacon Act

In 1931, at the urging of the Hoover Administration, Congress enacted prevailing wage legislation for federal contract construction — legislation cosponsored by Representative Robert Bacon (R-NY) and Senator James Davis (R-PA), i.e., the Davis-Bacon Act.[2] The act was significantly amended in 1935 and its scope broadened. In 1964, the definition of prevailing wage was expanded to include a fringe benefits component. Otherwise, the act remains essentially in its 1935 form.[3] Although there have been intermittent efforts to repeal the Davis-Bacon Act and the

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[1] 40 U.S.C. 3141-3148. Davis-Bacon provides a wage floor. To recruit and retain a skilled workforce, contractors may be forced, by the market, to pay wages in excess of those found, under Davis-Bacon, to be prevailing in the locality of the construction work.

[2] Robert Bacon had engaged in banking in New York prior to his election to the House of Representatives in 1922. James Davis had served as Secretary of Labor in the cabinets of Presidents Harding, Coolidge, and Hoover prior to his election to the Senate in 1930.

[3] For a quick historical overview of the act, see CRS Report 94-408, *The Davis-Bacon Act: Institutional Evolution and Public Policy*, by William G. Whittaker.

related Copeland "anti-kickback" Act (1934),[4] such initiatives have been consistently rejected by Congress — which has, through the years, added Davis-Bacon requirements to numerous individual program statutes.

The Structure and Context of Davis-Bacon

The Davis-Bacon Act requires that federal (and some federally assisted) construction contracts specify the minimum wage rates to be paid to the various categories of laborers working under those contracts. *Minimum wages* are defined as those rates of pay found 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 *locality* is usually (but not necessarily always) a county or metropolitan area. Normally, construction work is divided into four categories: residential, non-residential buildings, highway, and heavy construction.

The act *does not* require that collectively bargained (union) wages be paid unless such wages happen to be prevailing in the locality where the work takes place. Further, the prevailing rate for Davis-Bacon purposes represents *a floor*, not necessarily the rate that a construction firm will have to pay in order to recruit and retain qualified workers.[5]

Typically, the Department of Labor (DOL) conducts two types of wage rate determinations: general area determinations and, where necessary, specific project determinations. DOL sometimes collects data through a direct survey process. More often, it works from data provided by contractors, trade unions and other interested parties. It may use both methods, jointly.

The act requires that the "advertised specifications for every [construction] contract in excess of $2,000, to which the United States or the District of Columbia is a party," must specify the wage that the Secretary of Labor determines to be prevailing in the locality for the "various classes of laborers and mechanics" employed on the covered work. Speaking generally, DOL does not recognize unskilled or semi-skilled "helpers" as a class of workers for wage rate determination purposes. Rather, it evaluates workers by craft. Thus, employers are discouraged from employing helpers on Davis-Bacon projects, turning to more skilled craftspersons instead. DOL does, however, recognize apprentices and encourages the employment on Davis-Bacon projects of persons enrolled in *bona fide* apprenticeship programs.[6]

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[4] Some employers, it was alleged, had paid the prevailing wage to their workers but then demanded rebates or kickbacks. To end this practice, Congress passed the Copeland "anti-kickback" Act in 1934 (P.L. 73-324). Though not a part of the Davis-Bacon Act, it operates in tandem with that statute and, in policy terms, is usually a part of the Davis-Bacon debate.

[5] There does not appear to be any systematic analysis of the gap, if any, between the floor provided by the Davis-Bacon Act and the wages actually paid to construction workers on covered projects.

[6] With the Fitzgerald Act in 1937 (29 U.S.C. 50 ff.), the federal government assumed an oversight role with respect to apprentice training. Workers enrolled in programs recognized

(continued...)

Supplemented by other statutes, work under Davis-Bacon is covered by workhours and health and safety standards legislation — though the latter are not part of the Davis-Bacon Act, *per se*. The related 1934 Copeland "anti-kickback" Act requires weekly reporting of wages actually paid, with an affirmation from employers that any deductions from wages due to employees were proper.

Davis-Bacon applies to direct federal construction, alteration, or repair of public buildings and public works, including painting and decorating, where the contract is in excess of $2,000. Further, Davis-Bacon provisions have been written into numerous federal program statutes. Some states have enacted "little Davis-Bacon" acts. These state statutes, however, normally differ from each other and from the federal Davis-Bacon Act.[7]

In general, labor standards *for federal contract procurement* are governed by three statutes. The Davis-Bacon Act applies only to federal contract construction. The *Walsh-Healey Public Contracts Act* (1936) deals with labor standards with respect to goods produced under contract for the federal government. The *McNamara-O'Hara Act* (1965), popularly known as the Service Contract Act, deals with labor standards under federal service contracts. (These statutes do not apply to fully private sector work.) In addition, there is the more general *Contract Work Hours and Safety Standards Act* (1969) — the latter, an amalgam of earlier federal workhours and safety enactments. Although the federal contract labor standards statutes supplement each other (i.e., for construction, goods, and services), they have different wage floors, different triggering mechanisms and other requirements, and are applied differently with respect to the various types of federal contract work.[8]

The Purposes of the Act

In the 1920s, the federal government undertook a major program of public works. As the nation moved into a depression after 1929, this program had important implications for the areas where the work was to be performed. However, given the

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[6] (...continued)
by the Department of Labor (or in cooperating state programs) receive specified training which, when complete, results in a credential certifying the competence of the graduate (journeyman). The credential is portable (i.e., recognized throughout the country). Such programs are usually funded jointly by the employer and the apprentice (through a temporarily reduced wage) and, often, by a contribution from the trade union in the craft. The reduced wage option, which increases normally with the systematic improvement in the skills of the apprentice, tends to encourage employment of apprentices on Davis-Bacon projects. Some open shop (i.e., non-union) firms, however, prefer to train workers independently.

[7] See CRS Report RS20940, *The "Little Davis-Bacon" Acts and State Prevailing Wage Standards*, by William G. Whittaker.

[8] For a more extended (but critical) account of these statutes and their administration, see Armand J. Thieblot, Jr., *Prevailing Wage Legislation: The Davis-Bacon Act, State "Little Davis-Bacon" Acts, the Walsh-Healey Act, and the Service Contract Act* (Philadelphia, University of Pennsylvania Press, 1986). See also CRS Report RL32086, *Federal Contract Labor Standards Statutes: An Overview*, by William G. Whittaker.

depth of the economic catastrophe and the scope of unemployment, any opportunity for work — almost without regard to wage rates or conditions under which the work was to be performed — was attractive both to workers and to struggling firms.

Federal construction contracts were normally awarded to the lowest responsible bidder — a process that appears to have limited the options of the various federal agencies when selecting a contractor. Treatment of workers and payment of *fair* wages were not taken into account. The result, some argued, was the sacrifice of product quality (and labor standards) for short-term economy. Certain itinerant contractors, employing workers imported from low-wage parts of the country, were able (or believed to be able) to underbid local contractors for federal construction work. In this way, it was alleged, *fly-by-night* operators would win contracts, based upon the payment of sub-standard wages (to workers desperate for employment but sometimes lacking mature and/or appropriate skills), and then produce an inferior quality of construction. In that manner, the positive rehabilitative economic impact of public building and public works projects for the various localities was reduced — to the disadvantage both of local contractors and local workers alike.[9]

In drafting the Davis-Bacon Act, Congress was not searching for the cheapest available labor for federal construction work. Rather, it prescribed payment of not less than the locally prevailing wage in order, in part, to protect *fair* local contractors and workers, residing in and employed in local markets, from contractors and low-wage crews from outside of the area of construction work. Thus, the original Davis-Bacon Act was as much a protection for fair contractors as for workers.[10] However, supporters have contended there is no essential conflict between the purposes of the statute and securing a bargain for the public agency consumer (the taxpayer).

