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THE SERVICE CONTRACT ACT OF 1965: TIME TO REVISE OR REPEAL

Beverly Hall Burns†

I. INTRODUCTION

CONGRESS adopted the Service Contract Act of 1965 (the Act),¹ with the laudable purpose of preventing the exploitation of the "poorest" and "most marginal" workers in America: the service employees who performed such tasks as washing laundry, preparing and serving meals, and doing the janitorial work for government facilities.² This purpose was to be realized by requiring that federal service workers employed by independent federal contractors be paid a minimum wage and provided certain minimum benefits determined by the Secretary of Labor (the Secretary).³ Eighteen years of administration by the Department of Labor (Labor Department, or DOL) and two congressional amendments have buried the Act's goals under an avalanche of confusion and chaos. The protections of the Act have been extended far beyond the imaginable scope of Congress' original intent. For example, the Act today includes within its ambit of protection not just "marginal" workers but some university researchers and specialists in high technology industries as well.⁴ The Service Contract Act, a remedial statute aimed at fixing problems that may never have existed, stands as a paradigm of good intentions

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Research for this study was financed by a grant from the Carthage Foundation to the Wharton School Industrial Research Unit, University of Pennsylvania, for analysis of prevailing wage legislation.


(435)
run amok. It has been justifiably maligned not only by the agencies and private-sector employers whose compliance it requires, but also by the administrative agency charged with its enforcement.\(^5\)

Revisions in administrative regulations, purportedly designed to limit the Act's application and to clarify some of its many ambiguities, have been greeted with the charge of legislation by administrative fiat.\(^6\) These revisions, stalled in administrative procedural channels from 1981 until they became final in November, 1983,\(^7\) recently withstood challenge in *AFL-CIO v. Donovan*\(^8\) and were expected to take effect following that decision.\(^9\) A more complete resolution of the problems—wholesale repeal of the Act—was suggested in January, 1983, by the General Accounting Office (GAO)\(^10\) and was reiterated in November, 1983, by the President's Private Sector Survey on Cost Control.\(^11\) The GAO contended that, although the new regula-

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Mr. Poulin was not the first person concerned with the DOL's attempts to rewrite legislation through regulations. *See also 1975 Oversight Hearings, supra* note 2, at 2 (remarks of Rep. Thompson). Representative Thompson, after stating that the proposed regulations struck "at the very heart of the Service Contract Act," warned the administration that "[t]he laws are not to be made under our system by the executive branch or changed by the executive branch or misinterpreted when the law is clear." *Id.* at 1-2.

7. For a discussion of the revised regulations, see notes 222-42 and accompanying text infra.


10. *COMPTROLLER GEN'L OF THE U.S., THE CONGRESS SHOULD CONSIDER REPEAL OF THE SERVICE CONTRACT ACT 57 (1983)* [hereinafter cited as COMPTROLLER GENERAL'S REPORT]. The GAO identified the principal problem as the impracticability and expense of efficiently administering the Act to insure that "accurate and equitable" wage determinations are made for all employees within the scope of the Act. *Id.* at 57-58.


...tion might correct some of the historic problems with coverage and enforcement, regulatory action would not resolve many of the Act’s underlying problems. In response, Lane Kirkland, the President of the AFL-CIO, called the GAO conclusion political, and argued that congressional repeal would ignore the needs of the entire class of workers whom Congress intended to protect when it adopted the statute.

This Article attempts to bring into sharp focus the polar viewpoints represented by the GAO recommendation and the AFL-CIO’s response to it, and to clarify the meaning of the statute itself and the reasons behind its adoption. Primarily, this Article will analyze the pragmatic and legal issues addressed in the limited litigation under the Act and specify the potential impact of the Act’s broad scope. In conclusion, the Article suggests major congressional revision, if not repeal, of the entire statute.

II. The Act

We were not thinking, you know, of all the ramifications . . . [when we enacted the Service Contract Act]. We never thought of all the different ways the thing would apply, so we did not think of some of these problems—Congressman James O’Hara, co-sponsor of the Act.

A. The Perceived Need

Contentions that employees of private contractors who provide services to the federal government deserve some wage and benefit protection were hardly new in 1965. Bills designed to confront the same issue had been introduced earlier in the decade, and it was well recognized that other employees of contractors who did work for the federal government had enjoyed such wage protection for about thirty years. Specifically, in 1931, the Davis-Bacon Act set up a statutory structure to require and enforce wage determinations on

13. Id. at App. XXII (letter from Lane Kirkland, President, AFL-CIO to Charles A. Bawsher, Controller General, GAO, Aug. 19, 1982).
federal construction jobs exceeding a cost of $2,000.  

Then, in 1936, the Walsh-Healey Public Contracts Act (the Walsh-Healey Act) provided a minimum wage requirement for employees of manufacturing and supply companies which did business with the federal government on contracts in excess of $10,000.  

To some, therefore, a statute designed to protect federal service employees would simply close the last gap in remedial labor legislation applicable to federal contractors.  

