The Davis-Bacon Act: Issues and Legislation During the 110th Congress

(name redacted)

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Summary

In 1931, following several years of intermittent hearings and, ultimately, encouragement from the Hoover Administration, Congress adopted the Davis-Bacon Act (now, 40 U.S.C. 3141-3148). The act, as amended, requires that workers employed on public buildings and public works of the federal government and of the District of Columbia must be paid at least the locally prevailing wage as determined by the Secretary of Labor. Initially, the act applied to construction in excess of $5,000; but, in 1935, the act was amended to render its terms applicable to projects of $2,000 and above.

With the passage of time, the act was added to a series of individual public works statutes—perhaps more than fifty, depending upon one's count. As each of these statutes came up for renewed funding, the Davis-Bacon provision became a subject of dispute; and, by the 1960s, such disputes became both numerous and contentious. Some have suggested that the act, having long outlived its Depression-era origins, should be repealed. Others have argued that the act is as important today as it was in the 1930s and that it should be applied more generally and routinely.

Through the past decades, application of Davis-Bacon to the Clean Water Act (State Revolving Funds) has posed a serious problem and, with other concerns, has impeded authorization of funding for covered projects. (See H.R. 720.) The battle for (or against) Davis-Bacon has been fought out in other sectors as well: for example, see Homeland Security (H.R. 2638) and the energy independence bill (H.R. 6). Even the Farm, Nutrition, and Bioenergy Act of 2007 (H.R. 2419) contains a Davis-Bacon provision. (As part of that program, a series of biorefineries and biofuel production facilities would be constructed; and, if so, construction workers on such plants can expect to be paid at least locally prevailing wages.) See also the HOPE VI housing renovation and restoration act (H.R. 3524), the Indian health care amendments of 2007 (H.R. 1328, S. 1200), and construction of educational facilities (H.R. 2470, H.R. 3021, H.R. 5401, S. 912, and others).

Other construction-related proposals currently before Congress contain Davis-Bacon requirements. See, for example, H.R. 3074 (the Department of Transportation and related agencies appropriations bill) and H.R. 3161 (the Agriculture and Rural Development appropriations bill).

This report, essentially a tracking document, will be updated as developments warrant. It reviews the origins and evolution of Davis-Bacon, suggests what is (and may not be) known about the act's impact, and reviews current legislative initiatives that involve the act. Though it may not review all Davis-Bacon proposals of the 110th Congress, it does provide some measure of the give-and-take on the legislative front.

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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 and 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 been more or less continuous 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 urge that the prevailing wage statute is as important now as in the 1930s. Others contend that the requirement should be set aside in order to stretch construction dollars by permitting payment of less than prevailing rates. Frequently, Davis-Bacon (or the prevailing rate question) has been contested within the context of program statutes in which wages were not the central focus of debate but that were, nonetheless, of considerable importance to employers, to workers, and to the communities in which they operate.

This report is essentially a tracking document. It traces the most recent interests by Congress in the Davis-Bacon Act and suggests the concerns that have been and are being voiced with respect to the act.

Introducing the Davis-Bacon Act

In 1931, at the urging of the Hoover Administration, Congress enacted prevailing wage legislation for federal contract construction. The legislation was cosponsored by Representative Robert Bacon and Senator James Davis: thus, 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 related Copeland "anti-kickback" Act (1934),[4] such initiatives have been consistently rejected by Congress.

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

[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, for 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 (name redacted).

[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). Reports filed under the Copeland Act put employers 'on record.' 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.

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. It is not necessarily the rate that a construction firm may have to pay in order to recruit and to 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 may be discouraged from employing helpers on Davis-Bacon projects, turning to more skilled crafts-persons instead. DOL does, however, recognize apprentices and encourages the employment on Davis-Bacon projects of persons enrolled in *bona fide* apprenticeship programs.[6]

Supplemented by other statutes, work under Davis-Bacon is covered by work hours 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]

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[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 by the DOL (or by 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.

[7] The Davis-Bacon Act applies only to federal contract construction. Other enactments apply to government purchases of goods and services. 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 (continued...)

The Purpose 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. Given the depth of the economic downturn and the scope of unemployment, any opportunity for work was attractive both to workers and to struggling firms.

Federal construction contracts were normally awarded to the lowest responsible bidder—but treatment of workers and payment of fair wages were not taken into account. As a result, certain itinerant contractors, employing workers imported from low-wage parts of the country, were able (or believed to be able) to underbid local contractors. 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 appropriate skills), and then produce an inferior quality of construction. Thus, 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.[8] The original Davis-Bacon Act, it would seem, was as much a protection for fair contractors as for workers. It was viewed as a model for private sector employers with respect to labor standards.

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, engaged in local markets, from contractors and low-wage crews from outside the area of construction work. However, supporters of Davis-Bacon have contended that there is no essential conflict between the purposes of the statute and securing a bargain for the public agency consumer (the taxpayer).[9]

A Continuing Process

In 1931, the Davis-Bacon legislation was regarded as an emergency measure that sparked little controversy. From the hearings and debates of that period, it seems clear that Congress anticipated none of the administrative problems that would ensue. But, almost immediately, restructuring of the act commenced.

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latter is an amalgam of earlier federal work hours and safety enactments. For a 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 (name redacted).

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

[9] Concerning early Davis-Bacon philosophy, see David B. Johnson, "Prevailing Wage Legislation in the State," *Monthly Labor Review*, August 1961, pp. 839-845. The prevailing wage requirement does not preclude award of contracts to outside contractors. Rather, the philosophy of the act is to ensure that local labor standards will not be undercut.

In early 1932, President Hoover moved to strengthen administration of the statute through Executive Order No. 5778.[10] Although Congress proceeded with oversight and, ultimately, adopted reforms, its reform initiative was vetoed by the President.[11] The Copeland "anti-kickback" Act (1934) helped ensure that rates would be paid without improper deductions. In 1935, Congress adopted major changes to the statute: (a) reducing the coverage threshold from contracts of at least $5,000 to those in excess of $2,000; (b) extending coverage from public buildings to include "construction, alteration, and/or repair, including painting and decorating, of public buildings or public works"; and (c) requiring that the locally prevailing wage rates be predetermined—prior to solicitation of bids—and that they be written into bid solicitations.[12]

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.

Through the years, arguments for and against Davis-Bacon have become largely fixed, as have counter arguments of defenders and critics. In the evolving debate, few contentions about the act have gone (or are likely to go) unchallenged. On both sides, there are assertions that advocates tend to accept without question.

Current policy debate has focused upon whether to attempt to strengthen or diminish the Davis-Bacon 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. In policy terms, the division of opinion seems to be in some measure philosophical, reflecting basic attitudes toward labor-management relations rather than a division along partisan political lines.

Perspectives of Davis-Bacon Critics

Some critics of Davis-Bacon argue that the act is inflationary (that it unnecessarily raises the cost of construction), that it is difficult to administer, and that it hampers competition—especially (advocates assert) with respect to small 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

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

[11] 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.

[12] 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.

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 low-skilled workers, allowing them to gain work experience and on-the-job training, while at the same time reducing the costs of public construction.

Besides, critics note, the Davis-Bacon Act (1931, 1935) was adopted 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, 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.[13] In addition, they urge simplification of the Copeland Act's reporting requirements.

Perspectives of Davis-Bacon Supporters

Supporters of Davis-Bacon often contend that the act prevents cutthroat competition from fly-by-night firms that would undercut local wages and working conditions and compete unfairly with local contractors. They suggest 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 contracting 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.[14] 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 those younger workers who are creating careers for themselves in the building trades. In addition, some assert that if "helpers" are substituted for skilled craft workers, it would likely be those same apprentices, ones young and lacking experience in the crafts, who could expect to be laid off or forced into lower-wage jobs that did not train them in all-around skills needed by journeymen in their chosen fields.[15]

[13] 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.

[14] 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.

[15] Both 'critics' and 'supporters' of Davis-Bacon have tended to make arguments that involve women and minorities—or 'small business' people—perhaps less because they would be directly impacted than that they have become sympathetic participants.

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 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 useful 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* and, perhaps, most difficult 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.[16]

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 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.[17]

[16] See, also, CRS Report 94-908, *Davis-Bacon: The Act and the Literature*, by (name redacted).

[17] 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 (continued...)

Recent Congressional Concern with the Davis-Bacon Act

During each Congress, some measures have normally been introduced that would strengthen, diminish, or repeal the Davis-Bacon Act. Generally, the issues have been contentious and, in some cases, have been a threat to enactment of the underlying measures.

There follows a series of Davis-Bacon related issues upon which some legislative action has been taken during the 110th Congress. In some cases, the presence of a Davis-Bacon proposal does not appear to have been an impediment to enactment; in other cases, Davis-Bacon seems to have been determinant.

The Davis-Bacon Act and the CWA/SRFs

Through more than a decade, authorization for funding of the Clean Water Act State Revolving Fund (CWA/SRF) has been a matter of contention with the authorizing committees of both the House and the Senate. Each time a bill has been brought up for consideration, various issues were raised—among them, coverage under the Davis-Bacon Act—and, ultimately, the bills died.[18]

In the 110th Congress, consideration of the CWA/SRF issue commenced in the House very early in 2007, with Davis-Bacon an essential ingredient in the proceedings.[19] Although the House has passed the CWA/SRF, it has not been acted upon in the Senate.

A New Bill Introduced (H.R. 720)

On January 30, Representative James Oberstar introduced H.R. 720, the Water Quality Financing Act of 2007.[20] The bill was referred to the Subcommittee on Water Resources and Environment, marked-up and promptly forwarded to the full Committee on Transportation and Infrastructure.

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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), January 1982.

[18] For general background on this issue, see CRS Report RL31491, *Davis-Bacon Act Coverage and the State Revolving Fund Program Under the Clean Water Act*, by (name redacted), and CRS Report RL33800, *Water Quality Issues in the 110th Congress: Oversight and Implementation*, by (name redacted).

[19] Bureau of National Affairs, *Daily Labor Report*, January 10, 2007, p. A8.

[20] *Congressional Record*, January 30, 2007, p. E220.

Subcommittee and Committee Action

In the subcommittee mark up (January 31, 2007), Davis-Bacon once more became an issue. Representative Richard Baker urged that the Davis-Bacon language be stricken. On a voice vote, the Baker amendment was rejected and the Davis-Bacon provision was retained.[21]

On February 7, the House Committee on Transportation and Infrastructure took up the measure. Here again, there was controversy over the Davis-Bacon issue but it was overcome. The bill was approved in the full committee by a vote of 55 yeas to 13 nays. With the Davis-Bacon provision intact, the bill was ordered reported.[22]

As reported (H.Rept. 110-30), H.R. 720 has two provisions that deal with Davis-Bacon. Section 513, which applies the act broadly to treatment construction, was retained. It requires that "all laborers and mechanics employed by contractors or subcontractors on treatment works for which grants are made under this Act shall be paid wages at rates not less than those prevailing for the same type of work on similar construction in the immediate locality."

