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Government Contracts, Social Legislation and Prevailing Woes: Enforcing the Davis Bacon Act

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Cover Page Footnote

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GOVERNMENT CONTRACTS, SOCIAL LEGISLATION, AND PREVAILING WOES: ENFORCING THE DAVIS BACON ACT

Lisa Morowitz

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I. OVERVIEW OF THE DAVIS-BACON ACT

A. What It Requires And Whom It Protects

The prevailing wage concept dates back to the federal Davis-Bacon Act of 1931,¹ one of the oldest fair labor standards statutes in the country.² The prevailing wage concept is one of neutrality and as embodied in the Davis-Bacon Act requires that contractors engaged in federal government construction projects must pay their employees at wage rates not less than local "prevailing wages" as determined by the U.S. Department of Labor.³ Since 1931 over sixty federal statutes have been enacted with provisions requiring that prevailing wages be paid⁴ and forty states have statutes paralleling the Davis-Bacon Act,⁵ affectionately referred to as "Little Davis Bacon Acts".

Despite the little attention paid to it in legal literature, the Davis-Bacon Act annually affects approximately four million workers and over fifty billion dollars spent on government subsidized construction. The Act and the regulations promulgated for its enforcement establish those wage rates and fringe benefit payments that prevail for each

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craft in an area as the legal minimum wage rates payable on federally financed construction projects in excess of \$2000.⁶ The Act thus encourages uniform labor wage rates that are consistent with local practice. In so doing, the Davis-Bacon Act parallels the federal labor policy, embodied in the NLRA, to avoid competition on the basis of wage rates and to "promote the flow of commerce by removing certain recognized sources of industrial strife and unrest."⁷ The Supreme Court has recognized that "(o)n its face, the Act is a minimum wage law designed for the benefit of construction workers."⁸

B. How It Works

A review of the Act's administration and history aids in understanding the meaning of Davis-Bacon enforcement for workers involved on construction projects. Davis-Bacon contracts involve the following parties: the Federal agency (often called the procurement or contracting agency) under whose auspices the work is conducted (e.g. Dept. of Transportation, Energy, Housing etc.); the Contractor who bids on the project and then undertakes and supervises the construction (often referred to as the employer); the Sub-contractor who works on one particular part of the project (e.g. the painting, electric work); and the Laborers and Mechanics who actually do the manual labor (often referred to as employees or workers).

i. Administration

Within the Department of Labor (DOL), Davis-Bacon is the responsibility of the Office of Government Contract Wage Standards, which is a unit of the Wage & Hour Division in the Employment Standards Administration.⁹ Prevailing wage rates are determined by the DOL for each construction occupation used in different types of construction in specific U.S. localities. This requires the classification of workers (e.g. carpenters, electricians, iron workers etc.)¹⁰ as well as the classification of projects (e.g. building construction, heavy construction, highway construction and residential building).

The word "prevailing" in the statute has recently been interpreted by the DOL to mean "the wage paid to the majority of the laborers or mechanics in the classification on similar projects in the area during the period in question. If the same wage is not paid to a majority of those employed in the classification, the 'prevailing wage' shall be the average of the wages paid weighted by the total employed

in the classification."¹¹

In compiling wage rate information, the Employment Standards Administration's Wage and Hour Division considers statements voluntarily submitted by contractors showing wage rates actually paid on projects, collective bargaining agreements, wage rates determined for public construction by state and local officials pursuant to prevailing wage legislation, and information furnished by federal and state contracting agencies.¹²

It is frequently alleged that unions have an advantage under these regulations since their contracts usually require all workers of one classification to be paid the same rate to the penny, and, of the relevant interest groups, unions have the strongest incentive to submit wage rate information.¹³ Persuasive arguments are made, however, refuting the alleged "union bias" in the administration of the Act. Based on its examination of every area and project wage determination issued by the DOL in the first four months of 1986, the National Joint Heavy and Highway Construction Committee reported that 42.6 percent of all area determinations provided wage rates that were union rates, and only 23 percent of all project wage determinations were union. Thus, only 26.2 percent of all wage decisions issued in the first four months of 1986 were based on union rates.¹⁴ Despite the controversy it is evident that in a locale where the majority of construction workers are unionized,¹⁵ the union wage will be determined to be the prevailing wage. Likewise, where the majority of construction work is performed on a nonunion basis, the Davis-Bacon wage determinations will reflect the nonunion character of the industry.

ii. Allocation of Enforcement Functions

The Davis-Bacon Act does not assign overall enforcement responsibilities to any one agency. Rather, it is the function of the various federal contracting agencies to ensure that employees are properly classified and to withhold funds in the event of underpayment.¹⁶ Thus, the primary responsibility for day-to-day enforcement such as checking employer payroll records and making on-site inspections rests with the contracting agencies funding the construction.

The DOL determines the coverage of the Davis-Bacon Act and related statutes and issues prevailing wage rates. In addition, coordinating and oversight responsibilities rest with the DOL. To accomplish this task they issue regulations to be followed by the contracting agencies and conduct their own investigations of alleged violations when it is deemed necessary to do so.¹⁷

The Comptroller General also has enforcement responsibilities under the Act.¹⁸ S/he must reimburse workers for any wages due them from payment withheld from non-compliant contractors. S/he is also authorized to debar contractors from receiving government contracts for a period of three years when they have committed violations which constitute a disregard of their obligation to employees and subcontractors.¹⁹

iii. Some Recent Developments

The Davis-Bacon Act has been a controversial statute since its inception, a controversy that has intensified in recent years. In 1979, for instance, the National Right to Work Committee targeted prevailing wage laws across the country, helping to file 52 bills to weaken or repeal them in state legislatures.²⁰ Since then state prevailing wage laws in Alabama, Colorado, Florida, Idaho, New Hampshire and Utah have been repealed.²¹

On the federal level the strategy has developed to attack Davis-Bacon piecemeal through the appropriations process — attaching provisions to particular appropriations bills that would limit the applicability of Davis-Bacon to that particular expenditure area.²² One of the latest federal administration attempts has been a maneuver by the U.S. Department of Housing and Urban Development (HUD) to block states, including New York, from applying their prevailing wage laws to federally-assisted housing projects.²³ Not surprisingly, these legislative attempts coincided with the publication of a wealth of literature — research, studies, editorials and articles — criticizing the Act.²⁴

Simultaneously, the DOL, intending to bolster Davis-Bacon and to ward off some of the heat directed towards their department, aggressively activated the administrative rule-alteration machinery by publishing changes in the Federal Register on Dec. 28, 1979.²⁵ These changes in the proposed regulations were surmised as making Davis-Bacon more costly but more restraining on contractors.²⁶ The final version of these regulations was published on Jan. 16, 1981, with a scheduled effective date of Feb. 17, 1981. However, on Feb. 16, the then new Labor Secretary Donovan published a notice delaying implementation of the regulations. After a series of further delays and extensions, Secretary Donovan published new proposed Davis-Bacon regulations which differed substantially from the originally proposed regulations. The final version of the regulations was published in May of 1982²⁷ and was branded by many as having a deleterious effect on workers involved in construction.²⁸ The changes included: revising the definition of prevailing wage; instituting a new prohibition against using metropolitan wage data for setting prevailing rates in rural counties and vice versa; instituting a new prohibition against using wage rates paid on Davis-Bacon projects as a basis for developing future wage determinations; expanding the permitted use of semi-skilled helpers whenever the helper classification was identifiable in the area; and allowing contractors to submit a weekly statement certifying compliance with wage requirements instead of requiring the submission of the actual weekly payrolls. Secretary Donovan's justification for the changes in the proposed regulations appears to have been based on the high cost of implementing the Act,²⁹ a justification which many have criticized. The Davis-Bacon Act after all was not and is not designed to save the government or contractors money.³⁰

But the battle did not stop with the implementation

of these new regulations; protracted litigation followed. The Building & Construction Trades Department of the AFL-CIO acted quickly to enjoin use of the new regulations by filing an action in the U.S. District Court of the District of Columbia on June 11, 1982, seeking a preliminary injunction.³¹ A preliminary injunction was granted and in its final deposition issued five months later, the unions were granted summary judgment on all of the provisions except the elimination of the 30 percent rule to define prevailing wage.³² An appeal by both parties to the District of Columbia Circuit Court of Appeals ensued, resulting in an opinion similar to the district court's opinion. Although invalidating the regulation elimination submission of actual weekly payroll records, and ordering modifications of the regulations to require that semi-skilled helpers be "prevailing" rather than "identifiable" in an area, the court upheld the Department's authority to permit a wider use of helpers and modify the rules for surveying wages.³³ The AFL-CIO's petition to the Supreme Court was denied³⁴ and the new regulations became law.

But the battle is far from over. Efforts continue on all fronts to weaken or repeal the Act. One such effort, which has had an enormous impact on the Act's effectiveness, has been the failure to enforce the Act. Although limiting Davis-Bacon applicability, instituting regulatory changes and pushing for its repeal all have significant impact, nothing has a greater effect on the morale and confidence of the construction worker — whom the Act is designed to protect — than the failure to enforce the Act and punish those who violate it.

