

# THE SUSPENSION OF THE DAVIS BACON ACT AND THE EXPLOITATION OF MIGRANT WORKERS IN THE WAKE OF HURRICANE KATRINA

## I. INTRODUCTION

Before Hurricane Katrina devastated the Gulf region, Geremias Lopez was harvesting grapes in Southern California.<sup>1</sup> However, less than two weeks after Katrina hit, Geremias, in response to a commercial soliciting workers for the clean up and rebuilding process, boarded a bus that would take him to the Hurricane-ravaged Gulf Coast.<sup>2</sup>

Many other migrant workers shared Geremias' sentiments regarding the opportunities which the Gulf Coast presented to cheap laborers. Lured by promises of long hours and good wages, thousands of workers left their families and homes in order to work in New Orleans.<sup>3</sup> "When we heard about the work in New Orleans, it seemed like a fantasy," recalled Jose, Joao, and Carlos.<sup>4</sup> "We were recruited and we were told that we would work ten to twelve hours a day and get paid well."<sup>5</sup> Adding to their incentive were advertisements publicizing the fact that none of the employers were requesting working papers and that construction wages had doubled to \$16 an hour.<sup>6</sup>

Some workers initially received the promised wages but many faced hazardous living and working conditions.<sup>7</sup> Jose recounts, "[w]e first stayed in a parking area with some mattresses, without bathrooms,

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1. Eliza Barclay, *As Locals Struggle, Migrants Find Work in New Orleans*, SAN FRANCISCO CHRON., Oct. 12, 2005, at A1, available at <http://www.sfgate.com/cgi-bin/article.cgi?file=/c/a/2005/10/12/MNG53F74SK1.DTL>.

2. *Id.*

3. S. POVERTY LAW CTR., IMMIGRATION JUSTICE PROJECT, BROKEN LEVEES, BROKEN PROMISES: NEW ORLEANS' MIGRANT WORKERS IN THEIR OWN WORDS, available at <http://www.splcenter.org/pdf/static/IJPorleans.pdf>, at 1, 13.

4. *Id.* at 13.

5. *Id.*

6. Sam Quinones, *Migrants Find A Gold Rush in New Orleans*, L.A. TIMES, Apr. 4, 2006, available at <http://www.latimes.com/news/nationworld/nation/la-na-labor4apr04.1.1553697.story?coll=la-headlines-nation>.

7. *Id.*

and without showers . . . taking baths in the Mississippi River.”<sup>8</sup> Other workers slept in hotel rooms that lacked running water and furniture.<sup>9</sup> Many of these rooms were completely underwater during the hurricane, just days before their new occupants arrived.<sup>10</sup> In addition to the threadbare living conditions, the workers soon found that they were being “systematically underpaid for their work and [were] often not paid at all.”<sup>11</sup> If this were not enough, the workers began to encounter increasingly hazardous work conditions, including exposure to asbestos and mold without protective gear.<sup>12</sup>

Despite the many problems facing the Gulf Coast workers, their number increased to an estimated ten to twenty thousand by April 2006.<sup>13</sup> This huge influx was facilitated by the federal government’s suspension of two hurdles that normally prevent the hiring of illegal migrant workers. First, President Bush suspended the Davis-Bacon Act,<sup>14</sup> thereby eliminating the requirement that federal construction contractors pay locally prevailing wages to all employees on projects in excess of \$2,000.<sup>15</sup> The reduced wages offered by federal contractors estranged local workers, who were accustomed to a higher wage, but attracted migrant workers, who were accustomed to less than the newly reduced wage. Second, the Department of Homeland Security temporarily suspended rules requiring that employers prove that their workers are either citizens of the United States or are legally permitted to work in the United States.<sup>16</sup> This suspension, in particular, lulled migrant workers into a false sense of security.

Although the Davis-Bacon Act was reinstated two months after Hurricane Katrina, its reinstatement did not apply retroactively.<sup>17</sup>

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8. S. POVERTY LAW CTR., *supra* note 3, at 13.

9. Barclay, *supra* note 1.

10. *Id.*

11. S. POVERTY LAW CTR., *supra* note 3, at 1.

12. *Id.*

13. Quinones, *supra* note 6. This figure was estimated by John Logan, a Brown University demographer who has studied the city since Katrina. *Id.*

14. Reuters, *Bush Lifts Wage Rules for Katrina*, Sept. 9, 2005, available at [http://villagenews.weblogger.com/stories/storyReader\\$14770](http://villagenews.weblogger.com/stories/storyReader$14770).

15. Davis Bacon Act, 40 U.S.C. § 276a (2000).

16. Barclay, *supra* note 1.

17. JAMES SKOVRON, BEUREAU OF NAT’L AFFAIRS, DOL MEMO OUTLINES REINSTATEMENT OF PREVAILING WAGE ON KATRINA PROJECTS, (2005), <http://subscript.bna.com/pic2/erk.nsf/id/BNAP-6JCNWU?> (“The all-agency memorandum implementing prevailing wage application, as provided by Bush’s revocation of the suspension order, affirms that contracts awarded between Sept. 8 and Nov. 7 are not affected by the latest proclamation re-establishing the prevailing wage requirements. Also, any subcontracts awarded pursuant to a prime contract not subject to Davis-Bacon provisions should not contain prevailing wage determinations regardless of the date the subcontracts are entered into or the period in which

Therefore, government construction contracts granted during its suspension are presumably still effective. Due to the fact that each company's bid was based upon the decreased labor costs that resulted from Davis-Bacon's suspension, those companies are permitted to pay less than the prevailing wage even though the Act was reinstated.<sup>18</sup>

This Note, through analyzing the effect that Davis-Bacon's suspension had on Gulf Coast employment, seeks to demonstrate the present utility of the Act, which has been dismissed as obsolete by contemporary politicians.<sup>19</sup> After discussing the problems, resulting from Davis-Bacon's suspension, this Note argues that the Davis-Bacon Act should not have been suspended. This conclusion does not reflect the belief that Davis-Bacon should be used as a device for keeping illegal immigrants out of the Gulf Coast's rebuilding effort.<sup>20</sup> Illegal migrant workers are not the problem. Rather, the problem is that the federal government opened the doors to these workers without simultaneously providing them with protections. Currently, there is no legislation in place in the Gulf that effectively protects illegal migrant workers who rushed in to fill the void left by local workers.<sup>21</sup> The President should have provided new protections for the illegal workers before suspending Davis-Bacon, understanding that local workers would be unable to carry out the rebuilding effort without the promise of a living wage.

Finally, this Note grapples with the fact that the damage, which Davis-Bacon's suspension inflicted on Gulf laborers, is irreversible.<sup>22</sup> Therefore, the federal government must now enact legislation that will stop the abuses being committed against the very workers that the federal government lured in to do the cleanup. Legislation that is currently being proposed in Congress, as a means of solving the problem of illegal workers nationwide, will be analyzed and used as a means of

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they are performed.”).

18. *Id.*

19. REPEAL OF THE DAVIS BACON ACT, S. REP. NO. 29-010, pt.1, at 2 (1995); *see generally* WILLIAM WHITTAKER, CRS REPORT FOR CONGRESS, THE DAVIS-BACON ACT: SUSPENSION (Sept. 26, 2005), available at [http://www.opencrs.com/rpts/RL33100\\_20050926.pdf](http://www.opencrs.com/rpts/RL33100_20050926.pdf) (reviewing the Act's four suspensions).

20. Some opponents of Davis-Bacon's suspension wanted it reinstated as a means of excluding cheap migrant labor. *See* Roberto Lovato, *Using Illegal Labor to Clean Up After Katrina: Gulf Coast Slaves*, SPIEGEL ONLINE, Nov. 15, 2005, <http://www.spiegel.de/international/0,1518,385044,00.html>. Sen. Mary Landrieu (Democrat from Louisiana), recently said, “It is a downright shame that any contractor would use this tragedy as an opportunity to line its pockets by breaking the law and hiring a low-skilled, low-wage and undocumented work force.” *Id.*

21. Mark Brenner, *Survival of the Fittest Workers in the Aftermath of Katrina*, Apr. 12, 2006, available at <http://www.counterpunch.org/brenner04052006.html>.

22. SKOVRON, *supra* note 17.

determining what specific legislation needs to be adopted in order to remedy the problems in the Gulf. This Note concludes by advocating a Temporary Worker Program coupled with worksite audits and a system whereby contractors assume responsibility for violations committed by their subcontractors. Giving these workers legal status will enable them to travel to and from work without fear of being arrested and deported and it will give these workers a means of remedying the abuses committed against them.<sup>23</sup> This Note does not attempt to provide a solution to the problem of illegal workers nationwide. The workers in the Gulf deserve greater protections since the federal government has enabled them to be hired legally.

## II. HURRICANE KATRINA DESTROYS THE GULF COAST, BECOMING THE WORST NATURAL DISASTER IN UNITED STATES HISTORY

On August 29, 2005, Hurricane Katrina made landfall, as a Category 4 storm, along the United States' Central Gulf Coast.<sup>24</sup> The pressure from the storm surge overwhelmed New Orleans' century old levees, which were only built to withstand a Category 3 hurricane.<sup>25</sup> When the storm surge breached the levee system that protected New Orleans from Lake Pontchartrain, a huge flood resulted; eighty percent of the city became submerged in water as deep as 20 feet.<sup>26</sup> More than 20,000 people, who were unable to evacuate the city before the storm hit, became trapped inside the Superdome, which was without running water or air conditioning.<sup>27</sup> The situation inside the Superdome was unsafe and chaotic.<sup>28</sup> Reports of rapes, violence, and filth were widespread.<sup>29</sup> Survivors stranded in their flooded homes escaped by

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23. Although some argue that the Fair Labor Standards Act applies to legal and illegal workers alike, most illegal workers are too afraid to report employer misconduct out of fear that they will be fired. Gwen Filosa, *Migrants on Clean Up Crews Allege Unfair Work Practices; Almost 2,000 Laborers Join a Pair of Lawsuits Over Pay*, THE TIMES-PICAYUNE (New Orleans), Feb. 2, 2006, available at <http://www.nola.com/archives/t-p/index.ssf?/base/news-12/1138867348217340.xml&coll=1>.

24. American Red Cross, *Hurricanes Katrina, Rita and Wilma: The Unprecedented American Red Cross Response*, [http://www.redcross.org/sponsors/drf/hurrstewreport\\_05.html](http://www.redcross.org/sponsors/drf/hurrstewreport_05.html) (last visited Dec. 6, 2006).

25. *Id.* Seventy percent of New Orleans sits below sea level on swampland between the Mississippi River and Lake Pontchartrain. *Id.*

26. *Id.*

27. *Id.*

28. Marco Giannangeli, *Britons Return to Tell of Anarchy in Superdome*, TELEGRAPH (United Kingdom), Sept. 5, 2005, <http://www.telegraph.co.uk/news/main.jhtml?xml=/news/2005/09/05/wkat105.xml>.

