North Dakota Law Review

Volume 48 | Number 1 Article 2

1971

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LABOR RELATIONS AND LABOR STANDARDS FOR EMPLOYEES OF UNITED STATES ENTERPRISES WORKING IN FOREIGN AREAS

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Increasing international trade and transportation combined with a widespread United States military and foreign aid effort has resulted in the deployment of American work forces all over the world. American firms, and other firms doing business with the United States Government, or performing contracts for the Government all have employees; and it is to the status of these employees that the attention in this discussion will be directed. With the labor being performed in one country, but for the benefit of another, by laborers who may be nationals of still a third, there is understandable confusion concerning labor standards and labor-management relations standards which may govern these work forces.

There has evolved in the United States, a highly developed system of labor and labor-management relations standards. By labor standards, we shall mean that body of law which prescribes minimum wages, maximum hours, compensation benefits, and other terms and conditions of employment. By labor-management relations standards, we mean that body of law which establishes rules and guidelines for the establishment of a bargaining relationship between employees and employers. These federal laws are based on Congress' authority to regulate commerce and on the conditions of the Government's contracts.

The United States has established standards for labor-management relations in the Railway Labor Act[1] and the Labor Management Relations Act.[2] These Acts establish the rights of employees in relation to their employers and fellow employees.

The Railway Labor Act governs commerce among or between

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1. Railway Labor Act, 45 U.S.C. §§ 151-188 (1964).
2. Labor Management Relations Act, 29 U.S.C. §§ 141-188 (1964).

states or within any state but through another state, territory, the District of Columbia, or any foreign nation.[3] A carrier is any carrier subject to the Interstate Commerce Act.[4] The Railway Labor Act was made applicable to air carriers by a 1936 amendment,[5] and although this extension applies to common carriers by air engaged in interstate and foreign commerce,[6] the definitions of carrier and employee which are contained in the Railway Labor Act also apply to the extension.[7]

The purpose of the Labor Management Relations Act is, as stated in section 1 (b) of the Act:

> to promote the full flow of commerce, to prescribe the legitimate rights of both employees and employers in their relations affecting commerce. . . to define and prescribe practices on the part of labor and management which affect commerce. . . and to protect the rights of the public in connection with labor disputes affecting commerce.[8]

As will be discussed, *infra*, the definitions of "commerce" and "affecting commerce" are critical:

> The term "commerce" means trade, traffic, commerce, transportation or communication among the several States, or between the District of Columbia or any Territory of the United States and any State or other Territory, or between any foreign country and any State, Territory, or the District of Columbia, or within the District of Columbia or any Territory, or between points in the same State but through any other State or any Territory or the District of Columbia or any foreign country.[9]
>
> The term "affecting commerce" means in commerce, or burdening commerce or obstructing commerce or the free flow of commerce, or being led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce.[10]

In addition to legislation in the field of labor-management relations, Congress has also seen fit to establish labor standards.

The Fair Labor Standards Act,[11] which is the federal minimum wage law, results from its power to regulate interstate and foreign commerce.[12] From Congress' authority over the navigable water-

3. Railway Labor Act, 45 U.S.C. § 151 (Fourth) (1964).
4. *Id.* at § 151 (Fourth).
5. 45 U.S.C. §§ 181-188 (1964).
6. *Id.* at § 181.
7. *Id.* at § 182.
8. Labor Management Relations Act § 1(b), 29 U.S.C. § 141(b) (1964).
9. Labor Management Relations Act § 2(6), 29 U.S.C. § 152(6) (1964).
10. Labor Management Relations Act § 2(7), 29 U.S.C. § 152(7) (1964).
11. Fair Labor Standards Act of 1938, 29 U.S.C. §§ 201-219 (1964).
12. U.S. CONST. art. I, § 8.

ways comes the federal workmen's compensation statute, the Longshoremen's and Harbor Workers' Compensation Act,[13] and its various extensions, the most critical of which, for the purpose of this discussion, are the Defense Base Act[14] and the War Hazards Compensation Act.[15] Finally, exercising its control over contracting by the federal government, Congress has enacted several minimum wage and maximum hours laws, *to wit*: the Davis-Bacon Act,[16] prescribing standards for federal construction contracts; the Walsh-Healey Public Contracts Act,[17] regulating wages and other conditions of employment for employees of Government supply contractors; the McNamara-O'Hara Service Contract Act;[18] and the Contract Work Hours Standards Act,[19] generally known as the "Eight Hour Law."

This fabric of legislation demonstrates congressional intent to establish minimum standards and protection for laborers whose work brings them within federal control, and who may not, for that or other reasons, come under applicable state legislation. In practice, however, this coverage is incomplete with respect to the employees, referred to at the outset of this article, who work outside the United States, particularly in foreign countries.