Indeed, the federal government has confessed responsibility for the fact that many service employees were poorly paid prior to the Act's adoption. In 1975, the House Committee on Education and Labor cited the requirement that the government accept the bid of the lowest responsible bidder as a major cause of the low pay of contract cleaning and other service employees. In the labor-intensive service industry, the requirement that the government accept the lowest responsible bidder was criti-


The wage determination features of the Walsh-Healey Act have been inoperative since 1964 when the Circuit Court of Appeals for the District of Columbia held that the Department of Labor could not rely on data collected by its Bureau of Labor Statistics without revealing the sources for that data if the data was subject to impeaching evidence. Wirtz v. Baldor Elec. Co., 337 F.2d 518, 529 (D.C. Cir. 1964). Since the Bureau of Labor Statistics collected wage data under a pledge of secrecy, this holding effectively terminated Walsh-Healey Act wage determinations. See Amending the Service Contract Act of 1965: Hearing on H.R. 11884 Before the Special Subcomm. on Labor of the House Comm. on Education and Labor, 92d Cong., 2d Sess. 7 (1972) (statement of Gregory J. Ahart, Director, Manpower and Welfare Division, General Accounting Office) [hereinafter cited as 1972 House Hearings].


19. See, e.g., H.R. REP. No. 948, supra note 2, at 2. See also Service Contract Act of 1965: Hearing on H.R. 10238 Before the Special Subcomm. on Labor of the House Comm. on Education and Labor, 89th Cong., 1st Sess. 4 (1965) (statement of Charles Donahue, Solicitor of Labor) [hereinafter cited as 1965 House Hearings]. Mr. Donahue testified that the Act would cover workers who "are among the most poorly paid and economically deprived in our society. Many are not covered by the Federal Fair Labor Standards Act or State minimum wage laws. Often they are not members of unions and have little prospect of bettering their condition through collective bargaining." Id.

cized as tolerance, if not actual encouragement, of "wage busting." In addition, service contracts have generally been re-bid annually, increasing the existing downward wage pressures. It was this perceived institutional exploitation of blue collar service workers that led to the adoption of the Service Contract Act.

B. The Service Contract Act in its Original Form

The Service Contract Act was written in 1965 to apply to every federal contract in excess of $2,500 if that contract's principal purpose was to furnish services in the United States through the use of service employees. The Act specifically exempted seven types of contracts: 1) construction contracts; 2) work required to be done in accord with the Walsh-Healey Act; 3) certain contracts for the carriage of freight or personnel where published tariff rates were in effect; 4) contracts for furnishing broadcast services subject to the Communications Act of 1934; 5) contracts for utility services; 6) employment contracts for direct services to a federal agency by an individual or individuals (es-

21. Id. at 2-3. The House report detailed how the government bidding process encouraged low wages:

Since labor costs are the predominant factor in most service contracts, the odds on making a successful low bid for a contract are heavily stacked in favor of the contractor paying the lowest wage. Contractors who wish to maintain an enlightened wage policy may find it almost impossible to compete for Government service contracts with those who pay wages to their employees at or below the subsistence level. When a Government contract is awarded to a service contractor with low wage standards, the Government is in effect subsidizing subminimum wages.

Id. The Act was passed in order to discourage these "wage-busters." See 1981 Oversight Hearings, supra note 6, at 24 (statement of George Poulin, General Vice-President, International Association of Machinists and Aerospace Workers).

22. See 41 U.S.C. § 11 (1976). Section 11 provides that "[n]o contract . . . on behalf of the United States shall be made, unless the same is authorized by law or is under an appropriation adequate to its fulfillment." Id. Since appropriations are generally made for one-year periods, the contracts are usually let for one year. See Special Subcomm. on Labor, 92d Cong., 1st Sess., The Plight of Service Workers Under Government Contracts 18 (Comm. Print 1971) [hereinafter cited as 1971 SPECIAL REPORT]. The constant re-letting of government contracts was seen to accelerate the downward spiral of federal service wages. See 1965 House Hearings, supra note 19, at 5 (statement of Charles Donahue, Solicitor of Labor). See also 1971 SPECIAL REPORT, supra, at 2. The special subcommittee found specifically that the government's policy of one-year contract terms was "one of the principal causes of the chaotic conditions in [the service] industry." Id.

23. In this respect, the purpose behind the Act is not significantly different from that of the Davis-Bacon and Walsh-Healey Acts: to protect the wage structure in the private sector from the impact of the federal government's highly regulated procurement process. For a discussion of the Davis-Bacon and Walsh-Healey Acts, see notes 11-16 and accompanying text supra.

sentially, consulting contracts); and 7) contracts for the operation of a postal contract station.\textsuperscript{25}

All service contracts covered by the original statute were required to contain the following: 1) a provision specifying the monetary wages to be paid for each class of employees covered by the particular contract; 2) a provision specifying the "fringe benefits" to be paid to each class of employees;\textsuperscript{26} 3) a provision that the contract would be performed under safe and sanitary conditions;\textsuperscript{27} 4) an assurance that the employees of the successful bidder would be notified of the compensation required by the Act;\textsuperscript{28} and 5) a provision that service employees under contracts covered by the Act could not be paid less than the minimum wage specified in the Fair Labor Standards Act.\textsuperscript{29} The Labor Department was charged with administration and enforcement of the new statute and given significant latitude to make "rules and regulations allowing reasonable variations, tolerances, and exemptions to and from any or all provisions of this [Act]."\textsuperscript{30}