29. *Id.*

cutting holes in their rooftops.<sup>30</sup> The Coast Guard and other emergency workers rescued thousands of people trapped in floodwaters.<sup>31</sup>

After the storm, the government declared 90,000 square miles as a federal disaster area.<sup>32</sup> Katrina left an estimated five million people without power and it was unclear how long it would take for all the power to be restored.<sup>33</sup> On September 3, Homeland Security Secretary Michael Chertoff described the aftermath of Hurricane Katrina as “probably the worst catastrophe . . . certainly that I’m aware of in the history of the country, a devastating hurricane followed by a second devastating flood.”<sup>34</sup> The official death toll, as of April 2006, stood at 1,282 people with 987 people missing.<sup>35</sup> “The overall destruction wrought by Hurricane Katrina . . . exceeded that of any other major disaster . . . including Hurricane Andrew in 1992.”<sup>36</sup> As of April 2006, bodies were still being discovered in deserted homes.<sup>37</sup>

Local governments lost nearly \$3.3 billion in revenue since Hurricane Katrina hit, which forced them to lay off workers they were unable to pay.<sup>38</sup> As of October 31, 2005, approximately 468,000 people had lost their jobs.<sup>39</sup> This was a huge jump from October 6, 2005, when it was estimated that 363,000 people had lost their jobs.<sup>40</sup> As of October 31, 2005, nearly 250,000 Gulf residents remained in transitional housing<sup>41</sup> and there were nearly 125,000 evacuees living in Houston.<sup>42</sup>

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30. See Brigadier General Brod Veillon, Assistant Adjutant General for Air of Louisiana National Guard, Prepared Statement (Jan. 30, 2006), [http://hsgac.senate.gov/\\_files/013006Veillon.pdf](http://hsgac.senate.gov/_files/013006Veillon.pdf).

31. *Id.*

32. LINDA LUTHER, CRS REPORT FOR CONGRESS, DISASTER DEBRIS REMOVAL AFTER HURRICANE KATRINA: STATUS AND ASSOCIATED ISSUES 1 (2006), available at [http://openocrs.cdt.org/rpts/RL33477\\_20060616.pdf](http://openocrs.cdt.org/rpts/RL33477_20060616.pdf).

33. American Red Cross, *supra* note 24.

34. *CNN Live Saturday: The Aftermath of Katrina* (CNN television broadcast Sept. 3, 2005), available at <http://transcripts.cnn.com/TRANSCRIPTS/0509/03/cst.04.html> (last visited Dec. 4, 2006).

35. KATC News Channel, Crews Clearing Hurricane Debris Find Human Remains in Rubble, <http://www.katc.com/Global/story.asp?S=4780698> [hereinafter Human Remains].

36. FRANCIS FRAGOS TOWNSEND, THE FEDERAL RESPONSE TO HURRICANE KATRINA: LESSONS LEARNED 5-7 (2006), available at <http://www.whitehouse.gov/reports/katrina-lessons-learned.pdf>.

37. Human Remains, *supra* note 35.

38. DEMOCRATIC POLICY COMMITTEE, BUSH ADMINISTRATION, CONGRESSIONAL REPUBLICANS MISMANAGE HURRICANE RECOVERY, (2005), available at [http://democrats.senate.gov/dpc/dpc-new.cfm?doc\\_name=fs-109-1-119](http://democrats.senate.gov/dpc/dpc-new.cfm?doc_name=fs-109-1-119).

39. *Id.*

40. Associated Press, *Storms Leave 363,000 Jobless*, (Oct. 6, 2005), available at [http://www.wfaa.com/sharedcontent/dws/wfaa/katrina/stories/wfaa051006\\_wz\\_stormjobs.100975ee8.html](http://www.wfaa.com/sharedcontent/dws/wfaa/katrina/stories/wfaa051006_wz_stormjobs.100975ee8.html).

41. DEMOCRATIC POLICY COMMITTEE, *supra* note 38.

Moreover, it is estimated that 20,000 of those evacuees will eventually seek permanent employment in Houston.<sup>43</sup> While the short-term physical impact to the city was easily assessed, the long-term impact on the affected region was speculative at best. Kathleen P. Utgoff, Commissioner of the Bureau of Labor Statistics, collected statistical data indicating that one million people (16 and older) were evacuated from their residences in August, and, as of March 2006, only about one-half of the evacuees had returned to their homes.<sup>44</sup>

Below is a chart reflecting the unemployment rates in September 2005, of the states most directly affected by Hurricane Katrina, using data gathered by the U.S. Department of Labor's Bureau of Labor Statistics.<sup>45</sup>

State	Labor Force	Employment	Unemployment Level	Unemployment Rate
Alabama	2,169,355	2,081,973	87,382	4.0
Florida	8,757,070	8,427,298	329,772	3.8
Louisiana	2,004,625	1,777,069	227,556	11.4
Mississippi	1,299,299	1,171,811	127,488	9.8
Texas	11,276,764	10,684,597	592,167	5.3
<b>TOTAL</b>	<b>25,507,113</b>	<b>24,142,748</b>	<b>1,364,365</b>	<b>5.3</b>

Unemployment in the state of Louisiana jumped from 5.6% in July 2005 to 11.4% in September 2005.<sup>46</sup> Mississippi's unemployment rate increased from 7.1% to 9.8%, making it the second most highly affected state; on the other hand, the unemployment rates of Texas, Alabama, and Florida remained stable.<sup>47</sup>

However, what is most surprising about the unemployment rates is

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42. Robert W. Gilmer, Fed. Res. Bank of Dallas, *Houston After the Hurricanes*, HOUSTON BUSINESS: A PERSPECTIVE ON THE HOUSTON ECONOMY, (Oct. 2005), available at <http://www.dallasfed.org/research/houston/2005/hb0507.html>.

43. *Id.*

44. Kathleen P. Utgoff, Comm'r, Bureau of Labor Statistics, Statement on March, 2006, Employment Rates 3-4 (Apr. 7, 2006), [http://www.bls.gov/news.release/archives/jec\\_04072006.pdf](http://www.bls.gov/news.release/archives/jec_04072006.pdf) ("Among Katrina evacuees identified in March, 53.6 percent were in the labor force, and their unemployment rate was 16.5 percent. Unemployment rates were much lower for those evacuees who were living at their pre-Katrina residences (5.3 percent) than for those who were living elsewhere (34.7 percent).").

45. Bureau of Labor Statistics, U.S. Dep't of Labor, Regional and State Employment and Unemployment Summary, (Oct. 21, 2005), <http://www.bls.gov/news.release/laus.nr0.htm>.

46. *Id.*

47. *Id.*

that the rates in the two most ravaged states, Mississippi and Louisiana, returned to normal in less than a year. As of August 2006, Louisiana's unemployment rate was 3.4%, and Mississippi was at 7.1%, but these statistics are deceiving.<sup>48</sup> The decrease in the employment rate is attributable to the huge decrease in the region's population. Residents of both Louisiana and Mississippi simply relocated.<sup>49</sup> Furthermore, after the mass exodus of local workers, migrant workers moved in, filling all the jobs created by the cleaning and rebuilding process.

*A. President Bush suspends the Davis-Bacon Act.*

This Act, which governs worker compensation on federal contracts,<sup>50</sup> was suspended exclusively in the Hurricane damaged areas of Alabama, Florida, Louisiana, and Mississippi.<sup>51</sup> The President suspended the Act pursuant to Section 276a-5 of Title 40 of the United States Code, which provides that “[t]he President may suspend the provisions of this subchapter during a national emergency.”<sup>52</sup> “In a notice to Congress, President Bush said the hurricane had caused ‘a national emergency’ that permits [sic] him to take such action under the 1931 Davis-Bacon Act in ravaged areas of Alabama, Florida, Louisiana and Mississippi.”<sup>53</sup>

Many applauded the suspension because they believed it would result in a cheaper and faster rebuilding process.<sup>54</sup> Conversely, President Bush's decision scared many others who thought the suspension would only exacerbate the problem of low wages, which plagued the region prior to Hurricane Katrina.<sup>55</sup> In order to understand the ramifications of the President's decision, it is necessary to understand the Act itself. Therefore, it is essential to evaluate the Act's language, purview, and historical contentiousness.

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48. *Id.*

49. See Gilmer, *supra* note 42.

50. 40 U.S.C. § 276a (2000).

51. WHITTAKER, *supra* note 19, at 17.

52. 40 U.S.C. § 276a-5 (2000); see also Proclamation No. 7924, 70 Fed. Reg. 54,227 (Sept. 8, 2005), available at <http://www.whitehouse.gov/news/releases/2005/09/print/20050908-5.html>.

53. Reuters, *supra* note 14.

54. WHITTAKER, *supra* note 19, at 17-18.

55. Harold Meyerson, *Master of the Poison Pill*, WASH. POST, Sept. 9, 2005, at A23 available at <http://www.washingtonpost.com/wp-dyn/content/article/2005/09/20/AR2005092001411.html> (“The prevailing wage that Bush's Labor Department has designated for the Gulf Region averages about \$9 an hour. For more highly skilled carpenters in New Orleans, the prevailing hourly wage rises to \$13.75, which means that if a New Orleans carpenter is lucky enough to work 40 hours a week for 50 weeks a year, he or she will have a princely pretax annual income of \$27,500.”).

### III. HISTORY AND DEBATE SURROUNDING THE FORMATION OF THE NATION'S FIRST FEDERAL PREVAILING WAGE LAW: THE DAVIS-BACON ACT

In 1931, the Davis-Bacon Act became the “first prevailing wage law” for the construction industry at the federal level and “the first federal wage law to apply to non-government workers.”<sup>56</sup> Since that time, it has served as the construction industry’s prevailing wage law.<sup>57</sup> Due to the sheer size of that industry, and the amount of government-sponsored construction projects, the Davis-Bacon Act is a very “influential piece of legislation in the government procurement system.”<sup>58</sup> In addition, Davis-Bacon’s wage-setting mechanisms have a substantial effect on wage scales in the construction industry.<sup>59</sup> These mechanisms also affect the level of wages within the construction industry compared with the level of wages in other industries.<sup>60</sup>

In 1931, the concept of a “prevailing wage” was not new.<sup>61</sup> There were state precursors to the federal act that were enacted as early as 1891.<sup>62</sup> By 1923, Kansas, New York, Oklahoma, Idaho, Arizona, New Jersey, Massachusetts, and Nebraska had public works laws intended to prohibit contractors from lowering wages after the shorter workday was instituted.<sup>63</sup> Although these laws were fair labor standards acts or work hour laws, they occasionally mentioned prevailing wage rates.<sup>64</sup> Through such references to prevailing wages, these laws created “a precedent for Congress when they took up the public works question.”<sup>65</sup> Accordingly, when Pennsylvania Senator James J. Davis (R) and New York Representative Robert L. Bacon (R)<sup>66</sup> introduced the Davis-Bacon Bill they had analyzed various state work hour laws and labor standards legislation.<sup>67</sup>

Between 1927 and 1931, fourteen bills advocating a prevailing

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56. Armand J. Thieblot, *Prevailing Wage Legislation: The Davis-Bacon Act, State “Little Davis-Bacon” Acts, The Walsh-Healey Act, and The Service Contract Act*, 27 LABOR RELATIONS AND PUBLIC POLICY SERIES, 21-25 (1986).

57. *Id.* at 21.

58. *Id.*

59. *Id.*

60. *Id.*

61. *Id.* at 27.