That authority (Section 513) had long been in place; but, now, a new provision was added: Section 602(b)(17). The committee report explained:

> New Section 602(b)(17) requires the application of the Davis-Bacon requirements for the construction of treatment works carried out in whole or in part with assistance made available from state revolving loan funds under Title VI, funds from section 205(m) of the Act, or both. This amendment authorizes the application of the prevailing wage requirements to construction projects carried out with any financial assistance from the state revolving fund, whether the source of assistance originates from Federal capitalization grant funds, state matching funds, repayments to the fund, interest payments, or other sources of income to the state revolving fund, and whether the character of the assistance is through loans, loan guarantees, or other types of assistance authorized by section 603(d).

The report continued. "By establishing the Davis-Bacon prevailing wage requirement for the construction of treatment works, the Committee continues its long-standing practice of ensuring the application of Davis-Bacon where Federal funds are provided for construction...." It added: "For the Clean Water SRFs, the most significant source of revenue in the state revolving funds is the Federal capitalization grant. As Congress has done in 63 separate instances for Federally-funded construction, the Davis-Bacon Act should apply to the reauthorization of the Clean Water SRFs."

The committee went on to discuss the different reasons for support of the Davis-Bacon Act: to "attract more experienced and better trained workers," workers who "are often more productive than workers with less training and experience," that Davis-Bacon work results often "in the completion of construction projects ahead of schedule," "reducing the overall cost of the project," and "offsetting any increased costs due to higher hourly wage rates."[23]

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[21] Terry Kivlan, "*Subpanel, OKs $20 Billion Waste Water Construction,*" see http:nationaljournal.com/members/markups/2007/01/mr_20070131_3,htm, February 28, 2007. See also Bureau of National Affairs, *Daily Labor Report*, February 2, 2007, p. A3.

[22] Bureau of National Affairs, *Daily Labor Report*, February 9, 2007, p. A2.

[23] U.S. Congress. House. Committee on Transportation and Infrastructure. H.Rept. 110-030, *Water Quality Financing Act of 2007: Report to Accompany H.R. 720*. p. 24-25. (Cited hereafter as H.Rept. No. 110-030.)

Conversely, Representative John Mica, together with several others, expressed opposition to the Davis-Bacon provisions. Representative Mica stated that the bill "represents an important step forward for clean water" but "it also takes a significant step backwards by mandating and expanding upon the past application of Davis-Bacon Act prevailing wage requirements in the SRF program." Davis-Bacon, he stated, would add "to the cost of public construction" and have a disproportionate impact on "small, rural, and disadvantaged communities, which can least afford to pay the higher cost of projects." He stated that the act was "discriminatory" in that "[f]ew small and minority-owned firms can afford to pay the higher wages that the Davis-Bacon Act requires. As a result," he observed, "they are rarely awarded Davis-Bacon contracts, and many of them stop applying for those contracts." He concluded: "There is no precedent here for applying the Davis-Bacon Act to state funds...."[24]

The Bill Considered in the House

On March 9, the Water Quality Financing Act of 2007 was called up for debate in the House. Davis-Bacon was a major part of the debate that followed.

In a discussion of the rule (H.Res. 229), Representative Pete Sessions raised the issue of Davis-Bacon coverage. He stated: "...the Democrat leadership is bringing legislation to the House floor that benefits big labor bosses at someone else's expense." Sessions continued: "...in order to help big labor bosses pad their dwindling ranks, they would apply these same provisions [Davis-Bacon regulations] to all non-Federal funds, such as loan repayments, State bond revenues, interest and State-matching funds." Sessions objected to "this Depression Era wage subsidy law" and "its associated inflation" which means that local budgets cannot build "schools, hospitals, prisons, roads and other vital projects." He continued:

> If you support fiscal responsibility, small business, States' rights, rural communities, women- and minority-owned businesses, and the environment, you will join with me in opposing this rule.
>
> If, however, instead, you support environmental harm, market distortion, wasteful Federal spending, and stacking the deck in favor of labor bosses, I wholeheartedly encourage you to vote for this legislation.[25]

Representative Kathy Castor responded that some were "...unable to criticize the heart of this legislation" (i.e., authorization for "an important part of the Clean Water Act"). Thus, she suggested that the Member from Texas "instead reverts to attacking a portion of this legislation that is vital to workers across America, the Davis-Bacon provisions." She affirmed that

> ...it is our policy, in fact, it is Congress's long-standing continuing tradition of applying prevailing wage requirements to federally funded construction projects. Studies have shown that by attracting more experienced, better-trained workers, that wage requirements lead to higher productivity and they reduce overall costs, which offset any higher wages.

Castor argued that Davis-Bacon "protects communities by ensuring that wage determination" is based "solely on the local workforce costs"—the locally prevailing wage rate. Further, she

[24] H.Rept. No. 110-030, 2007, pp. 56-57.

[25] *Congressional Record*, March 9, 2007, p. H2346.

argued, with Davis-Bacon in place, oftentimes "projects come in under budget and on time."[26] Throughout floor consideration of H.R. 720, Members took strong positions either for or against the statute.[27]

As discussion moved on through actual consideration of the measure, Representatives Baker and Steve King proposed an amendment. Representative King explained: "... really all this amendment does is it just stops the expansion of the Davis-Bacon, and it says we are not going to move this Davis-Bacon into a revolving fund." Mr. Baker added with respect to Davis-Bacon: "It [Davis-Bacon] will make the compliance of the rules for rural and lower income communities much more difficult to achieve. Compliance with the Davis-Bacon provisions," he stated, "is a difficult and cumbersome task."[28] Speaking against the Baker/King amendment was the chairman of the Committee on Transportation and Infrastructure, James Oberstar, who noted the difference between a union wage and a prevailing wage. "This Davis-Bacon provision is [a] prevailing [wage], not [a] union wage." Oberstar added: "It is the prevailing local wage."[29]

Although the Clean Water Act was under discussion, very little attention actually focused upon that issue. Davis-Bacon had become the central topic. "The only debate that we really have is," Oberstar stated, "What shall be the wages paid to those who work on building these facilities?"[30] Mica (as would others) referred to "an unprecedented expansion of Davis-Bacon requirements" and suggested that the "President will veto the legislation if it contains the Davis-Bacon provisions."[31] Further, Representative Howard McKeon asserted that "...Davis-Bacon typically increases the costs of Federal projects by anywhere from 5 to 38 percent."[32]

On a roll-call vote, the Baker/King amendment was defeated: 140 ayes to 280 nays.[33] Thus, the Davis-Bacon Act would apply to the SRFs under the House-passed version of the Water Quality Financing Act of 2007—whether on a first use basis or, repeatedly, throughout the program. Following discussion of other issues, the bill was adopted.

Consideration by the Senate

H.R. 720 was dispatched to the Senate. On March 12, 2007, it was referred to the Committee on Environment and Public Works. Senate consideration remains unclear.

[26] *Congressional Record*, March 9, 2007, pp. H2346-H2347.

[27] *Congressional Record*, March 9, 2007, pp. H2345-H2368.

[28] *Congressional Record*, March 9, 2007, p. H2369.

[29] *Congressional Record*, March 9, 2007, p. H2370.

[30] *Congressional Record*, March 9, 2007, p. H2351.

[31] *Congressional Record*, March 9, 2007, p. H2352.

[32] *Congressional Record*, March 9, 2007, p. H2356. Later, *ibid*, p. H2369, Representative King of Iowa suggested that "my average number is a 20 percent increase" in bids for projects. Such percentages may depend upon the currency of Davis-Bacon rate data: i.e., how frequently they are updated by the Department of Labor. Again, a distinction may need to be made between *project costs* and *labor costs*.

[33] *Congressional Record*, March 9, 2007, pp. H2373-H2374.

Davis-Bacon and Energy Independence (H.R. 6)

On January 12, 2007, Representative Nick Rahall introduced H.R. 6, the Creating Long-Term Energy Alternatives for the Nation Act of 2007.[34] A week later, the bill was adopted by the House (264 ayes to 163 nays) and was subsequently placed on the Senate legislative calendar.[35] Ultimately, the bill was adopted by each body, becoming P.L. 110-140.

Parliamentary Maneuvering

As passed by the House, the measure was relatively brief (about 14 pages) and dealt, largely, with technical aspects of oil and gas leases, taxation, and other non-Davis-Bacon issues. However, with its passage by the Senate in mid-June 2007 (65 ayes to 27 nays), it had grown by several hundred pages and now contained a wide variety of energy-related considerations. Among its provisions was coverage under the Davis-Bacon Act of workers engaged in the construction of energy generating facilities.[36]

Several months passed before the House again called up the bill. The Rules Committee reported the measure on December 5, and on December 6, the measure was opened for debate.[37]

Representative Howard P. McKeon rose in opposition to H.R. 6. Mr. McKeon, among other things, objected to the bill's "inclusion of bureaucratic mandates that will kill American jobs and complicate job-training." He cited a pro-Davis-Bacon letter to the Administration suggesting that the bill will "not significantly expand the application of Davis-Bacon prevailing wage requirements." He continued:

> Now, I don't know how the majority defines the words 'significantly expand,' but by my count, this bill contains at least seven separate instances in which the Davis-Bacon wage mandates are imposed.
>
> Simply put, this bill furthers the majority's aggressive application of Davis-Bacon wage mandates. Davis Bacon wages can inflate project costs by as much as 15 percent, costs that get passed on to taxpayers. They also force private companies to do hundreds of millions of dollars of excessive administrative work each year, squandering resources that would be better spent creating jobs and spurring innovation.

And further, he stated, if the "job killing Davis-Bacon requirements weren't bad enough, this bill also complicates our job training system...."[38]

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[34] *Congressional Record*, January 12, 2007, p. H513.

[35] *Congressional Record*, January 18, 2007, p. H729.

[36] H.R. 6, as adopted by the Senate, June 21, 2007 (635 ayes to 27 nays), pp. 93-94. See also *Congressional Record*, June 11, 2007, p. S7469.