The Act provided sanctions against contractors who violated the Act's provisions. Specifically, violators were liable for underpayments to employees\textsuperscript{31} and the contract involved was subject to cancellation.\textsuperscript{32} Lists of violators were to be circulated and, unless the Secretary recommended otherwise, violators would be barred from further federal contracts for three years.\textsuperscript{33} Finally, the original statute pro-

\begin{itemize}
\item[25.] \textit{Id.} § 7 (codified as amended as 41 U.S.C. § 356 (1976)).
\item[26.] \textit{Id.} § 2(a)(1)-(2) (codified as amended at 41 U.S.C. § 351(a)(1)-(2) (1976)). The minimum wages to be paid were to be set by the Secretary of Labor (the Secretary) "in accordance with prevailing rates for such employees in the locality." \textit{Id.} §2(a)(1). The Secretary was afforded limited discretion in determining benefits "prevailing for such employees in the locality" which at a minimum shall include medical or hospital care, pensions on retirement or death, compensation for injuries or illness resulting from occupational activity, or insurance to provide any of the foregoing, unemployment benefits, life insurance, disability and sickness insurance, accident insurance, vacation and holiday pay, costs of apprenticeship or other similar programs and other bona fide fringe benefits not otherwise required by Federal, State, or local law to be provided by the contractor or subcontractor. \textit{Id.} § 2(a)(2). The contractor, however, could elect to provide equivalent benefits or to make "equivalent or differential payments in cash." \textit{Id.}
\item[27.] \textit{Id.} § 2(a)(3) (codified as amended at 41 U.S.C. § 351(a)(3) (1976)).
\item[28.] \textit{Id.} § 2(a)(4) (codified as amended at 41 U.S.C. § 351(a)(4) (1976)).
\item[30.] Service Contract Act of 1965, § 4(b) (codified as amended at 41 U.S.C. § 353(b) (1976)).
\item[31.] \textit{Id.} § 3(a) (codified as amended at 41 U.S.C. § 352(a) (1976)).
\item[32.] \textit{Id.} § 3(c) (codified as amended at 41 U.S.C. § 352(c) (1976)).
\item[33.] \textit{Id.} § 5(a) (codified as amended at 41 U.S.C. § 354(a) (1976)).
\end{itemize}
vided for a right of action by the United States against a violating contractor (or its surety or even a subcontractor) on behalf of underpaid and unreimbursed service employees.34

C. The 1972 Amendments

Within eight months of adoption, the Labor Department’s Wage and Hour Administration proposed to the Congress that some original provisions of the Act be amended because they were already “unnecessary and outdated.”35 Within a few years, supporters of the Act were promoting amendments to compel the Labor Department to make wage determinations36 and to eliminate what was seen as “rapid turnover of government service contracts through underbidding on wages and working conditions. . . .”37 Hearings in 1972 revealed that the DOL had, in fact, failed to make wage determinations in nearly two-thirds of all federal service contracts.38 Additionally, the House Special Labor Subcommittee found that a combination of the government’s continued practice of rebidding contracts each year and the requirement of awarding contracts to the lowest bidder resulted in frequent turnover of contracts.39 In other words, whenever a new bidder could minimize labor and benefit costs at a level below the current contract holder, in the absence of a wage determination, that new bidder would be awarded the contract.40

34. Id. § 5(b) (codified as amended at 41 U.S.C. § 354(b) (1976)).
37. Daily Labor Report (BNA), Aug. 2, 1972, at A-3. See also 1971 Special Report, supra note 22, at 18. The House special subcommittee, after blaming the annual re-bidding process for causing chaos, explained as follows: “The pattern is for a contractor to come in, establish a relationship with his employees, perform the contract for a year, and then be underbid by another contractor when the agency recompetes the contract.” Id.
38. 1972 House Hearings, supra note 17, at 6-7 (statement of Gregory J. Ahart, Director, Manpower and Welfare Division, GAO). In fiscal year 1970, only 37% of the notices of intention to award contracts were accompanied by DOL wage determinations. Id. In fiscal year 1971, the figure dropped to 35%. Id. at 6.
40. See SUBCOMM. ON LABOR-MANAGEMENT RELATIONS, 94TH CONG., 1ST SESS., CONGRESSIONAL OVERSIGHT HEARINGS: THE PLIGHT OF THE SERVICE WORKER REVISITED 4 (Comm. Print 1975) [hereinafter cited as PLIGHT OF THE SERVICE WORKER REVISITED]. In analyzing the problems with the administration of the Act prior to the 1972 amendments, the subcommittee concluded,

A combination of the Department’s failure to make wage and fringe benefit determinations and its failure to recognize prospective increases in
In 1972, Congress addressed these concerns. In amending the Act, Congress 1) required successor contractors to pay service employees wages and fringe benefits at rates no lower than those to which the predecessor contractor was committed by a collective bargaining agreement (including future increases); 2) allowed multi-year contracts up to a maximum of five years; 3) required the Secretary to consider federal wage board rates applicable to similar civil service employment in determining the rates to be paid under a service contract; and 4) mandated that the Secretary issue wage determinations for all government service contracts subject to the Act "as soon as . . . administratively feasible."  

Clearly, it was hoped that by mandating wage determinations and reducing the turnover on service contracts, the administration

wages and fringe benefits led to a situation where incumbent contractors were turned out every year and new contractors refused to recognize existing collective bargaining agreements. Existing employees were forced to take wage cuts if they wanted to keep their jobs.

41. Act of October 9, 1972, Pub. L. No. 92-473, § 3(c), 86 Stat. 789 (codified at 41 U.S.C. § 353(c) (1976)). The amendment provides an exception to the successor requirement if the Secretary finds, after a hearing, that the predecessor's wage rates were substantially at variance with those prevailing in the locality.  