The prevailing wage statute preceded the Fair Labor Standards Act (1938) with its minimum wage provisions and was, thus, a somewhat new concept in federal labor standards law.[11] Davis-Bacon was viewed as a device that might help to ensure quality of construction, to stabilize the local economy and industry, and to make the

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[9] During the late 1920s and early 1930s, the contracting community appears to have been very much concerned about establishment of quality controls, ethical standards, and fair competition. See, for example G.F. Schlesinger, "Responsibility as a Pre-Requisite," *The Constructor*, Aug. 1928, pp. 24-25, 55-61; "'Irresponsible Contractor' Defined," *The Constructor*, Aug. 1928, pp. 35-36, 51; A. E. Horst, "Accomplishments in Cooperation: Elimination of Irresponsibility Marks Progress of the Industry," *The Constructor*, Nov. 1929. pp. 28-30, 56; "When Low Bids Are Too Expensive," *The Constructor*, Feb. 1930, pp. 40-41, and 58; and E. A. St. John, "Cooperation Eliminating Irresponsibility," *The Constructor*, Apr. 1930, pp. 35-36.

[10] The prevailing wage requirement did not preclude award of contracts to *outside* contractors. It simply ensured that local labor standards would not be undercut.

[11] Late in the 19th century, the states had begun to enact prevailing wage laws with respect to public construction. See David B. Johnson, "Prevailing Wage Legislation in the State," *Monthly Labor Review*, Aug. 1961, pp. 839-845.

federal government, indirectly through its power as a consumer, a model for private sector employers with respect to labor standards.[12]

A Continuing Process

In 1931, the Davis-Bacon legislation was regarded as an emergency measure. It sparked little controversy at the time of its enactment and, from a review of the hearings and debates of that period, it seems clear that Congress anticipated none of the administrative problems that would ensue. Few of the terms or concepts embodied within the statute were defined. No provision was made for *pre*determination of the prevailing wage rate: only after a bid was submitted and a contract awarded would a contractor learn what his wage obligations might be. How disputes were to be adjusted was not specified: it was assumed that the Secretary of Labor would have little difficulty enforcing the act. But, complications were soon to arise.

Almost immediately, restructuring of the act commenced as Congress and the Administration each began a process of reassessment. In early 1932, in an effort to preempt action by the Congress, President Hoover moved to strengthen administration of the statute through Executive Order No. 5778.[13] Although Congress proceeded with general oversight of the act and, ultimately, adopted reform legislation, that initiative was vetoed by President Hoover.[14] The Copeland "anti-kickback" Act (1934) helped ensure that the appropriate rates would be paid without improper deductions. Then, in 1935, Congress approved basic changes to the statute. The 1935 amendments: (a) reduced the coverage threshold from $5,000 to $2,000; (b) extended coverage from only public buildings as in the original enactment to "construction, alteration, and/or repair, including painting and decorating, of public buildings or public works"; and (c) required that the locally prevailing (Davis-Bacon) wage rates be predetermined — that is, prior to solicitation of bids — and that they be written into bid solicitations.[15]

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[12] Some have questioned whether, given the Fair Labor Standards Act after 1938, there was a continuing need for Davis-Bacon prevailing wage protection.

[13] *Proclamations and Executive Orders: Herbert Hoover, March 4, 1929 to March 4, 1933* (Washington: GPO, 1974), vol. II, pp. 1066-1067.

[14] These reform initiatives are discussed in U.S. Congress, Senate, *Relationship Between Employees and Contractors on Public Works, Report Pursuant to S.Res. 228*, H.Rept. 74-332, Part 2, 74th Cong., 1st sess., (Washington: GPO), May 13, 1935, pp. 7-9.

[15] Reduction of the coverage threshold appears to have been motivated by at least two considerations. *First*. Contracts for painting and decorating were often too small to come under the $5,000 figure. *Second*. It appears that some contractors artfully divided work into small parcels in order to avoid Davis-Bacon coverage. Reducing the threshold to $2,000 was viewed as a means through which to extend coverage.

The Debate Over Davis-Bacon

By the 1950s, Congress had begun to add Davis-Bacon provisions to various program statutes in which federal funding made the work possible. But, such extensions of coverage (which would involve new and different types of contract work — and a new body of contractors) seem to have sparked increased uneasiness with the act. Despite numerous efforts by Davis-Bacon critics, however, proposals to weaken the prevailing wage legislation were uniformly rejected by Congress.

Through the years, arguments for and against Davis-Bacon have become largely fixed; so have counter arguments of defenders and critics. The logic and many of the assumptions these arguments contain have been questioned at length. In the evolving debate, few contentions about the act have gone (or are likely to go) unchallenged. On both sides, there are *truths* that advocates tend to accept without question.

Current policy debate has focused upon change: to amend the act, whether to strengthen it or to diminish its impact — or to repeal the statute outright. Outlined below are some of the arguments advanced by critics and by defenders of Davis-Bacon expressed in summary as each side in the ongoing debate might state them. Some of these arguments, pro and con, may not appear on the surface to be consistent; but, then, not all critics or defenders of the act can be expected to make precisely the same assumptions. Further, hardly a phrase of either set of arguments has passed without refutation (and counter-refutation).[16]

Perspectives of Davis-Bacon Critics

Some critics of Davis-Bacon argue that the act is inflationary (unnecessarily increasing public construction costs), that it is difficult to administer (that it has frequently been inequitably administered), and that it hampers competition — especially with respect to small and minority-owned businesses that may be unfamiliar with federal contracting procedures and lack the staff to deal with the requirements such procedures impose. They contend that the act impedes efficient manpower utilization, limiting the use of "helpers" or general utility workers. Some argue, were Davis-Bacon restrictions absent, that contractors would be able to restructure the work to be performed, dividing tasks into less complex assignments, in order to make practical the employment of workers who may be less skilled — and who are also less expensive to employ. The result, they argue, would be increased efficiency. And, they suggest, this would likely open more employment opportunities to minorities and women, allowing them to gain work experience and on-the-job training, while reducing the costs of public construction.

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[16] Among trade unionists, the Davis-Bacon Act affects primarily persons involved in the building and construction trades where the statute seems to have general support. Critics of the act, however, are a more diverse group. In some measure, industry is split. In policy terms, the division of opinion seems to be more often philosophical, reflecting basic attitudes toward labor-management relations rather than a division along partisan political lines. The distinctions are not always neatly drawn.

Besides, critics note, the Davis-Bacon Act (1931, 1935) was enacted before there were federal minimum wage standards. With the general minimum wage floor established under the Fair Labor Standards Act (1938), they suggest, the Davis-Bacon Act is no longer needed: that is, that a "super minimum wage" for federal construction work is both unnecessary and inequitable. They assert that labor costs for federal construction could be reduced (with savings for the taxpayer) if actual local market wages were paid rather than administratively determined locally prevailing wages which, some argue, may often be union rates.[17] In addition, they urge simplification of the Copeland Act's reporting requirements, arguing that a simple declaration of compliance would have equal effect: that compliance with existing law is onerous, bureaucratic, and that reports are rarely even examined.