[37] Concerning the logistics of passage, see Dina Cappiello and Richard Rubin, "House Pushes Broad Energy Plan," *CQ Today*, December 5, 2007, pp. 1 and 15; and Cappiello, "As Support for Ambitious Energy Bill Slips, House Postpones Floor Action," *CQ Today*, December 6, 2007, pp. 3 and 29.

[38] *Congressional Record*, December 6, H14425-H14426.

Mr. McKeon's protest may have been overshadowed by concerns about the current price of oil and its impact for the economy. The bill, with Davis-Bacon included, was approved by a vote of 235 ayes and 181 nays.[39]

At this juncture, the bill moved back to the Senate where its fate was uncertain. "Mr. President," Senator Mitch McConnell observed, "there is a difference between passing a bill and actually making laws. The bill before us is a prime example." Reviewing the House-passed measure, McConnell stated that "...it will not become law."[40] Senator Harry Reid moved "to concur with the House on the message they have sent us" and called for a cloture vote—which failed by 53 ayes to 42 nays.[41] Speaker Nancy Pelosi was "disappointed" by the Senate's action but reportedly affirmed: "The House will work with the Senate on a bipartisan basis to pass a strong energy bill and send it to the president's desk for his signature."[42]

The result would be a reopening of the bill with further amendment and shifts between the House and Senate. In the Senate, there were some concerns voiced about an expansion (or a continuation of coverage) of Davis-Bacon requirements where energy-related construction was involved: these may have been partially resolved.[43] The bill was adopted by the Senate on December 13, 2007, by a vote of 86 yeas to 8 nays.[44] In the House, the final version of the measure was called up on December 18, 2007, and approved by a vote of 314 ayes to 100 nays.[45] Davis-Bacon, it appears, was not an issue in the final judgment on the bill.

Davis-Bacon Provisions of the New Energy Bill

Although Davis-Bacon was a relatively small element of the new energy act (P.L. 110-140), it could have an important role in the administrative history of the act: insuring that workers, engaged in federal construction, receive not less than the locally prevailing rate for their services.

The Davis-Bacon language appears on several occasions throughout the new statute. For example, in Sec. 136 ("Advanced Technology Vehicles Manufacturing Incentive Program"), there is a sub-section that deals with an "Advanced Vehicles Manufacturing Facility." Among other things, the act provided for "not more than $25,000,000,000 in loans to eligible individuals and entities" to carry out this aspect of the program. In applying for a loan, the applicant "shall submit to the Secretary" an application with such information as the Secretary may require but

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[39] *Congressional Record*, December 6, H14444.

[40] *Congressional Record*, December 7, 2007, p. S15007.

[41] *Congressional Record*, December 7, 2007, pp. S15007-S15009. Though a majority favored the cloture motion, the vote fell short of the 60 votes required.

[42] Speaker Pelosi is quoted by Dina Cappiello and Richard Rubin, "Senators Examine Options for Getting Energy Bill Past Filibuster Threshold," *CQ Today*, December 10, 2007, p. 29.

[43] See Cappiello and Rubin, "Senators Examine Options for Getting Energy Bill Past Filibuster Threshold," *CQ Today*, December 10, 2007, p. 29; Bureau of National Affairs, *Daily Labor Report*, December 11, 2007, p. A6; Cappiello,"Democrats Push Ahead on Energy Bill," *CQ Today*, December 12, 2007, p. 25; Cappiello and Rubin, "Vote on Whether to Bring Energy Bill to Senate Floor Expected to Be Close," *CQ Today*, December 13, 2007, p. 3; and Cappiello, "Senate Removes Tax Package From Energy Bill, Clearing Way for Enactment," *CQ Today*, December 14, 2007, p. 21.

[44] *Congressional Record*, December 13, 2007, p. S15432.

[45] *Congressional Record*, December 18, 2007, p. H16752. See also Bureau of National Affairs, *Daily Labor Report*, December 17, 2007, p. A9, and December 19, 2007, p. A8.

> including a written assurance that—... all laborers and mechanics employed by contractors or subcontractors during construction, alteration, or repair that is financed, in whole or in part, by a loan under this section shall be paid wages at rates not less than those prevailing on similar construction in the locality, as determined by the Secretary of Labor in accordance with sections 3141-3144, 3146, and 3147 of title 40, United States Code.

Essentially, the same language resurfaces with each new energy-related program that deals with aspects of construction.[46]

Davis-Bacon and the Farm Bill (H.R. 2419)

The Farm, Nutrition, and Bioenergy Act of 2007 (H.R. 2419), as passed by the House, contains loan guarantees for biorefineries and biofuel production facilities. It was the construction of these plants that suggested a Davis-Bacon provision and encouraged the Committee on Agriculture to propose one.

H.R. 2419 was passed by the House on July 27, 2007, with Davis-Bacon a part of the new farm bill. On December 14, 2007, a much expanded farm bill was approved by the Senate (apparently without Davis-Bacon). The Senate asked for a conference. That request did not meet with an immediate response; and, the process continued into the spring without resolution and is ongoing.

Consideration by the House

H.R. 2419, as reported from committee, provided that, as a condition for receiving a loan or loan guarantee, the applicant "shall ensure that all laborers and mechanics employed by contractors or subcontractors in the performance of construction work financed in whole or in part" with such loan or loan guarantee, "shall be paid wages at rates not less than those prevailing on similar construction in the locality, as determined by the Secretary of Labor...."[47]

At the full committee level, Representative Marilyn Musgrave, a long-time critic of Davis-Bacon, proposed striking the prevailing wage provision. But, in a recorded vote, the provision was sustained: 17 ayes to 26 nays.[48] Shortly thereafter, during a late evening session, the Rules Committee decided that the farm bill should be promptly considered and, with H.Res. 574, the measure was brought up the following day, July 26, 2007.

As debate on the rule progressed, the Davis-Bacon Act remained as an undercurrent.[49] Representative Bob Goodlatte observed:

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[46] Citations, where appropriate, are taken from H.R. 6, the version as enacted, the Energy Independence and Security Act of 2007, H.R. 6, p. 24. See also pp. 156, 160, 179-180, 216, 228, and 268.

[47] U.S. Cong., House, *Farm, Nutrition, and Bioenergy Act of 2007*, Report to accompany H.R. 2419, H.Rept. 110-256, Part 1, July 23, 2007, pp. 594-595.

[48] Catharine Richert, "Farm Policy Critics Vow Floor Challenge as Panel Approves Bill," *CQ Committee Coverage*, July 19, 2007, pp. 21-22.

[49] Some 110 proposed amendments had been filed with the Rules Committee; 31 were made in order under H.Res. 574. See Adriane Kroepsch, "After Much Deliberation, Panel Offers Rule on Farm Bill," *CQ Committee Coverage* (on line), July 26, 2007, p. 1.

> ... no one can recall a farm bill process as closed as this one, Members denied the opportunity to deal with provisions brought into this legislation like labor provisions and so on, not allowed to offer an amendment to take out Davis-Bacon provisions that have no business being in farm bill legislation. And it is, in my opinion, very disappointing.

As a result of this process, Goodlatte stated, "the provision requiring Davis-Bacon wage rates on the new loan guarantee program for the next generation ethanol plants" will "go unchallenged."[50]

Representative Tim Walberg, similarly, argued against "... the anti-competitive Davis-Bacon provision included in this bill [that] would drive up the cost of building ethanol plants and discourage alternative energy production."[51] And Representative Phil Gingrey suggested: "If the United States is serious about moving our country to alternative fuels, we don't need restrictions like Davis-Bacon prevailing wages."[52] As speaker after speaker argued the merits of Davis-Bacon, debate moved forward. "It sounds to me like the Republican caucus of this body," observed Dennis Cardoza, "is actually considering voting against the thousands of farmers, their families, and the millions of people throughout this country that rely on farming for their livelihood...."[53] But on H.Res. 574, the vote was yeas 222 to nays 202.[54]

Little was said of Davis-Bacon as the House moved on to H.R. 2419. Representative Joe Baca recalled the good things about the farm bill, adding that "...we have preserved the Davis-Bacon provision to ensure workers in rural America earn a decent wage."[55] Steve King of Iowa had his own version of developments. "There is [a] Davis-Bacon wage scale in this bill," he noted, and he predicted that "...the 5th Congressional District of Iowa will remain the number one renewable fuels congressional district in America." Mr. King added: "Last year we put over a billion dollars of private capital into that, and we did so without the Davis-Bacon wage scale. We did it," he stated, "with merit shop wages."[56] He also said that Davis-Bacon results in a "20 percent increase in cost."[57]

Representative Jack Kingston called inclusion of the Davis-Bacon provision a "special-interest payoff to the unions." Mr. Kingston averred:

> ... here we are at an energy crisis time. It is $3.05 if you shop all over town to find the bargain, and we are going to increase the cost of producing ethanol. We are going to say if you build an ethanol plant, you have to use the highly inflated union prevailing wages. It is a special payoff to the unions.

He added: "We should not increase the price of producing energy during a fuel crunch. It is that simple. This bill does that."[58]

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[50] *Congressional Record*, July 26, 2007, p. H8679.

[51] *Congressional Record*, July 26, 2007, pp. H8682-H8683.

[52] *Congressional Record*, July 26, 2007, p. H8684.

[53] *Congressional Record*, July 26, 2007, p. H8685. The House, pp. H8684-H8685, had just completed a vote on a motion by Representative Ed Whitfield to adjourn—that was defeated: yeas, 174; nays, 248.

[54] *Congressional Record*, July 26, 2007, p. H8686.

[55] *Congressional Record*, July 26, 2007, p. H8694.

[56] *Merit shop* wage rates refers to a standard of wages espoused by the essentially non-union Associated Builders and Contractors which prides itself in paying "merit" scale.

[57] *Congressional Record*, June 26, 2007, p. H8695.

[58] *Congressional Record*, June 26, 2007, p. H8696.

On July 27, 2007, with the Davis-Bacon provision still a part of the bill, H.R. 2419 was called up for a vote and approved. The vote was 231 ayes to 191 noes.[59]

Consideration in the Senate

H.R. 2419 was received in the Senate on September 4, 2007, and placed on the Legislative Calendar under General Orders No. 339. On November 5, the Senate commenced debate on the measure.