* * * *

There appears to be little doubt that Congress has the power to stipulate standards for laborers outside the United States. In *Blackmer v. United States*[20] the Supreme Court addressed the question of the validity of a United States statute[21] which authorized United States courts to issue subpoenas against United States citizens domiciled abroad, to be served upon the citizen by the U. S. Consul, compelling the citizen to appear as a witness in the issuing court, and enforceable by attachment of the witness' property in the United States. In upholding the validity of this Act, the Court noted nothing in international law which prohibited a nation from exercising jurisdiction over its citizens who travel or reside abroad:

> By virtue of the obligations of citizenship, the United States retained its authority over him, and he was bound by its laws *made applicable to him* in a foreign country. (emphasis added)[22]

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13. Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. §§ 901-950 (1964).
14. Defense Base Act, 42 U.S.C. §§ 1651-1654 (1964).
15. War Hazards Compensation Act, 42 U.S.C. §§ 1701-1717 (1964).
16. Davis-Bacon Act, 40 U.S.C. §§ 276(a) to 276(a)-7 (1964).
17. Walsh-Healey Act, 41 U.S.C. §§ 35-46 (1964).
18. Service Contract Act of 1965, 41 U.S.C. §§ 351-357 (Supp. V 1970).
19. Contract Work Hours Standards Act, 40 U.S.C. §§ 327-332 (1964).
20. Blackmer v. United States, 284 U.S. 421 (1932).
21. Act of July 3, 1962, ch. 762, 44 Stat. 835.
22. Blackmer v. United States, 284 U.S. 421, 436 (1932).

In upholding the statute in question, the Court noted the requirement of a clear expression of congressional intent to exercise its authority outside the United States. The Court stated the accepted rule of law, and its rule for determining the intent of the legislature:

> With respect to such exercise of authority, there is no question of international law, but solely of the purport of the municipal law which establishes the duties of the citizen in relation to his own government. While the legislation of the Congress, unless the contrary intent appears, is construed to apply only within the territorial jurisdiction of the United States, the question of its application, so far as citizens of the United States in foreign countries are concerned, is one of construction, not of legislative power.[23]

It becomes clear then, that the starting point for any inquiry into the applicability of United States labor or employment standards legislation outside the territorial jurisdiction of the United States, is the congressional expression of intended applicability of the statute concerned.

* * * *

Labor management relations standards for employees in the airline industry are governed by the Railway Labor Act.[24] This was accomplished by the 1936 amendment of the Act, covering common carriers by air who are engaged in "interstate and foreign commerce" and the employees of such carriers.[25] Section 202 of the Act[26] states that the duties and requirements shall be the same with respect to air carriers as to other carriers, and the courts have determined that Congress' intent, by this language, was to limit coverage to the territorial boundaries of the United States.[27] In *Airline Dispatchers Association v. National Mediation Board,*[28] the Association brought an action to determine whether the National Mediation Board had jurisdiction in a representation dispute between U. S. Flag Air Carriers and foreign based employees. The U. S. Court of Appeals for the District of Columbia answered the question in the negative and affirmed the district court which had dismissed the complaint. In doing so, the court traced the statutory language which included the air carrier industry within the scope of the Act. The Railway Labor

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23. *Id.* at 437. That the Court looks for a clear expression of Congressional intent to legislate outside the boundaries of the United States is apparent. The Court alludes often to the warning of Chief Justice Marshall in The Charming Betsy, 6 U.S. (2 Cranch) 64, 118 (1804) who stated that "an act of Congress ought never to be construed to violate the laws of nations, if any other possible construction remains. . . ."
24. Railway Labor Act, 45 U.S.C. §§ 151-188 (1964).
25. *Id.* at § 181.
26. *Id.* at § 182.
27. *See Railway Labor Act—Coverage—International Air Carriage,* 35 J.AIR L. & COM. 100, 103-104 (1969).
28. Airline Dispatchers Association v. National Mediation Bd., 189 F.2d 685 (D.C. Cir. 1951), *cert. denied,* 342 U.S. 849 (1951).

Act defines carrier as any carrier by rail which is subject to the Interstate Commerce Act.[29] The Commerce Act limits its application to common carriers engaged in interstate or foreign transportation, "but only insofar as such transportation. . . takes place within the United States."[30] The Railway Labor Act was extended in 1936 to include airlines "engaged in interstate or foreign commerce."[31] Although the Airline Dispatchers Association argued that this language intended a broader coverage for airlines than for rail carriers, the court reasoned that section 202 of the Railway Labor Act[32] limits the application of the amended Act to that of section 1 of the Commerce Act, that is, limited to such transportation which takes place within the territorial limits of the United States.[33]

The same result issued when the question was the applicability of the Railway Labor Act to foreign based, foreign national employees of United States flag carriers.[34]

Labor management relations standards for other industries affecting commerce are established by the Labor Management Relations Act[35] as amended. In *Benz v. Compania Naviera Hidalgo, S.A.*,[36] the Supreme Court ruled that the Labor Management Relations Act does not apply to foreign vessels with foreign crews shipping under foreign articles even while those ships are in United States ports. In reaching this finding, the Court reasoned that there is no indication of congressional intent to make the Act so applicable,[37] stating that the legislative history of the Act "inescapably describes the boundaries of the Act as including only the workingmen of our own country and its possessions."[38] This holding was reaffirmed in *McCulloch v. Sociedad de Marineros de Honduras*[39] when the Supreme Court held that the Labor Management Relations Act does not apply to foreign flag vessels employing foreign seamen, even though such ships may be part of a fleet operated by a United States company.