Enforcement problems have plagued the Act since its inception and are particularly troubling today given the stance of the previous administration³⁵ and no doubt the current administration. The lax enforcement by the DOL is not unique to the Davis-Bacon Act; it reflects the overall hostile policy of the Republican administration towards worker protection statutes. According to one commentator, it is clear that the Reagan administration regarded the enforcement of health and safety regulations as a nuisance.³⁶ Additionally, recent studies indicate that the government's approach to the Fair Labor Standards Act has resulted in many of the same compliance problems facing the Davis Bacon Act, a not all too surprising fact considering that the Wage & Hour Division of the DOL is responsible for enforcing both statutes. "A U.S. Government Accounting Office (GAO) report issued in September 1985 updated a 1981 report which had concluded that noncompliance with minimum wage, overtime and record-keeping provisions of the FLSA was a serious and continuing problem and that the DOL was not seeking maximum compensation."³⁷ The statement of former Labor Secretary William Brock, testifying before a Congressional Committee, reflects well the position the Reagan administration held towards the Davis-Bacon Act: "I don't think it's possible, Mr. Chairman, for us to enforce this law on every rinky-dink contract that comes along at \$10,000 or 20,000 or

100,000."³⁸

In 1988, the DOL uncovered 2222 violations of the Davis-Bacon Act and recovered \$14,972,798 owed to 17,513 employees.³⁹ These numbers highlight the need to make enforcement the top priority of those people and agencies whose job it is to ensure that the Act is complied with.

Violations of the Davis-Bacon Act are a serious problem and need to be seriously addressed. Creating regulations aimed at reducing administrative costs do nothing to answer this problem and may in fact just make it worse.⁴⁰ The words of one contractor, speaking about a violator of Davis-Bacon on a \$400 million dollar rapid project station, illustrate this point:

He was hiring Haitian people from the government detention center, that were just being picked up on the boats, and bringing them to the job site and working them for the most standard wages that you could ever believe, far below the minimum wage.

And when this was brought to the attention of the Labor Department, by the time they were able to do anything to rectify it, this individual had gone bankrupt and drawn out a large portion of his money, approximately 80 percent, and had done only about 25 or 30 percent of the work.

This is where our problem lies, in the enforcement of this law. We have to see that the Labor Department gets on top of it, because the problems that exist out there in the market have to be corrected, and Davis-Bacon provides that correction only if it is enforced.⁴¹

The current focus by the Secretary of Labor, the legislators, and the scholars, on the economics of the Act, is a misplaced one which disregards the purpose of the Act. By enacting the Davis-Bacon Act, Congress demonstrated that it preferred a wage floor for workers rather than a reduction of government expenses.⁴² Failure to enforce this wage floor completely disregards Congressional intent.

One final word remains on whom the Act is designed to protect. A commonly held perception is that the Davis-Bacon Act, because it is supported by organized labor, is merely a pro-union piece of legislation.⁴³ While it is true that union workers reap the benefit of the wage protections, union contractors are able to avoid competing at a disadvantage because of it and this concededly reduces pressure to look for non-union contractors, the Act provides important safeguards to all workers regardless of their union status. Indeed workers who are not unionized perhaps are in greater need of its protections because they can not turn to a union for protection. Among unionized contractors, wage cutting practices are constrained by the requirements

of collective bargaining agreements which contain specified wage rates. Among non-union employers, however, there are no such restraints.⁴⁴ Thus, while the Davis-Bacon Act protects the livelihood of union employees, it is also a very effective wage protection for construction workers who do not have the benefit of union representation and negotiated work agreements.

II. ORIGINS OF THE DAVIS-BACON ACT AND ITS CURRENT RELEVANCE

A. Statutory History

The Davis-Bacon Act, like most early federal labor laws, was preceded by state statutes. By the time the original Davis-Bacon Act became federal law in 1931, seven states had already enacted prevailing wage statutes for construction work performed under contracts let by those states. Kansas was the first state to do so, adopting its statute in 1891.⁴⁵ Prior to the 1930's, wages on federal construction projects were lower than wages on local projects because federal agencies were required to award contracts to the lowest bidder.⁴⁶ Contractors who took advantage of growing unemployment by utilizing itinerant laborers at lower wages underbid local contractors and thus won the government contract.

During the 1930's this problem became accentuated because the federal government became engaged in significant construction programs for public buildings throughout the U.S.⁴⁷ The Great Depression had generated armies of jobless workers, with jobs so scarce that wage-cutting had become a regular practice and national conscience was aroused by the effect of widespread unemployment on the wages of workers. The lower wage rates paid by exploitative contractors not only undermined the federal building program but also led to labor strife and broken contracts. Consequently, the Davis Bacon Act was passed to ensure that workers on federal projects would receive a minimum wage based on local prevailing rates.⁴⁸ Representative Bacon said in the debate on the House bill:

A practice has been growing up in carrying out the building program where certain itinerant, irresponsible contractors, with itinerant, cheap, bootleg labor, have been going around the country "picking" off a contract here and a contract there, and local labor and the local contractors have been standing on the sidelines looking in. Bitterness has been caused in many communities because of this situation.

This bill . . . is simply to give local labor and the local contractor a fair opportunity to participate in this building program.⁴⁹

In 1931 the building trades were the most strongly organized group in the labor movement and their support played a part in the Act's passage. Yet it is by no means true that their support was the only or even the key reason

for the Act's passage.⁵⁰ It must be remembered that it was Republicans, not Democrats (the so called allies of organized labor) who sponsored the Act and that they were as much concerned with the stability of the construction industry⁵¹ as with the level of wages to be paid to construction workers.⁵²

The bill which became law in 1939 was a very limited measure and bears only slight resemblance to the statute in its present form; it did not provide for predetermination of prevailing wages by the Secretary and it did not establish any enforcement mechanisms. In response to the widespread evasion of the 1931 Act, Congress conducted hearings on the topic in 1932 and 1934⁵³ which resulted in the amendment of 1935⁵⁴ and also the Copeland "Anti-Kickback" Act of 1934.⁵⁵ The 1935 amendment required that the Secretary of Labor predetermine wages and ultimately led to Labor's promulgation of the prevailing wage regulations.⁵⁶ The Copeland Act made it a federal crime to induce workers to pay back the income ensured by the establishment of a prevailing wage.

The other significant amendment was enacted in 1964 in response to the changing pattern of wage payments.⁵⁷ By this time fringe benefits had become a large portion of the compensation received by the workers. Yet, the labor force of a local community could continue to lose government contracts to competitors who were able to underbid them by denying their workers fringe benefits.⁵⁸ The effect of the amendment was to require wage determinations to specify not only locally prevailing hourly rates of pay, but also locally prevailing fringe benefits expressed as hourly rates.

B. The Davis-Bacon Act and the Modern Era

The theory behind the passage of the Davis-Bacon Act is as valid today as it was when the original law was passed. Despite the many changes that have occurred since the 1930's, the driving down of wages continues to be a particular danger in construction, because labor is still likely to be the only element of cost over which an employer can exercise any degree of short-term control.⁵⁹

Furthermore, "[t]o say that this law is obsolete or to say that it is anachronistic is to ignore the reality of the construction industry and the lives of the workers in it."⁶⁰ Inherent conditions in the construction industry make Davis-Bacon more needed today than ever before. Construction work is seasonal, hazardous and subject to an extensive amount of downtime due to adverse weather conditions and industrial controversy. Most workers in construction move from project to project and are unemployed between projects. Consequently, at any one point in time there is usually a large pool of jobless workers.

Construction is not the prime source of wage and salary employment for many of the individuals who work in the industry.⁶¹ About one-third of the construction workers find employment in the industry for only one of

the four quarters in the year and more than one fourth of the industry's total work force earn more of their annual income in some other industry. The construction industry typically has an unemployment rate twice the national average and this high rate of unemployment subjugates the construction worker to a greater likelihood of exploitation.⁶² One union official noted that his members worked an average of 1200 hours this year (equivalent of 3/5 of the hours of a full time worker), which is a number higher than usual.⁶³ So although hourly construction wages are high, annual earnings are low, lower in fact than those of their counterparts in substantially all other industries except retail trade and services.⁶⁴

Another unique feature of the construction industry is its large number of small employers, a situation which engenders fierce competition. According to the Small Business Administration, in 1984 approximately fifty-seven percent of all construction employees worked in firms employing less than fifty persons.⁶⁵ The low capital requirements for entry into the industry, often only a set of tools, allows the individual entrepreneur to hire a few workers and form his or her own company.⁶⁶ Thus, it is clear that the need for Davis-Bacon arises out of the nature of the construction industry itself and not the prevailing economic conditions.

III. VIOLATIONS OF THE DAVIS-BACON ACT

A. Nature And Extent of Violations

The above section illustrates why violations of the Davis-Bacon Act still occur at persistent and high rates in the construction industry. Among the most common forms of abuse of the Act are the following:

Kickback Practices: Despite the presence of the Copeland 'Anti-Kickback' Act⁶⁷ workers are still being forced to kickback part of their wages to obtain or retain a job or to reduce the legally required wage which the workers must receive through Davis-Bacon protections.⁶⁸

Payroll Falsification and Manipulation of Work Hours: Employers, aware of the Act's requirements⁶⁹ in this respect, reduce, on the payroll records, the number of hours that employees worked. A worker whose prevailing wage is determined to be \$20.00 per hour and who works a full forty hour week should be paid \$800.00. Instead, an employer may pay this worker \$400.00 and write in on the payroll records that this worker only worked 20 hours that week. Thus, the amount the worker was paid (\$400.00) and the amount the payroll indicates they were paid comports. But the worker is being cheated out of half his or her salary.