The successor provision, which binds the successor to pay wages contracted by the predecessor, conflicted with a 1972 Supreme Court decision which held that a successor employer, although obligated under the National Labor Relations (Taft-Hartley) Act to bargain with the union certified as the representative of the predecessor's employees, was not required to assume the obligations of the labor agreement negotiated by the predecessor. NLRB v. Burns Int'l Security Servs., Inc., 406 U.S. 272, 287 (1972). The Burns Court noted that the obligation to negotiate did not arise from the existence of an agreement between the union and the contractor's predecessor, but from the contractor's voluntary take-over of "a bargaining unit that was largely intact and that had been certified within the [previous] year."  

Id. At least one governmental agency, the Armed Services Board of Contract Appeal, has held that the reasoning of Burns applies to contracts covered by the Service Contract Act and, thus, that successor contractors would not be bound to assume the obligations of the predecessor. See Daily Labor Report (BNA), Aug. 31, 1972, at A-8 (citing Space Engineering Inc., [1965-1972] 8 Gov't Cont. Rep. (CCH) ¶ 89,873 (Aug. 10, 1972)). This agency felt that the Service Contract Act was so close in purpose to the federal labor acts that the Burns analysis should control. See id. at A-9. For a discussion of court decisions interpreting the Service Contract Act's successor provisions, see notes 87-104 and accompanying text infra.


43. Id. § 2(a)(5) (codified as amended at 41 U.S.C. § 351(a)(5) (1976)). The federal wage board employees correspond generally to the "blue-collar" workers in the private sector. See H.R. Rep. No. 1251, 92d Cong., 2d Sess. 3 (1972). The subcommittee was concerned with the "substantial disparity in wages and fringe benefits [which] had developed between Federal wage board employees and their counterparts employed by service contractors."  

Id.


Id.
and enforcement of the Service Contract Act would become manageable, efficient, and effective. Just as clearly, that was not to be. Even through 1982, contracts continued to be let without requests for wage determinations.\(^{45}\) Moreover, the successor contractor provision of the 1972 amendments has been continually challenged for requiring a new contractor—even one with its own labor force—to pay its workers wages and benefits specified in a contract which neither the successor contractor nor its employees negotiated.\(^{46}\)

**D. The 1976 Amendments**

In 1976, it remained evident that the law continued to be subject to *ad hoc* enforcement. Some issues which had arisen earlier remained unresolved. For example, the wage determinations were still a major problem. While the Labor Department seemed to have taken seriously its legislatively-mandated responsibility to make wage determinations,\(^{47}\) the procuring agencies were letting contracts without ever notifying the DOL that the determinations were needed.\(^{48}\)

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45. **GAO, Assessment of Federal Agency Compliance with the Service Contract Act** 7 (1982) [hereinafter cited as 1982 Compliance Assessment]. The GAO reported that wage determinations were either not requested or not included in 381 of 980 contracts let by 20 agency procurement offices. *Id.* See also **Plight of the Service Worker Revisited**, supra note 40, at 5. The House Special Subcommittee pointed to the "effectiveness" of the 1972 amendments by noting that "44.5% of service contracts were covered by wage determinations during fiscal year 1973, and 53% were covered by the end of fiscal year 1974." *Id.* While certainly an improvement over the 37% and 35% figures of fiscal years 1970 and 1971, respectively, the fact remained that nearly half of all relevant contracts were not covered by such determinations.

Moreover, those determinations which were made were not required to meet the federal wage board rates for the corresponding jobs. *See* American Fed'n of Gov't Employees v. Donovan, 93 Lab. Cas. (CCH) ¶ 34,177 (D.D.C. 1982). In that case, the court recognized that Congress sought to close the gap between wage board employees and their private sector counterparts. It reasoned that Congress could easily have made such a provision expressly mandatory if it so desired. *Id.* at 44,502-03. Thus, the court concluded that Congress intended to give the Secretary the discretion to allow a justified disparity. *Id.* at 44,503.

46. **See 1972 Senate Hearings**, supra note 5, at 19-20 (statement of Richard Grunewald, Assistant Secretary for Employment Standards, DOL). Mr. Grunewald raises the specter of outgoing contractors agreeing to wage increases to minimize labor unrest, since there is no competitive reason not to do so. *Id.*

An additional result of the successorship provision has been that, out of a desire to avoid having third parties dictate their contract terms, contractors may be discouraged from bidding on contracts. *See* Goldfarb & Heywood, *An Economic Evaluation of the Service Contract Act*, 36 Indus. & Lab. Rel. Rev. 56, 62 (1982). The authors contend that this development will lead to a "locking in" of contractors. *Id.* For a full discussion of the implications of the successorship provision in the 1972 amendments, see notes 88-107 and accompanying text infra.

47. For an illustration of the DOL's improved record in issuing wage determinations, see note 45 supra.

48. For a discussion of this failure to request wage determinations, see note 45.
Moreover, by 1976, a new and troubling issue had arisen. Since the enactment of the original statute, the Labor Department had vacillated on the question of whether clerical employees of service contractors were to be covered and included in wage determinations. This ambiguity remained despite the fact that the legislative history of the Act provided strong evidence that clerical and other office employees were not intended to be included as service employees. In 1976, a Florida district court had, in fact, held that Congress intended the Act to be limited in its coverage to blue-collar workers or "wage board" job classifications as defined for the federal civil service. Congress reacted to that decision by amending the statute to cover all persons except bona fide executive, administrative, and professional employees. Nevertheless, just as the 1972 amendments had failed to resolve problems (and in fact created their own), the definitional

supra. It should be noted that this problem continues today. See 1982 COMPLIANCE ASSESSMENT, supra note 45, at 7.