While there has been judicial consistency in agreeing that Congress has the power to enact legislation which has an extraterritorial effect, the courts have determined that with respect to both the Railway Labor Act and the Labor Management Relations Act, there is

29. Interstate Commerce Act, 49 U.S.C. §§ 1-27 (1964).
30. *Id.* at § 1(1)(c).
31. Railway Labor Act, 45 U.S.C. § 181 (1964).
32. *Id.* at § 182.
33. Airline Dispatchers Association v. National Mediation Bd., 189 F.2d 685, 690 (D.C. Cir. 1951).
34. Airline Stewards and Stewardesses Association, International v. Northwest Airlines, Inc., 162 F. Supp. 684 (D. Minn. 1958), *aff'd*, 267 F.2d 170 (8th Cir. 1959), *cert. denied*, 361 U.S. 901 (1959). *See also* Airline Stewards and Stewardesses Association, International v. Trans. World Airlines, 173 F. Supp. 369 (S.D.N.Y. 1959), *aff'd*, 273 F.2d 69 (2d Cir. 1959), *cert. denied*, 362 U.S. 988 (1959).
35. Labor Management Relations Act, 29 U.S.C. §§ 141-188 (1964).
36. Benz v. Compania Naviera Hidalgo, S.A., 353 U.S. 138 (1957).
37. *Id.* at 147.
38. *Id.* at 144.
39. McCullough v. Sociedad de Marinevos de Honduras, 372 U.S. 10 (1963).

no such result because Congress has not clearly expressed its intent to give the Acts such effect. The test, as reaffirmed by the Court again in *McCulloch* is stringent:

> We therefore conclude, as we did in *Benz*, that for us to sanction the exercise of local sovereignty under such conditions in this "delicate field of international relations there must be present the affirmative intention of the Congress clearly expressed."[40]

* * * *

With respect to labor standards legislation (as opposed to labor management relations legislation), we shall see that this is a mixed bag of extraterritoriality. The Defense Base Act[41] and the War Hazards Compensation Act[42] by their very nature, establish compensation standards which are applicable at defense bases, or where the war hazard risks exist—which clearly contemplates areas outside the United States. The Defense Base Act actually applies exclusively outside the United States. Section 1651, Title 42 of U.S.C. Act provides:

> Except as herein modified, the provisions of the . . . "Longshoremen's and Harbor Workers' Compensation Act," as amended, shall apply in respect to the injury or death of any employee engaged in any employment—(1) at any military, air, or naval base acquired . . . from any foreign government; or (2) upon any lands occupied or used by the United States for military or naval purposes in any Territory or possession outside the continental United States . . . or (3) upon any public work in any Territory or possession outside the continental United States. . . if such employee is engaged in employment at such place under the contract of a contractor. . . (4) under a contract entered into with the United States. . . or any subcontract. . . where such contract is to be performed outside the United States. . . (5) under a contract approved and financed by the United States. . . where such contract is to be performed outside the continental United States. . . (6) outside the United States by an American employer providing welfare or similar services for the benefit of the Armed Forces. . . .[43]

The logic of this rests in the fact that the Defense Base Act is an extension of the Longshoremen's and Harbor Workers' Compensation Act.[44] The latter Act established workmen's compensation benefits for those employees working on navigable waterways and harbors within Congress' jurisdiction, and hence not subject to

40. *Id.* at 21-22.
41. Defense Base Act, 42 U.S.C. §§ 1651-1654 (1964).
42. War Hazards Compensation Act, 42 U.S.C. §§ 1701-1717 (1964).
43. Defense Base Act § 1(a), 42 U.S.C. § 1651(a) (1964).
44. Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. §§ 901-950 (1964).

state workmen's compensation legislation. On the other hand workers on defense bases in the United States would be subject to the workmen's compensation legislation of the state within which the base was located.