62. *Id.*

63. *Id.*

64. Thieblot, *supra* note 56, at 27.

65. *Id.*

66. *Id.* at 29.

67. *Id.* at 27.



wage for federal construction projects were introduced in Congress.<sup>68</sup> Since the bills were introduced in the late 1920s, “a period of general prosperity,” the concept of a prevailing wage was likely not a by-product of the Great Depression,<sup>69</sup> but a reflection of the “economic conditions and social values of the 1920s.”<sup>70</sup> This is not to say that the Great Depression did not have an impact on the Davis-Bacon Act. Quite to the contrary, “it is unlikely that the 1931 Davis-Bacon Bill would have met with any greater success than its predecessors if the Depression had not been in full sway” when it was introduced.<sup>71</sup>

“The depressed economy and the conditions of the construction industry [after the collapse of the stock market in 1929] offered the possibility of a new rationale for a prevailing wage requirement on federal contracts.”<sup>72</sup> This new rationale, protectionism, allowed this bill to succeed where its predecessors had failed.<sup>73</sup> The Davis-Bacon Act was marketed as a means by which local labor and contractors could be protected from the “predations of outsiders,”<sup>74</sup> which Congressman Bacon referred to as “certain itinerant, irresponsible contractors, with itinerant, cheap, bootleg labor.”<sup>75</sup> In contrast, protection from migrant laborers was not the rationale attached to earlier state acts or prevailing wage bills.<sup>76</sup>

Academics differ as to the true intent behind Congressman Bacon’s “protectionism” rationale. Some have called the Congressman’s rationale a “Jim Crow” position because it was motivated by the fears of white workers who were losing jobs to cheap black laborers, and “[i]n particular, white union workers were angry that black workers who were barred from unions were migrating to the North in search of jobs in the building trades and undercutting ‘white’ wages.”<sup>77</sup> Those who support the “Jim Crow” rationale rely on the sentiments of Congressman Allgood, who referred to the itinerant contractors as “cheap colored labor,” and noted “it is labor of that sort that is in competition with white

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68. *Id.* at 25.

69. *Id.*

70. *Id.*

71. *Id.*

72. *Id.* at 29-30.

73. *Id.* at 25.

74. *Id.* at 29.

75. *Id.*

76. See Thieblot, *supra* note 56, at 29-30.

77. David Bernstein, *The Davis-Bacon Act: Let's Bring Jim Crow to an End*, CATO INST. BRIEFING PAPERS, Jan. 18, 1993, [https://www.cato.org/pub\\_display.php?pub\\_id=1458&print=Y&full=1](https://www.cato.org/pub_display.php?pub_id=1458&print=Y&full=1).

labor throughout the country.”<sup>78</sup> Others disagree with this position because they feel that it places too much emphasis on a sentiment which was expressed only once during the hearings preceding the Act’s passage.<sup>79</sup>

Others critics suggest that Congressman Bacon’s “protectionism” rationale was simply a cover to hide the Bill’s true purpose: bolstering the union movement.<sup>80</sup> Some who adhere to this idea believe that promoting unionism was not Davis-Bacon’s final goal.<sup>81</sup> Rather, commentators like David Bernstein,<sup>82</sup> believe that the Davis-Bacon Act sought to bolster unionism as a means to legally exclude black laborers from the market.<sup>83</sup>

When it was first passed, the Davis-Bacon Act required that “construction contractors with contracts in excess of \$5,000 or more must pay their workers the ‘prevailing wage,’ which in practice meant the wages of unionized labor.”<sup>84</sup> Since the prevailing wage undermined the benefit of hiring non-union laborers (namely, the fact that they were willing to work for less than the union wage) and since blacks were excluded from white-only unions, the Davis-Bacon Act effectively eliminated black laborers from the market.<sup>85</sup> Thus, the Davis-Bacon Act simultaneously promoted the status of unions and discriminated against black workers.

Despite Congressman Bacon’s “new” rationale, the Davis-Bacon Bill was still confronted with opposition. In the year the Bill passed, the comptroller general expressed his opposition to a prevailing wage rate.<sup>86</sup> Specifically, he argued that a prevailing wage rate on federal contracts “would ‘remove from competitive bidding . . . an important element of cost and tend to defeat the purpose of the [procurement] statute’ to acquire goods or services at the lowest price ‘after full and free

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78. Thieblot, *supra* note 56, at 30 (discussing the debate over the significance of Congressman Allgood’s statement).

79. *Id.* Some argue that prevailing wage laws should be used to protect against Mexican and other alien labor. See Lovato, *supra* note 20.

80. Thieblot, *supra* note 56, at 30.

81. See Bernstein, *supra* note 77.

82. David Bernstein was a clerk for the Sixth Circuit and has worked as a litigator for Cromwell and Moring in Washington, D.C. *Id.*; see Press Release, University of Alabama News, UA Student Group Hosts Law Speaker, (Oct. 2, 2003), available at <http://uanews.ua.edu/aneews2003/oct03/lawspeaker100203.htm>.

83. Bernstein, *supra* note 77 (arguing that congressmen saw the “bill as protection for local, unionized white workers’ salaries in the fierce labor market of the Depression.”).

84. *Id.*

85. See *id.*

86. Thieblot, *supra* note 56, at 27-28.

competitive bidding.”<sup>87</sup> Despite this opposition, Congressman Bacon and Senator Davis’s Bill was ratified.<sup>88</sup> In its original form, the Davis-Bacon Act provided:

That every contract *in excess of \$5,000* in amount, *to which the United States or the District of Columbia is a party*, which requires or involves the employment of laborers or mechanics in the *construction, alteration, and/or repair* of any *public buildings* of the United States or the District of Columbia within the geographical limits of the States of the Union or the District of Columbia, shall *contain a provision* to the effect that *the rate of wage* for all laborers and mechanics employed by the contractor or any subcontractor on the public buildings covered by the contract shall be *not less than the prevailing rate of wages for work of a similar nature in the city, town, village, or other civil division of the State* in which the public buildings are located, or in the District of Columbia if the public buildings are located there, and a further provision that *in case any dispute arises* as to what are the prevailing rates of wages for work of a similar nature applicable to the contract which can not be adjusted by the contracting officer, the matter *shall be referred to the Secretary of Labor for determination* and his decision thereon shall be conclusive on all parties to the contract: *Provided*, That in case of national emergency the President is authorized to suspend the provisions of this Act.<sup>89</sup>

In 1935, President Roosevelt signed amendments to the Davis-Bacon Act, which President Hoover had previously vetoed in 1932.<sup>90</sup> After the amendments were passed, prevailing wages had to be predetermined and posted.<sup>91</sup> In addition, the Act applied to public works as well as to public buildings. This meant that the Act was extended to cover levees, dams, and other various construction projects.<sup>92</sup> Painting and decorating were also covered by the Act.<sup>93</sup> Moreover, there was a contract threshold reduction from \$5,000 to \$2,000,<sup>94</sup> in addition to the

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87. *Id.* (quoting HOUSE EDUCATION AND LABOR COMM., LEGISLATIVE HISTORY OF THE DAVIS-BACON ACT, 87th Cong., at 2 (2d Sess. 1962)).

88. Davis-Bacon Act § 1, 46 Stat. 1494 (1931).

89. Davis Bacon Act § 1, 46 Stat. 1494 (emphasis added); *see also* Thieblot, *supra* note 56 (noting that the text of the Act, in its original form, reveals two interesting things. First, “that a provision for prevailing rates be included in contracts for constructing public buildings.” Second, the Secretary of Labor would post-determine individual rates. Essentially, the Secretary of Labor would only determine the prevailing rate after disputes arose).

90. Thieblot, *supra* note 56, at 32.

91. *Id.* at 33.

92. *Id.*

93. *Id.*

94. *Id.*

requirement that workers had to be paid in full, weekly.<sup>95</sup> The Act also carried with it heavier enforcement provisions, such as “set-asides, contract terminations, blacklisting, and right to recovery actions by employees.”<sup>96</sup>

Prior to 1950, it was the individual government agency’s responsibility to determine whether or not contractors were paying their workers the prevailing wage.<sup>97</sup> However, in 1950, the Secretary of Labor became authorized to prescribe enforcement mechanisms for the Davis Bacon Act.<sup>98</sup> Finally, in 1971, the Branch of Construction Wage Determinations of the Wage and Hour Division of the Employment Standards Administration was assigned the responsibility of setting the prevailing wage.<sup>99</sup>

#### IV. THE SUSPENSION OF THE DAVIS-BACON ACT IN RESPONSE TO NATIONAL EMERGENCIES AND THE DEBATE SURROUNDING ITS SUSPENSION AFTER HURRICANE KATRINA

The last sentence of the Davis-Bacon Act, which provides that “[i]n the event of a national emergency the President is authorized to suspend the provisions of [the Act],” granted a power to the President that was controversial in the days following its suspension.<sup>100</sup> Politicians, unions, contractors, and Gulf residents questioned whether President Bush’s suspension of Davis-Bacon would help or hinder the post-Hurricane recovery efforts.<sup>101</sup> Although Hurricane Katrina undoubtedly qualified as a national emergency, it was unclear what effect the suspension of the Act would have on the region.

Although Davis-Bacon is equipped with a suspension mechanism, it has only been suspended four times since its enactment in 1931.<sup>102</sup> The first time was in 1934 when President Franklin D. Roosevelt suspended the Act to manage administrative conflicts between the Davis

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95. *Id.*

96. *Id.*

97. *Id.* at 47.

98. *See id.*

99. *Id.*

100. 40 U.S.C. § 276a-5 (2000).

101. *See generally* Press Release, Congressman Jeff Flake, Congressmen Flake, Feeney, Musgrave and Other House Members Ask President Bush to Suspend Davis-Bacon for Hurricane Recovery Effort: Presidential Proclamation would Hasten Recovery Effort (Sept. 7, 2005), available at [http://www.house.gov/list/press/fl24\\_feeney/DavisBacon.shtml](http://www.house.gov/list/press/fl24_feeney/DavisBacon.shtml) (petitioning for the suspension of the Davis Bacon Act in hopes that it would hasten the recovery effort); *see also* DEMOCRATIC POLICY COMMITTEE, *supra* note 38 (criticizing the choice to suspend the Davis Bacon Act, claiming it would only contribute to the low wages already prevalent in the region).

102. WHITTAKER, *supra* note 19, at 1.

Bacon Act and the National Industrial Recovery Act.<sup>103</sup> The second time was in February 1971, when President Nixon suspended the Act for 28 days because “the economy ran into trouble with inflation” due to the Vietnam War.<sup>104</sup> The third time was in September 1992 when President George H.W. Bush suspended the Act during the recovery from Hurricanes Andrew and Iniki.<sup>105</sup> Most recently, it was suspended in September 2005 by President George W. Bush in reaction to the devastation inflicted on the Gulf by Hurricane Katrina.<sup>106</sup>

Traditionally, there have been three major criticisms to the legality of the Davis-Bacon Act. One of those criticisms have been borrowed (and somewhat reworked) by those disfavoring President George W. Bush’s decision to suspend the Davis-Bacon Act.