Perspectives of Davis-Bacon Supporters

Supporters of Davis-Bacon often contend that the act prevents cutthroat competition from *fly-by-night* firms that undercut local wages and working conditions and compete *unfairly* with local contractors: that the act helps stabilize the local construction industry, an advantage to workers and employers alike. The act, they suggest, may tend to assure the consuming agency of higher quality work since employers, required to pay at least the locally prevailing wage, are likely to hire more competent and productive workers — resulting in better workmanship, less waste, reduced need for supervision, and fewer mistakes requiring corrective action.[18] This may lead to fewer cost overruns and more timely completion of public construction — and, in the long-term, lower rehabilitation and repair needs. Thus, some argue, the Davis-Bacon Act could actually save the taxpayer money on public construction.

Supporters of the act also argue that Davis-Bacon deters contractors from fragmenting construction tasks in order to utilize low-wage (and low-skill) "helpers" or pick-up crews. Some argue that without Davis-Bacon (and in the absence of a collective bargaining agreement), contractors would probably be unlikely to provide training beyond the necessary and narrow requirements of the job — and would not likely enter into a formal program such as those monitored by DOL's Bureau of Apprenticeship and Training. Reducing or eliminating apprenticeship programs in the construction industry might work to the disadvantage of minority and women workers who are entering the building trades in growing numbers. In addition, some assert that if "helpers" are substituted for skilled craft workers, it would likely be minorities and some women who might be laid off or forced into lower-wage jobs that failed to take advantage of their skills.

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[17] Again, one needs to recall that the Davis-Bacon prevailing rate is a floor, not necessarily the rate that employers will actually have to pay. DOL suggests that union rates are used only where they are found to be prevailing in a locality.

[18] Conversely, some argue that, in the fully private sector, there is a significant amount of quality construction work that is performed without Davis-Bacon protection.

What Do We Really Know About the Impact of the Davis-Bacon Act?

Perhaps the most frequently asked question concerning the Davis-Bacon Act is: How much money could be saved if Davis-Bacon were repealed or modified to narrow its scope? The short (and honest) answer is probably: no one really knows.

Conversely, does Davis-Bacon save money for the federal government in its purchases of construction — for example, employment of more highly skilled workers on Davis-Bacon projects? Here again, a response may also be uncertain.

Davis-Bacon literature is extensive and diverse, much of it in the form of public materials (i.e., agency reports and analyses). Journalists have taken a continuing interest in the act, resulting in a substantial popular literature. Serious academic studies may be fewer. It is extremely difficult for an independent scholar to review the administration of the act to assess its impact. *First.* There is the scope of the task: vast numbers of projects scattered throughout the United States, administered by different agencies and involving hundreds of contractors and subcontractors, working under dissimilar circumstances and in diverse labor markets. *Second*. There is the problem of the availability of documentation. Since the contractors involved are of the private sector, how much information has been preserved? *Third*. Access presents a problem. Assuming that the data and documents have been preserved and could be made available, securing such documentation (and access to administrative personnel) may be problematic — both from the private sector (contractors, workers and unions) and from the various public agencies.

If one assumes that documentation exists, access is allowed, that all of the parties are cooperative, and that the means, financial and other, are available for such an undertaking, there remains a *fourth* complication. *The analyst would be comparing something that* ***did*** *happen with something that in fact, for whatever reasons,* ***did not*** *happen*. Payroll records, labor-management relationships, availability of skilled workers, quality of supervision, internal agency memoranda, etc., all relate to an actual project and not to what might have happened under other circumstances.

In the absence of a Davis-Bacon requirement, would the contract have gone to the same contractor? If so (or if not), would the contract have been managed in the same way? Did the act have any impact upon the wages *actually* paid or upon workforce utilization? Without Davis-Bacon, would different workers have been employed? The work of a governmental researcher may be further complicated by political or public policy considerations.[19]

For all of these reasons, there appear to be significant gaps in our knowledge of the act and of its administration despite oversight by Congress, extensive study by public and private agencies, and the work of individual scholars. Further, few studies

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[19] See, also, CRS Report 94-908, *Davis-Bacon: The Act and the Literature*, by William G. Whittaker.

of the act, whether public or private, have escaped criticism on grounds of flawed methodology or inadequate sample size. Thus, precise estimates of impacts ought to be viewed with considerable caution.[20]

Some Areas of Continuing Concern

The Davis-Bacon Act has been a focus of legislative and administrative consideration. DOL has instituted its own reform initiatives — most notably during the Reagan Administration — but these have often proven contentious and have resulted in prolonged litigation. *Among* areas of continuing concern and controversy are those discussed below.

The "Helper" Issue

The Davis-Bacon Act makes no mention of "helpers"; nor does it refer to "trainees," "apprentices," or other skill groups. Rather, it refers to "various classes of laborers and mechanics" and then leaves up to the Secretary of Labor the determination of just what those "various classes" might be and how they might be distinguished one from the other. But just what is a "helper" — and how might he or she be differentiated from a "laborer" or skilled construction worker? An equally contentious issue has been whether the use of helpers is a common or prevailing practice in the locality of a proposed federal construction project.[21]

Setting Out the Issue. Under Davis-Bacon, before bids are solicited, the minimum locally prevailing wage rate is determined for each category of worker that might be used on the project. Where a "helper" category is not recognized in the locality of the projected construction, craft or laborer rates have to be paid, potentially (but not necessarily) increasing the labor cost of such construction. On the other hand, recognition of a helper category where it is not common or prevailing area practice could defeat the purposes of the act, (i.e., allowing contractors to fragment tasks so that low-skilled, low-wage helpers could be employed instead of laborers and craft workers) resulting in a downward wage spiral. Further, some

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[20] A distinction needs to be made between *labor costs* and *project costs*. Higher labor costs could result in lower project costs if more efficient and more skilled workers are employed. But, as a practical matter, to what extent are actual project costs governed by the requirements of the Davis-Bacon Act? Might they reflect the manner of federal agency oversight and monitoring of the progress of the work? Is federal construction work supervised as closely as that of the private sector? What might be the impact of other federal requirements: style of construction/architecture, especially for ceremonial buildings? Is cost impacted by various "set asides" for sheltered contractors — small and minority business and the like? For an example of the problems private research involves, see Martha Norby Fraundorf, with John P. Farrell, and Robert Mason, *Effect of the Davis-Bacon Act on Construction Costs in Non-metropolitan Areas of the United States* (Corvallis: Oregon State University), Jan. 1982.

[21] For general background, see Herbert R. Northrup, "The "helper" Controversy in the Construction Industry," *Journal of Labor Research*, fall 1992, pp. 421-435.

argue, employment of helpers would undercut apprenticeship programs with a generally deleterious impact upon skills transfer.