49. See Shlemon, supra note 4, at 242-43. The author notes that despite indications in 1970 and 1971 from the Wage and Hour Division and the Labor Department that clerical employees would be excluded from wage determinations, no regulations were changed and wage determinations issued in 1972 included clerical employees.

Id. at 225. For a further discussion of Federal Electric, see notes 60-67 and accompanying text infra.


51. Federal Elec. Co. v. Dunlop, 419 F. Supp. 221, 225 (M.D. Fla. 1976). The court was persuaded that the similarity between the language in the Act defining "service employee" and the language of the Classification Act which defines the blue collar "wage board" employees of the federal government was too striking to be coincidental. Id. See 5 U.S.C. § 5102(c)(7) (1982). The court also made reference to the legislative history of the Act, which was replete with concern for the service worker counterparts of federal blue collar workers. 419 F. Supp. at 225. For a further discussion of Federal Electric, see notes 60-67 and accompanying text infra.

A federal district judge in Delaware faced the same issue and held that keypunch operators were not service workers within the meaning of the Act. Descomp, Inc. v. Sampson, 377 F. Supp. 254 (D. Del. 1974). For a further discussion of Descomp as it relates to the definition of service employee, see notes 69-79 and accompanying text infra.

52. Act of October 13, 1976, Pub. L. No. 94-489, § 3, 90 Stat. 2358 (codified at 41 U.S.C. § 357(b) (1976)). The amendment was endorsed by the Ford Administration. Its effect was to overturn federal court decisions limiting the scope of the Act. See Federal Elec. Co. v. Dunlop, 419 F. Supp. 221, 226 (M.D. Fla. 1976). The court recognized that Congress, subsequent to the 1972 amendment and the Descomp case, has criticized the Descomp holding as unduly restrictive, and had agreed with the government's more expansive reading which included white-collar employees. Id. See PLIGHT OF THE SERVICE WORKER REVISITED, supra note 38, at 11-12. However, the court limited its consideration of congressional intent to analyzing the contemporaneous legislative history of the Act as enacted and amended. 419 F. Supp. at 226. In conclusion, it invited the Congress to further amend by stating as follows: "Congressional dissatisfaction with a Court's construction of an act must be expressed through subsequent legislation in order to change the law as indicated by the statute enacted and its contemporaneous legislative history." 419 F. Supp. at 226. With the passage of the 1976 amendments, Congress accepted the invitation.
“clarification” in 1976 was to wreak its own kind of havoc.53

III. LEGAL ISSUES

Litigation over the statute has been limited, perhaps in part because of the erratic enforcement of the Act.54 Moreover, what litigation there has been has produced a number of conflicting interpretations of major provisions of the Act. Primarily, judicial review of the statute has focused on five major issues of statutory interpretation which are essential to evaluating the efficacy of the Act: 1) Who is a “service employee?”; 2) What is a “locality” for the purposes of the statute?; 3) What is the extent of the “successorship” requirement?; 4) When and to what extent can penalties be imposed?; and 5) Who has standing to sue under the Act?

A. The Scope of the Term “Service Employee”

The question of what kinds of employees Congress intended to include within the Act’s protections generated greater controversy prior to the adoption of the 1976 amendments. The statute as originally enacted defined a “service employee” essentially to be “any person engaged in a recognized trade or craft . . . and any other employee . . . in a position having trade, craft, or laboring experience as the paramount requirement.”55 While the 1976 amendments, to a large extent, resolved discrepancies in the interpretation of this language,56 some discussion of the cases which interpreted the original language is helpful in evaluating the Act’s usefulness.

53. The most pressing problem is the applicability of the Act to highly skilled “service” industries such as automated data processing (ADP). See COMPTROLLER GEN’L OF THE U.S., SERVICE CONTRACT ACT SHOULD NOT APPLY TO SERVICE EMPLOYEES OF ADP AND HIGH TECHNOLOGY COMPANIES 30 (1980) [hereinafter cited as SCA, ADP AND HIGH-TECHNOLOGY]. For a discussion of the application of the Act to skilled, high technology labor, see notes 190-203 and accompanying text infra.

54. Indeed, the Supreme Court has never heard a case relating to the Service Contract Act. For a discussion of agency and Labor Department enforcement of the Act, see notes 205-25 and accompanying text infra.

55. Service Contract Act of 1965, Pub. L. No. 89-286, § 8(b), 79 Stat. 1034, 1036 (codified as amended at 41 U.S.C. § 357(b) (1976)). The original act covered guards, watchmen, and any person engaged in a recognized trade or craft, or other skilled mechanical craft, or in unskilled, semi-skilled, or skilled manual labor occupations; and any other employee including a foreman or supervisor in a position having trade, craft, or laboring experience as the paramount requirement; and shall include all such persons regardless of any contractual relationship that may be alleged to exist between a contractor or subcontractor and such persons.

Id.