Manipulation of work hours also frequently occurs when a worker participates in two separate projects for one contractor. Many times these two projects will be let by two separate federal agencies and thus the payroll records will be kept separately, each by the respective federal agen-

cies involved in the project. If the worker puts in 35 hours for one project during a week, and 20 hours on the other project during that same week, s/he should be receiving 15 hours in overtime pay (hours worked in excess of 40 hours per week) and the payroll records should reflect this. However, since the payroll records for the different projects are kept separately and never inspected together, there is no way to determine that overtime is being worked.⁷⁰

Diversion of Fringe Benefit Payments: As enforcement agents get wiser so do the contractors, who always try and remain one step ahead of the game. Thus, blatant falsification of documents has become less frequent and abusing the fringe benefits packages has become more prevalent.⁷¹ Fringe benefits are easily concealable in the construction industry because of workers' mobility and failure of the DOL to require contractors to specify fringe benefit packages being purchased for the workers. Often these payments are not made to the appropriate fund, or are put into an annuity that a worker cannot get to.

Misclassification of Workers: A major source of present-day violations continues to involve workers who are paid at the rate for one craft while doing the work of a different, higher paid craft.⁷² Since the prevailing wage for different crafts in a single locale can vary as much as \$15.00 per hour, willful misclassification can cheat a worker out of great sums of money.

A case arising out of the construction of a brick training building at the Trident Submarine Base in Kings Bay, Georgia is a good example of this sort of violation. In 1985 the Navy let this three year contract to Blake Construction Company for \$96.3 million. On August 13, 1985 the Heavy and Highway Committee made a Freedom of Information Act request to the Department of the Navy for certified payroll records submitted by Blake. Review of the certified payrolls revealed that there was outright misclassification of workers resulting in thousands of dollars in wage underpayment. For example, in one pay period there were twenty-four bricklayers, paid at the rate of \$10.00 an hour, to twenty-eight mason tenders, paid at the rate of \$5.00 an hour, according to the predetermined rate. Mason tenders assist bricklayers on the job. "There is no situation in the construction of a brick building as is being built at the Trident Submarine Base that the number of mason tenders would equal or exceed the number of bricklayers. Indeed, most commonly, the ratio is one mason tender to each two bricklayers. Thus, it is readily apparent from the certified payroll reports submitted by Blake that the people classified as mason tenders were in fact doing bricklayers' work and should have been paid at the \$10.00 rate rather than the \$5.00 rate of a mason tender."⁷³

Similarly, a contractor can classify a skilled worker as an apprentice or trainee and thus claim s/he is not entitled to the prevailing rate. The regulations set forth that an ap-

prentice or trainee can be paid less than the prevailing wage only if s/he is enrolled in a bona fide training program.⁷⁴ The purpose behind this program is to insure an ongoing pool of skilled workers and to protect workers from being forever destined to low paying, dead end jobs. Many contractors take advantage of this category by paying workers at a lower rate while they receive no real training. One commentator recounts the testimony, before Congress, of the Office of Navajo Labor Relations describing how Navajos had been victimized in this precise manner because the Davis-Bacon "apprenticeship" regulations were not being enforced on the Navajo Reservation. "Our 1973 investigation of such programs indicated that these programs were mainly designed to create a cheap labor force for the contractor. As an example, one contractor set up a six month program and paid the Navajos \$2.25 per hour, then he ended the training programs after six months and laid off the trainees on grounds that the journeymen workforce was sufficient."⁷⁵

B. Statistical Information Regarding Violations and A Concrete Example

According to DOL statistics (cited above) 2,222 of the 2,892 investigations undertaken in fiscal year 1988 resulted in findings of violations with \$14,972,798 being recovered in back wages for 17,513 employees.⁷⁶ It should be noted that this \$14 million figure represents the amount contractors agreed to pay in back wages — i.e. the settlement figure— not the amount actually due. And since many violators are never caught, it is safe to assume that this figure represents only a portion of the amount unlawfully withheld from workers.

A concrete example of a Davis-Bacon violator is useful in highlighting enforcement problems and the regularity with which these violations occur. The example of Janik Paving & Construction Inc.⁷⁷ is particularly enlightening because it culminated in a Court of Appeals case challenging the debarment order.

Janik Paving has been primarily engaged in the highway paving and construction business in and around Buffalo since 1979. Most of the projects Janik has been involved in received federal funding.⁷⁸ In 1980, Janik was awarded two contracts that obligated it to pay the laborers and mechanics it employed on these contracts the wages prevailing for similar construction in the same localities.⁷⁹ Local 17, of the International Union of Operating Engineers, through questioning the employees, uncovered a number of infractions of the prevailing rate laws in overtime payments, including questionable fringe deductions,⁸⁰ which enabled Janik to compete unfairly with union contractors. A complaint was filed with the New York State Labor Department for the Western District of N.Y., whose investigative staff for Davis-Bacon violations include four field investigators, one senior investigator and one secretary.⁸¹ Violations were uncovered and \$3,213.45 was originally withheld and later settled for the sum of \$1400.

A complaint for the same time period was filed with the U.S. Department of Labor for the Western District of N.Y. The investigative staff at this office totals thirteen, but in addition to Davis-Bacon violations these officers investigate various federal labor standards laws.⁸² Between February and June of 1981, the Wage & Hour Division investigated Janik's performance by inspecting payroll records and employee time cards, and interviewing past and present employees. Based on these findings the Division concluded that certain employees had not been paid overtime rates and that certain payroll records were falsified.⁸³ On May 9, 1983, Janik was notified that they would be debarred from future federally-sponsored work and on May 25 Janik requested an administrative hearing.⁸⁴

More than two years later an evidentiary hearing was held before an administrative law judge during which one of Janik's former employees, Richard Pollard,

testified that he visited Janik's offices at one point to ask about his hours and discovered that the timecards Janik had maintained on him were not the same as those he had submitted and that the hours on Janik's timecards were different from those he had reported. Pollard stated William Janik then telephoned and indicated that he would discharge him if he turned Janik in to the Department of Labor.⁸⁵

The Administrative Law Judge found that Janik's violations were willful, debarred the company for a two year period, and ordered Janik to pay back wages to specified employees.⁸⁶ After unsuccessfully appealing to the DOL's Wage Appeals Board, Janik commenced an action to preliminarily enjoin the implementation of the debarment order in federal district court for the Western District of N.Y.. The action was dismissed and on appeal the Court of Appeals for the Second Circuit affirmed the ALJ's holding.⁸⁷

IV. ENFORCING THE DAVIS-BACON ACT: A CALL FOR CHANGE

The above example highlights the nature and extent to which workers are being cheated out of money which is rightfully theirs.⁸⁸ Solutions to enforcement problems need to be found and implemented immediately. The following is an outline of some possible changes that could be undertaken to ensure greater complicity with the Act.

A. Statutory Changes
Legislation to Protect "Whistleblowing" Workers: Due to the regulatory allocation of Davis-Bacon enforcement and the cutback in staff at the various DOL offices,⁸⁹ almost all investigations by DOL are currently reactive, undertaken in response to complaints, instead of mandatory routine investigations. This method of enforcement means that the onus is on the worker to activate the enforcement mechanisms. And although the DOL keeps

information confidential, workers are often asked to testify (as in the Janik example) or submit written affidavits. In an industry that is no newcomer to corruption, greed and blacklisting,⁹⁰ statutory protection of workers who lodge complaints and initiate investigations needs to be built in to the Davis-Bacon Act.

There are several federal statutes that protect both private and public sector employees who disclose information or engage in sanctioned activities,⁹¹ and numerous state statutes have recently been enacted specifically to promote employee disclosure of information that would lead to correcting or preventing violations of law. These federal laws vary in the activities they protect and the manner in which allegations of reprisal are investigated and adjudicated.⁹² The statutory protections often appear as an appendage to an underlying substantive regulatory program rather than as the result of efforts to structure comprehensive employee protections.⁹³ Such an appendage to the regulatory program of the Davis-Bacon Act is sorely needed.