Several questions are immediately apparent: (a) Are helpers commonly employed in the area of the projected construction? (b) Is a clear distinction made between a "helper" and a "laborer" or other craft workers? (c) What is the technical distinction in terms of actual work performed between such groups of workers? Upon what is that distinction based? (d) What might be the economic impact of the recognition and utilization of a distinct category of "helpers" on Davis-Bacon covered projects? Such questions have remained a part of the debate over the helper issue through more than two decades and, with the dawn of the 21st century, they remain largely unresolved. The position of DOL on the issue has varied over time.

Efforts to Revise the "Helper" Requirement. Through the years, helpers have been employed on Davis-Bacon construction where their use was common in the area of the projected work and where they were clearly distinguished from "laborers" and from skilled craft workers. However, such use of helpers appears to have been infrequent. During the late 1970s, the Carter Administration opened the general issue of Davis-Bacon implementation for debate and public comment. Seizing the opportunity, industry urged a closer adherence to area practice when establishing worker classifications — "especially 'helper' classifications."[22] But before new Davis-Bacon regulations could be given effect, President Carter was replaced in office by President Reagan — regulations proposed by the former Administration were withdrawn and their substance reconsidered.

New Davis-Bacon regulations, proposed by the Reagan Administration in May 1982, redefined the concept of helper and, potentially, expanded their use: this change was applauded by industry and objected to by the building trades unions.[23] Litigation followed. In order to circumvent objections raised by the courts, DOL redrafted the helper regulations. In January 1989, during the Bush Administration, the courts acquiesced in the judgment of the Department and cleared the regulations for implementation. At that juncture, Congress objected, refusing to appropriate funds for implementation and enforcement of the regulation. This restraint continued into the 1990s, disappearing during fiscal 1996. Then, another impediment was raised: DOL, under the Clinton Administration, declined to act.

In June 1996, the Associated Builders and Contractors brought a suit to require DOL to enforce its helper regulations. DOL responded quickly and, in late July, Assistant Secretary Bernard Anderson affirmed that the helper regulation (approved, but still suspended) was "simply ... non-administratable." Anderson explained that the distinction between helpers and other workers in terms of their role and duties was insufficiently clear, and that DOL had no intention of implementing the regulation in its current form.[24] In a *Federal Register* notice of August 2, 1996, DOL noted that during the 14 years that had passed since the regulation was first

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[22] *The Constructor*, Dec. 1980, p. 61.

[23] *Federal Register*, May 28, 1982, p. 23644 ff.

[24] Bureau of National Affairs, *Daily Labor Report*, July 29, 1996, pp. A9-A10.

published, "additional information has become available which warrants review of the suspended rule." Therefore, the regulation remained in abeyance while DOL engaged "in substantive rulemaking" on the issue.[25]

Through the next five months, DOL reassessed the data and, in December 1996, it announced that the helper regulation would remain suspended "until the Department either (1) issues a final rule amending (and superseding) the suspended helper regulations; or (2) determines that no further rulemaking is appropriate, and issues a final rule reinstating the suspended regulations."[26] In July 1997, the U.S. District Court for the District of Columbia ruled that the Department was within its rights to issue an indefinite suspension of the helper regulation.[27] Then, in April 1999, DOL issued a new proposed rule that would, essentially, reaffirm the *status quo* prior to the Carter Administration initiatives of the late 1970s — two decades earlier.[28] Thus, the use of helpers would be limited to demonstrated common area practice where they were clearly differentiated from "laborers" and other craft workers. Under the proposed rule, their use could be expected to be infrequent.

Another Look from the Congress. Late in the 105th Congress, Representative Charlie Norwood (R-GA) introduced legislation that would have created a special category of workers (i.e., "helpers") for Davis-Bacon purposes, but no action was taken on the proposal. Early in the 106th Congress (in March 1999), the Congressman introduced new legislation that would have established a separate helper classification under the Davis-Bacon Act. On July 21, 1999, the House Subcommittee on Oversight and Investigations, Committee on Education and the Workforce, conducted a general hearing on the impact of Davis-Bacon helper rules for job opportunities in the construction industry. The Subcommittee, however, took no further action: the Norwood bill was not reported.

The "helper" issue also arose during committee consideration of the Labor, Health and Human Services, and Education Appropriations for FY2000. In that instance, Representative Anne Northup (R-KY) raised objection to the helper regulation that DOL had proposed in April 1999. At the Congresswoman's request, language was added during mark-up that would have denied funding "to implement, administer, or enforce" the helper rule proposed by the Clinton Administration. However, through the legislative process, the provision was dropped. What impact its inclusion would have had may not have been entirely clear since, in essence, it would have codified *existing practice*.

As the 106th Congress was drawing to a close, DOL issued a new final regulation governing the use of helpers. It was dated November 14, 2000, and was set to take effect 60 days after its publication in the *Federal Register* — just hours prior to the end of the Clinton Administration. The regulation provides that helpers

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[25] *Federal Register,* Aug. 2, 1996, p. 40367; and Bureau of National Affairs, *Daily Labor Report,* Aug. 1, 1996, pp. A2-A3.

[26] *Federal Register,* Dec. 30, 1996, p. 68646.

[27] Bureau of National Affairs, *Daily Labor Report,* Aug.4, 1997, pp. A10-A11.

[28] *Federal Register,* Apr. 9, 1999, pp. 17442-17458.

will be recognized as a "distinct classification ... only where" the following conditions occur:

> (i) The duties of the helper are clearly defined and distinct from those of any other classification on the wage determination;
> (ii) The use of such helpers is an established prevailing practice in the area; and
> (iii) The helper is not employed as a trainee in an informal training program.

The work of a "helper" is not to be performed by any other classification of worker "in the wage determination."[29]

While this final regulation from the Clinton Administration has now gone into effect, it may not be the end of the process. On the one hand, the Department could, at its discretion, reevaluate the "helper" question and issue a new proposed rule. Or, conversely, Congress could attempt to resolve the issue through new legislation.

On May 23, 2001, Representative Norwood introduced legislation that, had it been passed, would have redefined the concept of "helper" and would have permitted the use of "helpers" on Davis-Bacon projects. The bill was referred to the Subcommittee on Workforce Protections where it remained at the close of the 107th Congress.

Initiatives of the 108th Congress. In the 108th Congress, the "helper" issue was raised again by Representative Marsha Blackburn (R-TN) with the introduction of new legislation. The Blackburn bill would (a) mandate recognition, for wage rate determination purposes, of *helpers* as a separate workforce classification, and (b) require that a helper "be paid the prevailing wage of helpers ... employed on projects which are of a character similar to the project on which the helper is employed" in the locality "in which the helper is employed." The bill continues:

> ... the term "helper" means a semi-skilled worker (other than a skilled journeyman mechanic) who —
> (1) works under the direction of and assists a journeyman;
> (2) under the journeyman's direction and supervision, performs a variety of duties to assist the journeyman, such as preparing, carrying, and furnishing materials, tools, equipment, and supplies, maintaining them in order, cleaning and preparing work areas, lifting, positioning, and holding materials or tools, and other related semi-skilled tasks as directed by the journeyman; and
> (3) may use tools of the trade at and under the direction and supervision of the journeyman.

The Blackburn bill was referred to the Committee on Education and the Workforce and to the Subcommittee on Workforce Protections where it died at the close of the 108th Congress.

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[29] Bureau of National Affairs, *Daily Labor Review*, Nov. 20, 2000, pp. E1 forward. For a more detailed discussion of this issue, see also CRS Report 96-228, *Davis-Bacon: Employment of Helpers on Federal Contract Construction*, by William G. Whittaker.