56. For a discussion of the 1976 amendments, see notes 45-51 and accompanying text supra. Prior to the 1976 amendments, the DOL had included in its wage determinations such diverse occupations as “marine engineers, priests, ministers, li-
In two important cases, different courts held that the resolution of this troublesome issue, essentially involving the scope of the Act’s protections, rested on a distinction between “blue-collar” and “white-collar” workers. In Descomp, Inc. v. Sampson, a Delaware district court found that keypunch operators were not service employees within the meaning of the Act. In so finding, the court relied on the single criterion of whether an employee’s status would be classified as “wage-board” or “general schedule” if the employee were employed directly by the government. The court found that a federal employee counterpart to the keypunch operators would be classified as “general schedule”—a “white-collar” position. Consequently, the court determined that Congress did not intend keypunch operators to fall within the purview of the Act.

Similarly, in Federal Electric Corp. v. Dunlop, decided just prior to the adoption of the 1976 amendments, a Florida district court also held that keypunch operators and their supervisors were not covered by the Act. In Federal Electric, the parties had agreed that none of the ten classifications involved would constitute “wage-board” or “blue-collar” occupations. Nonetheless, the Secretary argued that despite their “white-collar” status, the Federal Electric employees and others like them were deserving of the protection of the statute. It

brarians, radio announcers, computer operators, draftsmen, stenographers, and other clerical, technical and management personnel.” Shlemon, supra note 4, at 242.

57. 377 F. Supp. 254, 264 (D. Del. 1974). The DOL had concluded that the contract in question was one for “services” within the Act and, thus, had performed a wage determination as required by the Act. Id. at 256. The court agreed with the DOL’s position that a contract to provide keypunching was one for “services,” but held that the Act required a further finding that the contract in question was to be performed “through the use of service employees.” Id. at 257. The contractor had argued that the contract was one primarily designed to provide materials, not services. Id. at 257.

58. Id. at 263. The court noted that whether certain types of employees were “service employees” was a “factual” issue requiring an agency determination in each individual case. Id. at 260. Thus, a reviewing court should generally defer to the DOL’s expertise, subject of course to the boundaries of congressional mandate. Id. See also Kentron Hawaii, Ltd. v. Warner, 480 F.2d 1166, 1175-76 (D.C. Cir. 1973).

59. Descomp, 377 F. Supp. at 263-64. In this regard, the court noted the Labor Department’s own regulations providing that “[t]he breadth of the definition [of ‘service employees’ . . .] . . . is identical with that in the Classification Act Amendment of 1954 defining the so-called ‘blue-collar workers’ or ‘wage board employees’ in the Federal service.” Id. at 262 (citing 5 U.S.C. § 1082(7)) (1982) and quoting 29 C.F.R. § 4.113(b) (1968)). The court concluded that, as the DOL’s determination was in conflict with its own regulations, it had no “warrant in the record,” nor a “reasonable basis in law.” Id. at 264.

60. 419 F. Supp. 221, 226 (M.D. Fla. 1976).

61. Id. at 223. The 10 classifications that were involved ranged from keypunch operators to senior computer operators. Id. The contractor sued for a declaratory judgment of exemption from the Act’s provisions. Id.

62. Id. at 223-24.
was clear that the court was sympathetic to this argument, a sympa-
thathy later echoed and magnified by Congress in adopting the 1976
amendments. However, the court rejected the Secretary’s arguments,

stating, “While this court must accord due deference to the expertise
of the Secretary of Labor, this Court is also under a higher duty to
. . . [hold] when necessary, that the Secretary’s determination has ex-
ceeded the boundaries set by Congress.”63 These boundaries, the
court found, incorporated only the “blue-collar” definition for service
employees.64

Although the determination of what kinds of employees consti-
tute “service employees” continues to be a pragmatic problem,65 litiga-
tion over the question has not continued. The passage of the 1976
amendments legislatively overruled Descomp and Federal Electric,
and brought all employees of federal service contractors except those
who are bona fide executives, administrators, and professionals—under
the statute’s umbrella.66 Indeed, the “service employee” definition
question has been litigated only once since the passage of the amend-
ments; the court simply reiterated the broad language of the amend-
ments and found the employee, a truck driver under contract to
deliver mail, to be such a “service employee.”67

B. What Is A “Locality”?

The locality provision of the Act requires that service employees
working under government service contracts be paid “in accordance
with prevailing rates for such employees in the locality.”68 The question of

63. Id. at 224.

64. Id. at 226. The court emphasized the similarity of the Act’s language to the
Classification Act Amendments of 1954 defining blue-collar workers. Id. at 225 (cit-
ing 5 U.S.C. § 5102(c)(7) (1982)). Essentially the same point was made in Descomp.
See note 59 supra. In Federal Electric, the court focused heavily on the legislative
history of the Act and found no “evidence [of] a concern for those employees who would
fall within the ‘white collar’ classification.” 419 F. Supp. at 225. The court conceded
that there had been some congressional dissatisfaction expressed in the wake of the
Descomp opinion. Id. at 226. Nonetheless, the court felt compelled to consider only
the Act’s original enactment and its contemporaneous legislative history. Id.

65. See notes 190-203 and accompanying text infra.

66. For a discussion of the 1976 amendments in this regard, see notes 49-53 and
accompanying text supra.

For a discussion of the potential implications of the broad scope of the 1976 amend-
ments, see notes 190-203 and accompanying text infra.

68. 41 U.S.C. § 351(a)(1) (1976) (emphasis added). The “fringe benefit” re-
quirement of the Act also contains a similar “locality” provision. Id. § 351(a)(2).
The Senate report on the original Act stated that “[t]he Secretary in determining the
locality for such purpose would take a realistic view of the type of service contract
intended to be covered by the determination [of prevailing wages].” S. REP. No. 798,
what constitutes the applicable "locality" was raised in the earliest cases under the Act and has continued to be a troublesome issue. Therefore, an analysis of the major decisions raising this issue is necessary to an understanding of the practical problems still present under the Act.