Similarly, the War Hazards Compensation Act provides for benefits for the injury, death, capture, or detention:

> (1) to any person employed by a contractor with the United States, if such person is an employee specified in the [Defense Base Act.] . . . or (2) to any person engaged by the United States under a contract for his personal services outside the continental United States; or (3) to any person employed outside the continental United States as a civilian employee paid from non-appropriated funds. . . or (4) to any person who is an employee specified in section 1(a)(5) of the Defense Base Act, as amended, if no compensation is payable with respect to such injury or death under such Act, or to any person engaged under a contract for his personal services outside the United States. . . or (5) to any person employed or otherwise engaged for personal services outside the continental United States by an American employer. . . .[45]

Interestingly enough, both the Defense Base Act and the War Hazards Compensation Act establish compensation benefits which are applicable to both United States citizens and non-United States nationals so employed,[46] although section 101(d) of the War Hazards Compensation Act excludes from coverage, Local Nationals (LNs).[47] The logic of this exclusion seems to rest on the idea that indigenous nationals stand subject to the same war risks regardless of their employment status, merely because of their residence in the war zone.

A difficult problem has resulted from the application of the United States law overseas to non-United States nationals; specifically where the non-United States national's home country also has a law which applies to him. Recall that, just as Congress has the authority in international law to apply its laws to its nationals abroad, so do other countries. Since under the Defense Base Act,[48] the employer is contractually liable for providing the required pro-

45. War Hazards Compensation Act § 101(a), 42 U.S.C. §1701(a) (1964).

46. In the Republic of Vietnam, for example, the military services have arranged for a substantial portion of their logistical support to be done by contract. The U.S. Army contractors in Vietnam employed, during Fiscal Year 1969, nearly fifty thousand employees of more than a dozen nationalities. These are informally classified as United States Nationals (USNs), Local (or indigenous) Nationals (LNs), and Thirty Country Nationals (TCNs).

47. "The provisions of this section shall not apply in the case of any person (1) whose residence is at or in the vicinity of the place of his employment, and (2) who is not living there solely by virtue of the exigencies of his employment. . . ." 42 U.S.C. § 1701(d) (1953).

48. Defense Base Act § 1(e), 42 U.S.C. § 1651(e) (1964).

tection for his employees, the employer may find himself in the position of having to provide duplicating compensation coverage—once to meet the requirements of the Defense Base Act, and once to meet the compensation requirements of the laws of the country of the employee's origin. The latter may be applicable to the contractor as a result of operation of the law of the country in which the work is being performed, or, if the employee is a Third Country National (TCN), the laws of the TCN's home country, which the contractor may be required to incorporate into the employment agreement as a condition of hire; or more generally, the employer's agreement to comply with the home country's law may be a condition precedent to that country's agreeing to give the employee permission to leave the country and work elsewhere. A case in point arose in Vietnam, when the Republic of Korea informed the United States Department of Defense (procurement activities) that its Korean Labor Standard Act applied to employment outside Korea, and required employers who recruited employees in the Republic of Korea to provide such employees with compensation benefits in accordance with schedules contained in that statute (which benefits differed significantly in amount and method of payment from those established in the Longshoremen's and Harbor Workers' Compensation Act). Such eventuality is provided for in section 1(e) of the Defense Base Act[49] which authorizes the Secretary of Labor, upon the recommendation of the head of any department or agency of the Government, or of any employer, to waive the application of the Act with respect to any contract or subcontract, or any work location or any employee or class of employees. Such a waiver was obtained for Koreans employed in Vietnam by the Department of the Army, and army contracting officers were instructed to direct contractors employing Koreans to secure insurance protection in accordance with the standards established by the Korean Labor Standard Act.[50]

Minimum wage and maximum hour legislation is not so clearly applicable overseas. In the Fair Labor Standards Act,[51] Congress expressed its intent:

> It is hereby declared to be the policy of this Act, through the exercise by Congress of its power to regulate commerce among the several States and with foreign nations, to correct and as rapidly as practicable to eliminate the conditions above referred to. . . .[52]

In announcing the contemplated applicability of the Act, Congress de-

49. *Id.*
50. 32 C.F.R. § 10.403 (1969) (Armed Services Procurement Regulation § 10-403, June 30, 1969, superseding Defense Procurement Circular No. 64, October 28, 1968).
51. Fair Labor Standards Act of 1938, 29 U.S.C. §§ 201-219 (1964).
52. *Id.* at 202(b).

fined "commerce" as "trade, commerce, transportation, transmission, or communication among the several States, or between any State and any place outside thereof,"[53] and, 'State' means any State of the United States, or the District of Columbia or any Territory or Possession of the United States."[54]

The applicability of the Fair Labor Standards Act to areas outside the United States was the issue in *Vermilya-Brown Co. v. Connell.*[55] The question presented was whether the Act applied to work done on a military base in Bermuda which was leased to the United States by the government of Great Britain. The district court dismissed the complaint, arguing that the executive and legislative branches had indicated that such leased areas were not under United States jurisdiction.[56] The Second Circuit reversed,[57] and the Supreme Court affirmed the circuit court.[58] The Court's reasoning turned on the meaning of the word "possessions". The Court noted that the Act clearly applied to such places as Guam, Puerto Rico, Samoa, and the Virgin Islands even though those places had economies which were different from our own, and concluded that the drastic change which the imposition of the United States minimum wage would have on the local economies apparently did not deter Congress from making the Act applicable to those places. Accordingly, the Court rejected the argument that Congress was persuaded to limit the coverage of the Act because of the effect the high United States minimum wages would have on the local economies of the areas surrounding foreign, leased bases. The conclusion was:

> [i]t is difficult to formulate a boundary to [the Act's] coverage short of areas over which the power of Congress extends, by our sovereignity or by voluntary grant of the authority by the sovereign lessor to legislate upon maximum hours and minimum wages.[59]

Although not specifically stated, we can conclude that it was the Court's opinion that the Fair Labor Standards Act applied to non-United States citizens who may be so employed, as well as to citizens of the United States.

Congress reached the same conclusion when in 1957 it amended the Fair Labor Standards Act to specifically exclude overseas applicability: excluding the minimum wage, the maximum hour, the records, and the child labor provisions of the Fair Labor Standards

53. *Id.* at 203(b). The concluding words were substituted by § 3(a) of P.L. 81-393 for the original language "from any State to any place outside thereof."
54. Fair Labor Standards Act § 3(c), 29 U.S.C. § 203(c) (1964).
55. Vermilya-Brown Co. v. Connell, 335 U.S. 377 (1948).
56. Connell v. Vermilya-Brown Co., 73 F. Supp. 860 (S.D.N.Y. 1946).
57. Connell v. Vermilya-Brown Co., 164 F.2d 924 (2d Cir. 1947).
58. Vermilya-Brown Co. v. Connell, 335 U.S. 377 (1948).
59. *Id.* at 389.

Act from applicability "with respect to any employee whose services during the workweek are performed in a workplace within a foreign country. . . ."[60] The intent seems to be specifically to overrule, by legislation, the *Vermilya* case. The Senate stated its concern with the result of the *Vermilya* case; that the full scope of possible coverage was not appreciated until that decision. Expressing concern with the delicate question of international relations, with the scope of possible back wage claims, and with the effect that high United States wages would have on backward economies, the Senate clearly stated its intent that the Act not apply overseas.[61] The House Report states a similar clear intent, and lists as a purpose of the 1957 amendments, "[t]o exclude from any possible coverage of the [Fair Labor Standards Act] work which has been done in the past or which will be done in the future by United States Government contractors on overseas bases in foreign countries. . . ."[62]

The reasoning applied by the Congress, which resulted in the 1957 Fair Labor Standards Act amendments was apparently the same reasoning which motivated the Supreme Court in *Foley Bros. v. Filardo*.[63] In *Foley*, the Supreme Court ruled that the Contract Work Hours Standards Act,[64] the "Eight Hour Law," does not apply to a contract between the United States and a private contractor where the contract work was to be performed outside the United States; specifically, in Iran and Iraq. Section 103(a) of the Act[65] proclaims its applicability to any contract involving the employment of laborers and mechanics on a public work of the United States or any territory or of the District of Columbia or to any contract involving the employment of laborers or mechanics to which the United States Government is a party or which is made on behalf of the Government. The Act does not condition its applicability on the place where the contract is performed. In *Foley*, the respondent sued for overtime compensation allegedly owed to him as a result of the Act's applicability to his employment situation. The Court distinguished between the Fair Labor Standards Act and the Eight Hour Law by noting that the result in *Vermilya* was based upon the finding that the leasehold was a "possession" within the meaning of the Fair Labor Standards Act, while:

> [t]here is no language in the Eight Hour Law, here in question, that gives any indication of a congressional purpose to extend its coverage beyond places over which the United

60. 29 U.S.C. § 213(f) (1964).
61. S. REP. No. 987, 85th Cong., 1st Sess. 2-4 (1957).
62. H.R. REP. No. 808, 85th Cong., 1st Sess. 1 (1957).
63. Foley Bros. v. Filardo, 336 U.S. 281 (1949).
64. Work Hours Standards Act, 40 U.S.C. §§ 327-332 (1964).
65. *Id.* at § 329(a).