The first criticism of the Davis-Bacon Act centers on its administration and,

[c]ontends, in essence, that the complex structure necessary for the implementation of a law that extends to so many contracts, involves so many judgmental decisions at the regulatory level about rates and surveys and applications, and has so few avenues for external review of accuracy . . . [it] is unlikely ever to be made fair.<sup>107</sup>

Simply put, the law is overly broad and does not effectively govern or dictate the terms of the diverse and complex set of contracts it purports to regulate.

The second criticism concerns the Act’s philosophy, maintaining that “the act was the wrong way to achieve the original [purpose],” or that the original stated purpose, “protectionism,” is no longer socially desirable.<sup>108</sup>

The final criticism focuses on economic impact. It weighs the “costs of the act . . . in terms of escalating wage rates, how much the

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103. *Id.* at 4. As a result of the conflict, Roosevelt simply declared, “‘I find that a national emergency exists,’ and . . . [h]e did not define ‘national emergency’ . . . beyond noting that concurrent operation of the two laws . . . caused ‘administrative confusion and delay which could be avoided by suspension of the provisions of the Davis-Bacon Act.’” *Id.*

104. *Id.* at 5-12; Encarta Online Encyclopedia: United States History, [http://encarta.msn.com/encyclopedia\\_1741500823\\_34/United\\_States\\_\(History\).html](http://encarta.msn.com/encyclopedia_1741500823_34/United_States_(History).html) (last visited Oct. 3, 2006) (“In 1971 inflation leaped to 5 percent, the stock market fell, and for the first time since the 19th century, the United States had an overall trade deficit, which meant that it imported more goods than it exported. To fight inflation, Nixon briefly imposed wage and price controls.”).

105. WHITTAKER, *supra* note 19, at 13 (taking note of the destruction caused by Hurricanes Andrew and Iniki, the President suspended Davis-Bacon in Florida, Louisiana, and Hawaii).

106. *Id.* at 17.

107. Thieblot, *supra* note 56, at 52.

108. *Id.*

government pays for construction projects relative to what it would pay in the open market, or costs to the economy through wage-push inflation.”<sup>109</sup> This economic argument has become the battle cry of those in favor of President Bush’s decision to suspend the Davis-Bacon Act in the Gulf region.<sup>110</sup>

Advocates of President Bush’s decision believe that it will allow the Federal Government to better finance the reconstruction process.<sup>111</sup> These supporters, like Florida Representative Tom Feeney, believe that if Davis-Bacon were left in place during the crisis, it would inflate the cost of reconstruction and make it harder for the government to finance the rebuilding.<sup>112</sup> Proponents of the Act’s suspension, such as M. Kirk Pickerel, chief executive of Associated Builders and Contractors, believe that the Davis-Bacon Act would also slow down the rebuilding process. Pickerel recently asserted his opinion: “[c]ertain special interests and their allies in Congress are more concerned about reinstating this wasteful and outdated act than they are with fairly and expeditiously reconstructing the devastated areas. . . .”<sup>113</sup> This statement clearly demonstrates that Pickerel equates reinstatement with unfairness and inefficiency.

Another of the three traditional criticisms, the Act’s original “protectionism rationale,” was used to advocate the Act’s reinstatement rather than support its suspension or total abandonment. Opponents of President Bush’s decision to suspend Davis-Bacon believed that the suspension led to predictable results: “. . . instead of providing jobs to displaced local workers, contractors have hired out-of-state migrant workers willing to accept minimal compensation.”<sup>114</sup> By suspending the Davis-Bacon Act, many Democrats, such as Senator Byron L. Dorgan, believed that Bush “created a bonanza for contractors paying cut-rate

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109. *Id.*

110. Griff Witte, *Prevailing Wages to be Paid Again on Gulf Coast: Rule Was Waived for Post-Katrina Work*, WASH. POST, Oct. 27, 2005, at A1, available at <http://www.washingtonpost.com/wp-dyn/content/article/2005/10/26/AR2005102601706.html>; see also, WHITTAKER, *supra* note 19, at 17-18 (discussing Representative Charlie Norwood’s reaction to President Bush’s decision to suspend the Act). Referring to the President’s decision to suspend Davis-Bacon, “Representative Charlie Norwood praised the President for his ‘quick action to strip away unnecessary bureaucracy that may hamper our ability to recover.’” *Id.* at 17. Norwood went on to say that the Davis-Bacon rules “‘are onerous and drive up the cost of any project to which they are applied . . . .’ The nation . . . ‘can’t afford that kind of inefficiency, red tap [sic], and inflated costs when we have an entire region to rebuild, largely on taxpayer expense.’” *Id.* at 18.

111. See WHITTAKER, *supra* note 19, at 17.

112. Witte, *supra* note 110.

113. *Id.*

114. DEMOCRATIC POLICY COMMITTEE, *supra* note 38.

wages and providing inadequate benefits.”<sup>115</sup> Therefore, these opponents believed that Davis-Bacon should be reinstated so that federal contractors would not be given an incentive to hire workers who were not residents of the Gulf.<sup>116</sup> In other words, opponents of Davis-Bacon’s suspension wanted it reinstated as a means of protecting local workers from cheap migrant labor.<sup>117</sup> This reasoning is reminiscent of the Act’s original purpose, and stated rationale: to protect local workers from cheap African-American labor.<sup>118</sup> However, it is clear that the fear of cheap African-American labor, which gave rise to Act in 1931, has been replaced by a fear of cheap *Hispanic* labor.

#### V. REINSTATEMENT OF THE DAVIS-BACON ACT AND MISHANDLING OF THE RECONSTRUCTION EFFORT

The President’s suspension of the Davis-Bacon Act “came one day after 35 Republican members of Congress led by Reps. Jeff Flake (R-AZ), Tom Feeney (R-FL) and Marilyn Musgrave (R-CO) requested [that] Bush . . . temporarily suspend the Davis-Bacon Act for the Hurricane Katrina recovery effort.”<sup>119</sup> Congressman Jeff Flake claimed that “[t]he Davis-Bacon Act [could] add weeks to federally financed construction projects, and it effectively discriminates against non-union contractors, often driving up costs.”<sup>120</sup> Flake stated that “the victims of this disaster deserve the swiftest and most efficient response that the federal government can provide . . . [and] [w]ith Davis-Bacon in place, recovery projects will be delayed and costs will be inflated, and that is unacceptable.”<sup>121</sup>

However, OMB Watch, a government watchdog organization, has argued that,

[c]ompanies such as Halliburton’s Kellogg Brown & Root that are given federal contracts to rebuild in the Gulf region are under no obligation to pass the savings from reduced labor costs onto taxpayers. There is nothing to prevent these contractors from cutting workers’

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115. *Id.*

116. *See id.*

117. Lovato, *supra* note 20. Sen. Carl Levin (Democrat from Michigan) explained that the practice of hiring undocumented workers had “serious social ramifications . . . [and] it devastates ‘local workers who have been hit twice, because they lost their homes.’” *Id.*

118. Thieblot, *supra* note 56, at 29-30.

119. OMB Watch, White House Finds in Katrina Recovery ‘Opportunity’ to Waive Needed Protections, (Sept. 19, 2005), <http://www.ombwatch.org/article/articleview/3098/1/132?TopicID=1>.

120. Press Release, *supra* note 101.

121. *Id.*

wages and boosting their own profits, while passing no savings onto taxpayers.<sup>122</sup>

In addition, the Center for American Progress stated that the, “prevailing wages in the Gulf Coast are not likely to make people rich . . . [a] laborer in New Orleans would receive \$10.40 per hour in wages and fringe benefits.”<sup>123</sup>

Bush’s suspension of the Davis Bacon Act enraged Democrats and labor unions, who said it would “lower wages and make it harder for union contractors to win bids.”<sup>124</sup> Senator Kennedy believed that allowing the government to pay less than the prevailing rate would increase the poverty in the area.<sup>125</sup> Therefore, Senator Kennedy, in conjunction with his colleagues, put forth a bill to annul Davis-Bacon’s suspension, arguing that they wanted to “ensure that the men and women of the Gulf Coast would receive a fair wage as they rebuilt the Gulf.”<sup>126</sup> Congressional Representatives adverse to Bush’s suspension, moved to reverse it legislatively.<sup>127</sup> Rep. George Miller introduced H.R. 3763, a bill that required that Davis-Bacon’s requirements be re-applied to the hurricane affected areas.<sup>128</sup> A letter-writing campaign was initiated by The Campaign for America’s Future to promote Miller’s legislation.<sup>129</sup>

Controversy increased when a Congressional Research Service report was published which indicated that Bush may have illegally waived the Davis-Bacon Act.<sup>130</sup> According to *Secrecy News*, “[t]he National Emergencies Act of 1976 renders several statutory authorities dormant, unless specific procedural formalities are enacted by the President . . . .”<sup>131</sup> Therefore, “since the President did not formally declare a national emergency in accordance with that act, the Davis-Bacon waiver may be illegal.”<sup>132</sup>

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122. OMB Watch, *supra* note 119.

123. *Id.*

124. Thomas B. Edsall, *Bush Suspends Pay Act In Areas Hit by Storm*, WASH. POST, Sept. 8, 2005, at D03, available at <http://www.washingtonpost.com/wp-dyn/content/article/2005/09/08/AR2005090802037.html>.

125. See Press Release, Senator Edward Kennedy, Kennedy and Colleagues Fight Bush’s Decision on Davis Bacon (Sept. 21, 2005), available at [http://help.senate.gov/Min\\_press/2005\\_09\\_21\\_b.pdf](http://help.senate.gov/Min_press/2005_09_21_b.pdf).

126. *Id.* Senator Kennedy further argued, “[t]he victims of Katrina have lost everything, and now President Bush says it is okay for them to lose their fair wages too. This is blatantly unfair—and we’re fighting it.” *Id.*

127. See OMB Watch, *supra* note 119.

128. *Id.*

129. *Id.*

130. *Id.*

131. *Id.*

132. *Id.*; see also Nathan Newman, *Davis Bacon: GOP Congressmen Facing Music in Six*



The mounting pressure by labor unions and democrats eventually worked; on November 8, 2005, President Bush reinstated the Davis-Bacon Act.<sup>133</sup> The President was forced to reinstate the Act by Rep. George Miller, a veteran San Francisco democrat, who uncovered an obscure parliamentary provision enabling congressmen to force a vote on whether to rescind a Presidential decision to suspend a statute.<sup>134</sup> With the unified support of the Democratic Caucus, Miller did just that.<sup>135</sup> On November 4th, Congress would have voted on Miller's bill, which proposed to rescind President Bush's suspension of the Davis-Bacon Act.<sup>136</sup> Although democrats won their fight to reinstate the Act, the Act was not applied retroactively.<sup>137</sup> Therefore, workers participating in the clean up and rebuilding process would receive less than the living wage even though Davis-Bacon was reinstated. Consequently, local workers could not afford to participate in these processes, and this meant that the door was left wide open for migrant workers to come in and take their places.