Early Dispute over Process

Senate consideration of the farm bill proceeded along a somewhat different tract from House consideration. On November 5, 2007, Senator Tom Harkin proposed Senate Amendment 3500 in which he would strike "all after the enacting clause" of H.R. 2419 and substitute a new bill.[60] Over the next week, some 265 amendments were proposed.[61] Meanwhile, Senator Harry Reid, in an effort to restrict the number of amendments, had introduced delimiting proposals—a procedure that sparked hostility from some opposing Members.[62]

Among those in opposition to the Reid amendment was Senator Judd Gregg. Gregg listed a series of issues that Reid would have removed from consideration. Reid, Gregg stated, among other things, "...took off the table the issue of labor, labor questions. Well, in my experience, labor questions have a huge impact on farm policy, especially the immigration labor issues," he observed, "... how you get people who are immigrants to help you pick apples in New Hampshire, and the potatoes in Idaho."[63] During debate on the farm bill, it appears, only Senator Wayne Allard referred directly to the prevailing wage issue. "There are some things that continue to concern me," he suggested, though it was not clear whether he was referring the House-passed bill (then technically before the Senate) or the Harkin alternative amendment, when he spoke of the "expansion of Davis-Bacon."[64]

Passage in the Senate

Debate continued and, on November 16, the Senate voted on a Reid motion for cloture. On the cloture motion, the yeas were 55 and the nays were 42. But, with two-thirds of the Members not having voted to support the motion, it was rejected.[65] On December 7, a second cloture motion again failed: 53 yeas, to 42 nays.[66] Finally, on December 13, a third cloture motion was agreed to

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[59] *Congressional Record*, July 27, 2007, pp. H8788-H8789.

[60] *Congressional Record*, November 5, 2007, p. S13775.

[61] *Congressional Record*, November 14, 2007, p. S14354.

[62] *Congressional Record*, November 6, 2007, p. S13948. Reid later suggested that the procedure was, "as Senator [Robert] Dole used to refer to [it] as decorating a Christmas tree." See *Congressional Record*, November 6, 2007, p. S13951.

[63] *Congressional Record*, November 6, 2007, p. S19351.

[64] *Congressional Record*, November 8, 2007, p. S14125.

[65] *Congressional Record*, November 16, 2007, p. S14592. See also "Reid Moves to Limit Debate on Stalled Farm Bill," *CQ Today*, November 15, 2007, p. 15, and "Reid Takes Farm Bill to the Brink," *CQ Today*, November 16, 2007, pp. 1 and 16, both by Catharine Richert.

[66] *Congressional Record*, December 7, 2007, p. S15009.

by a vote of 78 yeas to 12 nays.[67] On December 14, with a vote of 79 yeas to 14 nays, the farm bill was adopted by the Senate—but, it would appear, without a Davis-Bacon provision[68] A conference was authorized; Senate conferees were appointed.

Further Maneuvering

Almost immediately, the various interests began a campaign for further amendment of the bill. "A showdown is brewing between Congress and the White House over the farm bill," columnist Catharine Richert reported in *CQ Today*, "as lawmakers try to sell their reauthorization legislation to a president who wants deeper cuts in agricultural supports."[69] The sugar companies moved to "insert into the farm bill" consideration of the trade with Mexico. "The proposal is designed to maintain support for U.S. sugar prices," Richert stated. "But the effect would be to restore some of the trade barriers that NAFTA was intended to eliminate." Also involved were "producers of corn-based sweeteners," the candy and soft drink industry, and sugar for "conversion to ethanol."[70]

A few days later, House Agriculture Committee Chairman Collin Peterson was reported to have begun a full rewrite of the legislation: "...negotiating a new version of the farm bill with the Bush administration...."[71] But, negotiations continued intermittently—seeming to focus upon the issue of higher taxes in order to maintain agricultural subsidies.[72]

On April 9, 2008, the House voted 400 yeas to 11 nays "to instruct conferees to oppose higher taxes to fund new farm bill spending."[73] Only at this point were official conferees from the House appointed. Several extensions of the existing farm bill were approved and, still, negotiations proceeded—largely without public result.[74] Conferences continued through the first week of May amid intense political bargaining. On May 13, the conferees reported to the House (H.Rept. 110-627). The following day, the House approved the conference report: 318 yeas to 106 nays. The Senate concurred (81 yeas to 15 nays). The measure was cleared for the White House on May 15, 2008. The Davis-Bacon provision was retained.[75]

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[67] *Congressional Record*, December 13, 2007, p. S15450.

[68] *Congressional Record*, December 14, 2007, p. 15639. See CRS Report No. 34130, *"Renewable Energy Policy in the 2007 Farm Bill,"* December 21, 2007, by Randy Schnept and Tom Capehard. The bill now came to over 1800 pages.

[69] Richert, "Path to Final Farm Reauthorization May Require a Delicate Balancing Act," *CQ Today*, January 14, 2008, p. 2.

[70] Richert, "U.S. Sugar Growers Look to Farm Bill for Protection in Trade with Mexico," *CQ Today*, January 17, 2008, p. 3. Richert notes that, under Senate rules, the introduction of new materials during a conference would be subject to challenge.

[71] Aliya Sternstein and Richert, "New Version of Farm Bill in Works," *CQ Today*, February 11, 2008, pp. 1 and 8.

[72] Richert, "Aid for Wealthy Farmers at Issue," *CQ Today*, May 5, 2008, pp. 1 and 4.

[73] Richert, "Farm Bill Conference Begins with House United Behind $6 Billion in Extra Spending," *CQ Today*, April 10, 2008, p. 4. See also *Congressional Record*, April 9, 2003, pp. H2119-H2121.

[74] See Richert, "Fight Over Offsets for Extra Spending Snags Resolution of Farm Bill," *CQ Today*, April 15, 2008, pp. 4 and 11; "Harkin Will Force Votes on Farm Bill Provisions If Conference Continues to Stall," *CQ Today*, April 21, 2008, p. 8; and "Bush Calls for Farm Law Extension," *CQ Today*, April 23, 2008, pp. 1 and 8.

[75] See Richert, "New Farm Deal Draws Veto Threat," *CQ Today*, May 9, 2008, pp. 1and 4; "Farm Bill Likely to Withstand Veto," *CQ Today*, May 15, 2008, pp. 1and 39; and "Bush Unlikely to Get Much Help From Republicans If He Vetoes Farm Bill," *CQ Today*, May 16, 2008, pp. 9 and 10.

A Presidential veto came on May 21, 2008. The President protested that Congress had not passed "a good farm bill that I can sign." He continued: "At a time of high food prices and record farm income, this bill lacks program reform and fiscal discipline." He was critical of the use of earmarks which he suggested appeared throughout the bill. "These earmarks, and the expansion of Davis-Bacon Act prevailing wage requirements, have no place in the farm bill."[76] Immediately, the House voted to override the President's veto: 316 ayes to 108 nays. The Senate followed suit: 82 ayes to 13 nays.[77]

However, as the Congress was adjourning for a Memorial Day session at home, it was discovered that something that gone astray. Catharine Richert explains: "Senators will return from the Memorial Day recess to take up farm legislation again—except this time they will try to make sure they send a complete version to the president." She continued:

> The problem stemmed from an error by a House enrollment clerk, who dropped one of the original bill's 15 titles before sending it to the White House.
>
> While congressional Democrats say they are confident the 14 titles in the version of the bill they overrode are now law, they still have to deal with the dropped title, which deals with trade issues.
>
> After weighting the option of passing a stand-alone bill with just the missing trade title, House leaders decided the best way to avoid any constitutional questions was to pass a duplicate version of the 15-title bill.[78]

There followed a flurry of activity with several bills contesting for preeminence. H.R. 2419 had become P.L. 110-234. But, in the interim, a new bill (H.R. 6124), a duplicate of H.R. 2419, had been introduced in the House on May 22 and was immediately adopted: 306 yeas to 110 nays. The replacement bill was then dispatched to the Senate where it was placed on the Calendar as No. 753.[79]

On June 5, 2008, the new version of the farm bill ("identical to the conference report" on H.R. 2419) was called up in the Senate and adopted by a vote of 77 ayes to 15 nays. But, the bill's fate (H.R. 6124) seems to be in doubt with the possibility of a new veto by the President.[80]

Davis-Bacon and Homeland Security (H.R. 2638)

In the wake of the terrorist attacks of September 11, 2001, there was a substantial restructuring of portions of the American government—a process that included the creation of the Department of Homeland Security (DHS).

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[76] *Congressional Record*, May 21, 2008, p. H4402.

[77] *Congressional Record*, May 21, 2008, p. H4411, and May 22, 2008, p. S4749.

[78] Richert, "Farm Bill's Missing Title Complicates Its Passage," CQ Today, May 23, 2008, pp. 1 and 22. Under a special procedure, the House passed a new bill (H.R. 6124) intended to replace the flawed bill vetoes by the President. The Senate decided, tentatively, to move in another direction—possibly amending the extant statute.

[79] Richert, "Delayed Farm Bill Enactment May Put International Food Aid in Trouble," *CQ Today*, June 2, 2008, p. 7.

[80] Aliya Sternstein, "Senate Clears Farm Bill With All Titles as Bush Plans Another Veto," *CQ Today*, June 6, 2008, p. 6.

H.R. 2638 of the 110th Congress proposed additional funding and certain further adjustments in the agency's structure. The House-passed bill (June 15, 2007) did contain a Davis-Bacon provision; but, Senate consideration was overtaken by a consolidated appropriations bill (H.R. 2764: P.L. 110-161). In the process, legislation was passed seemingly without reference to Davis-Bacon.[81]

Action in the House

On June 14, 2007, during House consideration of H.R. 2638, an appropriations measure, Representative Harold Rogers proposed an amendment to add new language to the measure. The amendment, Rogers explained, is really quite simple. "It strikes the Davis-Bacon section in the bill."[82]

As reported by the House Committee on Appropriations, H.R. 2638 contained the following provision:

> None of the funds appropriated in this Act may be used for a grant or contract for any project that does not comply with the requirements of subchapter IV of chapter 31 of title 40, United States Code [the recodified Davis-Bacon Act]: Provided, That the President may suspend the provisions of such subchapter during a national emergency.[83]

Mr. Rogers observed: "That section has consequences that I'm not sure the majority has thoroughly thought through." Working on the assumption that the Davis-Bacon Act increases the cost of federal construction and that the bill would extend Davis-Bacon to previously uncovered work, Mr. Rogers stated that the act "could unfairly disadvantage communities that are unfortunate enough to be struck by a disaster." He commented:

> This expansion further disadvantages small, emerging and minority businesses new to the complex, inefficient wage and work restrictions which make it nearly impossible for them to compete with better capitalized corporations, disadvantaging the very companies we often seek to help following a disaster.