Initiatives of the 109th Congress. On September 27, 2005, Representative Blackburn (with Mr. Norwood as a co-sponsor) introduced H.R. 3907, the "Helpers Job Opportunity Act." The bill, essentially the same as the Blackburn bill of the 108th Congress, was referred to the House Committee on Education and the Workforce and, on November 7, 2005, was referred to the Subcommittee on Workforce Protections.

The "Site of the Work" Coverage Issue

The initial Davis-Bacon Act of 1931 was a relatively simple statute; but, with experience, the statute was modified. In 1935, new language was added to provide that the act's prevailing wage requirements should apply to "the contractor or his subcontractor" and to "all mechanics and laborers employed directly upon the site of the work."[30]

Through the years, with implementation of the act, questions have arisen with respect to this seemingly uncomplicated provision. For example, what is the "site of the work" and how is "directly" to be defined? By whom must the workers in question be employed? These concepts have changed over time with altered technology and industry practice. But, rather than being quietly resolved, the "site of the work" issue would become a subject of administrative review and, ultimately, of litigation.[31] Rulemaking in this area would continue until near the close of the Clinton Administration late in 2000. Litigation would be extensive.

Questions of Interpretation. Differences in the interpretation of the "site of the work" are numerous. For example, given the specific wording of the statute, if workers engaged in the construction of a building (working on the structure itself) were covered by Davis-Bacon, would workers in *an adjoining space* mixing mortar, etc., be similarly covered? How far removed from the actual structure could such work take place and still be regarded as "directly upon the site of the work?" Where some assembly of components is undertaken in a holding area *down the street a little way*, would workers engaged in such assembly be regarded as employed "directly upon the site of the work" for Davis-Bacon coverage purposes? If prefabricated units to be used at a construction site in Alaska were assembled at a site in Seattle (a *thousand miles* away), would the Seattle workshop be considered part of the site of the work?

As one begins to apply the statute, questions multiply. For example, one might use the case noted above. Is the site in Seattle owned by the firm operating in Alaska? Are the employees, engaged in the work in Seattle, direct employees of the Alaska firm? Is the Seattle site *dedicated solely* to the Alaska project? Or, is the work in Seattle being performed by a manufacturing plant that makes and sells components to any construction firm engaging in work, public or private? Are the

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[30] P.L. 74-403. The provision remains a part of the statute.

[31] See, for example, *Building and Construction Trades Department, AFL-CIO* v. *United States Department of Labor Wage Appeals Board*, 932 F. 2d 985 (D.C. Cir. 1991) (*Midway*); *Ball, Ball and Brosamer* v. *Reich*, 24 F. 3d 1447 (D.C. Cir. 1994); and *L. P. Cavett Company* v. *U.S. Department of Labor*, 101 F. 3rd 1111 (6th Cir. 1996).

components, thus, purchased in the open market? Or, are they developed and fabricated under a specific federal contract? When do the fabricated goods change ownership — from the manufacturer to the construction firm? Are they installed by workers employed by the construction firm or by employees of the manufacturer? And, if the latter, would these non-construction workers (installers) be Davis-Bacon covered?[32] Was the support facility created solely to serve the federal project (did it have prior existence) and will it, likely, close when the federal project is completed?

If a contractor, engaged in work covered by Davis-Bacon, has concrete hauled to the construction site (the permanent location of the structure, in this instance), how are the drivers hauling the concrete to be treated? Does it matter by whom the drivers are employed? Or, how long they are directly involved on the construction site (however defined) as opposed to actual hours spent driving? If the construction contractor sets up a separate firm to haul material, would this device insulate the drivers from Davis-Bacon coverage?

Such questions may seem tedious, but they have been, through decades, the subject of rulings from the Comptroller General and a focus of litigation and/or of appeals through the hierarchy of DOL. Among federal contracting agencies, there has not always been agreement on these matters. They have also been a focus of attention for those who wish to extend Davis-Bacon coverage broadly — and for those who favor a narrower application of the act. DOL has sought to deal with these issues through the regulatory process (and continues to do so) but with mixed results. Even precise judicial rulings have been insufficient to prevent partisans from finding nuances of meaning, either in the statute or in the regulations, from which further litigation might blossom.[33]

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[32] Several options could come into play. The components in this hypothetical case could be off-the-shelf purchases in which federal labor standards requirements may not be an issue. They could be contract purchases of goods, covered by the Walsh-Healey Public Contracts Act rather than the Davis-Bacon Act. Or, if purchased from the manufacturer and installed by employees of the manufacturer, the work could be regarded as an adjunct to the purchase of the goods (possibly Walsh-Healey covered) or part of a service contract covered under the McNamara-O'Hara Service Contract Act. The particular circumstances, likely different in each case, would seem to be determinative. These issues were the subject of extensive hearings during the early 1960s with respect to missile site development. See U.S. Congress, House Committee on Education and Labor, Special Subcommittee on Labor, *Administration of the Davis-Bacon Act*, hearings, 87th Cong., 2nd sess., Part 1, June 6, 1962 ff (Washington: GPO, 1962); and, U.S. Congress, Senate Committee on Government Operations, Permanent Subcommittee on Investigations, *Work Stoppage at Missile Bases*, hearings, 87th Cong., 1st sess., Parts 1 and 2, Apr. 25, 1961 ff (Washington: GPO, 1961). More generally, see CRS Report RL32086, *Federal Contract Labor Standards Statutes: An Overview*, by William G. Whittaker.

[33] Concerning recent litigation, see the following, all authored by William A. Isokait: "Davis-Bacon Developments after *Midway Excavators*," *The Constructor*, July 1991, pp. 100-102; "What *Midway Excavators* Means for Federal Construction Contractors," *The Constructor*, Aug. 1992, pp. 27-29; and "Anatomy of a Victory: Reason Restored, Courts Rule Davis-Bacon Act Language Means What It Says," *The Constructor*, Aug. 1994, pp. 20-22.

A New Rule Is Issued. On September 21, 2000, DOL published in the *Federal Register* a proposed rule redefining the concept of "site of the work" and calling for public comment through October 23, 2000. Under the proposed regulation, "site of the work" would be defined to include, in addition to the common concept of a construction site, "... any other site where a significant portion of the building or work is constructed, *provided* that such site is established specifically for the performance of the contract or project." This would include, further, "job headquarters, tool yards, batch plants, borrow pits, etc.," where they are "dedicated exclusively, or nearly so" to the performance of the contract and are "adjacent or virtually adjacent to" the site of work. It *would not include* "permanent home offices, branch plant establishments, fabrication plants, tool yards, etc.," the existence of which is not dependent upon the federal or federally-assisted project. Pre-established facilities (those extant prior to opening of project bids) are not to be regarded as part of the site of the work.[34]

The proposed rule was opposed by certain construction industry groups but supported by the building trades unions.[35] On December 20, 2000, DOL published the final rule in the *Federal Register*. Unchanged (in this respect) from the proposed rule, it took effect on January 19, 2001.[36] But, like the "helper" case, the issue of the "site of the work" could be addressed further through departmental rulemaking, through legislation — neither one a simple task — or through further litigation.