> States has sovereignty or some measure of legislative control.[66]

The Court concluded that since there was no leasehold or similar transfer of sovereignty in the case, and since there was no indication that the United States had been granted by Iran and Iraq any legislative or other authority over the labor laws of those countries, then, under the established rule, there being no clear expression of congressional intent to apply the Act outside the United States, there is no such extraterritoriality. What is disturbing about the *Foley* opinion is not the result itself, but the argument, in the nature of *dicta*, which the Court uses to buttress its conclusion:

> No distinction is drawn [in the Act itself] between laborers who are aliens and those who are citizens of the United States. Unless we were to read such a distinction into the statute we should be forced to conclude, under the respondent's reasoning, that Congress intended to regulate the working hours of a citizen of Iran who chanced to be employed on a public work of the United States in that foreign land. Such a conclusion would be logically inescapable, although the labor conditions in Iran were known to be wholly dissimilar to those in the United States and wholly beyond the control of this nation. An intention so to regulate labor conditions which are the primary concern of a foreign country shall not be attributed to Congress in the absence of a clearly expressed purpose.[67]

It will be recalled that in *Vermilya*, the Court dismissed the economic-effect-upon-the-local-backward-economy argument in holding that the Fair Labor Standards Act applied outside the United States. The acceptance of this reasoning in *Foley*, then, seems incongruous when we note the fact that the Fair Labor Standards Act, like the Contract Work Hours Standards Act, makes no distinction regarding nationality, and defines employee as "any individual employed by an employer."[68] While the different approaches of the Court are interesting; as already noted, the distinction is now largely academic, as the Congress, in 1957, did clearly indicate that it was impressed by the economic-effect-upon-the-local-backward-economy argument.

The Davis-Bacon Act,[69] which deals with minimum wages for federal construction contracts, clearly limits its application to contracts for construction, alteration or repair of public buildings or public works "within the geographical limits of the States of the Union, the Territory of Alaska, the Territory of Hawaii, or the Dis-

66. Foley Bros. v. Filardo, 336 U.S. 281, 285 (1949).
67. *Id.* at 286.
68. Fair Labor Standards Act § 2(e), 29 U.S.C. § 203(e) (1964).
69. Davis-Bacon Act §§ 276(a) to 276(a)-7 (1964).

trict of Columbia."[70] While they have no effect on the territorial applicability of the Act, the recent machinations concerning the minimum wage provisions of the Davis-Bacon Act should be noted. On February 23, 1971, the President suspended the minimum wage provisions of the Davis-Bacon Act, using authority contained in the Act itself.[71] On March 29, 1971, the President revoked the suspension, and instituted a scheme of wage and price guidelines for the construction industry, in a move to combat inflation in the industry.[72]

The McNamara-O'Hara Service Contract Act[73] is even more specific than the Davis-Bacon Act in stating Congress' intent to limit its application. By its language, it is applicable to every contract of the United States (above a minimum dollar amount) the principal purpose of which is to furnish services "in the United States."[74] The United States, by definition, includes the States, the District of Columbia, Puerto Rico, the Virgin Islands, the Outer Continental Shelf lands, American Samoa, Guam, Wake and Johnston Islands, and Eniwetok and Kwajalein Atolls; and, perhaps taking a lesson from *Vermilya*, specifically excludes "any other territory under the jurisdiction of the United States or any United States base or possession within a foreign country."[75]

The Walsh-Healey Public Contracts Act,[76] which establishes minimum labor standards for government supply contractors is totally silent regarding extraterritorial application, and applies, by its own language, to "any contract made and entered into by . . . the United States, or by the District of Columbia. . . for the manufacture or furnishing of materials [or] supplies . . . in any amount exceeding $10,000. . . ."[77] While this would appear to leave room for extraterritorial application, the requirement that such intent be clearly stated would probably lead to the conclusion that the Act does not apply abroad. The Court's language in *Foley*, and the general tenor of the 1957 amendments to the Fair Labor Standards Act would buttress this conclusion. No case has been disclosed which even raises the question of the extraterritorial effect of the Walsh-Healey Act.

The most recent legislation in the area of labor standards is the Occupational Safety and Health Act of 1970.[78] Based on the Com-

70. *Id.* at § 276(a).
71. The suspension was accomplished by Presidential Proclamation 4031, dated February 23, 1971, 36 Fed. Reg. 3457 (1971). The authority to suspend is contained in § 6 of the Act, 40 U.S.C. 276(a)-5 (1964).
72. The revocation was accomplished by Presidential Proclamation No. 4040 dated March 29, 1971, 36 Fed. Reg. 6335 (1971). The scheme for wage and price controls was established in Exec. Order No. 11588, dated March 29, 1971, 36 Fed. Reg. 6339 (1971).
73. Service Contract Act of 1965, 41 U.S.C. §§ 351-357 (Supp. V. 1970).
74. *Id.* at § 351(a).
75. *Id.* at § 357(d).
76. Walsh-Healey Act, 41 U.S.C. §§ 35-45 (1964).
77. *Id.* at § 35.
78. 29 U.S.C.A. §§ 651-678 (Supp. 1971).

merce clause rather than on Congress' authority over government contracts, the Act establishes industrial health and safety standards and an enforcement procedure for industries affecting commerce. Congress clearly limits the Act's applicability:

> This Act shall apply with respect to employment performed in a workplace in a State, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, American Samoa, Guam, the Trust Territory of the Pacific Islands, Wake Island, Outer Continental Shelf lands defined in the Outer Continental Shelf Lands Act, Johnston Island, and the Canal Zone.[79]

While not specifically precluding application elsewhere, it appears clear that the Congress' intent was to strictly limit the Act's applicability to the named places. This conclusion appears in line with the general trend of Congress, to refrain from imposing labor standards in areas which are not under United States territorial jurisdiction.