For these reasons, he urged his colleagues "...to support this amendment and strike this onerous restriction on the Nation's communities."[84]

Representative David Price, author of H.R. 2638, replied that, under the act, the employer has "got to pay their employees, if they're using Federal funds, not less than the locally prevailing wage." Homeland Security, Price stated, has "interpreted the application of Davis-Bacon far too narrowly," has applied the act only to Stafford Act[85] grant programs, and to "virtually no other DHS programs." Price continued: "Our belief is simply that there is no good reason for denying prevailing wage protection to jobs involved in these activities." He noted the presidential

[81] There may also have been some dispute as to whether further reference to Davis-Bacon was appropriate and, if so, for which programs and projects.

[82] *Congressional Record*, June 14, 2007, p. H6472.

[83] The title in question, subchapter IV of chapter 31 of title 40, was the recodified Davis-Bacon Act.

[84] *Congressional Record*, June 14, 2007, p. H6472.

[85] The Stafford Act is also known as the Robert T. Stafford Disaster Relief and Emergency Assistance Act of 1988 [P.L. 100-707].

emergency option that would apply "in situations where Davis-Bacon requirements would truly have a detrimental impact" but stated that "for most jobs most of the time, carrying out the intent of this bill, fair, locally prevailing wages should prevail." With that, he urged "rejection of this [the Rogers] amendment."[86]

Later, on a vote of 145 ayes to 277 nays, the Rogers amendment was defeated.[87] With the Davis-Bacon provision still in place, the measure was passed by the House and dispatched to the Senate where it was placed on the Legislative Calendar under General Orders.

Action by the Senate

In the Senate, S. 1644 (the Senate version of H.R. 2638) was passed unanimously by the Appropriations Committee and, on July 24, was called up and considered as a substitute for the House-passed version.[88] For three days, the Senate debated Homeland Security, voted to accept the Senate bill, and appointed conferees (July 26, 2007).[89] However, the bill, as reported, did not have the House-approved Davis-Bacon language, thus (along with other considerations) suggesting the need for a conference; Senate conferees were duly appointed. At that juncture, other matters seemed to take precedence.

Consolidated Appropriations Bill

As the first session was drawing to a close, with 11 of the 12 regular appropriations measures pending, Congress turned to a 'consolidated appropriations act.' It chose as its vehicle H.R. 2764: initially, the State-Foreign Operations Appropriations Act for FY2008. The bill had passed the House in June and the Senate in September 2007. Negotiations continued through mid-December, clearing the bill for the President who signed the measure on December 26, 2007: P.L. 110-161.

Section E of P.L. 110-161 contains an appropriation for the Department of Homeland Security. It appears that, in the process of accommodation, references to Davis-Bacon were not made a part of the new enactment.[90]

HOPE VI Reauthorization Act of 2007 (H.R. 3524)

On January 17, 2008, Representative Kathy Castor called up H.Res. 922, a resolution to make in order consideration of the bill H.R. 3524, the HOPE VI Improvement and Reauthorization Act of 2007. Following debate, the House passed the measure with a Davis-Bacon provision included. The bill was dispatched to the Senate where it was referred to the Committee on Banking, Housing and Urban Affairs.

[86] *Congressional Record*, June 14, 2007, pp. H6472-H6473.

[87] *Congressional Record*, June 15, 2007, pp. H6496-H6497.

[88] *Congressional Record*, July 24, 2007, pp. S9812-S9813.

[89] *Congressional Record*, July 26, 2007, p. S10115.

[90] See CRS Report RL34298, *Consolidated Appropriations Act for FY2008: Brief Overview*, by (name redacted).

The HOPE Housing Act

The bill (H.R. 3524) expands upon a joint federal/local community initiative, dating from the 1990s, to renovate or replace "old, distressed public housing projects with modern housing and new communities that are healthy, safe and affordable." Castor suggested that the measure "could not have come at a more important time" given the current rash of foreclosures.[91]

Conversely, Representative Pete Sessions rose "in reluctant opposition" to the bill "in its current form." He stated that in "mandating compliance with privately developed green building rating systems, rather than providing market-based incentives to reach these goals," the legislation creates burdens for contractors by adding "further impediments to an already complicated financing structure which could discourage developers from undertaking future projects." Sessions affirmed that a move to a "market-based approach, rather than the one-size-fits-all [Washington] standard" can easily be fixed. He then turned to the logistics of housing demolition and rehabilitation; but there was seemingly little real disagreement. The House passed the resolution and moved on to the bill itself.[92]

The King Davis-Bacon Amendment

As the House took up the Hope VI Reauthorization Act, Representative Steve King rose with an amendment. It provided: "None of the funds authorized to be appropriated under this paragraph may [be] used to pay wages in compliance with subchapter IV of chapter 31 of title 40, United States Code." This reference was to the Davis-Bacon Act.[93]

The King amendment would have stricken "the requirements for [a] Davis-Bacon wage scale" and would have prohibited act funds from "going to a Davis-Bacon wage scale." Representative King explained that he was, perhaps, the only Member of Congress who had actually "worked and lived under [a] Davis-Bacon wage scale, and I have done that for well over 30 years." He continued:

> I have done the homework, I have done the paperwork, I have put together the spreadsheets, and I dealt with all the employee dynamics that were involved there.
>
> And I make the point, Mr. Chairman, that labor is a commodity like corn or beans or gold or oil or gasoline, and the value of it needs to be determined by the marketplace, not by the government. And for the Federal Government to intervene in a relationship between two people, and a contractual relationship in particular, at the cost of the taxpayer that always favors going to a union scale and is not a prevailing wage but it is in effect a union scale, this authorization as written, if my amendment is not adopted, will cost the taxpayers an additional $26 million.

King did not, specifically, explain the basis for the "additional $26 million," though he did seem to suggest that his figures were "a low average." He stated that the statute "is not effective," that

[91] *Congressional Record*, January 17, 2008, p. H299.

[92] *Congressional Record*, January 17, 2008, pp. H300-H301.

[93] *Congressional Record*, January 17, 2008, p. H324.

it "cannot keep up with a change in the wage scale," and, according to the Inspector General of DOL, that "nearly 100 percent of the [Davis-Bacon] data cannot be relied upon."[94]

King's comments triggered a response from Representative David Scott, who stated: "...the gentleman from Iowa very cleverly used the words 'union scale.' This is not union scale; this is prevailing wage scale." Scott continued:

> Now this amendment ... is very timely. Here we are in the throes of a recession, one of the most damaging economic crises that this Nation has faced in the last quarter of a century, and we have the gentleman from Iowa wanting to put on an amendment that would diametrically affect the living wages of the people who need the help the most.
>
> Now, by preventing workers on HOPE VI projects from earning a living wage is certainly not the right way to go.

Scott closed with the affirmation: "The Davis-Bacon prevailing wage helps attract the necessary skilled workforce to build housing in the most efficient and cost-effective manner. This," he said of the King proposal, "is a bad amendment."[95]

Meanwhile, thanking Scott for his comments, Representative George Miller explained further: "This is about prevailing wages; it is not about a union wage." Miller added: "...the fact of the matter is the majority in this House understands how important this provision is to working people in this country and to the communities in which these projects are being built." In a statement for the *Record*, Miller summarized:

> The King amendment uses taxpayer money to worsen the cycle of poverty in the poorest neighborhoods in the country. It uses taxpayer money to buy shoddy work that just increases the costs later on. It's difficult to tell who the amendment is trying to hurt the most—the poor neighborhoods, the workers, or the taxpayers.

He concluded: "This Amendment is outrageous and should be roundly defeated by the House."[96]

Not so, remarked Representative King. He found Miller's remarks "offensive to me to say that my 28 years of meeting payroll, my 1,400-some consecutive weeks of making payroll, of providing health insurance and retirement benefits and year-around work for employees and a career path for them is, to take his words, poor wages and poor working conditions." Who, in this Congress, "has some experience that can step forward and say otherwise?" King concluded: "I urge the adoption of my amendment."[97]

On a recorded vote, the ayes were 136 and the nays were 268. The King amendment was defeated.[98] The House then passed the bill (271 ayes to 130 nays) and sent the bill on to the Senate.

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[94] *Congressional Record*, January 17, 2008, p. H324.

[95] *Congressional Record*, January 17, 2008, p. H325.

[96] *Congressional Record*, January 17, 2008, p. H325.

[97] *Congressional Record*, January 17, 2008, p. H325.

[98] Congressional Record, January 17, 2008, p. H330. See also Bureau of National Affairs, *Daily Labor Report*, January 24, 2008, p. A7.

Consideration by the Senate

On January 22, 2008, the Hope VI reauthorization was received in the Senate and was referred to the Committee on Banking, Housing and Urban Affairs.

Indian Health Care Amendments of 2007

During the spring of 2007, two bills were introduced (H.R. 1328 and S. 1200), respectively in the House and in the Senate, that dealt with improvements in Indian health care and facilities. In each case, the bills contained a provision for Davis-Bacon coverage of any construction 'funded in whole or in part' with federal funds associated with Indian health care. The bills began to move along relatively straight forward tracts; but, ultimately, the Senate moved more quickly—adopting new language and moving a Senate-passed bill on to the House for further consideration.

The Pallone Bill (H.R. 1328)

In the House, on March 6, 2007, the Indian Health Care Improvement Act Amendments of 2007 was introduced (H.R. 1328) by Frank Pallone. The bill was referred to the Committees on Natural Resources, Energy and Commerce, and Ways and Means.

Hearings were conducted by the Natural Resources Committee and the bill was ordered to be reported in early April 2007.[99] Under labor standards, Section 303(b), the bill provides:

> For the purposes of implementing the provisions of this title, contracts for the construction or renovation of health care facilities, staff quarters, and sanitation facilities, and related support infrastructure, funded in whole or in part with funds made available pursuant to this title, shall contain a provision requiring compliance with subchapter IV of Chapter 31 of title 40, United States Code (commonly known as the 'Davis-Bacon Act').

In its report (H.Rept. 110-564, Part 1), the Committee noted, "...it is the intention of the Committee to maintain current law. When Indian health facilities are constructed or renovated, Davis-Bacon prevailing wage rates apply." The Report continued:

> However, pursuant to current federal law and longstanding policy of the Department of Labor, Indian Health Service, and Bureau of Indian Affairs, when Indian tribes and tribal organizations construct or renovate federally-funded Indian health facilities using their own employees, Davis-Bacon prevailing wage rates do not apply.

Finally, the report notes: "The Intention of the Committee is to maintain the status quo of current law and policy pursuant to the Davis-Bacon Act and the Indian Self-Determination and Education Assistance Act in this regard."[100]

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[99] Hearings were also held by the House Energy and Commerce Committee, Subcommittee on Health. On November 7, 2007, the measure was ordered reported to the full Committee by a voice vote. The Committee on Ways and Means has not yet reported the bill.