Legislation of this kind could not only make it a crime to harass or blacklist such employees, but might also provide for temporary financial support and/or job training for a worker who is no longer able to maintain his livelihood in this industry because of blacklisting. Unlike most other industries, reinstatement and/or promotion would not be available since construction jobs are short-lived. One law review commentator concisely summed up the benefits and purposes of such legislation:

The object of protecting whistleblowers is to encourage them to have a personal investment in the enforcement of laws and in the integrity of their organizations. Whistleblower are an aid in enforcing statutes and in furthering public policy; it is conceivable that the very existence of whistleblower protections is an incentive that encourages employers to comply with laws, rules, and other standards of conduct. The likelihood that an employee will make the personal investment to blow the whistle will increase if the threat of retaliation or reprisal is reduced.⁹⁴

Stiffer Criminal Penalties: Fines and the possibility of debarment are not sufficient deterrents to violators. Often times the penalty for violators does not amount to a hardship because the only result is that the contractor has to make remuneration. Thus, s/he is no worse off if s/he violates the law and gets caught, a problem which is in no way unique to Davis-Bacon violations but which is a pervasive problem in worker protection statutes.⁹⁵

Although the Copeland "Anti-Kickback" Act provides that weekly payroll forms are subject to the criminal code,⁹⁶ this language is not strong enough. The law should explicitly provide that whoever induces another to give up his entitled wages in any way shall face criminal charges, including

imprisonment. Accompanying this statutory change should be the increased effort to impose criminal penalties, rather than just civil, upon those who violate the Act. Unfortunately, criminal prosecutions for these violations, as well as violations under other worker protection statutes, are unusual. A study by the GAO of DOL's Fair Labor Standards Act (FLSA) enforcement practices (undertaken by the same division which is responsible for the Davis-Bacon Act) indicates that regional directors in at least four regions could not recall having filed a criminal suit under the Act in more than ten years.⁹⁷ This trend must be reversed. In support of this change is the information intimated by officials at both the federal and state DOL regarding the noticeable "chilling effect" the imposition of a jail sentence for violators had on other contractors.⁹⁸

B. Regulatory Changes

Payroll Records: Due to the prevalence of payroll falsification and the manipulation of work hours, a requirement that payroll records contain more detailed information is necessary. Requiring that carbon-copy time cards signed by employees, noting when work began and when work ended for each day of employment, be kept on file (one with the federal agency, the other with the worker) would also be another safeguard against abuse. However, any additional paperwork requirements are sure to come under a crossfire of criticism as adding to an already costly program. The paperwork requirements of the Act are one of its most vulnerable points for attack, prompting William Brock, former Secretary of the DOL, to state before a Congressional committee: "I really do think that weekly reporting requirement is not only onerous but unnecessary and, frankly, a waste of time and energy. We don't do anything with those reports except file them. There really is no value to that kind of process other than in use of warehouse space, which the taxpayers have to pay for. I think it's ridiculous."⁹⁹ However, the FLSA contains recording requirements almost identical to the Davis-Bacon Act, and like Davis-Bacon, requires the retention of payroll records for three years.¹⁰⁰ Thus government construction contractors will not be relieved of their obligation to maintain and preserve payroll records for three years even if the Davis-Bacon did not contain these requirements. In addition, the failure of DOL to make use of these records highlights DOL's lax enforcement, rather than the record's uselessness. "Generalized recordkeeping requirements can provide an alternative means by which agencies can ensure the availability of information for potential enforcement action, as well as a means to check the accuracy of any reports filed with the agency."¹⁰¹ In the words of one labor official: "[f]or the Department of Labor to concede that these agencies do not conduct systematic reviews of these reports is nothing less than an admission that enforcement of the law is a sham."¹⁰² Despite the reasons for better recordkeeping, it is still unlikely that an administration so bent on "cost savings" would adopt this additional, albeit

important, paperwork requirement.

To detect the more subtle problem engendered when one employee simultaneously works two projects for a single contractor, payroll forms should specify wages earned for the particular job and then total hours and wages earned by that employee for that week. This requirement would cut down on the problem of "hidden overtime".

Ending Dual Enforcement: The transfer of primary responsibility for monitoring and enforcing the Act from the federal procurement agency to the DOL would have a major impact on the enforcement problems plaguing the Act. It is the DOL staff which has the expertise to investigate violations.¹⁰³ The personnel at the various contracting agencies often have no great interest in enforcing the law on their respective projects. It is not only that they do not attach a high priority to the administrative needs of Davis-Bacon, but they also tend to look at the Act as a barrier to their acceptance of the lowest bid. The contracting agency concerned with minimizing its own costs on a federal construction project is not the most likely participant to safeguard the rights of laborers and mechanics because the requirement to pay prevailing wages increases those costs. This conflict of interest has been described by one author as a situation in which "the home team not only plays its own baseball game, but umpires as well."¹⁰⁴

Of course, placing all the enforcement responsibilities in the hands of the DOL would require increasing its investigative staff. The current ninety-four full time investigative officers working on Davis-Bacon¹⁰⁵ would not be a sufficient number to handle an increased enforcement effort. It would cost quite a bit to increase the staff at DOL; however, in the long term there would be monetary savings since the federal government is currently losing millions of dollars to contractors cheating workers. If Davis-Bacon was enforced these millions would be in the hands of workers — who would no longer need public assistance, unemployment benefits, etc. — and returned to the communities in which they live. "[W]hen you have prevailing rates that provide benefits, it provides the construction worker with health and welfare pension and training, and the result is that the worker who gets these benefits becomes a net contributor to the community and to the Government rather than a net user. If a person does not get these benefits they ultimately have to go to the Federal Government."¹⁰⁶ The Davis-Bacon Act "affects not just costs but also, the lives of many hundreds of thousands of American workers and affects their wages, and that in turn, affects the economic lives of not only their families but their communities as well. So this issue goes beyond a matter of mere bookkeeping, accounting, or paperwork, and indeed it touches the lives of millions of Americans."¹⁰⁷

C. Other Changes

Educating Workers About the Davis-Bacon Act: Since much of the initiative for investigations now comes

from worker's complaints and union investigations¹⁰⁸ rather than mandatory routine investigations, it is imperative that workers understand the protections afforded to them under the Davis-Bacon Act. In addition, workers need to be educated as to how contractors falsify documents so they can catch it themselves, and they must be encouraged to keep their own records of hours worked. An education program of this sort can be undertaken by the various unions in the building and construction trades. However, such a program would not reach non-union workers who, because they lack union protection and collective bargaining agreements, are in great need of this information.

Access to Payroll Records and Disclosure of File Material: As was stated above, in many locales, it is the building trades unions and committees jointly funded by unions and contractors who are currently responsible for discovering many Davis-Bacon violations.¹⁰⁹ In monitoring compliance with the Act, union locals, intimately knowledgeable as to the contractors likely to be cheating in their locale, request copies of certified weekly payroll reports filed by contractors through the Freedom of Information Act (FOIA).¹¹⁰

Several years ago, however, it became apparent that many local unions were being denied copies of certified payroll reports from the federal agencies which held them on file.¹¹¹ This trend eventually led to a 1984 district court case originating in Buffalo, N.Y.¹¹² The court held that certified weekly payroll reports were subject to disclosure under FOIA because the union was seeking information to protect wages and fringe benefits, which its members presently received, from unlawful competition, thus outweighing any personal privacy interest which the employees might have against disclosure of income from a job.¹¹³ After a Court of Appeals decision summarily affirmed the District Court opinion,¹¹⁴ many agencies have reconsidered their position concerning release of certified payroll reports, but other agencies have not been so accommodating. In particular, HUD (the subject of the 1984-85 litigation) continues to resist compliance with the *IBEW Local 41* precedent.¹¹⁵ In cases denying similar requests for certified payroll reports, unions are forced to withstand delays and attorney's fees in exhausting administrative avenues. Once these avenues are exhausted, they are forced to file suit, thereby incurring unnecessary litigation expenses and further delays. Eventually, the requesting party (union) is vindicated and the federal government is forced to pay reasonable attorneys' fees. Such a process is costly to the unions, the federal government and the taxpayers, and is counterproductive since all the unions are seeking to do is supplement the federal government's enforcement of the Davis-Bacon Act. A mechanism to ensure that the contracting agency immediately releases the requested payroll information to the unions (either through a regulation, stated policy or an expedited administrative procedure) is needed. This is especially so considering that the unions

can not gain access to contractor's records in any other manner. Even if the DOL has undertaken an investigation or is monitoring compliance on a particular project and in their authority have demanded company records, including payrolls, such records can not be shared with the unions. Currently, under regulation 5.6(a)(4), none of the material from the investigatory files of the DOL may be disclosed to anyone other than Federal officials charged with administering the contract.¹¹⁶

Disclosing such information to unions and joint labor-management groups investigating compliance with Davis-Bacon would surely lead to more violators being caught. However, there is a danger in allowing unions greater access to company records and file material: unions should not shoulder the responsibility for enforcing this Act. Aside from the problem of allowing unions to "police" federal laws, investigations require time, resources and costs to unions (often lacking in all three) that should be borne by the government. "While all of these organizations should be congratulated for their effort, the fact remains that private groups are providing funding to do a job that the Department of Labor and procuring agencies are required by law to do."¹¹⁷ Thus, allowing unions greater access to contractors and the DOL's records must be done, if at all, with the understanding that this access does not get the federal government "off the hook" in their enforcement duties.