In Descomp, Inc. v. Sampson, a bidder on a government keypunch contract sued for a declaratory judgment that the "locality," for purposes of a Labor Department wage determination, should be the location of the contractor's principal place of business rather than the location of the contracting federal agency. The government proposed four arguments in favor of the location of the contracting facility as the proper locality. Specifically, the government claimed that the Act's use of the word "locality" in the singular suggests the location of the contracting facility, since Congress must have known there would be multiple bids from multiple localities. Second, the government argued that Congress could not have meant the locality of the place of performance because it must have known that the Labor Department would not have the manpower to perform wage determinations for the location of every contract bidder. Third, the government contended that Congress intended to give the Labor Department great flexibility in determining the proper locality. Finally, the government argued that where a duty to act rests on ambiguous terms, a court should defer to the agency's expertise.

The district court rejected each of the government's contentions and found that the place of performance was the proper "locality" under the Act. The court stated that it was "just as likely" that Congress intended the place of performance rather than the location


70. Id. at 256-57. As already discussed, the district court found that keypunch operators were not covered by the Act. See notes 55-58 and accompanying text supra. Nonetheless, the court went on to determine the locality issue in dictum. 377 F. Supp. at 264. The contract was to be performed at the contractor's place of business at Wilmington, Delaware, while the contracting agency, the General Services Administration, was located at Washington, D.C. Id. at 256-57.

71. 377 F. Supp. at 264.

72. Id. at 264-65.

73. Id. at 265.

74. Id.

75. Id. at 264. The court noted that the question of the proper "locality" was a matter of congressional intent and thus "[t]he Secretary is in no better position than the courts to determine Congressional intent in using the word 'locality' in the Act." Id. at 260. Therefore, the court reasoned, the usual rule of judicial deference to an administrative finding would not apply. Id.
of the contracting facility. Additionally, the court reasoned that the inability of the Department of Labor to perform the requisite work, if proven, was a weak basis on which to rest a determination of congressional intent. Third, the court interpreted the "flexibility" intended by Congress as simply "enabl[ing] the Secretary to determine localities . . . which would not be bound by municipal or state boundaries." Finally, the court found direct support for the "place of performance" locality in the legislative history of the Act.

Having been unsuccessful in *Descomp* at persuading adoption of the place of contracting facility as the applicable locality, the Labor Department later argued in *Southern Packaging and Storage Co. v. United States* for a nationwide definition of locality. The advantage in defining "locality" as nationwide was clear: the Labor Department would have to make only a single wage determination for the entire country. The only practical alternative, the Department of Labor stated, would be a kind of composite locality approach that would be applicable when a bidding agency neither knew nor cared where the

76. *Id.* The court reasoned that, in general, the contract work would be performed in a single locality despite a multiplicity of bidding localities, and thus no inference could be drawn from Congress' use of the singular "locality." *Id.*

77. *Id.* at 265. The court noted that without proof of such inability, it was reluctant to assume such a fact. *Id.* Additionally, the court wrote that "to permit a contract to be awarded when the Secretary has been unable to make the appropriate wage-determination in time would defeat the implementation of the Act." *Id.* (footnote omitted).

78. *Id.* at 265 (citing *Hearings on H.R. 10238 Before the Subcomm. on Labor of the Comm. on Labor and Public Welfare, 89th Cong., 1st Sess., 12-13* (1965) [hereinafter cited as *1965 Senate Hearings*]).

79. *Id.* at 265-66. The court pointed to statements of Charles Donahue, Solicitor of Labor, describing the Act's use of the term "locality" as "comparable to the words in the Davis-Bacon Act; city, town, village, or any other political division of the state in which the work is to be performed." *Id.* (citing 1965 *Senate Hearings*, supra note 78, at 11 (statement of Charles Donahue). For a discussion of the Davis-Bacon Act, see notes 12-13 and accompanying text supra.

Defining "locality" as the place of performance has been viewed as restricting competitive bidding, particularly in light of the 1972 successorship provision. See Brooks, Service Contract Act Amendments of 1972, 66 MIL. L. REV. 67 (1974). For a discussion of the practical problems inherent in this interpretation, see notes 179-82 and accompanying text infra.

80. *Southern Packaging*, 618 F.2d 1088, 1089 (4th Cir. 1980). The contractor, Southern Packaging, sought a declaratory judgment that the Act was inapplicable to a contract to produce and assemble "C" rations for the Department of Defense. See *Southern Packaging and Storage Co. v. United States*, 458 F. Supp. 726, 731 (D.S.C. 1978). The district court held that the Act applied and that the "locality" for purposes of a wage determination was "the standard metropolitan statistical area, if available, or the specific county, where the bidding party's plant or facility is located." *Id.* at 735.

81. 618 F.2d at 1091.
contract work would be performed. In rejecting the government's arguments for a nationwide rate, the Fourth Circuit relied particularly on the plain meaning of the word "locality as a particular spot, situation or location." Moreover, it felt that the Labor Department's broad definition would be "too expansive, too unwieldy, and too unfair" to government contractors.

Despite apparent unanimity among the courts on the issue of locality, the issue remains problematical, given the pragmatic problems associated with wage determinations and the Labor Department's tendency to apply geographically expansive determinations of locality.