Although the mass exodus of locals and the large influx of migrant workers in the Gulf drew a lot of attention, it was hardly the first time that a natural disaster prompted a large population movement. When Hurricane Mitch hit Central America in 1998, it sent waves of migrants to the region.<sup>138</sup> Similarly, in 2001 an earthquake in El Salvador produced noticeable migration shifts.<sup>139</sup> However, the event most comparable to Katrina is Hurricane Andrew, which displaced 250,000 of Florida's residents in 1992.<sup>140</sup> After the displacement, a construction boom in the region "attracted large numbers of Latin American immigrants, who rebuilt towns such as Homestead," and "whose Latino population has increased by 50 percent since then."<sup>141</sup>

Natural disasters are not the only triggers giving rise to an increased dependence on illegal/migrant workers. The private sector of the construction industry has become increasingly dependent on cheap

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*Months?*, HOUSE OF LAB. UNION NEWS, Sept. 16, 2005, <http://www.tpmcafe.com/story/2005/9/16/192815/924> ("Bush violated the 1976 National Emergencies Act in failing to follow proper procedures in suspending Davis-Bacon wage regulations.").

133. AFL-CIO, *Workers Win Fair Wages as Bush Backs Off Davis-Bacon Suspension* (Oct. 26, 2006), <http://www.aflcio.org/issues/jobseconomy/jobs/ns10262005.cfm>.

134. *See id.*

135. *Id.*

136. *Id.*

137. SKOVRON, *supra* note 17.

138. Gregory Rodriguez, *La Nueva Orleans: Latino Immigrants, Many of Them Here Illegally, Will Rebuild the Gulf Coast*, LOS ANGELES TIMES, Sept. 25, 2005, at M1.

139. *Id.*

140. *Id.*

141. *Id.*

illegal labor, often using migrant workers. From 1990 to 2004 the percentage of construction workers who were Mexican immigrants jumped from 3.3% to 17%.<sup>142</sup> The shortage of local workers for major federally funded projects, including the transcontinental railroad and the Erie Canal, was combated with the use of migrant workers.<sup>143</sup> In fact, by 1890, “90 percent of New York City’s public works employees, and 99 percent of Chicago’s street workers, were Italian [immigrants].”<sup>144</sup>

By 2000, most of the construction on the railroads in Arizona, Nevada, New Mexico, and Southern California was completed by Mexican laborers.<sup>145</sup> These workers were also critical in transforming the Southwest into the fertile region that it is today.<sup>146</sup> Based on the migrant workers’ long standing involvement in the construction and agriculture industries, it is apparent that immigrant labor is here to stay.

#### VI. MIGRANT WORKERS WERE LURED TO THE GULF REGION IN THE AFTERMATH OF THE HURRICANE WITH HIGH WAGES AND RELAXED WORKING-PAPER REQUIREMENTS

Not only did the Gulf, which lost a huge portion of its population, need workers, but two hurdles that normally prevent the hiring of migrant workers were suspended: (1) the Davis-Bacon Act and (2) the requirement that employees prove that their employers are either citizens of the United States or that they are legally permitted to work in the country.<sup>147</sup>

With the President’s suspension of Davis-Bacon, companies no longer had an incentive to hire more costly local workers. Instead, they could hire migrant workers, who were willing to work for less than the prevailing wage. And, for migrant workers, less than the prevailing wage was still a clear improvement over the wages they receive when working as fruit pickers or poultry processors.<sup>148</sup>

The Department of Homeland Security removed a second hurdle normally preventing migrant workers from gaining access to jobs. The Department of Homeland Security temporarily suspended rules requiring contractors to present I-9 forms, which are forms completed by workers

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142. *Id.*

143. *Id.* (“By 1867, 12,000 of the Central Pacific’s 13,500 workers were Chinese Immigrants.”).

144. *Id.*

145. *Id.*

146. *Id.*

147. Barclay, *supra* note 1.

148. *Id.*

proving their work eligibility.<sup>149</sup>

As of January 2006, requests have been received by the Louisiana Department of Labor to certify 500 Gulf workers.<sup>150</sup> Officials argue that this number is artificially low because contractors are “not bothering with the paperwork.”<sup>151</sup>

The influx of migrant workers as well as the federal government's lax stance has compounded the anguish of local contractors, who were already struggling to re-establish their businesses, after having been put out of operation for weeks.<sup>152</sup> “The local people can't participate in their own recovery,” said Jack Donahue, a local contractor operating out of Louisiana.<sup>153</sup> Donahue said “[p]art of the problem . . . is that local construction workers scattered during the evacuation and are just beginning to come back.”<sup>154</sup> After returning to the region, the workers are discovering their homes destroyed or severely damaged, and hotels are booked at capacity with migrant workers. Therefore, even when the local workers returned to work there was nowhere for them to live.

#### VII. HURRICANE KATRINA'S MIGRANT WORKERS ARE FACED WITH A SURVIVAL OF THE FITTEST CHALLENGE BY CONSTRUCTION EMPLOYERS

Although enticed by the Gulf's promise of work, migrant workers are plagued by hazardous living and working conditions. Geremias Lopez, a migrant worker from Chiapas, Mexico, shares the damp floor of a motel room in Gretna, Louisiana with four illegal migrants because Hurricane Katrina forced the removal of the motel's furniture, including all of its beds.<sup>155</sup>

Not only are the living conditions deplorable, but work that the migrant workers are performing is just as bad, if not worse. Jose Morillo, is another of the motel's residents.<sup>156</sup> First, he removed refrigerators filling with rotten food in Slidell, Louisiana. Since then, he began working on roofs. Despite what Morillo has been through, he is an optimist and says that “[r]oofting is much better than cleaning . . . . It's also much better to be in a hotel instead of the outdoor camps where we

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149. Lovato, *supra* note 20.

150. Barclay, *supra* note 1.

151. *Id.*

152. *Id.*

153. *Id.*

154. *Id.*

155. *Id.*

156. *Id.*

were getting bit by mosquitoes.”<sup>157</sup>

The motel in which Lopez and Morillo were staying housed around eighty roofers, and only a few were legally permitted to work in the United States as they possessed neither residency nor temporary work visas.<sup>158</sup> However, these workers admit their illegal status is rarely an issue in their search for employment: “[w]e’re here doing this work for the same reason we have jobs back home: We’re willing to do the dirty work, and we’ll work [ten] or more hours a day seven days a week,” Morillo said.<sup>159</sup> Observers predict that the migrants may want to stay in the Gulf after enjoying months of steady work and good wages.<sup>160</sup> In doing so, they might change the demographics of the region forever.<sup>161</sup>

The current surge in the Gulf’s migrant worker population has created several major problems. The first is that, “as the cleanup of . . . [the] Gulf Coast morphs into a multibillion-dollar reconstruction . . . , untold numbers of Hispanic immigrant laborers are being stiffed.”<sup>162</sup> Another concern is that these workers are being subjected to hazardous work and living conditions. Neither of these problems are adequately addressed by current legal or legislative means. Moreover, the local government and residents are unhappy about the change in demographics caused by the influx of migrant workers and hostilities appear to be on the rise.<sup>163</sup>

*A. Migrant workers are not receiving their wages despite tolerating an abusive work schedule.*

Armando Ojeda, who paid \$2,400 to be smuggled from Mexico to Mississippi, was promised \$7 dollars an hour.<sup>164</sup> After 8 days of dusk till dawn work, he has not been paid the \$600 dollars that he was owed.<sup>165</sup> Similarly, Francisco, another migrant worker assisting in the Gulf cleanup, stated “I’ve been cheated by three employers in two

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157. *Id.*

158. *Id.*

159. *Id.*

160. *Id.*

161. *Id.*

162. CNN.com, *Immigrant Workers Stiffed for Katrina Work*, (Nov. 5, 2005), [http://www.cnn.com/2005/US/11/05/katrina.immigrant.work.ap/?section=cnn\\_us](http://www.cnn.com/2005/US/11/05/katrina.immigrant.work.ap/?section=cnn_us); *see also* Lovato, *supra* note 20 (reporting on how Halliburton and its subcontractors hired many undocumented Latino workers for the Katrina cleanup, but without pay).

163. Roberto Lovato, *The Latinization of the New New Orleans*, NEW AMERICA MEDIA, Oct. 18, 2005, *available at* [http://news.newamericamedia.org/news/view\\_article.html?article\\_id=fa92e2c88a63985418da75582292b5c7](http://news.newamericamedia.org/news/view_article.html?article_id=fa92e2c88a63985418da75582292b5c7).

164. CNN.com, *supra* note 162.

165. *Id.*

months. I did the work. I'm only asking what's fair—that I be paid for the work I've done.”<sup>166</sup> These sentiments are representative of a majority of the migrant workers in the area. “It's really survival of the fittest out there—the raging, unregulated free market,” noted Bill Quigley, a lawyer with the Loyola Law School Legal Clinic.<sup>167</sup> “Since the hurricane we've really seen a meltdown of wage and hour laws, OSHA laws and practically every other standard that exists for work in this country.”<sup>168</sup>

However, several watchdog groups for immigrant rights have filed lawsuits against the FEMA subcontractors who have not paid the promised wages. In Mississippi, a Mississippi Immigrants Rights Alliance representative said that the Alliance group has prepared complaints for over 150 workers who are cumulatively owed more than \$100,000.<sup>169</sup> Illegal immigrants, like Ojeda, have no real recourse when they are stiffed on pay day. Mississippi, for example, does not specify non-payment as a crime.<sup>170</sup> Therefore, the only recourse available for immigrant workers claiming back wages is to file a federal complaint or a civil suit in state court.<sup>171</sup>

Similarly, lawyers from the Immigrant Justice Project of the Southern Poverty Law Center filed two separate lawsuits in federal court on behalf of approximately 2,000 laborers.<sup>172</sup> The first complaint, which represents more than 700 workers, is against LVI Environmental Services of New Orleans, Inc. (“LVI”) and D&L Environmental, Inc. of Florida for “grossly underpaying” workers.<sup>173</sup> The lawsuit alleges that LVI used the “subcontractor hiring system . . . to ‘evade responsibility to pay minimum wage and overtime wages as required by the Fair Labor Standards Act.’”<sup>174</sup> The complaint alleges that these laborers worked twelve or more hours a day, seven days a week, in contaminated environments.<sup>175</sup>

The second complaint is against Belfor USA Group Inc. and its subcontractors for not paying its workers overtime.<sup>176</sup> Belfor USA

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166. S. POVERTY LAW CTR., *supra* note 3, at 14.