Judicial Review of Enforcement Activities: One modification to the administrative procedures, suggested by one law review commentator in 1980, that would ensure consistent and uniform enforcement was an express grant of judicial review of enforcement activities.¹¹⁸ However, given the outcome of a 1985 Federal Circuit case, the likelihood of this occurring in the near future seems extremely slim. In *Unity Bank & Trust Co. v. United States*,¹¹⁹ the Federal Circuit held that the Davis-Bacon Act did not require the DOL to investigate contractors' wage reports to ascertain whether a contractor was paying statutorily mandated wages, and failure to do so did not breach any duty to Unity Bank.¹²⁰ The case involved a contract entered into by a painting contractor who took out a loan from Unity Bank to finance the project and as security for the loan assigned to Unity Bank its right to payment under the contract.¹²¹ After employees filed a complaint alleging they had not received the prevailing minimum wage, an investigation revealed that employees had indeed been underpaid.¹²² The government withheld final payments on the contract and Unity Bank filed suit to recover the amount of withheld funds.¹²³ The court held that enforcement of provisions of Davis-Bacon did not require a higher degree of monitoring where the DOL issued its first withholding request seven weeks after receipt of complaints that the contractor was not paying employees the prevailing wage.¹²⁴ The court concluded that all that was required was sufficient investigation as necessary to assure compliance, a decision which rests with the agency.¹²⁵

And therein lies the problem. Leaving monitoring and investigation requirements up to the discretion of the federal agency, whose interests often are antithetical to those of the workers,¹²⁶ is virtually rolling out the red carpet to violators. Leaving the determination of whether and when to conduct an investigation of a contractor's compliance with the prevailing wage provision to the discretion of the federal agency, as the court did, perpetuates already inconsistent and insufficient enforcement. Granting judicial review of the procurement agencies and the DOL's enforcement activities would ensure more uniform and more stringent enforcement.

In reaching its conclusion the Court stated that "[t]he mandatory and routine investigation that Unity Bank's position would require the DOL and the agencies to conduct would create an impossible administrative burden in light of the thousands of federal construction contracts that are being performed at any one time."¹²⁷ However, the failure to undertake these mandatory routine investigations currently creates a tremendous burden on thousands of workers and their families who are being cheated out of millions of dollars for which they worked. Why individual workers should be forced to bear the cost of this burden, rather than the federal government, was not explained by the judge.

V. CONCLUSION

The Davis-Bacon Act is an early example of federal involvement in social legislation. Like most social legislation it involves a major administrative undertaking and thus substantial costs. What the judge in *Unity Bank*, Labor Secretaries Donovan and Brock, the legislature and various academics and scholars fail to understand is that to adequately protect construction workers from the wage cutting inherent in the construction industry, these costs must be borne. Their economic analysis does not account for the Act's contribution to social welfare.¹²⁸ The purpose of the Davis-Bacon Act is to protect the wages of construction workers even if the effect is to increase the costs of construction to the federal government. Representative Williams summed up this point most eloquently when he stated before a Congressional Committee:

It seems to me that Davis-Bacon almost [always], no matter how efficiently it is administered, is going to have one effect or the other [increasing wages, or increasing the Federal deficit]. I would come down on the side of saying let's weight it towards a slight uplifting of wages rather than allowing it to depress wages. It isn't designed to do either, but we're all only human we can only administer the act, and we're really better to fall on the side of increasing wages for Americans than we are decreasing wages for Americans.¹²⁹

Without a willingness to bear this administrative cost, we are faced with the current situation — a failure to adequately safeguard workers from exploitation.

ENDNOTES

1 40 U.S.C. 276 et seq. (1982).

2 The Davis-Bacon Act was the first federal wage law which provided wage protection to non-government workers. There were no general minimum wage laws, no federal unemployment compensation and no NLRA at the time of its enactment. Elisberg, *Wage Protection Under the Davis-Bacon Act* 28 **Lab. L. J.** 323, 323 (1977).

3 40 U.S.C. 276a(a).

4 See 29 C.F.R. 5.1 (1988) for a compilation of statutes containing Davis-Bacon provisions.

5 In addition there are counties throughout the country which have local ordinances mirroring the Davis-Bacon Act. These "micro Davis-Bacon" Acts are bound to become more common as state prevailing wage statutes are repealed or weakened. See *infra* note 21 and accompanying text. The first county to enact a local prevailing wage law where no state version existed was Broward County, Florida in 1983 following the repeal of Florida's Davis-Bacon Act, Fla. Stat. Ann. tit. 13, sec. 215.19 (1933), in 1979. For an excellent discussion of the campaign to adopt this county law see, Fine, *Organizing For Prevailing Wage in Florida* 12 **Lab. Res. Rev.** 71 (1988).

6 40 U.S.C.276a(a).

7 National Labor Relations Act, 29 U.S.C 151 [Findings and Policies] "The inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the coporate or other forms of ownership association substantially burdens and affects the flow of commerce, and tends to **aggravate recurrent business depressions, by depressing wage rates and the purchasing power of wage earners in industry and by preventing the stabilization of competitive wage rates and working conditions within and between industries.**" *Id.* (emphasis added).

8 United States v. Binghamton Construction Co., 347 U.S. 171, 178 (1954); Walsh v Schlect, 429 U.S. 401,411 (1977); Universities Research Ass'n v. Coutu, 450 U.S. 754, 771 (1981).

9 29 C.F.R. 1 (1988). Administrative responsibilities for the Act were placed within the Employment Standards Administration on July 1, 1969 pursuant to Labor Secretary's Order 24-69.

10 "By tradition, each craft has been carefully defined and union craftsmen have been zealous in protecting the integrity of their respective skill areas against fragmentation and dilution. In union shop construction, such matters are normally arranged through labor management agreements." Warner, *Congressional and Administrative Efforts to Modify or Eliminate the Davis-Bacon Act*, 10 **W. St. L. Rev.** 1 (1982).

11 29 C.F.R. 1.2(a) (1988). Prior to the 1982 regulatory changes this section read as follows

(1) The rate of wages paid in the area in which the work is to be performed, to the majority of those employed in that classification in construction in the area similar to the proposed undertaking; (2) In the event that there is not a majority paid at the same rate, then the rate paid to the greater number; Provided such greater number constitutes 30 percent of those employed; or (3) In the event that less than 30 percent of those employed receive the same rate, the average rate.

12 29 C.F.R. 1.3 (1988)

13 See, e.g., Walsh, *Labor and the Law* (White Paper: Organized Labor) 6 **Gov't Union Rev.** 23, 25 (1985).

The willingness of the Department of Labor to favor unions

in the administration of Davis-Bacon is a consequence of practical and political consideration, not economic ones. . . . Still the implementation of the Davis-Bacon law remains largely an expression of the parochial interest of organized labor. Organized labor's view on federal contracting is that unionized construction workers, paid at union levels should be employed on federal projects.

See also Schooner, *The Davis-Bacon Act: Controversial Implementation of the 50 Percent Rule*, 10 **Empl. Rel. L. J.** 702, 713 (1985). "Continued adherence to the Act's requirements serves only union interests at the taxpayers expense." *Id.*

14 Nat'l Joint Heavy and Highway Construction Comm., 2 *Heavy & Highway News* (June 1986) reprinted in *Oversight Hearings on the Davis-Bacon Act: Hearings Before the Subcomm. on Labor Standards of the House Comm. on Education and Labor*, 99th Cong., 2nd Sess. 371-74 (1986) [hereinafter *Oversight Hearings*]. See also, Allen, *Much Ado About Davis-Bacon: A Critical Review and New Evidence*, 26 **J. L. & Eco.** 707 (1983). In examining whether there exists a bias towards using union rates, Allen used a sample which contained a total of 1029 observations of union and Davis-Bacon wages for seven different occupation across 167 determinations covering 77 SMSA's. "In summary, the results indicate that the selection of union versus nonunion rates in Davis-Bacon area determination is sensitive to percent union." *Id.* at 724.

15 "Union membership in the construction industry in the 1930's and 40's was extremely high, and in the 1950's it represented 80% of the workforce. Since then, unionization has declined quite significantly, to where it was estimated at 23.4% in 1986." Levine, *Prehire Agreements and Doublebreasting in the Construction Industry: Prospects for Legislative Change* 39 **Lab. L. J.** 247 (1988).

16 See 29 C.F.R. 5.6(a)(3) (1988). "The federal agency shall cause such investigations to be made as may be necessary to assure compliance with the labor standards clauses required by Sec. 5.5. . . . See also 29 C.F.R. 5.5(a)(2). "The (write in name of Federal Agency or the loan or grant recipient) shall . . . withhold . . . from the contractor . . . so much accrued payments or advances as may be considered necessary to pay laborers and mechanics . . . the full amount of wages required by the contract." *But see infra* note 104 and accompanying text.

17 29 C.F.R. 5.6(b) (1988)

18 40 U.S.C. 276a-2 ["Payment of wages by Comptroller General from Withheld Payments; Listing Contractors Violating Contracts."].

19 29 C.F.R. 5.12 (1988).

20 Fine, *supra* note 5, at 71.

21 Thiebolt, *Prevailing Wage Laws of the States*, 4 **Gov't Union Rev.** 1 (1983).

22 See, e.g., S. 1535 and H.R. 2648, 100th Cong., 1st Sess. (1986). (Bills to raise the thresholds for coverage under Davis-Bacon from \$2000 to \$100,000 for nonmilitary contracts and to 1,000,000 for military contracts. For a concise discussion of some of the various bills proposed, see generally Warner, *supra* note 10.

23 "[I]n late 1987 [HUD] issued a proposed regulation which would specifically preclude public housing authorities from applying state prevailing wage law to housing projects. New York was one of five states that joined with the Building Trades Council in publicly urging HUD to withdraw the regulation. A final rule is expected to be issued soon." Attorney General, N.Y. State Dep't of Law, *Prevailing Wage Update*.