The Clean Water Act and Prevailing Wage

In 1961, Congress passed federal water quality legislation that would emerge as what is now popularly known as the Clean Water Act (CWA). Included in the 1961 legislation was a provision applying Davis-Bacon prevailing wage requirements to construction of sewage treatment facilities where there was a federal involvement (i.e., direct federal assistance), notably through grants to the states.

An Altered Requirement? In 1987, Congress shifted its focus. Rather than continuing with a program of direct federal funding (grants) of such construction, it established a structure of state revolving loan funds (SRFs), about 80% federally funded with 20% non-federal matching funds. Congress expected that, by FY1995, the SRFs would provide a continuing source of financing for pollution abatement and that the federal role (further appropriations) would end. In authorizing legislation (1987), Congress mandated Davis-Bacon coverage for such work commenced prior to FY1995.

Things did not work out as anticipated, however. *First*, the SRFs did not provide an adequate source of funding for pollution abatement work. *Second*, Congress continued to fund this work — though channeling much its support through the SRFs. *Third*, because of a series of unrelated environmental controversies (for

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[34] Bureau of National Affairs, *Daily Labor Report*, Sept. 21, 2000, pp. A8-A9; and *Federal Register*, Sept. 21, 2000, pp. 57269-57276.

[35] Bureau of National Affairs, *Daily Labor Report*, Oct. 26, 2000, pp. C1 forward.

[36] *Federal Register*, Dec. 20, 2000, pp. 80268-80278.

example, a dispute concerning the environmental approach to *wetlands*), no new authorizing legislation was adopted after 1987. *However*, Congress continued to appropriate funds for the CWA and the SRF program continued.

Thus, a question arose. If the abatement program remained federal in terms of funding and priorities (notwithstanding the absence of authorizing legislation), should the statutorily mandated administrative requirements of that program — including the prevailing wage requirement — remain in place? In 1995, the Environmental Protection Agency (EPA) declared that Davis-Bacon would no longer apply to SRF-related construction: that the requirement (but not the funding) had terminated at the end of the period covered by the 1987 authorization (i.e., by FY1995). Thereafter, agencies involved in such work would be permitted to pay contract construction workers *less than* the locally prevailing wage (the market permitting) and to avoid any other perceived disadvantages associated with Davis-Bacon coverage.

The Building and Construction Trades Department of the AFL-CIO, or BCTD, protested and, following extended negotiation, EPA changed its position. In May 2000, it proposed a "settlement agreement" under which Davis-Bacon would once more apply to certain CWA/SRF construction and, in an announcement published in the *Federal Register* of June 22, 2000, called for comment. Comment was sharply divided: some industry groups and local governmental entities (users of construction labor) urged that Davis-Bacon not apply — and, for the most part, argued that EPA was moving beyond its statutory authority in attempting to reinstate that requirement. The BCTD, conversely, held that Davis-Bacon *did* apply and, ultimately with the concurrence of EPA, that the environmental agency was statutorily bound to enforce the prevailing wage requirement. In the *Federal Register* of January 25, 2001, EPA decided that Davis-Bacon did (and should) apply and would be applied effective on July 1, 2001. Subsequently, EPA moved the effective date back to September 1, 2001 — and then to October 1, 2001. The situation then became somewhat ambiguous.[37]

Consideration During the 107th Congress. Debate on the Davis-Bacon provision of the Clean Water Act continued into the 107th Congress as the House and Senate commenced consideration of new clean water legislation. In each instance, the prevailing wage provision was a relatively minor — *though contentious* — part of an otherwise comprehensive legislative package. The committees in the House and Senate proceeded independently — though they covered much of the same ground.

Senate Action. On February 26 and 28, 2002, hearings were conducted in the Senate by Subcommittees of the Committee on Environment and Public Works. Two proposals were under consideration. S. 252 was presented by Senator George Voinovich (R-OH) that, *inter alia*, would have deleted certain of the administrative requirements of the 1987 CWA legislation but would have left the Davis-Bacon

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[37] For a more extended sketch of this issue, see CRS Report RL31491, *Davis-Bacon Act Coverage and the State Revolving Fund Program under the Clean Water Act*, by William G. Whittaker.

requirement in place. S. 1961, introduced by Senators James Jeffords (I-VT) and Bob Graham (D-FL), was silent on the Davis-Bacon issue.

As the Committee moved forward with the CWA legislation, the Davis-Bacon issue became a focus of attention — and remained so during full Committee mark-up in May 2002. An amendment, proposed by Senator Harry Reid (D-NV), resulted in applying Davis-Bacon coverage to all CWA and Safe Drinking Water SRFs.[38] According to the *National Journal*, Senator Robert Smith (R-NH) argued that the amendment might be self-defeating. "If Davis-Bacon is added to this bill," Smith predicted, "it'll be dead as a mackerel ... dead, dead, dead!"[39] The bill was reported on July 29, 2002, with the Davis-Bacon requirement, but it died at the close of the 107th Congress.

House Action. In the House, a somewhat different bill (H.R. 3930) was introduced by Representative John Duncan (R-TN). The Duncan bill, in eliminating certain administrative requirements, also deleted Davis-Bacon coverage.

During mark-up by the Committee on Transportation and Infrastructure on March 20, 2002, Representatives Sue Kelly (R-NY), Ellen Tauscher (D-CA) and Peter DeFazio (D-OR) proposed an amendment restoring the Davis-Bacon requirement and making it apply to SRFs — including recycled funds.[40] The amendment was approved and the bill, as amended, was ordered to be reported (March 20, 2002).[41]

The result, it appears, was a stalemate. According to the *Daily Labor Report*, House Majority Leader Richard Armey (R-TX) declared that he "will not allow a bill to authorize appropriations for state water pollution control projects to come to the House floor because of a Davis-Bacon Act amendment included in the measure." At the same time, House Transportation and Infrastructure Committee Chairman Don

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[38] U.S. Congress, Senate Committee on Environment and Public Works, *Water Investment Act of 2002*, report to accompany S. 1961, S.Rept. 107-228, 107th Cong., 2nd sess. (Washington: GPO, 2002), p. 45. (Hereafter cited as Senate Committee on Environment and Public Works, *Water Investment Act of 2002*.) The *Daily Labor Report*, May 20, 2002, p. A10, stated that under the Reid amendment to S. 1961, the prevailing wage requirements "would apply to second and subsequent rounds of funding" for projects under the legislation.

[39] David Hell, "Environment Panel Slogging Ahead on $35 Billion Water Quality Bill," *National Journal*, May 16, 2002.

[40] CRS Report RL31683, *Clean Water Act: A Review of Issues and Legislation in the 107th Congress*, by Claudia Copeland, p. 7. Representative Michael Rogers (R-MI) proposed an amendment to weaken the Kelly-Tauscher-DeFazio amendment, as reported by the *National Journal*, on the ground that the stronger language, according to "'a leadership office'" would "'stop the bill.'" The *National Journal* further stated: "Young replied that he would be 'surprised' if the bill were stalled, and Rogers' amendment was defeated on another voice vote." Michael Steel, "$20 Billion Loan Fund Approved for Wastewater Projects," *National Journal News Service*, Mar. 20, 2002.

[41] H.R. 3930 was also referred to the Committee on Ways and Means and reported on Apr. 17, 2002.