As we have seen, the Railway Labor Act and the Labor Management Relations Act do not apply to foreign nationals outside the United States. The Railway Labor Act does not govern labor-management relations for United States citizens employed outside the United States, and the Labor Management Relations Act probably does not govern the labor management relations of United States citizens employed outside the United States.[80] This result is compatible with the administrative capability of the executive agencies responsible for the administration of these Acts. Both Acts require extensive supervision. Under the Labor Management Relations Act, for example, the National Labor Relations Board must determine appropriate units, hold elections, certify collective bargaining agents, investigate unfair labor practice complaints, issue charges, and exercise other close supervision over the employees, employers and unions that come within the coverage. If the Act, then, were applicable outside the United States, the strain on the Board's facilities and personnel would be considerable.

On the other hand, the Defense Base Act and the War Hazards Compensation Act require no such close supervision by the executive agency over the foreign based personnel and their employment status. Despite the applicability of these Acts outside the United States, it appears clear, however, that Congress still did not wish to exercise its authority over foreign nationals in opposition to the national's home country's desire to itself supervise the employment

79. *Id.* at § 653(a).
80. Benz v. Compania Naviera Hidalgo, S.A., 353 U.S. 138, 144 (1957).

standards of its citizens abroad.[81] The same arguments made in *Blackmer*[82] supporting Congress' authority to, and valid interest in, legislation concerning United States citizens traveling or domiciled abroad, also support the right of any other government to similarly control or protect its own citizens. Accordingly, the waiver provisions of section 1 (e) of the Defense Base Act[83] appear necessary.

Labor standards legislation appears to be generally inapplicable overseas. The result in *Vermilya*[84] is based on the Court's determination that the leasehold there in question was a possession of the United States within the meaning of the Fair Labor Standards Act. That case no longer serves as precedent for overseas applicability of the Act. Rather, it appears that the courts will continue to look to the clear expression of congressional intent and would probably not find such an intent to apply United States labor standards outside the United States. Recent legislation reinforces the conclusion that Congress does not so intend, and the language of the Court in *Foley*[85] makes it clear that the Court will not give the acts overseas applicability without a clear congressional expression of such intent.

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To some extent, the inapplicability of United States law abroad can be made up, with respect to United States citizens, through the medium of the Friendship, Commerce and Navagation treaty. The parties to such a treaty can agree that with respect to the citizens of the other, the labor standards laws of the host nation, or some of them, will be applicable to the citizens of the other nation when such citizens are employed in the host country. For example, the Treaty of Friendship, Commerce and Navigation with Japan[86] provides such with respect to workmen's compensation, and Social Security-type legislation.[87] However, it is doubtful that the minimum wage legislation of other countries would be satisfactory to American workers. Further, the Friendship, Commerce and Navigation treaty is not an appropriate vehicle for establishing labor standards for Third Country Nationals (TCNs).

Still, it should be in the interest of the United States to insure that its contractors performing abroad do not exploit foreign labor. While Local Nationals (LNs) would be subject to the labor standards legislation of their own (the host) country, as (as noted) is true of United States Nationals, TCNs may fall outside protective legislation.

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81. Defense Base Act § 1(e), 42 U.S.C. § 1651(e) (1964).
82. Blackmer v. United States, 284 U.S. 421, 436-37 (1932).
83. Defense Base Act § 1(e), 42 U.S.C. § 1651 (e) (1964).
84. Vermilya-Brown Co. v. Connell, 335 U.S. 377 (1948).
85. *See* Foley Bros. v. Filardo, 336 U.S. 281, 285-86 (1949).
86. Treaty of Friendship, Commerce and Navigation with Japan, April 2, 1953, [1953] 2 U.S.T. 2063, T.I.A.S. No. 2863.
87. *Id.* at art. III.

As we have seen, one way to resolve this problem is the unilateral act of the TCN's home country, requiring the employer's agreement to apply the home country's laws before that country agrees to let the TCN leave home to work elsewhere. Another solution is the extraterritorial application by the TCN's home country of its municipal law; but there is no reason to believe that other countries' lawmakers are any more anxious to charge into that delicate international area than is the Congress of the United States.