24 See, e.g., GAO Rep. *The Davis-Bacon Act Should Be Repealed*, HRD-7918 (Washington, D.C.: U.S. General Accounting Office 1979). The major conclusions of the report are that significant changes in economic conditions and in worker protection laws since the Depression have negated the law's original purpose; the Act is impractical, if not impossible, to administer. A. Thiebolt, *The Davis-Bacon Act* (1975); Goldfarb & Morrall, *Cost Implications of Changing Davis-Bacon Administration* 4 *Pol'y Analysis* 439 (1978); Gould, *The Economics of the Davis-Bacon Act* (Washington, D.C.: American Enterprise Institute, 1971); N.Y. Times, May 4, 1981 at 22, col. 1; Mainland, *Prevailing Wages, America* (1986).

25 44 Fed. Reg. 77,026 (1979).

26 See Goldfarb & Morrall, *The Davis-Bacon Act: An Appraisal of Recent Studies*, 34 *Indus. & Lab. Rel. Rev.* 191, 205 (1981).

27 47 Fed. Reg. 23,544-79.

28 See e.g., Capuano, *Davis-Bacon, ERISA and MPAA — Impact in Construction Industry*, 1982 *Constr. Indus. Lab. Rel.: Prac. L. Inst.* 165, 169. "Those regulations accomplished what Congress had declined to do less than a month before the regulations were drafted — they effectively repealed the Davis-Bacon Act . . ." *Id.*

29 See Summary of Final Regulatory Impact and Regulatory Flexibility Analysis, 47 Fed. Reg. 23,647-48 (1982). "The final revisions discussed above, in conjunction with the changes to Part 5 of the Davis-Bacon rules . . . will result in substantial cost savings annually of \$585 million for both contractors and the government while still assuring protection of local wage rates and practices." *Id.*

30 "[T]he Secretary must articulate a reason bearing some relationship to the statutory purpose to support his new interpretation of that statute. The Secretary's recitation of tenuously supported projections of cost savings is not persuasive. Cost and cost savings are not only irrelevant to the statute's purpose, but those very same cost considerations were rejected by Congress." Capuano, *supra* note 28 at 175. See also *Batterton v. Francis*, 432 U.S. 426 (1970) for an articulation of the Secretary's burden. ("The secretary cannot 'adopt a regulation that bears no relationship to any recognized concept of [the issue] or that would defeat the purpose of the . . . program.'")

31 *Building & Constr. Trades' Dept. v. Donovan*, 543 F. Supp. 1282 (D.D.C. 1982).

32 *Building & Constr. Trades' Dept. v. Donovan*, 553 F. Supp. 352 (D.D.C. 1982).

33 *Building & Constr. Trades' Dept. v. Donovan* 712 F. 2d 611 (D.C. Cir. 1983). See generally, Roberts, *Labor Law — The Davis Bacon Act, Another Setback for Labor: Building & Construction Trades' Department v. Donovan*, 10 *J. Corp. Law* 277 (1984).

However, the injunction remained in effect as to the use of helpers despite approval of other Davis-Bacon revisions. On January 27, 1989, the Labor Department issued a final rule in the Federal Register, 54 Fed. Reg. 4224. The rule will be effective 60 days after the injunction against certain provisions is lifted by the U.S. District Court. According to Terry Yellig, AFL-CIO attorney, building trade unions opposed to a helper rule in any form, will file suit to block the rule when it becomes effective. 130 *Lab. Rel. Rep.* 153 (Feb. 6, 1989).

34 104 S. Ct. 975 (1984).

35 The Reagan administration has consistently turned the other cheek towards violations of the Davis-Bacon Act and other Federal statutes designed to protect workers. They have managed to strip these statutes of their effectiveness partially by cutting the staff and budget of the Department of Labor, ensuring that investigations will be fewer and further between. A prime example of this is the only 1200 compliance officers for OSHA who currently have responsibility for five million sites. Salem, *Recent Developments in the Law at the U.S. Department of Labor*, 34 *Inst. on Lab. L.*, Sec. 8.03 (1988). The Department of Labor currently has 94 (number does not include support staff) compliance officers working full time on Davis-Bacon investigations for the entire country. Telephone interview with Bob Devore, U.S. Dept. of Labor in Washington D.C., Planning and Review Division (Nov. 18, 1988). *Cf.* Interview with Skip Easterly, Area Director, Wage and Hour Division, U.S. Dept. of Labor for the W.D.N.Y (Sept. 1988) ("The department is losing staff, good people are retiring and the pay doesn't attract young people.") In addition it is speculated that federal monies that might have been used to finance investigations of violations of Davis-Bacon and other worker-protection statutes are now going towards financing investigations of unions. Interview with Tom Hopkins, Field Representative, Local 17, International Union of Operating Engineers (Nov. 4, 1988). *But cf.* statement made by DOL official in Washington that the Reagan administration has not asked us to cut back enforcement efforts. Interview with Bob Devore, *supra*.

36 Reno, *Job Safety Cry Has Deep Roots in Disasters*, *Newsday*, March 26, 1986 at 37.

37 Rothstein, A. Knapp, & L. Leibman, *Employment Law* 329 (1988). See also Nordlund, *A Brief History of the Fair Labor Standards Act* 39 *Lab. L. J.* 715, 727 "In the early years of the FLSA about ten percent of covered establishments were investigated each year. In 1987, about 2 percent of covered establishments were investigated."

38 *Oversight Hearings supra* note 14 at 22 (testimony of William Brock).

39 Interview with Bob DeVore, *supra* note 35. See also *infra* note 76.

40 One commentator has noted that, "Officials estimate that the new regulations will cause employees currently employed on federal projects to accept lower wages, force journeymen craft employees currently employed on federal projects to accept work at helper wages, or be replaced by helpers, and allow nonunion contractors to squeeze union contractors out of government subsidized construction." Roberts, *supra* note 33, at 289.

41 *Oversight Hearings supra* note 14 at 296 (testimony of Don Mariutto. President of Mariutto & Sons, a tile and marble contracting firm in Coral Gables, FL)

42 In passing the Davis-Bacon Act, the clear Congressional purpose was to protect employees from substandard wages on federally funded contracts. See *infra* notes 49-51 and accompanying text. There was no intent to save federal funds nor to benefit contractors and the Supreme Court explicitly recognized this in *U.S. v. Binghamton Construction Co.*, 347 U.S. 171, 176-77 (1954). See also *Building & Constr. Trades' Dept. v. Donovan*, 543 F. Supp. 1282, 1291 (D.D.C. 1982) ("The basic purpose of the Davis-Bacon Act is to protect the wages of construction workers even if the effect is to increase the costs of construction to the federal government.")

43 See *supra* note 13.

44 *Cf.* Interview with Tom Hopkins *supra* note 35. (Mr. Hopkins explained that all complaints he has received regarding Davis-Bacon violations have come from non-union workers since his union's members are protected under collective bargaining agreements. Pursuit of these complaints by unions do not arise out of a responsibility to non-union members but rather out of a responsibility to all workers and to the construction industry on the whole).

45 New York followed in 1897; Oklahoma in 1909; Idaho in 1911; Arizona in 1912; N.J. in 1913 and Mass in 1914. See generally Johnson, *Prevailing Wage Legislation in the States*, 8 *Monthly Lab. Rev.* 840 (1961).

46 10 U.S.C. 2304 (1982) "Purchase of and contracts for property or services . . . shall be made by formal advertising, and shall be awarded on a competitive bid basis to the lowest responsible bidder in all cases in which the use of such method is feasible and practicable under the existing conditions and circumstances."

47 "Passage of the Act was spurred by the economic conditions of the early 1930's which gave rise to an oversupply of labor and increased importance of federal building programs, since private construction was limited." *Universities Research Ass'n v. Coudu* 450 U.S. 754, 774 (1981).

48 For an interesting discussion of the history of the Act in which it is argued that in adopting the prevailing wage concept Congress was not taking a very aggressive position see A. Thiebolt, *Prevailing Wage Legislation* 26 (Labor Relations and Public Policy Series No. 27) (1986)

But Congress did not have a free hand in choosing a wage policy. It felt compelled to respect limitations with regard to how far government could intrude into what, in 1931, was still considered to be the private contract between employers and employees. It seems clear that one of the reasons that Davis-Bacon adopted the prevailing wage concept was because prevailing wages offered a less stringent requirement than a set wage, including a mandated minimum wage.

49 Mr. Bacon continued:

I think that it is a fair proposition where the Government is building these post offices and public buildings throughout the country that the local contractor and local labor may

have a 'fair break' in getting the contract. If the local contractor is successful in obtaining the bid, it means that local labor will be employed, because that local contractor is going to continue in business in that community after the work is done. If an outside contractor gets the contract, and there is no discrimination against the honest contractor, it means that he will have to pay the prevailing wages, just like the local contractor.

74 **Cong. Rec.** 6510, Feb. 28 1931.