167. Brenner, *supra* note 21.

168. *Id.*

169. CNN.com, *supra* note 162.

170. *Id.*

171. *Id.*

172. Filosa, *supra* note 23.

173. *Id.*

174. *Id.*

175. *Id.*

176. *Id.*

Group is a “giant” in the Katrina clean-up industry.<sup>177</sup> Representing more than 1,000 workers, this suit is “the first complaint of its kind filed in the city in response to the influx of migrant workers arriving to clean, gut and restore buildings.”<sup>178</sup>

If the plaintiffs in either of these suits are successful, they could receive double their lost wages.<sup>179</sup> According to the law center representing these plaintiffs, it does not matter if these plaintiffs are legal or illegal immigrants because the “law applies to both sets of workers.”<sup>180</sup> According to Jennifer Rosenbaum, an attorney with the Southern Poverty Law Center, “[y]ou can’t employ immigrants and try to get around the Fair Standards Act . . . [i]t applies equally to all workers. If you could employ any group of people at a lower standard, then unscrupulous employers could try to employ those people at less than minimum wage.”<sup>181</sup>

Although these suits deal strictly with wage complaints, laborers who are part of the suit have said that worksite bosses often abuse the workers.<sup>182</sup> Adrian Salazar, one worker who is part of the lawsuit against Belfor USA Group, says that his bosses refused to feed him and the other workers during the work day and threatened to fire those workers who complained.<sup>183</sup> Salazar recounts stories of workers being fired for taking breaks that were owed to them and of being forced to walk long distances (up to 40 minutes) at the end of the day to get back to their rented rooms.<sup>184</sup>

Interestingly, Salazar notes that while the worksite bosses are abusive, the residents of New Orleans are hospitable.<sup>185</sup> He said that while unpaid workers were being expelled from a hotel, the responding police officers “were trying to tell the owner he needs to pay his workers.”<sup>186</sup>

While the lawsuits begin to remedy the wage disputes, they fail to adequately represent the migrant worker population, which as of April, 2006 is estimated to be between 10,000 and 20,000 people.<sup>187</sup> Furthermore, these lawsuits have not yet proven to be an effective

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177. *Id.*

178. *Id.*

179. *Id.*

180. *Id.*

181. *Id.*

182. *Id.*

183. *Id.*

184. *Id.*

185. *Id.*

186. *Id.*

187. Quinones, *supra* note 6.

deterrent for non-payment of wages by subcontractors.<sup>188</sup> In addition, the abuse suffered by the workers at the hands of their employers cannot be remedied in a lawsuit.

*B. Migrant workers face serious health threats from dangerous work conditions coupled with inadequate training and protective gear.*

The second concern is that migrant workers are being exposed to potential health hazards in New Orleans, and, to a lesser extent, throughout the Gulf Coast. These dangers vary from hazards commonly associated with hurricanes, such as “electrical hazards, falling tree limbs, and dust containing lead, silica and asbestos,” to the hazards unique to Hurricane Katrina, which include, “raw sewage, rotting human and animal bodies, medical waste, and chemicals such as gasoline, oil, corrosives, lead and other heavy metals.”<sup>189</sup> Even while the city is being rebuilt, these materials will remain in the soil.<sup>190</sup>

Employers are failing to give workers adequate protection and training for the hazardous work conditions they face. For example, Carlos states:

They gave us masks with filters, and they changed the filters in the first and second weeks, but after a couple of weeks, the company didn't change them anymore. The masks were only good for seven days. If a worker lost his mask, he couldn't get a new one. He had to work without one until the end of the seven days. There wasn't anyone to ensure that everyone had a mask—no one from the government, from the public health agency, or anyone, to take care of us.<sup>191</sup>

These conditions are comparable to the aftermath of the September 11, 2001 attacks, “when police, fire, rescue, construction, utility and volunteer workers in New York were exposed to a similar array of hazards.”<sup>192</sup>

Hector recounts his health issues as a result of gutting schools in the Gulf region. “Since working in the schools, I haven't been well. In the

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188. See Filosa, *supra* note 23 (stating that there are similar problems faced by workers all across the country).

189. Jordan Barab, *Katrina Workers in Peril: Will We Repeat Mistakes of 9/11 Cleanup?*, CENTER FOR AMERICAN PROGRESS, Sept. 14, 2005, <http://www.americanprogress.org/issues/2005/09/b1043341.html>.

190. *Id.*

191. S. POVERTY LAW CTR., *supra* note 3, at 14.

192. Barab, *supra* note 189. (“Asbestos, glass, concrete and hazardous chemicals were pulverized when the buildings fell and then cooked for weeks while the fires sent out plumes of toxic smoke.”).

mornings when I shower, I find dried blood in my nose. I feel like something has damaged me . . . I [also] have stomach problems . . . [m]aybe it's because of so much filth and the putrid smells."<sup>193</sup> Jose describes similar health risks associated with his clean up job: "The work in the basement of the hospital was the worst because of the stench. It was still flooded. I was in contact with contaminated materials—syringes, dead monkeys, medical waste. We took all the filth out of the building with our hands."<sup>194</sup> Hector and Jose both ignored their health concerns, much like the other migrant workers, becoming resigned to the fact that those were the conditions they had to endure in order to earn a living wage in the region.

When illegal workers suffer injuries due to unsafe working conditions, they are refused treatment and are denied worker compensation benefits.<sup>195</sup> While there are some clinics and hospitals available to these workers, many avoid these facilities primarily for fear of deportation. Carrie Galphin, a volunteer nurse, states "there is a fear that [i]mmigration will come and find them so we have to clarify over and over again [that] it will not happen to our patients."<sup>196</sup> However, Galphin's assurances are often undermined by the fact that immigration hangs out by the mobile health care units in order to pick up illegal workers seeking health care.<sup>197</sup>

The health problems facing these laborers are not as easily remedied as are the wage disputes. Workers who are suffering from hazardous work and living conditions have no basis upon which to sue and, in light of the conditions they are working in, their health problems will likely haunt them for years to come, if not for the rest of their lives.

*C. The controversial "Latinization of the New New Orleans"<sup>198</sup> and the rising tensions between the locals and migrant workers.*

Despite the migrant workers' willingness to perform these risky jobs, they have not been welcomed.<sup>199</sup> New Orleans Mayor Ray Nagin

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193. S. POVERTY LAW CTR., *supra* note 3, at 11.

194. *Id.* at 13.

195. *Id.* at 1.

196. Richard A. Webster, *Health Care Workers Struggle to Treat Latino Laborers*, NEW ORLEANS CITY BUS. Feb. 20, 2006, available at <http://www.neworleanscitybusiness.com/viewStory.cfm?recID=14753>.

197. *Id.*

198. Lovato, *supra* note 163.

199. Kathleen Donato & Shirin Hakimzadeh, *The Changing Face of the Gulf Coast: Immigration to Louisiana, Mississippi, and Alabama*, MIGRATION INFORMATION SOURCE, Jan. 1, 2006, available at <http://www.migrationinformation.org/Feature/display.cfm?id=368>.



notoriously asked business leaders “[h]ow do I make sure New Orleans is not overrun with Mexican workers?”<sup>200</sup> Even though Nagin swiftly distanced himself from the bigoted remark, which provoked a hostile response from Latino organizations and civil rights groups, many in the region think contractors favor cheap illegal labor over more expensive local labor.<sup>201</sup>

Local residents are also disheartened about how the new demographic make up of the city will affect the region’s distinctive culture. “Throughout most of the 20th century, patterns and trends in the foreign-born populations of Louisiana, Mississippi, and Alabama were highly particularistic and differed from those elsewhere in the nation with respect to national origin and size.”<sup>202</sup> The city of New Orleans, which has African, Caribbean, French, and Spanish roots, is a melting pot responsible for the birth of “jazz, jambalaya and lavish Mardi Gras parades.”<sup>203</sup> Azucena Diaz, a New Orleans disc jockey stated that “the new workers don’t care about traditions. They’re not going to eat crawfish . . . They don’t care about anything else, just work, getting money, and sending it to their families.”<sup>204</sup>

While some residents are concerned about preserving and restoring the region’s historical roots and traditions, some are more concerned with the immediate effect of available job openings. Some African American locals “see the thousands of Latino immigrants as usurpers who’ve come for jobs they once had, now that wages have risen and black workers are displaced.”<sup>205</sup>

Although there are no official estimates, the president of the Gulf Coast Latin American Association, Andy Guerra, informed Gannett News Service that, since Hurricane Katrina, approximately 30,000 Hispanic workers had come to the Gulf Region.<sup>206</sup> These new arrivals include U.S. residents and also migrants from Latin American countries, including Guatemala, Honduras, and Mexico.<sup>207</sup>

Not only are the local residents demonstrating bitter sentiments about the out of town workers, but various government officials and agencies are also fueling race tensions in the region.

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200. *Id.*

201. *Id.*

202. *Id.*

203. Sandra Amrhein, *Who’s Rebuilding New Orleans*, ST. PETERSBURG TIMES, Oct. 23, 2005, available at [http://www.sptimes.com/2005/10/23/Worldandnation/Who\\_s\\_rebuilding\\_New\\_shtml](http://www.sptimes.com/2005/10/23/Worldandnation/Who_s_rebuilding_New_shtml).

204. Quinones, *supra* note 6.

205. *Id.*

206. Donato & Hakimzadeh, *supra* note 199.

207. *Id.*

Latinos in the Gulf region are being racially profiled by local and federal authorities, says Victoria Cintra of the Mississippi Immigrant Rights Alliance, one of the only organizations addressing Latino immigrant concerns in the region. Cintra argues that the Bush administration's suspension of the Davis Bacon Act . . . [including its] temporary removal of documentation requirements on I-9 forms has strained race relations by lowering wages and fostering competition between groups.<sup>208</sup>

This criticism undoubtedly helped strengthen the battle to reinstate the prevailing wage rule approximately two months after its suspension.

Locals argue that if the "federal government had obtained temporary housing fast enough to ensure work for local working-class black residences . . . [t]hey could have jumped on the lucrative construction jobs" and the region's large African American presence could have been preserved.<sup>209</sup>

Meanwhile, migrant worker organizers are looking toward the future. One organizer, Frank Curiel, explains, "[t]he immigrant workers are doing the job, . . . [t]he only way to protect them is to organize them."<sup>210</sup> International rep, Darren Johnson, who is working out of the New Orleans local added, "We are positioning ourselves for the future . . . [and] [w]e hope to turn the tide in the South."<sup>211</sup> Reports indicate that the influx of migrants in the region will persist as these workers try to enjoy the benefits of the "Gulf Opportunity Zone."<sup>212</sup> Unfortunately, the animosity felt by local residents and government officials toward these migrant workers does not appear to have a simple solution and is likely to be a source of tension in the region for the foreseeable future.

#### VIII. THE DAVIS BACON ACT PRESERVES THE LIVING WAGE AND SHOULD NOT HAVE BEEN SUSPENDED

Although politicians and academics have argued that Davis-Bacon is out-dated legislation that serves no present utility, the Act's suspension in the wake of Hurricane Katrina made it clear that it still serves an extremely important function. Davis-Bacon preserves a living wage. In other words, Davis-Bacon preserves a wage that allows a person working forty hours a week, without additional income, to afford "the necessities and comforts essential to an acceptable standard of

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208. Lovato, *supra* note 163.

209. Amrhein, *supra* note 203.

210. Brenner, *supra* note 21.

211. *Id.*

212. Donato & Hakimzadeh, *supra* note 199.

living”<sup>213</sup> (i.e. food, housing, transport, etc.). When Davis-Bacon was suspended, contractors were no longer required to offer a living wage, meaning local workers, if they accepted the wages being offered, could not afford to provide their families with basic necessities.<sup>214</sup> The inability to earn a living wage led to a mass exodus of local workers and their families because they could not afford to stay in the region. This mass exodus coupled with the huge influx of migrant workers dramatically changed the face of the Gulf Coast. In addition, the migrant workers, who rushed in to fill the void left by local workers, are now suffering from hazardous living and working conditions inflicted by employers, who have no legal incentive to treat their workers justly.