Young (R-AK) was said to have "pledged that no legislation would be reported out of his committee without Davis-Bacon coverage."[42] No further action had been taken on H.R. 3930 by the close of the 107th Congress.

Consideration in the 108th Congress. With the opening of the 108th Congress (January 7, 2003), Representative Kelly of New York introduced new Clean Water Act legislation (H.R. 20) which, among its other provisions, affirmed Davis-Bacon coverage for SRF projects. In April, an alternative proposal, the "Water Quality Financing Act of 2003" (H.R. 1560) was introduced by Representative Duncan of Tennessee — a bill that was silent on the prevailing wage issue. Hearings were held on June 19 by the Subcommittee on Water Resources and Environment and, on July 17, 2003, the Duncan bill was unanimously approved and sent on to the full Committee on Transportation and Infrastructure.[43] Representative Kelly, with the Committee's ranking Democrat, Representative Jerry Costello of Illinois, reportedly indicated that they would reintroduce the Davis-Bacon issue in full Committee.[44]

Meanwhile, in the Senate, two bills were introduced that dealt with clean water and safe drinking water: S. 170 (Voinovich) and S. 2550 (Crapo). The Voinovich bill was silent on the issue of Davis-Bacon, as was, initially, S. 2550. However, a Davis-Bacon provision was added to S. 2550 and, although reported, the bill languished.

Ultimately, collateral controversies (largely, debate over the Davis-Bacon Act) proved too strong for either the House or Senate bills. Each of these bills, to authorize appropriations, died at the close of the 108th Congress.

Consideration in the 109th Congress. Early in the 109th Congress, legislation was introduced that would modify the CWA State Revolving Fund program. Two bills addressed the issue of Davis-Bacon coverage.

H.R. 2684, sponsored by Representative Kelly (with Representative Tauscher), was introduced on May 26, 2005. Referred to the Committee on Transportation and Infrastructure, the measure proposed, under the *capitalization grants agreements*, to require that "section 513 of this Act" (the Davis-Bacon provision) be implemented in the same manner "as treatment works constructed with assistance under title II…."[45] The bill, to authorize appropriations, was assigned (May 27) to the Subcommittee on Water Resources and Environment.

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[42] *Daily Labor Report*, Apr. 18, 2002, p. A7.

[43] U.S. Congress, House Committee on Transportation and Infrastructure, "Water Quality Financing Act of 2003 Unanimously Approved by House Subcommittee," press release, July 17, 2003.

[44] See Juliana Gruenwald, "House Subcommittee Boosts Wastewater Treatment Loan Program," *National Journal*, July 17, 2003; and Kathryn A. Wolfe, "Subcommittee Endorses Water Development Bills," *CQ.com*, July 17, 2003.

[45] See Section 3(a) of H.R. 2684.

S. 1400, sponsored by Senator Lincoln Chafee (R-RI), was introduced on July 14, 2005, and was referred to the Senate Committee on Environment and Public Works. On July 20, 2005, the Committee met and favorably reported the bill. During mark-up, Senators Joseph Lieberman (D-CN), Barbara Boxer (D-CA), and Barack Obama (D-IL) proposed an amendment requiring that Davis-Bacon prevailing wage requirements be imposed "on projects funded by the Clean Water Act State revolving loan fund." The amendment was approved on a voice vote. "The bill, as amended, was ordered favorably reported by unanimous consent." [46] The Chafee bill, to authorize appropriations, was placed on the Senate Legislative Calendar under General Orders, Calendar No. 304.[47]

Modernization of America's Railroads

Upgrading of America's rail transportation system has been a continuing concern of the Congress. Here, the question has emerged: Should track and construction workers fall under the Davis-Bacon Act?

Through the 107th Congress. H.R. 1020 was introduced by Representative Jack Quinn on March 14, 2001. The bill would, among other things, have directed the Secretary of Transportation to "establish a program of capital grants for the rehabilitation, preservation, or improvement of railroad track." Companion legislation, S. 1220, was introduced by Senator John Breaux (D-LA) on July 23, 2001.

H.R. 1020 was referred to the Committee on Transportation and Infrastructure. Following hearings, it was marked up and reported — and, on June 12, 2001, placed on the Union Calendar. It would have required, *inter alia*, that "laborers and mechanics employed by contractors and subcontractors in construction work," financed under the legislation, "be paid wages not less than those prevailing on similar construction in the locality" (i.e., the Davis-Bacon requirement). And, further, that "The Secretary [of Transportation] shall make a grant under this section only after being assured that required labor standards will be maintained on the construction work."[48]

S. 1220, which was referred to the Committee on Commerce, Science, and Transportation, contained parallel language with respect to Davis-Bacon coverage.

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[46] U.S. Congress, Senate, *Water Infrastructure Financing Act, Report To Accompany S. 1400*, 109th Cong. 1st Sess., S.Rept. 109-l86, Dec. 8, 2005, p. 33. Subsequently, the report noted: "An amendment offered by Senators Lieberman, Boxer and Obama to impose Davis-Bacon prevailing wage requirements on projects funded by the Safe Drinking Water Act State revolving loan fund was approved by voice vote." See also pp. 15 and 25.

[47] Concerning the Clean Water Act and the Safe Drinking Water Act, see CRS Report RL33465, *Clean Water Act Issues in the 109th Congress* by Claudia Copeland; and CRS Report RL33549, *Safe Drinking Water Act: Issues in the 109th Congress*, by Mary Tieman.

[48] U.S. Congress, House Committee on Transportation and Infrastructure, *Railroad Track Modernization Act of 2001*, report to accompany H.R. 1020, 107th Cong., 1st sess., H.Rept. 107-96 (Washington, GPO, June 12, 2001), pp. 2 and 11.

On August 1, 2002, S. 1220 was reported from Committee.[49] Both bills died at the close of the 107th Congress.

In the 108th Congress. On January 15, 2003, Senator Ernest Hollings (D-SC) introduced S. 104, the "National Defense Rail Act." The bill directed that an assessment be made of security risks associated with rail transportation and that the Secretary of Transportation make certain upgrades in existing rail infrastructure. "It is critical," the Senator affirmed, that the Senate adopt this legislation in order "to ensure that our railroads are secure and we have adequate investment in both Amtrak and the development of high speed rail corridors...."[50] A companion bill, H.R. 2726, was introduced in the House by Representative Julia Carson (D-IN) on July 15, 2003.

The Hollings/Carson bills, like the Quinn/Breaux bills of the prior Congress, each contained a Davis-Bacon requirement. No immediate action was taken on either bill, and each died at the close of the 108th Congress.

In the 109th Congress. On June 20, 2005, Representative Robert Menendez (D-NY), with others, introduced the "True Reinvestment for Amtrak Infrastructure in the 21st Century Act." The Menendez bill included a Davis-Bacon provision.

The bill was referred jointly to the Committee on Transportation and Infrastructure and to the Committee on Ways and Means. It has since been referred to the Subcommittee on Railroads.[51]

Other Davis-Bacon Legislative Issues of the 109th Congress

Program legislation that has a construction component often includes a Davis-Bacon prevailing wage provision — even though the legislation would not, ordinarily, be regarded as a labor bill. Several such bills are listed below.