50 *Contra* Walsh, *supra* note 13, at 26. "The key to passage of Davis-Bacon was the support of the AFL, which endorsed the concept as soon as it was introduced." *Id.*

51 With the market for private construction suffering through a period of severe decline, the federal building program clearly was the major source of stability for the Depression era construction industry. This argument has continued validity in the context of today's market. "The Act helps to maintain an adequate labor supply during periods of economic slowdown thus avoiding inflationary bottlenecks during periods of recovery. When there is an economic slowdown, the unemployment rate in the construction industry tends to rise to extremely high levels. Skilled labor will tend to leave the construction labor force under these conditions. By assuring the payment of at least locally prevailing wages, the Act thus helps the construction industry to maintain the skilled labor supplies it requires under normal conditions." *Oversight Hearings, supra* note 14 at 123 (prepared statement of Robert A. Georgine, President, Building and Constr. Trades Dept., AFL-CIO).

52 An argument not as often leveled by critics of the Act, but one which deserves some attention is that the Act's sponsors, in hoping to prevent itinerant contractors from bidding on federal contracts were not only attempting to protect local construction wage standards but were also attempting to exclude blacks from those jobs. That is, some of the resentment toward itinerant contractors employing migratory labor may have been a subtle form of racism. See Schooner, *supra* note 13 at 705. "Black workers imported from the South clearly earned more on federal projects than at their earlier jobs. However, Congress had intended the benefits of this relatively well-paying construction work to be realized elsewhere." The support for this criticism lies with a statement made by Congressman Allgood during the House debate on the bill in which he referred to the contractors' itinerant employees as "cheap colored labor" noting that it was "labor of that sort which was in competition with white labor throughout the country." 74 **Cong. Rec.** 6513, Feb. 28, 1931. *But see Building & Constr. Trades' Dept., AFL-CIO, The Davis Bacon Act: It Works to Build America*, 60 (1979). "Whatever may have been Congressman Bacon's original motives the fact is that by the time Congress was ready to deal in earnest with the prevailing wage proposal the problem was not considered to be one that was due exclusively to itinerant Southern contractors and 'imported' labor, black or white." *Id.*

It is often argued by supporters of the Act that too much emphasis has been placed on this reference by Congressman Allgood, since it is the only time that such a sentiment occurs in the recorded hearings leading up to the passage of the Act. However, in July 1985, in vetoing a measure that would otherwise have repealed Louisiana's state prevailing wage law the governor supported his actions by calling the prevailing wage law in the state "the only process by which [Mexican and other aliens being employed in local construction work] can be identified and remedial actions taken by administrative enforcement." A. Thieblot, *supra* note 48 at 30 quoting *Prevailing Wage Repeal Fails in Louisiana*, 31 **Constr. Lab. Rep.** 485-86 (1985). Of course, the governor's comments do not imply that the act is an inherently racist one, but rather that unscrupulous people can use it to further underlying racist policies.

53 *Hearings on H.R. 12 Before The House Committee on Labor*, 72 Cong. 1st Sess. 1673 (1932); *Hearings On S. Res. 228 Before Senate Subcommittee on Education and Labor*, 73rd Cong, 2nd Sess. 233-34, 414, 428, 512-54 (1934).

54 Act of August 30, 1935, ch. 825 Sec. 1, 49 Stat. 1011-12 (current version at 40 U.S.C. 276a(a) (1982)).

55 Act of June 13, 1934, ch. 482 Sec. 2, 48 Stat. 948 (current version at 40 U.S.C. 276(c) (1982)).

56 The House and Senate Reports stated that predetermination of wages "would strengthen the present law considerably since at present the Secretary of Labor is not permitted to fix the minimum wage rates until a dispute has arisen in the course of construction. In practice this has meant that in the early stages of the contract, unscrupulous contractors have defied orders of the contracting officers to pay the prevailing rate until a formal adjudication has been requested of the the Secretary of Labor. This means that laborers and mechanics who were underpaid until the decision was rendered had no redress since it has been held that the decisions of the Secretary could not operate retroactively." **S. Rep.** No. 1155, 74th Cong, 1st Sess., 2-3 (1935); **H.R. Rep.** No. 1756, 74th Cong., 1st Sess., 2-3 (1935) (quoted in *Universities Reserach Ass'n v. Coutu* 450 U.S. 1451, 1464, n.27. (1981)).

57 Act of July 2, 1964, P.L. 88-349 Sec. 1, 78 Stat. 238 (current version at 40 U.S.C. 276a(b) (1982)).

58 110 **Cong. Rec.** 1217 (1964) (remarks of Rep. Halpern).

59 The contractor has little if any opportunity to seek out cost savings in other areas. In the case of building materials, for example, which represent a sizable portion of total cost, there is little the contractor can do to achieve saving. These materials are usually spelled out in considerable detail in the design specification included in construction contracts. Thus, except for differences that may exist between contractors with respect to managerial capabilities the industry is and always will be tailor made for competition to impact on wages. *The Davis-Bacon Act: It Works to Build America, supra* note 52, at 67.

60 Marshall, *America Still Needs Davis-Bacon, Nat'l. J. Pol'y Analysis* 1839 (1981).

61 *Bureau of Labor Statistics, Compensation in the Construction Industry: Employment Patterns, Union Scales and Earnings* 1 (Bulletin 1656, 1970) [hereinafter BLS].

62 *Id.* See also *Oversight Hearings supra* note 14 at 113 (testimony of Robert Georgine, President, Building and Constr. Trades Dept., AFL-CIO). "The construction industry is plagued by persistently high unemployment. For instance, in 1985 the unemployment rate in the construction industry averaged 13.1 percent as compared to 7.2 percent for the economy as a whole. In 1984, the last year with available data, 6,762,000 people worked in the construction industry. Of this figure, 2,374,000 were unemployed at some time during the year, which . . . works out to approximately 34.4 percent of the total construction work force."

63 Interview with Tom Hopkins, *supra* note 35.

64 BLS, *supra* note 61, at 2.

65 *U.S. Small Business Administration, Office of Economic Research, U.S. Enterprise and Employment Microdata File* (1984) reprinted in *Oversight Hearings supra* note 14 at 90.

66 The low capital investment requirements have been pointed to by some as a major cause of corruption in the construction industry. Such a phenomenon along with the huge profits to be gained by successful contractors encourages the participation of unscrupulous contractors, little concerned with the quality of construction, the stability of the industry or the welfare of the worker. See *Oversight Hearings supra* note 14 at 113 (statement of Robert Georgine, President, Building and Constr. Trades Dept., AFL-CIO). "(C)onstruction firms are constantly being formed and dissolved. It is the ease of entry, in particular, that makes the construction industry vulnerable to the fly-by-night, undercapitalized operators who can readily form and dissolve construction companies to suit their sometimes devious purposes." *Id.*

67 40 U.S.C. 276c (1982).

68 Marshall, *supra* note 60, at 1838. This practice, explained in the words of one construction contractor, is quite prevalent and harms not only workers, but fair, law-abiding contractors. "In the area of enforcement, I think that as a contractor the thing I resent more than anything else is having a game played where the opposition has a different ball and bat than I do. I don't mind going out there and competing. . . . But I like everyone to play the same game, I don't like to see contractors out there that have two checks and one is the certified payroll and they have

it signed and passed back to the employer, and another one that is signed and passed to the employee." *Oversight Hearings supra* note 14 at 268 (statement of Dan Lowry, President of Grade Way Construction).

69 See 29 C.F.R. 5.5(a)(3) (1988), detailing submission and preservation of weekly payroll records. "Payroll and basic records relating thereto shall be maintained by the contractor during the course of the work and preserved for a period of three years thereafter . . . Such records shall contain the name, address, and social security of each such worker, his or her correct classification, hourly rates of wages paid... daily and weekly hours worked, deductions made and actual wages paid." *Id.*

70 This author's hunch from having done some investigations into "little" Davis-Bacon violations the summer of 1988 is that this form of abuse, since it is so imperceptibly subtle, and is so unlikely to be caught, goes on quite frequently.

71 Cf. Interview with Skip Easterly, *supra* note 35; Interview with Tom Hopkins, *supra* note 35.

72 *The Davis Bacon Act: It Works to Build America, supra* note 49, at 26, n.26. See also *Oversight Hearings supra* note 14 at 343 (testimony of Terry Bumpers, Director of National Joint Heavy and Highway Construction Committee). "Another method of cheating workers which can be detected by reviewing the certified payrolls is working people outside of their proper pay-classifications. The most common method, though, is to classify employees as laborers which just happens to be the lowest pay rate and then require them to do carpentry and other work. We have seen several instances whereas much as 80 percent of the total certified payroll is classified as laborers."

73 *Oversight Hearings supra* note 14 at 360 (prepared statement of Terry Bumpers).

74 29 C.F.R. 5.5(a)(4)(i) & (ii) (1988) "Apprentices will be permitted to work at less than the predetermined rate for the work they performed when they are employed pursuant to and individually registered in a bona fide apprenticeship program registered with the U.S. Department of Labor. . . ."

75 See Hill, *Minorities, Women and the Davis-Bacon Act, Nat'l. J., Pol'y F.* 1701 (1981).

76 Interview with Bob Devore, *supra* note 35. Statistics for previous years reveal that in 1987 of the 2722 investigations undertaken 2130 resulted in finding of violations with \$16,126,377 being recovered for 18,496 employees. In 1986 of the 2739 investigations undertaken 2200 resulted in findings of violations with \$15,599,778 being recovered for 19,288 employees and in 1985 of the 2561 investigations 2051 resulted in violations with \$12,987,785 being recovered for 17,456 employees.