Considering the terrible abuses that have occurred in the wake of Davis-Bacon’s suspension, it is clear that it should not have been suspended. This conclusion does not, however, reflect the belief that Davis-Bacon should be used as a device for keeping illegal immigrants out of the Gulf Coast’s rebuilding effort. The illegal workers are not the problem; it is the abuse and deplorable living conditions of the workers that is the problem. Currently, there is no legislation effectively protecting the illegal migrant workers who rushed in to fill the void left by local workers.<sup>215</sup> Therefore, President Bush should not have suspended Davis-Bacon without enacting legislation to protect the vulnerable workers who predictably replaced local workers, who were unable to stay without the promise of a living wage. However, since the Davis-Bacon Act was suspended and the effect of that suspension (the massive influx of illegal workers) is irreversible,<sup>216</sup> the federal government must now step in and remedy the abuses which its own contractors are committing.

#### IX. LEGISLATIVE PROPOSALS NEED TO ADDRESS THE ISSUES DIRECTLY FACING THE MIGRANT WORKERS REBUILDING THE GULF COAST

It is undeniable that the Latino migrant workers have given a lot of support to New Orleans during the rebuilding process. Hector explains, “[w]e didn’t come here to harm anyone. . . . We ask of you, the authorities in New Orleans and anywhere else, that you just look at us

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213. Merriam-Webster Online Dictionary, <http://www.m-w.com/dictionary/living%20wage> (last visited Dec. 5, 2006).

214. See DEMOCRATIC POLICY COMMITTEE, *supra* note 38.

215. Brenner, *supra* note 21.

216. See SKOVRON, *supra* note 17.

too. Look at us because we came to better your city, to better the state. We're seeking only the rights that everyone deserves."<sup>217</sup> However, the local and federal governments are ignoring Hector's cries. Currently, the initiatives being taken on behalf of the Gulf Coast workers have not been effective at combating the numerous problems facing them;<sup>218</sup> they are exploited even though the immigrant advocacy groups, like the Southern Poverty Law Center, assert that they are protected by the Fair Labor Standards Act.<sup>219</sup> When a worker tries to assert his rights, he is brushed off or fired.<sup>220</sup> Only after a worker is fired or not paid is he able to seek compensation. In addition, each lawsuit only helps those workers who are a party to it. Considering that there are as many as 20,000 migrant laborers currently working in the Gulf,<sup>221</sup> the ability to sue falls short as a means of providing all of the workers with justice. Since current initiatives have failed, Congress must step in and provide a more useful set of protections for Gulf Coast workers.<sup>222</sup>

When President Bush suspended the Davis-Bacon Act, it was foreseeable that it would estrange local workers, who were accustomed to a higher wage, but attract migrant workers, who were routinely paid less than the reduced wage now offered as a result of Davis-Bacon's suspension. It is clear that the government foresaw this result as, shortly thereafter, the Department of Homeland Security provisionally removed the rules requiring government subcontractors to prove that their workers "are citizens or have a legal right to work in the United States."<sup>223</sup> Why would the government suspend the document requirement if not to accommodate illegal workers who, unlike local workers, would be willing to work for below the prevailing wage? Since the federal government opened the doors to these migrant workers by suspending the Davis-Bacon Act and by waiving the requirement that contractors prove their employees are legal workers, it is the federal government's responsibility to impose legislation that will fairly address the issues that have arisen as a result.<sup>224</sup>

Currently, the President, Senate, and various not-for-profit organizations have proposed legislation aimed at legitimizing and

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217. S. POVERTY LAW CTR, *supra* note 3, at 11.

218. *Id.* at 16.

219. Filosa, *supra* note 23.

220. *Id.*

221. Quinones, *supra* note 6.

222. See Leslie Eaton, *Study Sees Increase in Illegal Hispanic Workers in New Orleans*, N.Y. TIMES, June 8, 2006, at A16.

223. Barclay, *supra* note 1.

224. See Lovato, *supra* note 163.

protecting illegal workers nationwide.<sup>225</sup> Many of these proposals have been issued in response to an immigration bill already passed by the House.<sup>226</sup> The House Bill, which was passed in December 2005, “would declare all illegal immigrants felons and it would impose tough new penalties on those who hire and help any of the more than [eleven] million illegal immigrants now in the United States.”<sup>227</sup> The Bill has stirred up much debate prompting thousands of protestors to take to the streets in Denver waving Mexican flags, and causing high school students in Texas and California to stage walk outs.<sup>228</sup> Even Evangelical groups and the Roman Catholic Church have voiced their objections to the House bill.<sup>229</sup> The Church has said that it will not abide by any law that prevents them from serving these immigrant communities.<sup>230</sup>

Each of these proposals will be evaluated strictly in respect to the help that they could provide to the illegal workers in the Gulf Region. Each proposal will be discussed in consideration of the federal government’s suspension of the Davis Bacon Act and its suspension of the requirement that contractors prove that their workers are legally permitted to work in the United States.<sup>231</sup> Any legislation adopted must not conflict with these two suspensions.

The first proposal is that of President Bush. The President’s immigration plan contains three critical elements. The first element is securing the border, the second is strengthening enforcement inside of the country, and the third and final element is creating a temporary worker program.<sup>232</sup>

President Bush’s Proposal involves strengthening enforcement of the Country’s laws in the Interior.<sup>233</sup> The President believes that better Worksite Enforcement is essential to accomplishing better interior enforcement.<sup>234</sup> As a means of improving worksite enforcement, the President wants to launch task forces aimed at dismantling document

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225. *A NewsHour with Jim Lehrer: Undocumented Immigration* (PBS television broadcast Mar. 27, 2006) available at [http://www.pbs.org/newshour/bb/congress/jan-june06/immigration\\_3-27.html](http://www.pbs.org/newshour/bb/congress/jan-june06/immigration_3-27.html) (interviewing prominent leaders in the debate on immigration reform).

226. *Id.*

227. *Id.*

228. *Id.*

229. *Id.*

230. *A NewsHour with Jim Lehrer: Undocumented Immigration*, *supra* note 225.

231. Lovato, *supra* note 163.

232. Press Release, The White House, Fact Sheet: Comprehensive Immigration Reform: Securing Our Border, Enforcing Our Laws, and Upholding Our Values (Mar. 27, 2006), available at <http://www.whitehouse.gov/news/releases/2006/03/20060327-1.html>.

233. *Id.*

234. *Id.*

fraud rings.<sup>235</sup>

The President's proposal also calls for comprehensive immigration reform, which would create a Temporary Worker Program that would not provide amnesty.<sup>236</sup> This program would match willing American employers with willing foreign workers to fill jobs no American is prepared to do.<sup>237</sup> This program permits workers to register, on an interim basis, for legal status. These newly documented workers could also apply for citizenship, but they would have to "get in line" behind those who followed the legal route.<sup>238</sup> The White House proclaims, this program would "creat[e] a separate, legal channel for those entering America to do an honest day's labor."<sup>239</sup> The program would also entail the creation of tamper-proof identification cards, allowing the government to track temporary workers in America legally and it would help authorities spot those in America illegally.<sup>240</sup>

A key element and selling point of this proposal is that it does not provide amnesty. The President believes that granting amnesty would "allow people who break the law to jump ahead of people who play by the rules and wait in the citizenship line."<sup>241</sup> Furthermore, the White House believes amnesty would encourage "future waves of illegal immigration . . . [making] it more difficult for law enforcement to focus on those who mean us harm."<sup>242</sup>

The second proposal is that of Senators Cornyn and Kyl.<sup>243</sup> Senator John Cornyn, a republican from Texas, and Senator Jon Kyl, a republican from Arizona, have proposed an immigration reform bill premised upon the belief that "immigration reform can't reward illegal behavior."<sup>244</sup> This bill requires all illegal aliens to voluntarily register.<sup>245</sup> After five years expire, illegal workers would have to undergo a mandatory departure procedure, but would then be allowed to return

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235. *Id.*

236. *Id.*

237. *Id.*

238. *Id.*

239. *Id.*

240. *Id.*

241. *Id.*

242. *Id.*

243. Comprehensive Enforcement and Immigration Reform Act, S. 1438, 109<sup>th</sup> Cong. (2005).

244. Sen. John Cornyn & Sen. Jon Kyl, Immigration Reform Can't Reward Illegal Behavior: Changes Must Benefit Society, Economy, Security, <http://cornyn.senate.gov/index.asp?f=record&lid=1&yid=5&rid=237152&pg=1> (last visited Dec. 5, 2006). Senator Cornyn "is chairman of the Immigration, Border Security and Citizenship subcommittee . . . [and Senator Kyl] is chairman of the Terrorism, Technology and Homeland Security subcommittee. Together, their states represent 80 percent of the southern border." *Id.*

245. S. 1438, § 502(a).

through any legitimate channel,<sup>246</sup> including the new temporary worker status created in the bill.<sup>247</sup> Like President Bush's proposal, the Cornyn-Kyl bill stresses the necessity of increasing Interior enforcement. Under this bill, employers would have to provide evidence that a new worker is legally permitted to work in the United States.<sup>248</sup> The federal government would be responsible for providing the means necessary to comply. Senators Cornyn and Kyl believe a "quick electronic verification system" and "more secure documents" are the tools that will enable employers to verify the status of their new hires.<sup>249</sup> It is important to note that while neither the President's proposal nor the Cornyn-Kyl bill provide amnesty, the Cornyn-Kyl bill is harsher in that it forces illegal immigrants to leave the country before applying for a temporary visa or permanent residence, which will no doubt be prohibitive to many.<sup>250</sup>

Other Republicans, including Senator Mel Martinez and Senator Chuck Hagel, have considered a different compromise.<sup>251</sup> These Senators suggest differentiating between immigrants who overstayed their visas and those who illegally entered the United States,<sup>252</sup> as well as consider how long immigrants have been in the country.<sup>253</sup> One option would "allow illegal immigrants who have been in the United States for more than five years to apply for a green card and eventual citizenship,"<sup>254</sup> while this course of action would not be available to those who arrive later. Another option would be to require illegal immigrants to "return to a port of entry in order to legalize their status."<sup>255</sup> This option puts a lesser burden on illegal immigrants than does the Cornyn-Kyl bill, which requires illegal immigrants to return to their country of origin.<sup>256</sup>

The third proposal is that of Senator John McCain (R-Arizona) and Senator Edward Kennedy (D-Massachusetts).<sup>257</sup> Their immigration

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246. S. 1438, § 601.

247. S. 1438, §§ 501-502.

248. S. 1438, § 321(d)(1)(2).

249. Press Release, The White House, *supra* note 232.

250. Maura Reynolds & Nicole Gaouette, *GOP Senators Trying to Shape a Compromise on Immigration*, L.A. TIMES, Apr. 4, 2006, at A7.

251. *Id.* (Mel Martinez is a republican senator from Florida while Chuck Hagel is a republican senator from Nebraska).