Child Care Construction and Renovation Act

On February 25, 2003, in the 108th Congress, Representative Carolyn McCarthy (D-NY) introduced H.R. 895, the *Child Care Construction and Renovation Act*. The bill, which authorized various programs to assist in the development and/or renovation of child care facilities, included a provision applying the Davis-Bacon Act

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[49] U.S. Congress, Senate Committee on Commerce, Science, and Transportation, *Railroad Track Modernization Act of 2002,* report to accompany S. 1220, 107th Cong., 2nd sess., S.Rept. 107-238 (Washington, GPO, Aug. 1, 2002), pp. 7, 10-11.

[50] *Congressional Record,* Jan. 7, 2003, p. S80.

[51] Representative Menendez has moved on to the Senate. His initial co-sponsors, Representatives Jerrold Nadler (D-NY) and Allyson Schwartz (D-PA), remain in the House.

"to actions taken under this Act." The bill was referred to the Committee on Financial Services and to the Subcommittee on Housing and Community Opportunity. No action was taken on the McCarthy proposal.

In the 109th Congress, on March 15, 2005, Representative McCarthy reintroduced the measure (H.R. 1311) in essentially the same form. Once more, it includes a Davis-Bacon provision. The bill was referred to the House Committee on Financial Services and to the Subcommittee on Housing and Community Opportunity.

Investing for Tomorrow's Schools

Under the General Education Provisions Act (20 U.S.C. 1232(b)), it is provided that "all laborers and mechanics employed by contractors or subcontractors on all construction and minor remodeling projects ... shall be paid wages at rates not less than those prevailing" on similar work in the same area as provided under the Davis-Bacon Act. Even this broad language, however, may not have placed Davis-Bacon coverage, in all instances, beyond challenge. Proponents have put forth more specific language in subsequent legislation to ensure Davis-Bacon coverage.

On November 18, 2005, Senator Hillary Rodham Clinton introduced S. 2057, the *Investing for Tomorrow's Schools Act of 2005*, allowing the Secretary of Education to enter into cooperative agreements with the states to establish infrastructure banks (and, similarly, multi-state banks) to allow the states "to construct, reconstruct, or renovate" certain elementary and secondary schools and public libraries. The *banks* are to be revolving funds, to which not less than 25 percent of the cost will be from non-federal funds — and would require the Davis-Bacon Act with respect to workers engaged for such purposes. The bill was referred to the Senate Committee on Health, Education Labor, and Pensions.

On September 6, 2006, Representative Major Owens introduced H.R. 6028, a bill to amend the Elementary and Secondary Education Act of 1965, and to provide grants to improve the infrastructure of elementary and secondary schools. The purpose of the bill is "to finance the costs associated with the construction, repair, and modernization for information technology of school facilities within their jurisdictions." In carrying out the purposes of the act, the Secretary will (a) consider the threat posed by the current plant "to the safety and well-being of students," (b) the "demonstrated need," (c) the "age of the facility to be renovated," (d) whether the institution is eligible to receive funding under the National Education Technology Funding Corporation under certain circumstances, and (e) the requirements of "preparation for modern technology."

Under the Owens bill, the Secretary "shall take such action as may be necessary to ensure that all laborers and mechanics employed by contractors or subcontractors on any project assisted under this title ... shall be paid wages at rates not less than those prevailing on the same type of work on similar construction in the immediate locality as determined" by the Secretary in accordance with the Davis-Bacon Act. However, legitimate volunteers "not otherwise employed at any time in the construction of such project" may donate their services in order to reduce the costs

of such construction. The Owens bill was referred to the Subcommittee on Education Reform.

The Public Health Service and Davis-Bacon

On June 7, 2006, Representative Gene Green introduced H.R. 5545, a bill that would require the Secretary of Health and Human Services to "require that each entity that applies to the National Institutes of Health or any component thereof for a loan, loan guarantee, grant, contract, or cooperative agreement for any project shall include in its application reasonable assurance that all laborers and mechanics employed by contractors or subcontractors" in the performance of the work will be paid wages "at rates not less than those prevailing on similar work in the locality," as determined by the Secretary of Labor in accordance with the Davis-Bacon Act.

The Green bill was jointly referred to the Committee on Energy and Commerce and to the House Education and the Workforce Committee, Subcommittee on Workforce Protections.

The Davis-Bacon Enforcement Act

On November 15, 2005, Representative Robert E. Andrews (D-NJ) introduced H.R. 4329, the *Davis-Bacon Enforcement Act of 2005*. The measure provides that any contractor, under a contract with the United States, who has "engaged in a pattern of violations of this Act [Davis-Bacon]" shall be "ineligible to receive a contract with the United Stats for a 10-year period" — unless the contractor is able to show "that such violations were not intentional but were the result of simple and unsystematic errors." Under the act, disclosure of certain employee information would also be required.

The Andrews proposal was referred jointly to the House Committee on Education and the Workforce (Subcommittee on Workforce Protections), and to the House Government Reform Committee.

To Repeal the Davis-Bacon Act

On December 18, 2005, Representative Steve King (R-IA) introduced H.R. 4643, the *Davis-Bacon Repeal Act.* The purpose of the measure would be to repeal the Davis-Bacon Act.

The King bill was referred to the House Committee on Education and the Workforce and to the Subcommittee on Workforce protections.

The Davis-Bacon Suspension of 2005

Under the Davis-Bacon Act of 1931, the President was allowed to suspend the statute during a period of national emergency. The provision, with some slight variation, remains currently within the act. The concept of a *national emergency*, however, has not been defined.

The act has been suspended on four separate occasions. (1) In 1934, President Franklin Roosevelt suspended the act for what may have been administrative convenience associated with New Deal legislation. It was restored in about 30 days with few people, seemingly, having been aware of the suspension. (2) In 1971, President Richard Nixon suspended the act as part of a campaign intended to quell inflationary pressures that affected the construction industry. In just over four weeks, the act was reinstated, the President moving on to different approaches to the inflationary problem. (3) In 1992, in the wake of Hurricanes Andrew and Iniki, President George H. W. Bush suspended the act in order to render reconstruction and cleanup in Florida and the Gulf Coast and in Hawaii more efficient. The impact of the suspension is unclear for the act was suspended on October 14, 1992, just days prior to the 1992 election. President William Clinton won the election and restored the act on March 6, 1993. (4) On September 8, 2005, President George W. Bush suspended the act in order to render more efficient reconstruction and cleanup of Florida and the Gulf Coast in the wake of Hurricane Katrina. The act was reinstated on November 8, 2005.

In 1934 and 1971, the suspensions applied to the entire country — possibly with the understanding that they would be restored once the immediate *emergency* was over. In 1992 and in 2005, only portions of the country were involved.[52]

At the time of the 2005 suspension of the Davis-Bacon Act, a number of bills were introduced that would have affected the act in one manner or another. Among them are the following: H.J.Res 69 (George Miller), H.Res. 467 (George Miller), H.Res. 488 (LaTourette), H.Res. 516 (Melancon), H.R. 3684 (Flake), H.R. 3763 (George Miller), H.R. 3834 (Pallone), S. 1749 (Kennedy), S. 1763 (Boxer), S. 1817 (DeMint), and S. 1925 (Kennedy). None of these bills was enacted. The suspension came to an end on November 8, 2005.

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[52] For an account of the 2005 suspension, see CRS Report RL33100, *The Davis-Bacon Act: Suspension*, by William G. Whittaker.