77 *Janik Paving & Construction Inc. v. Brock*, 828 F. 2d 84 (2nd Cir. 1987). This case involved violations of the Contract Work Hours and Safety Standards Act, 40 U.S.C. 327-33 (1982), a statute containing Davis-Bacon provisions [hereinafter CWHSSA]. CWHSSA requires contractors to pay overtime rates for hours worked in excess of forty-hour work weeks. Enforcement of CWHSSA is subject to the same regulatory scheme which applies to Davis-Bacon.

78 *Janik* 828 F.2d. at 86.

79 *Id.*

80 *Testimony Before the N.Y. State Senate & Assembly Comm. on Labor*, March 3, 1983 (statement of Tom Hopkins, Field Representative I.U.O.E., Local 17).

81 Telephone interview with Mr. Stanley, Public Works Division, N.Y.S. Dept. of Labor (Nov.16, 1988).

82 However, it was intimated that this Wage & Hour Division probably does more Davis-Bacon enforcement than any other in the country, at least in terms of bringing criminal charges. Interview with Skip Easterly, *supra* note 35. Mr. Easterly attributed this partially to the willingness of the U.S. Attorney for the W.D.N.Y. to take these kind of cases. See also *infra* note 97 and accompanying text.

83 *Janik Paving* 828 F.2d at 87. "The Division found that Janik had failed to pay \$1123.72 in overtime compensation to 9 employees who worked on the Edison contract . . . and \$13,670.74 to 21 of Janik's employees performing similar work on the Route 16 contract. As the result of investigation, the Division also determined that Janik falsified its payroll

records by reducing reported hours . . ." *Id.* at 87 n. 2.

84 *Id.* at 87. Prior to the hearing Janik agreed to pay the affected workers \$13,000 in back overtime pay.

85 *Id.*

86 *Id.* at 88.

87 *Id.* at 94.

88 It also illustrates the possible extent to which the public is cheated out of the quality of workmanship that they expect their tax dollars to purchase. In an audit conducted by the inspector general of the Department of Housing and Urban Development, published in November 1985, the HUD inspector general concluded that there is a direct relationship between labor standards violations and construction deficiencies. *Oversight Hearings, supra* note 14, at 22 (statement of Hon. Austin J Murphy, Chairman, Subcomm. on Labor Standards). Such a correlation is understandable because violators often use inexperienced or unskilled workers and shortcut construction methods thereby resulting in poor quality results. But see, Metzger and Goldfarb, "Do Davis-Bacon Minimum Wages Raise Product Quality?", 3 *J. of Lab. Res.* 272 (1983). The authors of this article argue that forcing a contractor to purchase more expensive labor may result in fewer units of labor being used, or in the substitution of materials of lesser quality so that output quality need not rise at all and may, in fact, fall.

89 See *supra* note 35.

90 See *supra* note 66 and accompanying text.

91 See e.g., Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e-3; "It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment . . . because he opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding or hearing under this subchapter." See also National Labor Relations Act, 29 U.S.C. 157; Occupational Safety and Health Act, 29 U.S.C. 660; Federal Coal Mine Health and Safety Act, 30 U.S.C. 815(c); Atomic Energy Act, 42 U.S.C. 5951; Surface Transportation Assistance Act of 1982, 49 U.S.C.App.2305.

92 See Howard, *Current Developments in Whistleblower Protection*, 39 *Lab. L. J.* 67, 69 (1988).

93 *Id.*

94 *Id.* at 80.

95 See J. Atleson, R. Rabin, G. Schatzki, H. Sherman & E. Silverstein, *Collective Bargaining in Private Employment* 332-36 (2d ed. 1984).

96 40 U.S.C. 276c (1982).

97 Rothstein, Knapp & Leibman *supra* note 37 at 327.

98 Interview with Mr. Easterly *supra* note 35. Interview with Mr. Stanley *supra* note 81.

99 See *Oversight Hearings supra* note 14 at 6 (statement of William E. Brock, Secretary of Labor, U.S. DOL). See also *Id.* at 3 (statement of Rep. Bartlett) ("There are some rather significant compliance problems . . . adding to paperwork requirements that are of no benefit to anyone. Some data we received right before the House floor indicate that there are some 11 million submission forms per year, 11 million pieces of paper that have to be submitted to the Department of Labor by individual contractors about their wage reports.).

100 FLSA 29 CFR 516 "Records to be Kept by Employers."

101 Funk, *The Paperwork Reduction Act: Paperwork Reduction Meets Administrative Law*, 24 *Harv. J. on Legis.* 7, 106 (1987).

The Painting and Drywall Work Preservation Fund, a joint industry-labor fund, termed certified payroll records as the "key source of documentary proof of prevailing wage violations." *Public Works Manual*, Painting and Drywall Work Preservation Fund, Inc., VIII B-2 (June 1984) reprinted in *Oversight Hearings supra* note 14 at 354.

102 *Oversight Hearings supra* note 14 at 342 (testimony of Terry Bumpers, Director of National Joint Heavy and Highway Construction Committee).

103 Cf. interview with Skip Easterly *supra* note 35. "The DOL is more prone to show up at a worker's dinner table with an FBI agent than

any federal agency." *Id.*

104 Wolk, *Mr. Davis-Mr. Bacon — But Who Is The Enforcer* 15 **Lab. L. J.** 323, 326 (1964). See also Allen, *supra* note 14, at 735. "Since the contracting agencies (1) can produce more projects (and thus satisfy more constituents) with a given budgetary allotment if contractors ignore Davis-Bacon standards and (2) receive no rewards for upholding these standards, they are unlikely to invest more than a token amount of resources in enforcement. *Id.*

105 See *supra* note 35.

106 *Oversight Hearings supra* note 14 at 301 (testimony of Richard Stern, Assistant Director, Economic Department, Int'l Brotherhood of Teamsters)

107 *Oversight Hearings supra* note 14, at 4 (statement of Rep. Williams, Subcomm. on Labor Standards). See also Fine *supra* note 5, at 73. "Prevailing wage is good for communities. When workers are paid more, they have more money to put into the economy. In researching our county ordinance, we found that the increase of one dollar paid a worker in construction resulted in seventy-six cents of additional income to the area." *Id.*

108 See *Oversight Hearings, supra* note 14 at 114 (testimony of Robert Georgine, President, Building and Constr. Trades Dept., AFL-CIO). "Most of these violations are discovered not by the Federal contracting agencies or the DOL, but by local building trades union or joint labor-management organizations whose principle purpose to to monitor unscrupulous contractors who cheat their employees as well as the Federal Government." *Id.*

109 "For example, in some localities, committees jointly funded by unions and contractors have been established to act as watch dogs for Davis-Bacon violations. In Northern California, an organization known as the Foundation For Fair Contracting was established last year and is being funded to the tune of \$800,000 to oversee compliance with the act. Thus far they have been instrumental in uncovering hundreds of thousands of dollars in unpaid wages. Similar organizations are springing up in other parts of the United States." *Oversight Hearings supra* note 14 at 344 (testimony of Terry Bumpers).

110 5 U.S.C. 552.

111 Letter from Robert Georgine, Pres. of Building & Constr. Trades Dept. to Hon. A. Murphy, Chairman of Subcomm. on Labor Standards (Nov. 14, 1986) reprinted in *Oversight Hearings, supra* note 14 at 168.

112 *IBEW Local 41 v. HUD*, 593 F. Supp. 542 (D.D.C. 1984).

113 *Id.*

114 *IBEW Local 41 v. HUD*, 763 F. 2d 435 (D.C. Cir. 1985).

115 Letter from Robert Georgine *supra* note 111 at 170. It should be noted that HUD is not the only agency denying these requests. For example, a FOIA request this summer (1988) by the author while working for Local 17 of I.U.O.E. to the Manager of Design and Construction of the U.S. Postal Service requesting amongst other things, certified payrolls for a construction project let by the U.S. Postal Service resulted in a denial letter stating that disclosure would constitute a clearly unwarranted invasion of personal privacy. However, an appeal to the General Counsel of the Post Office in Washington, DC did result, some four months later, in the release of such payroll records. Letter from Charles Hawley, Assistant General Counsel, Administrative Law Division of U.S. Postal Service to Lisa Morowitz (Oct. 5, 1988) (on file with the author).

116 29 C.F.R. 5.6(a)(4) (1988).

117 *Oversight Hearings supra* note 14 at 344 (testimony of Terry Bumpers).

118 Jenero & Leader, *Implied Private Right of Action Under the Davis-Bacon Act: Closing Some Loopholes in Administrative Enforcement*, 29 **De Paul L. Rev.** 793, 817 (1980).

119 756 F.2d 870 (Fed. Cir. 1985).

120 *Id.*

121 *Id.* at 871-72.

122 *Id.* at 872.

123 *Id.*

124 *Id.* at 873.

125 *Id.*

126 See *supra* note 104 and accompanying text.

127 *Unity Bank*, 756 F. 2d at 873.

128 "Valuing social goals and ranking moral choices adds great complexity to the realm of economic analysis." Schooner, *Impossibility of Performance in Public Contracts: An Economic Analysis*, 16 **Pub. Cont. L.J.** 229, 262 (1986).

129 *Oversight Hearings supra* note 14, at 31 (statement of Rep. Williams, Subcomm. on Labor Standards).