[100] U.S. Congress, House of Representatives, Committee on Natural Resources, Indian Health Care Improvement Act Amendments of 2007, 110th- Cong., 2nd Sess., H.Rept. 110-564, Part I, April 4, 2008, pp. 42 and 117.

The Indian health care bill was multifaceted with the Davis-Bacon provision being only one small part of the measure.

The Dorgan Bill (S. 1200)

Shortly after the Pallone bill was introduced, Senator Byron Dorgan introduced a companion bill, also entitled the Indian Health Care Improvement Act Amendments. The bill was referred to the Committee on Indian Affairs of which Dorgan was chair. He noted that similar legislation had been under consideration through the past several Congresses. "Eight years is too long to wait...," he stated, observing that he "intends to move aggressively to seek approval of this legislation."[101]

Provisions of the Dorgan Bill

Like the Pallone bill, the Dorgan bill contained a Davis-Bacon provision—subchapter IV of Chapter 31 of title 40, United States Code (commonly known as the 'Davis-Bacon Act')—but with several caveats under which the Davis-Bacon Act would not apply in a strictly orthodox manner.

- *First:* The construction or renovation may be "performed by a contractor pursuant to a contract with an Indian Tribe or Tribal Organization with funds supplied through a contract or compact authorized by the Indian Self-Determination and Education Assistance Act (25 U.S.C. 450 et seq.), or other statutory authority;"
- *Second:* Or, it may be "subject to prevailing wage rates for similar construction or renovation in the locality as determined by the Indian Tribes or Tribal Organizations to be served by the construction or renovation."
- *Third:* "This subsection shall not apply to construction or renovation carried out by an Indian Tribe or Trival Organization with its own employees."[102]

Thus, the Dorgan bill would do three things. *First.* It reaffirms the existing Davis-Bacon provision but changes the old citation (40 U.S.C. 276a to 276a-5) to a recodified citation (subchapter IV of chapter 31 of title 40). *Second.* It provides that jurisdiction over Davis-Bacon rates, formerly the exclusive preserve of the Secretary of Labor, can be transferred to "Indian Tribes or Tribal Organizations." *Third*. It provides a rather standard exception from the act that allows work performed by the employees of "an Indian Tribe or Tribal Organization" (in-house staff) to be unprotected in terms of Davis-Bacon standards.[103]

Some Policy Implications

Initially, it appears, the Administration may not have taken the new proposals seriously. The Pallone bill contained a straight-forward reiteration of Davis-Bacon coverage; the Dorgan bill, a

[101] *Congressional Record*, April 24, 2007, p. S4926.

[102] See S. 1200, the Indian Health Care Improvement Act, as introduced on April 14, 2007, pp. 160-161.

[103] It may not be clear just what the impact of the devolution of enforcement policy to the several hundred "Tribes or Tribal Organizations" would be, since these entities would be, it seems, largely independent and could it would appear, operate under their own rules.

more complex proposal to allow Indians or tribal organizations an opportunity to share in determining wage rates for Davis-Bacon purposes. If there was opposition to the proposal(s), it was not immediately apparent.

Then, under date of January 22, 2008, the Office of Management and Budget (OMB) released a statement critical of the "expansion of Davis-Bacon" and suggesting: "If this provision is included in the final bill presented to the President, his senior advisors would recommend he veto the bill." OMB did not explain in what manner Davis-Bacon would be expanded, because Davis-Bacon was already a part of the statute. Further, under the Dorgan proposal, the Department of Labor could find its duties diminished in scope, primarily because of the new Tribal primacy with respect to the establishment of Davis-Bacon rates.[104]

On February 14, 2006, a colloquy occurred between Senators Edward Kennedy, Lisa Murkowski, and Dorgan. The colloquy opened with Senator Kennedy.

> Mr. KENNEDY. I understand that in the managers' amendment, section 303(b) of the bill has been modified so that the language is now identical to current law; is that correct?
>
> Mr. DORGAN. Yes. The intent of the provision in the managers' amendment to the bill is to maintain current law. Generally, when Indian health facilities are constructed or renovated, Davis-Bacon prevailing wage rates apply. However, pursuant to current Federal law and longstanding policy of the Department of Labor, Indian Health Service, and Bureau of Indian Affairs, when Indian tribes and tribal organizations construct or renovate federally funded Indian health facilities using their own employees, Davis-Bacon prevailing wage rates do not apply. Our intention in the managers' amendment is to maintain the status quo of current law and policy in these regards.
>
> Mr. KENNEDY. So this language does not change the construction or application of existing statutes?
>
> Mr. DORGAN. Correct, it does not change current law. It is our intent that the prevailing wage provisions in both the Indian Health Care Improvement Act and the Indian Self-Determination and Education Assistance Act will continue to apply when Federal funds are used for the construction and renovation of Indian health facilities, except where such work is carried out by tribal or tribal organization employees."[105]

Senator Murkowski joined in the dialogue, expressing the same sentiment: that is, that nothing in the statute had been changed—merely recodified.

On February 26, 2008, the Indian health care bill was approved by the Senate (83 yeas to 10 nays), with the Davis-Bacon provision remaining in the measure.[106]

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[104] Bureau of National Affairs, *Daily Labor Report*, January 23, 2008, p. A9. For the OMB document, see http://www.whitehouse.gov/omb/legislative/sap/110-2/saps1200-s.pdf. As proposed, part of the enforcement policy and procedures would be shifted from the Secretary of Labor to "Indian Tribes or Tribal Organizations"—a somewhat unclear definition since there could be several hundred such organizations with different standards for implementing the Davis-Bacon Act.

[105] *Congressional Record*, February 14, 2008, pp. S1040-S1041.

[106] *Congressional Record*, February 26, 2008, p. S1155. However, the language was changed so that 'Davis-Bacon' doesn't appear. References to a transfer of responsibilities from the Department of Labor to various Indian tribes and tribal organizations, where Davis-Bacon is concerned, were deleted in the Senate version.

Back to the House

On February 28, 2008, the bill was received in the House and was referred to the Committees on Natural Resources, on Energy and Commerce, and on Ways and Means.[107]

Improving Public School Facilities

On February 13, 2008, George Miller, Chairman of the Committee on Education and Labor, presided over a hearing on the physical state of America's schools. "We all agree on the urgent national priority of providing every child with a world-class education...," Mr. Miller began. "It is clear that we cannot satisfy that priority unless we help states and school districts improve the physical condition of their school buildings and facilities." He concluded: "We can help mitigate the [current] economic damage by investing in school construction projects that will create jobs and inject demand into the economy."[108]

General Discussion of Davis-Bacon

The Committee's Ranking Republican, Howard McKeon, tended to disagree with Chairman Miller's views, not on general substance, but on the source of funding. "Traditionally, states and local communities have retained control over education," McKeon stated, "particularly public K-12 education." He pointed to the "costly mandates" that would "threaten the autonomy ... maintained at the state and local level"—such as the Davis-Bacon Act. Mr. McKeon suggested that the "Depression-era" statute can "drive up the cost of federal projects."[109] Again: "Just yesterday, the Committee received a letter from leading business and construction groups outlining flaws within the Davis-Bacon wage mandates...."[110]

Several Members appeared before the Committee as witnesses. Representative Charles Boustany urged that the Committee consider "...one federal mandate that makes already expensive projects even more expensive...." namely, the Davis-Bacon Act. Mr. Boustany was "hopeful that the committee will focus on the critical shortcomings in the way those Davis-Bacon wages are calculated."[111] He suggested a 20 to 25 percent increase in total costs arising from Davis-Bacon, observing that a study by researchers at Suffolk University (Boston) found that "the current method inflates wages by 22 percent" overall. "I challenge anyone on this committee to argue that

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[107] Drew Armstrong, "Senate Aims to Complete Work on Indian Health Care Overhaul Bill," *CQ Today*, February 25, 2008, pp. 10 and 12.

[108] Prepared remarks of Chairman Miller when introducing the hearing on school facilities before the Committee on Education and Labor, February 13, 2008. See also H.R. 2470, H.R. 3021, H.R. 5401, S. 912, and others.

[109] Press release from the office of Representative McKeon, February 13, 2008.

[110] Statement of Representative McKeon, February 13, 2008, before the Committee on Education and Labor. Among signers to the letter were the U.S. Chamber of Commerce, the National Federation of Independent Business, and Associated Builders and Contractors.

[111] Some have suggested that DOL's wage rate calculations may be, in fact, substantially out-of-date and therefore reduce the effectiveness of the act. Mr. Boustany may well have concurred. "Many construction employees are actually underpaid using the flawed determination method instead of superior BLS figures." Employees in Florida, North Carolina, Michigan, Virginia, and Maine were some of those Americans who got cheated by the current system's shortcomings." See statement of Representative Boustany before the Committee on Education and Labor, February 14, 2008.

the Davis-Bacon wage surveys are scientific surveys that need no improvements." Boustany stated: "Either taxpayers get overcharged by the system, or construction employees are underpaid." He urged the Committee "to fix Davis-Bacon before imposing it on future school construction projects."[112]

Representative Steven King had also read Suffolk University study and asked that it be made a part of the record.[113] Mr. King alluded to work from his own experience with Davis-Bacon. Citing the General Education Provisions Act or GEPA [20 U.S.C. 1232b], he observed that the "Davis-Bacon mandate would apply to any bill that received federal dollars for construction or renovation" and affirmed that "...Davis-Bacon is the federal government intruding in the affairs of the States...." He charged that the act is "anti-competitive." Mr. King affirmed: "Non-union companies, like the one I started, are seriously hurt by Davis-Bacon provisions. Small Businesses," he concluded, "simply can't compete...."[114]

Jim Waters of Bowling Green, Kentucky, spokesperson for the Bluegrass Institute for Public Policy Solutions, Kentucky's "free-market think tank," was also a witness. Waters stated that Kentucky's "'prevailing wage' law represents "a well-intentioned policy gone awry." The Kentucky law "prevents state government from receiving the most value for every dollar spent on public projects" and increases the cost of infrastructure "by 10 to 15 percent." Waters questioned how "contractors build quality office complexes, large custom homes, investment properties and corporate facilities without being coerced by some kind of forced wage policy?"[115]

Several open shop contractors and business spokespersons had asked that application of Davis-Bacon to school construction be withheld "until serious flaws with the laws's wage determination process are fixed."[116]

House Considers a Construction Bill: H.R. 3021

Representative Ben Chandler had introduced H.R. 3021, the 21st Century High-Performing Public School Facilities Act, in early July 2007. That bill now became a vehicle for the Committee.