252. Reynolds & Gaouette, *supra* note 250.

253. *Id.*

254. *Id.*

255. *Id.*

256. Cornyn & Kyl, *supra* note 244.

257. Stephen Dinan, *McCain-Kennedy Bill Opens Citizenship Path*, WASH. TIMES, May 13, 2005, available at <http://www.washtimes.com/national/20050512-111803-6952r.htm>.

proposal includes a path for illegal aliens to obtain citizenship as well as an innovative program for workers who want to work in the country.<sup>258</sup> According to the Washington Times, this proposal “could increase yearly legal immigration by 400,000 people.”<sup>259</sup> According to the bill’s sponsors:

[I]t is not amnesty because it would require illegal aliens to pay all regular fees as well as a \$1,000 fine to join a guest-worker program and, after six years, another \$1,000 fine to obtain a green card signifying legal permanent residence. Green card holders eventually can apply for citizenship.<sup>260</sup>

The sponsors stress that their proposed bill does not put those that have been living illegally in the United States at the front of the citizenship line.<sup>261</sup> Senator Cornyn has already commented on the McCain-Kennedy proposal saying, “I favor a work-and-return bill, not a work-and-stay bill.”<sup>262</sup> According to Senator McCain, the Administration acknowledged that the bill’s provisions “are in accord with the president’s principles.”<sup>263</sup> Senator McCain also commented, “if you think [the bill is] different in some key aspects, you’ll have to point them out to me.”<sup>264</sup>

Politicians have not been alone in their quest to provide a solution to the problem of illegal immigrant labor. In fact, the fourth proposal is that of the Immigrant Justice Project. In 2004, the Southern Poverty Law Center launched the Immigrant Justice Project (IJP) to “ensure that the rights of immigrant workers are protected in the Southeastern states.”<sup>265</sup> The IJP has made specific recommendations for action in light of the reconstruction in New Orleans. The IJP states that “at a minimum, the government must ensure that the workers are paid properly and are not exposed to dangerous working conditions.”<sup>266</sup> The IJP has outlined six

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258. *Id.*

259. *Id.*

260. *Id.*

261. *Id.* (citing Senator Edward Kennedy’s comments about the proposed bill).

262. *Id.* (quoting Senator John Cornyn’s comments about the proposed bill).

263. *Id.* (quoting Senator John McCain’s comments about the proposed bill).

264. *Id.*

265. S. POVERTY LAW CTR., LEGAL ACTION: IMMIGRANT JUSTICE PROJECT, [www.splcenter.org/legal/ijp.jsp](http://www.splcenter.org/legal/ijp.jsp) (last visited Dec. 6, 2006). The IJP assists immigrant workers in the following nine states: Alabama, Arkansas, Georgia, Kentucky, Louisiana, Mississippi, North Carolina, South Carolina, and Tennessee. Prior to its establishment “there was no entity that provided legal representation to most immigrants in the South, even though the abuse of immigrants is one of the most significant current civil rights issues.” *Id.*

266. S. POVERTY LAW CTR., *supra* note 3 at 16.



steps which it believes must be taken “in order to ensure fair and decent treatment of [the Gulf] workers.”<sup>267</sup>

First, IJP believes that all levels of government need to acknowledge the magnitude of the exploitation occurring in the Gulf reconstruction effort.<sup>268</sup> Second, agencies, at both the state and federal levels “must aggressively enforce existing wage and hour, health and safety, and worker’s compensation laws.”<sup>269</sup> Third, officials should “enforce workplace protections without regard to race, national origin, immigration status, or level of English proficiency.”<sup>270</sup> Fourth, the United States Department of Labor ought to “audit government contractors for compliance with federal wage and hour laws, and the federal government should suspend contracts or refuse to award contracts to noncompliant employers.”<sup>271</sup> Fifth, new worker protection laws should be adopted in Louisiana to protect workers involved in the reconstruction.<sup>272</sup> Finally, contractors must abide by “federal wage and hour laws and . . . monitor their subcontractors to ensure compliance.”<sup>273</sup>

Many of the aforementioned proposals would help remedy the problems plaguing Gulf workers. The Temporary Worker program advocated by President Bush is very similar to that proposed by Senators McCain and Kennedy.<sup>274</sup> The premise behind the bill and its proposed temporary worker program, as mentioned above, is to match willing foreign workers with American employers who need workers. This parallels what actually occurred in the Gulf shortly after Hurricane Katrina. The Government suspended Davis-Bacon in order to lessen the cost of rebuilding.<sup>275</sup> Local workers were unwilling to work for the resulting lower wage. Therefore, government contractors, like Halliburton,<sup>276</sup> needed to find laborers willing to work for the offered wages. Migrant workers, who were accustomed to earning less than this newly reduced wage, were more willing to work for the offered wages than were American workers.<sup>277</sup> Thus, American employers were united with foreign workers to complete jobs that no American was willing to do.

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267. *Id.*

268. *Id.*

269. *Id.*

270. *Id.*

271. *Id.*

272. S. POVERTY LAW CTR., *supra* note 3 at 16.

273. *Id.*

274. Dinan, *supra* note 257.

275. See Press Release, Congressman Jeff Flake, *supra* note 101.

276. Lovato, *supra* note 162.

277. *Id.*

Since, under this proposed program, illegal immigrants would be able to register for legal status on a temporary basis, they would no longer be in the same vulnerable position as they are now. Jennifer Rosenbaum, an attorney of the Southern Poverty Law Center, insists that the Fair Labor Standards Act (FLSA) applies equally to legal and illegal workers.<sup>278</sup> However, the U.S. Department of Labor admits that while,

[t]he Supreme Court's decision [in *Hoffman Plastic Compounds, Inc. v. NLRB*]<sup>279</sup> does not mean that undocumented workers do not have rights under other U.S. labor laws. In *Hoffman Plastics*, the Supreme Court interpreted only one law, the NLRA. . . . The Supreme Court did not address the laws the Department of Labor enforces, such as the Fair Labor Standards Act (FLSA) and the Migrant and Seasonal Agricultural Worker Protection Act (MSPA), that provide core labor protections for vulnerable workers. . . . The Department of Labor is still considering the effect of Hoffman Plastics on other labor laws.<sup>280</sup>

If illegal immigrants were to register in a temporary worker program the uncertainty over whether or not the Fair Labor Standards Act covers these workers would be eliminated. The workers would gain legal status and would be covered by the Fair Labor Standard's Act.<sup>281</sup>

The Temporary Worker program would also boost the health of migrant workers. Not only would they be exposed to fewer hazards, but those workers who are hurt or sick would be able to seek medical attention. As it stands, workers refuse to go to healthcare centers because they are afraid that they will be captured and deported.<sup>282</sup> If these workers were afforded temporary legal status, they could go to free clinics without fear of apprehension.

In addition to instituting a Temporary Worker program, the U.S. Department of Labor should audit government contractors in order to make sure that they are complying with the wage and hour laws, as the Immigrant Justice Project advocates.<sup>283</sup> Currently, the lack of monitoring is a huge factor contributing to the ability of employers to

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278. Filosa, *supra* note 23.

279. *Hoffman Plastic Compounds Inc. v. NLRB*, 535 U.S. 137, 151 (2002) (“[A]llowing the Board to award backpay to illegal aliens would unduly trench upon explicit statutory prohibitions critical to federal immigration policy.”).

280. U.S. DEP'T OF LABOR, FACT SHEET #48: APPLICATION OF U.S. LABOR LAWS TO IMMIGRANT WORKERS: EFFECT OF HOFFMAN PLASTICS DECISION ON LAWS ENFORCED BY THE WAGE AND HOUR DIVISION, <http://www.dol.gov/esa/regs/compliance/whd/printpage.asp?REF=whdfs48.htm> (last visited Dec. 6, 2006).

281. Fair Labor Standards Act, 29 U.S.C. § 203 (2000).

282. Webster, *supra* note 195.

283. S. POVERTY LAW CTR., *supra* note 3 at 16.

exploit their workers.<sup>284</sup> Furthermore, when federal contractors are discovered committing abuses, they are not punished.<sup>285</sup> Federal audits resulting in a suspension or refusal to award contracts to noncompliant employers would force the employers to comply with the law and to stop exploiting workers.

In addition, contractors should be forced to monitor their subcontractors to ensure compliance with federal wage and hour laws, and with health and safety laws.<sup>286</sup> Such a policy would accomplish two things. First, it would alleviate some of the burden on the Department of Labor. If the Department of Labor could depend on the contractors to monitor their subcontractors, then it would not have to perform as many audits as it currently does. Second, the contractor would become liable for the practices of its subcontractor. This would give the contractor an increased incentive to make sure that the federal wage and hour laws, and the health and safety laws, are being upheld.

In sum, any legislation adopted which would affect the workers in the Gulf Coast should include a temporary worker program, worksite audits, and a system whereby contractors are required to monitor their subcontractor for compliance or face liability for any violations committed on the part of their subcontractors. Without the adoption of such legislation it is unlikely that employers will stop exploiting the migrant workers and the hazardous working conditions will continue.

## X. CONCLUSION

When Hurricane Katrina hit, the Gulf Coast prepared itself as best as it could for the extensive physical damage. However, no one could have predicted the impact the storm had on the demographics of the labor force. While one million local residents and workers fled the devastated region in the storm's aftermath, migrant workers flooded in, anxious to fill the void.<sup>287</sup>

Immediately after Katrina, the federal government facilitated the hiring of the migrant workers by eliminating prevailing wage standards

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284. Lovato, *supra* note 20 (“[T]racing the line from unpaid undocumented workers to their multi-billion dollar employers is a daunting task. As shadowy labyrinth of contractors, subcontractors and job brokers, *overseen by no single agency*, have created a no man’s land where nobody seems to be accountable for the hiring—and abuse—of these workers.”) (emphasis added).

285. *Id.*

286. S. POVERTY LAW CTR., *supra* note 3, at 16.

287. Rice University News & Media, Post-Katrina Wave of Mexican Migrant Workers Reflects Changes in Immigration Trends That Began Around 1990, (Jan. 12, 2006), <http://www.media.rice.edu/media/NewsBot.asp?MODE=VIEW&ID=8131>.

and by relaxing working-paper requirements.<sup>288</sup> Although these labor requirements were reinstated only two months after the storm,<sup>289</sup> the effect of their suspension on the workforce will be felt long after the cleanup is over.

“What remains unclear is whether Mexican and other Latino immigrant laborers will remain once the clean-up work is done.”<sup>290</sup> Similarly, the extent of rebuilding of New Orleans and rest of the Gulf Coast is just as unclear. Although a majority of the illegal migrants did not originally intend to remain in the Gulf, evidence suggests that the longer their jobs last, the more likely it will be that they will seek permanent residence,<sup>291</sup> thus altering the demographic make-up of the region. In addition, migration to the Gulf Coast states since Hurricane Katrina underscores the demographic changes that began in the 1990s.<sup>292</sup> The region’s present reliance on immigrant labor from Mexico and other Latin American nations may mean even faster growth in these communities than they would have had before Hurricane Katrina devastated the region.

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288. Lovato, *supra* note 20.

289. AFL-CIO, *supra* note 133.

290. Donato & Hakimzadeh, *supra* note 199.

291. *Id.*

292. Other Latinos also played a large role in Louisiana’s foreign-born population in the 1990s, and thousands of Hondurans and migrants from other Central American nations, including Nicaragua, arrived after Hurricane Mitch battered the region in 1998. During the three-month period after Hurricane Mitch hit land, an estimated 6,000 Central American undocumented migrants were captured and detained along the Texas-Mexico border — more than half of whom were from Honduras. *Id.*

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