There is still another possibility, the use of bi-lateral agreements between the hiring nation and the home nation of the potential employee which stipulates the standards to be applied to the offshore employment. Such an agreement was negotiated in late 1968 between the United States and the government of the Philippines.[88] This agreement establishes minimum employment standards for Filipinos employed in the Western Pacific and in Southeast Asia by the United States Government and its contractors, although under the agreement, somewhat different standards apply to contractors' employees. The agreement very neatly fills the void left by the lack of applicability of the United States and Philippine legislation, and deals with such matters as transportation of employees who have completed their employment obligation back to the place of hire,[89] the repatriation of salaries to the Philippines,[90] overseas pay differential,[91] and other fringe benefits. Of more significance, the agreement guarantees employees, "in conformance with laws and regulations prevailing in the place of employment" the right to self-organize and to engage in collective bargaining with respect to the terms and conditions of employment.[92] The agreement further states that in territories subject to United States sovereignty or administration, the standard for labor-management relations shall be the applicable United States law.[93] Thus, although the Supreme Court has said that the applicable United States labor-management relations legislation clearly applies only to working men of the United States and its possessions,[94] the two Governments have agreed to establish that Act as a standard.

Similarly, the agreement looks to the U. S. Department of Labor, Bureau of Employees' Compensation rate schedule to establish minimum standards for workmen's compensation.[95] This would appear to nullify a waiver of the Defense Base Act under section 1(e) of

88. Offshore Labor Agreement with the Republic of the Philippines, Dec. 28, 1968, [1968] 6 U.S.T. 7560, T.I.A.S. No. 6598.
89. *Id.* at art. II, para. 2.
90. *Id.* at art. II, para. 4.
91. *Id.* at art. II, para. 7(b).
92. *Id.* at art. III, para. 1.
93. *Id.* at art. III, para. 2.
94. Benz v. Compania Naviera Hidalgo, S.A., 353 U.S. 138 (1957).
95. Offshore Labor Agreement with the Republic of the Philippines, Dec. 28, 1968, art. II, para. 7(g), [1968] 6 U.S.T. 7560, T.I.A.S. No. 6598.

that Act,[96] but on the other hand, constitutes an agreement by the Government of the Philippines to subordinate the overseas application of its own workmen's compensation legislation to that of the United States.

The agreement also promulgates a minimum wage—again making reference to an external standard—this time, the U. S. Forces minimum wage schedule.[97]

The application of the agreement to contractors is covered in article V, and the obligations of contractors are somewhat less in scope than those of the United States as an employer. After defining contractors,[98] the agreement stipulates that contractors' employment agreements be consistent with the standards and terms established in the Offshore Labor Agreement.[99] The government of the Philippines assumes the responsibility for assuring that the contractors' employment agreements are in accord with the Offshore Agreement.[100] Contractor employees under the Agreement also enjoy the right to self-organize and to engage in collective bargaining.[101]

The Philippine Offshore Labor Agreement is particularly relevant to employment of Filipinos in the Republic of Vietnam. Under the present interpretation of the Pentalateral Agreement[102] employees of the United States Mission and its contractors (except, of course, Vietnamese) are not subject to the civil and criminal laws of Vietnam. Nor, as we have seen, does the United States law apply (except of course, for the Defense Base and War Hazards Compensation Act). Accordingly, without the Offshore Agreement, there would be no standards applicable to Filipino employees without subjecting the United States Government and its contractors to the difficulty which could result if the Republic of the Philippines had determined to exercise its sovereign right to apply its own laws extraterritorially.

As can be seen, the bilateral offshore labor agreement, modeled after the Philippine agreement, can be a very effective tool. Although accepted international law enables nations to legislate over their citizens who are outside the country, the United States, as we have seen, has been reluctant to do this in the area of labor standards and labor relations; and has been still more reluctant to enter the delicate area of international law and legislate over nationals of

96. Defense Base Act § 1(e), 42 U.S.C. § 1651(e) (1964).
97. Offshore Labor Agreement with the Republic of the Philippines, Dec. 28, 1968, art. II, para. 6, [1968] 6 U.S.T. 7560, T.I.A.S. No. 6598.
98. *Id.* at art. V, para. 1.
99. *Id.* at art. V, para. 2.
100. *Id.*
101. *Id.* at art. V, para. 3.
102. Mutual Defense Assistance in Indochina with Cambodia, France, Laos and Vietnam, Dec. 23, 1950, [1952] 2 U.S.T. 2576, T.I.A.S. No. 2447.

other countries who happen to be employed by United States enterprises. However, there can be no question of the responsibility of this country, and of the home state of the employee, to insure that he is not exploited by United States employers. The bilateral offshore labor agreement then, seems to be an excellent means of accomplishing this needed control. Through such agreements, the countries most concerned can establish standards of employment which are tailored to the employment situation, and are acceptable to the countries concerned. They can establish new standards, or adopt by reference, existing standards. They can take into account, where necessary, the laws of the country where the work is to be performed.

The stabilizing effect that such agreements would have on distant employment would thus contribute markedly to good will toward American enterprises and the American presence generally, without the apparent arrogance, which has been so far avoided, of Congress promulgating labor standards and labor relations legislation of world wide scope.