The Chandler bill stated that "at least one-third" of our public school buildings "need extensive repair or replacement and two-thirds have troublesome environmental conditions such as the presence of asbestos or lead in water and paint." The average public school building was built in the early 1960s, it stated, and now needs "hundreds of billions of dollars in construction, modernization, and repair" to bring them up to standards. The Chandler bill observed that there was a direct link between the quality of school facilities and the academic achievement of students. Bringing elementary and secondary schools "up-to-date" will help improve "academic performance and will improve teacher retention."[117]

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[112] Representative Boustany before the Committee on Education and Labor, February 13, 2008.

[113] See Sarah Glassman, Michael Head, David G. Tuerck, and Paul Bachman, *The Federal Davis-Bacon Act: The Prevailing Mismeasure of Wages* (Boston: The Beacon Hill Institute at Suffolk University, February 2008, 57 pp.

[114] Representative King before the Committee on Education and Labor, February 13, 2008.

[115] Jim Waters before the Committee on Education and Labor, February 13, 2008.

[116] Sheila R. Cherry, "Panelists Urge Labor Committee Not to Add Davis-Bacon Act to School Construction Bills," Bureau of National Affairs, *Daily Labor Report*, February 22, 2008, p. A5.

[117] Language, here, is from H.R. 3021 as introduced.

Views of the Majority

On April 30, 2008, the Committee conducted a full committee mark-up of H.R. 3021. In summarizing the legislation, the report presented by Representative Miller noted, noted that "construction, modernization, repair, and renovation projects" will be Davis-Bacon covered.

> Davis-Bacon requirements will help control costs, ensure higher quality work, and improve safety. Studies have shown that, where prevailing wages are not required, contractors compete on the basis of labor costs, frequently resulting in poor construction quality as well as substantial cost and time overruns due to cheaper workers' lower levels of skill, productivity, and training. Where prevailing wages are paid, higher rates of productivity, safety, and building quality more than offset the cost of higher wages.

The report continued: "Davis-Bacon requirements help save federal, State, and local revenue." Further: "Studies have found that repeal of local prevailing wage laws results in lower incomes, loss of sales tax revenues, and a general loss of economic activity." It concluded: "These are precisely the types of effects the Committee intends to avoid by providing federal assistance to local communities consistent with Davis-Bacon."[118]

It wasn't necessary to add Davis-Bacon to the bill. Under the General Education Provisions Act or GEPA, such programs would automatically be covered.[119] But, conversely, critics of Davis-Bacon were desirous of striking that provision.

Views of the Minority

Representative McKeon (with his colleagues) spoke for the minority. "One of the most troubling aspects of a massive new federal school construction program authorized through H.R. 3021," they stated, was the Davis-Bacon requirement. The prevailing wage system "has proven to be fundamentally flawed, often bearing no relation to market wages" and tends to "favor union wage workers." And, the cost impact from Davis-Bacon is "staggering." The Congressional Budget Office (CBO) and GAO were cited.

> CBO estimates that the federal government could save more than $10.5 billion in construction costs if it were to repeal the Davis-Bacon Act. (...) The GAO is also on record in stating that the Davis-Bacon Act is, 'not susceptible to practical and effective administration' by the Department of Labor and that Davis-Bacon has resulted in unnecessary construction and administration costs, inflated prices, and inaccurate wages.

They suggested, as a minimum, a new system of wage-rate calculation under the Bureau of Labor Statistics (within the Department of Labor).

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[118] U.S. Congress., House of Representatives, Committee on Education and Labor, Report 110-623, *21st Century Green High-Performing Public School Facilities Act*, pp. 14-15. (Cited hereafter as H.Rept. 110-623.) The majority cited two studies: Peter Philips, "Square Foot Construction Costs for Newly Constructed State and Local Schools, Offices and Warehouses in Nine Southwestern and Intermountain States, 1992-1994," Prepared for the Legislative Education Study Committee, New Mexico State Legislature, September 6, 1996; and Michael P. Kelsay et al., "The Adverse Economic Impact from Repeal of the Prevailing Wage Law in Missouri," Council for Promoting American Business, January 2004.

[119] H.Rept. 110-623, pp. 4 and 18.

> In some cities, the wage determinations are more than 75 percent above market wages. In other cities, they are just one-third of market wages. In some states, Davis-Bacon rates are actually below the minimum wage. These wage determinations simply do not reflect prevailing market wages and this failure has serious implications for construction workers and taxpayers.[120]

Citing a study by the National School Boards Association, Representative McKeon and his associates argued that "at least 38 states would have to endure significantly increased school construction costs if Davis-Bacon were imposed...."[121] The Davis-Bacon mandate, the minority stated, "will only over inflate school construction prices, limit competition, and reduce jobs for entry-level workers."[122]

The minority urged that "new school construction" be exempted from Davis-Bacon coverage. But, in Committee, a McKeon amendment was rejected: 16 ayes to 27 nays.[123] On May 8, 2008, the Committee reported H.R. 3021.

Floor Consideration in the House

On June 3, 2008, H.R. 3021 was approved for floor consideration under H.Res. 1234; on June 4, h.r. 3021 was called up, debated and passed by a vote of 250 yeas to 164 nays.[124]

Despite earlier discussion of the Davis-Bacon Act, little attention was paid to the act during debate on passage of the bill. In a general summary of the measure, Representative McKeon noted that the bill would "link this funding to the Depression-era Davis-Bacon Act." Mr. McKeon added: "The problem is, prevailing wage calculations are critically and fundamentally flawed" with some rates "higher than market rates and other times they are lower."[125] Later, Representative Carolyn McCarthy responded: "...as far as having David-Bacon, why should not we have prevailing wage for those that work in the community, pay the wages, and also have good construction done?"[126]

On June 6, 2008, H.R. 3021 was received in the Senate. The measure is said to be "strongly" opposed by the White House.[127]

[120] H.Rept. 110-623, pp. 34-36.

[121] H.Rept. 110-623, p. 36.

[122] H.Rept. 110-623, p. 37. The minority cited the Beacon Hill Institute study, noted above, and studies of implementation of state 'Davis-Bacon' provisions utilized in Ohio and Kentucky—but these studies were not named.

[123] H.Rept. 110-623, pp.20 and 38.

[124] *Congressional Record*, June 4, 2008, p. H4961.

[125] *Congressional Record*, June 4, 2008, p. H4937.

[126] *Congressional Record*, June 4, 2008, p. H4940.

[127] Libby George, "Bill Aided at Building Environmentally Friendly Schools Heads Toward House Vote," *CQ Today*, June 4, 2008, p. 11.

Appropriations: Departments of Transportation and HUD (H.R. 3074)

On July 22 and 24, 2007, the House took up H.R. 3074, the appropriations for the Departments of Transportation, Housing and Urban Development, and Related Agencies. Ultimately, the measure was added to H.R. 2764, the Consolidated Appropriations Act of 2008.

Proposal by Representative King

Representative John W. Olver presided over discussion that dealt with the more delicate points of housing and transportation that began with the phrase: "None of the funds made available in this Act...."

As debate proceeded on H.R. 3074, Representative Steve King proposed an amendment: "None of the funds made available under this Act may be used to implement the provisions" of the Davis-Bacon Act. Under House rules, Representative King was recognized for 5 minutes, together with a Member opposed to the amendment—Mr. Olver.[128]

Representative King explained that the amendment "strikes the requirements for the Davis-Bacon Act within the appropriations of this bill." He continued by noting his experience with Davis-Bacon, both as a recipient of Davis-Bacon wages and as a contractor through many years, and noted the paperwork requirements under the act. "I'm maybe the only one in Congress who has real hands-on experience ... of dealing with the additional costs that are involved with the Federal wage scale that's Davis-Bacon." He explained that projects, covered by Davis-Bacon, from his experience, add "anywhere from 8 percent increase in the cost of the projects up to 35 percent increase in the cost of the projects." But, he rounded the numbers off at "20 percent additional costs."

Mr. King stated that he supported a free market economy: "...of labor being able to collectively negotiate the value of their work...." He added:

> I believe that if two adult individuals want to enter into a contractual agreement, they should be able to do so without interference of the Federal Government. This is not a prevailing wage in practice. It's only a prevailing wage by statute. Actually, it is union scale....

Representative King suggested: "Some places, it's [the Davis-Bacon wage] actually below the prevailing wage. Other places, it distorts that prevailing wage dramatically." Why, he asked, should we limit our resources "by imposing such a draconian, top-down, Federal management tool that not only costs a lot more money, but it makes it a lot, lot harder to manage your projects?"[129]

[128] *Congressional Record*, July 24, 2007, p. H8375.

[129] *Congressional Record*, July 24, 2007, pp. H8375-H8376.

The Issue Debated

Representative Olver then rose to defend use of Davis-Bacon requirements. After noting that the act had been adopted "by a Republican Congress and a Republican administration" about 75 years ago, Representative Olver affirmed:

> Without Davis-Bacon, the transportation construction industry, which is responsible for building our highways and transit systems, might suffer from low-bid firms that aim to undercut local wages and perform construction on the cheap.
>
> Davis-Bacon encourages a higher quality of workmanship, and we should not do away with the law for transportation construction where we need the highest quality and the longest lasting workmanship.

With that, Mr. Olver urged rejection of the King amendment.[130]

In response, Representative King stated that he had "worked on union shop and merit shop jobs, both as an employer and as an employee." He added: "...I don't think we can apply high quality strictly to union." And, he continued: "In fact, merit shop employees do a fantastic job with the work that they're doing, and they take pride in it...." But it may not have been the wage rate that most disturbed Mr. King.

> My greatest frustration with Davis-Bacon wage scale is not the wage itself. It's that it takes away my ability to manage a project and my ability to provide incentives for employees to make decisions themselves on the ground.
>
> I have to manage them more when they're under a Davis-Bacon wage scale....
>
> It distorts the work we do. It distorts the skills and the complement of the skills, and it raises the cost of everything that we do in the construction business.

Referring to merit shop construction, King stated: "They make out better, we make out better, and we've got more consistent employees."[131]

King demanded a recorded vote. The ayes were 148 and the nays were 278. The King proposal failed.[132]

Combined in the Appropriations Process

With the King proposal rejected, debate moved on to other matters. But, ultimately, H.R. 3074 was added to H.R. 2764, the Consolidated Appropriations Act of 2008.

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[130] *Congressional Record*, July 24, 2007, p. H8376.

[131] *Congressional Record*, July 24, 2007, p. H8376.

[132] *Congressional Record*, July 24, 2007, p. H8385. See also H.R. 3412, a free-standing proposal by Representative King of Iowa that would repeal the Davis-Bacon Act. H.R. 3412 has been referred to the Committee on Education and Labor, Subcommittee on Workforce Protections. No action has yet been taken.

Appropriations: Agriculture and Rural Development (H.R. 3161)

In late July and early August 2007, the House took up H.R. 3161, the Agriculture, Rural Development, Food and Drug Administration, and Related Agencies Appropriations Act (2008). Representative Rosa L. DeLauro presided over the discussion.

Proposal by Representative Kingston

As with the farm bill, some portions of H.R. 3161 dealt with renewable energy. And related concerns. As debate progressed, Representative Jack Kingston rose with an amendment.

> None of the funds made available in this Act shall be used to pay the salaries or expenses of any employee of the Department of Agriculture who would require contracts to construct renewable energy systems to be carried out in compliance with the provisions of the Davis-Bacon Act.[133]

Mr. Kingston noted that "people are paying $3.10 for gas" or higher: the rate is on the rise. "We are importing 60 percent of our oil." He continued: "During this time when we are in desperate need for alternative energy options, we should not increase the price of making cellulosic ethanol. And yet," he stated, "in the Ag bill, there was a clause that says if you are building an ethanol plant, you have to have prevailing wages [the Davis-Bacon provision], which drives up the cost of the plant and, therefore, drives up the cost of ethanol."[134]

The Issue Debated

Representative DeLauro rose to claim the time in opposition to the amendment and then yielded to Representative Robert C. Scott.

Scott proceeded with a rebuttal. "This amendment smacks right at the heart of our wage structure, of fair wages and protected wages. Long before Taft-Hartley, before the Wagner Act, this was put on the books in 1931, 76 years ago." Then, Representative Scott added: "...Davis-Bacon was put on the books by a Republican administration, President Hoover, because at that time it was needed to have wage stabilization." Mr. Scott suggested that Davis-Bacon was "the cornerstone of the wage protection structure in this country" and noted: "Davis-Bacon prevents underbidding of any contractor coming in on a government contract, low bidding and attempting to bring in a contract and hire workers below the prevailing wage." Then, looking to the precise amendment, he stated that it was "dealt with in the Agriculture Committee and soundly defeated at that time."

Representative Scott then went on to a central issue. "In the Ag bill, we have dedicated $4 billion for loan guarantees to set up ethanol plants. Now, Mr. Chairman, these are highly sophisticated operations ... clearly we need the best talent, the best skills." He went on to discuss the nature of Davis-Bacon and the rationale for its enactment. "These protections were put in to prevent fly-by-

[133] *Congressional Record*, August 2, 2007, p. H9628.

[134] *Congressional Record*, August 2, 2007, p. H9628.

night operations from coming into a community." Abridgment of the Davis-Bacon Act, he suggested, would be "wrong ... and, quite honestly, unAmerican."[135]

Mr. Kingston reclaimed his time but was then joined by Representative King of Iowa. "Prevailing wage by definition, union scale in practice, there is no other way to analyze this. Union scale is what gets produced," King stated, "when the Department of Labor produces the proposed prevailing wage." Mr. King went on to the logistics of the new energy:

> There was over a billion dollars invested in renewable energy in my district last year. There will be over a billion dollars invested this year. We are number one in biodiesel production in America of the 435 districts.

King affirmed: "... there is no way that any other district in the country has a hope of catching up with the Fifth Congressional District of Iowa if you are going to impose Davis-Bacon wage scales on this...."[136]

Representative Sam Farr rose to challenge the critics of Davis-Bacon. Mr. Farr noted that California "has done more for cutting energy costs by doing energy conservation and renewable energy," and he stated: "...every one of those facilities was built under Davis-Bacon law." He stated that the amendment was an effort to "get at labor ... try to cut wages, go to the lowest cost." And Representative Farr added: "This is the wrong way to do it. It is a mean amendment, and it should be defeated."[137]

There may have been some measure of irony, here. "If this was about free enterprise," Kingston responded, "this clause would not be in the farm bill." He added: "...my biggest gripe is that it is making energy costs go up because it is making the construction of alternative energy facilities higher." Ms. DeLauro, in closing out the debate, affirmed: "I urge my colleagues to oppose this amendment. Why? Why would we want to deny American workers, including those involved in rural development, the opportunity to receive their prevailing wage protection. It's a matter of fairness for working men and women."[138]

Representative Kingston demanded a roll-call vote on his projected amendment. The vote was ayes 152 and nays 278.[139] The Kingston amendment was defeated.

"Helper" Issue and Manpower Utilization

Through the past half-century, the question of "helpers" has emerged as a Davis-Bacon issue: sometimes in legislative format; on other occasions, as an administrative matter. It will likely continue to be raised as Davis-Bacon remains a matter before Congress—both as to the definition of a "helper" and with respect to the use of helpers on Davis-Bacon covered projects.

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[135] *Congressional Record*, August 2, 2007, p. H9628.

[136] *Congressional Record*, August 2, 2007, pp. H9628-H9629.

[137] *Congressional Record*, August 2, 2007, p. H9629.

[138] *Congressional Record*, August 2, 2007, p. H9629.

[139] *Congressional Record*, August 2, 2007, p. H9644. Ultimately, H.R. 3161 was added to H.R. 2764, the Consolidated Appropriations Act of 2008.

DOL Efforts to Change the Helper Requirement

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.[140]

Under Davis-Bacon, before bids are solicited, the minimum locally prevailing wage rate is determined for each category of worker to 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 construction. Labor proponents maintain that recognition of a helper category could defeat the purposes of the act: that is, allowing contractors to fragment tasks so that low-skilled, low-wage helpers could be employed. Some argue that such a policy could result in a downward wage spiral and that employment of helpers would undercut apprenticeship programs with a generally deleterious impact upon skills transfer.

Through the years, helpers have been employed on Davis-Bacon construction where their use was common in the area and where they are clearly distinguished from laborers or craft workers. However, their use appears to have been infrequent. During the late 1970s, the Carter Administration opened the general issue of Davis-Bacon implementation. Seizing the opportunity, industry urged a closer adherence to area practice when establishing worker classifications—"especially 'helper' classifications."[141] Before new Davis-Bacon regulations could be given effect, President Carter was replaced by President Reagan. Regulations proposed by the former Administration were withdrawn and their substance reconsidered.

New regulations proposed by the Reagan Administration (May 1982) redefined the concept of helper and, potentially, expanded their use: a change applauded by industry and objected to by the building trades unions.[142] 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 DOL's judgment and cleared the regulations for implementation. But, at that juncture, Congress objected, refusing to appropriate funds for implementation and enforcement of the new regulations. This restraint continued into the middle 1990s by which time the agency was free to act. Then, another impediment was raised: DOL, under the Clinton Administration, declined to move forward with the regulation.

In June 1996, the Associated Builders and Contractors brought suit to require DOL to enforce its helper regulations. Confronted with impending litigation, Assistant Secretary of Labor Bernard Anderson affirmed that the helper regulation (approved, but not enforced) was "simply ... non-administratable." Anderson explained that the distinction between helpers and other workers was insufficiently clear: that DOL had no intention of implementing the regulation in its current form.[143] In August 1996, DOL noted that, during the 14 years that had passed since the regulation

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

[141] *The Constructor*, December 1980, p. 61.

[142] *Federal Register*, May 28, 1982, pp. 23644 ff.

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

was first published, "additional information has become available which warrants review of the suspended rule."[144] The regulation remained in abeyance.

Through the next several months, DOL reassessed the data and, in December 1996, it announced that the helper regulation would remain suspended for the immediate future.[145] 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.[146] 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.[147] Thus, the use of helpers would be limited by area practice and where they were clearly differentiated from "laborers" and other craft workers. The use of helpers was expected to be infrequent.

Congress Takes Another Look

Whatever the immediate outcome of the helper question, the Department, it appeared, had made a judgment. For the foreseeable future, no further administrative involvement could be expected.

The Late Clinton Administration

Late in the 105th Congress (1998), Representative Charlie Norwood introduced legislation that would have created a special category of workers (i.e., 'helpers') for Davis-Bacon purposes. No action, however, was taken on the proposal. In the 106th Congress (1999), Mr. Norwood introduced new helper legislation. On July 21, 1999, the Subcommittee on Oversight and Investigations, Committee on Education and the Workforce, conducted a hearing on the impact of the helper rules for job opportunities. The Subcommittee, however, took no further action: the Norwood bill was not reported.

During the same period, Representative Anne Northup raised the helper issue during consideration of appropriations for the Departments of Labor, Health and Human Services, and Education. At Representative Northup'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, as the legislation progressed through the legislative process, the provision was dropped. What impact its inclusion would have had may not have been entirely clear since, in essence, the bill would have codified existing practice.

As the 106th Congress was drawing to a close, DOL again took up the matter, issuing 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 provided that helpers were to be recognized as a "distinct classification ... only where" the following conditions occur:

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

[145] *Federal Register*, December 30, 1996, p. 68646.

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

[147] *Federal Register*, April 9, 1999, pp. 17442-17458.

> (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 was not to be performed by any other classification of worker "in the wage determination."[148]

The George W. Bush Administration

Another bill dealing with the issue was introduced during the 107th Congress but was not adopted. In the 108th Congress (May 2003), the helper issue was raised again by Representative Marsha Blackburn, with Representatives Norwood and King (of Iowa). The proposal (again, the Helpers Job Opportunity Act) mandated that helpers "of laborers and mechanics shall be considered to be a separate classification." But, the prospects were no better than with prior Congresses.[149] The bill was referred to the Committee on Education and the Workforce and subsequently to the Subcommittee on Workforce Protections, but no action was taken on the proposal.

On September 27, 2005 (the 109th Congress), Representative Blackburn, with Mr. Norwood as a co-sponsor, reintroduced the Helpers Job Opportunity Act (H.R. 3907). Again, the bill died in the Committee on Education and the Workforce.

The final regulation, dating from the Clinton Administration, has gone into effect and, thus far, the Bush Administration has not revisited the issue. However, this may not be the end of the process. On the one hand, the Department of Labor, at its own discretion, could reevaluate the helper question and issue a new proposed rule. Or, conversely, Congress could attempt to resolve the issue through new legislation. Of course, it may be that the matter has been resolved and that nothing further remains to be accomplished.

Author Contact Information

(name redacted)

[148] Bureau of National Affairs, *Daily Labor Review*, November 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 (name redacted).

[149] See H.R. 2283 of the 108th Congress.