C. The Scope of Contractor Obligations Under the 1972 Successorship Requirement

While some issues arising under the Act have been resolved, the successorship requirements enacted in 1972 have continued to cause substantial conflict. The extent to which a successor contractor must adhere to any or all the provisions of the contract negotiated between his predecessor and that contractor's employees has remained a subject of litigation.

Since prior to the enactment of the Act, the Supreme Court had addressed the issue of successorship in the context of the National Labor Relations Act (NLRA), and because commentators and agencies

82. Id. For a discussion of the benefits and disadvantages of this broad definition of "locality" in a general context, see notes 183-89 and accompanying text infra.

83. 618 F.2d at 1091 (quoting Webster's Third New International Dictionary (1976)) (emphasis added).

84. Id. at 1092. The government had argued that a particular locality such as a city or county was used in 98% of government contract cases and, thus, it was not unfair to allow a broadened definition in the small number of cases where the place of performance was unknown. Id. at 1091. The court of appeals felt that it did not impose an "undue burden" on the Labor Department to make more specific wage determinations in the 0.5% of cases where the department had previously used a "nationwide" approach. Id. Although the court acknowledged the general deference given to agency determinations, it felt constrained by the language of the Act. Id. at 1090 n.2.

85. See also Williams v. United States Dep't of Labor, 697 F.2d 842 (8th Cir. 1983) (government conceded controlling precedent of Descomp and Southern Packaging as to issue of "locality").

86. Subsequently-promulgated Labor Department regulations have persisted in advocating an "elastic and variable meaning" of locality, taking into consideration "all the facts and circumstances" pertaining to each wage or fringe benefit determination. See 29 C.F.R. § 4.163 (1983). For a discussion of continuing problems in the practical application of the "locality" standard, see notes 176-89 and accompanying text infra.

87. For a discussion of the 1972 successorship requirements, see notes 41-46 and accompanying text supra.
had paralleled the purposes of the Service Contract Act and the NLRA, the existing Supreme Court successor precedent seemed to be a natural starting point for guidance on the interpretation of the successorship provisions of the Act.\textsuperscript{88} Under the NLRA, a new employer found to be a successor is obliged to recognize and bargain with the union that was recognized as the employees’ representative under the old employer.\textsuperscript{89} Clearly, the new employer is not obligated to hire the previous workforce.\textsuperscript{90} However, if a substantial number of workers from the previous workforce are hired, the “substantial continuity of identity in the business enterprise” and workforce\textsuperscript{91} may form a basis for a finding of successorship. While the successor employer is generally not bound by the terms of the union’s agreements with the predecessor, it must recognize and bargain with the union representative.\textsuperscript{92}

\textsuperscript{88} To some extent the successorship problem had arisen prior to the effective date of the 1972 amendments. See note 41 supra. See also Boeing Co. v. International Ass’n of Machinists and Aerospace Workers, 504 F.2d 302 (5th Cir. 1974), cert. denied, 421 U.S. 913 (1975); Kentron Hawaii, Ltd. v. Warner, 480 F.2d 1166 (D.C. Cir. 1973). In Boeing, the court held that, when the successor contractor, in a periodic rebidding context, employed only 35% of the predecessor’s employees, there was insufficient identity of the workforce to obligate the successor to arbitrate under the predecessor’s contract. 504 F.2d at 323. In Kentron Hawaii, the court declined to find a violation of the successor employer doctrine where the successor’s contract was awarded prior to the enactment of the 1972 amendments, and the previous collective bargaining agreement terminated with the expiration of the predecessor’s contract. 480 F.2d at 1173.

\textsuperscript{89} See NLRB v. Burns Security Serv., 406 U.S. 272 (1972) (successor employer bound to recognize and bargain with certified union representative). For a discussion of the NLRA successorship doctrine, see Barksdale, Successor Liability Under the National Labor Relations Act and Title VII, 54 Tex. L. Rev. 707, 707-11 (1976). For a discussion of arguments equating the purposes of the NLRA with those of the Service Contract Act in order to aid in the interpretation of the latter’s successorship provision, see note 41 supra.

\textsuperscript{90} NLRB v. Burns Security Serv., 406 U.S. 272, 280 n.5 (1972). “The Board has never held that the National Labor Relations Act itself requires that an employer who submits the winning bid for a service contract or who purchases the assets of a business be obligated to hire all of the employees of the predecessor . . . . However, an employer who declines to hire employees solely because they are members of a union commits a § 8(a)(3) unfair labor practice.” Id. (citation omitted).

\textsuperscript{91} See John Wiley & Sons v. Livingston, 376 U.S. 543, 551 (1964). In John Wiley, the finding of substantial continuity was based on the “relevant similarity and continuity of operations across the change in ownership . . . evidenced by the wholesale transfer of [the predecessor’s] employers, to the Wiley plant, apparently without difficulty.” Id. See also Burns, 406 U.S. at 274-79. The successorship finding in Burns was predicated on the fact that a majority (27 of 42) of Burns employees had been employed by the predecessor, and the operational structures and practices of the business remained essentially the same despite the change in employer. Id. at 278, 280. But cf. Howard Johnson Co. v. Detroit Local Joint Exec. Bd., 417 U.S. 249 (1974) (the purchaser of a restaurant who continued the same business but had only nine employees of the predecessor in its work force of 45 was not a successor, and thus not bound to recognize or bargain with the union, nor to arbitrate under the agreement made between the predecessor and union).

\textsuperscript{92} Burns, 406 U.S. at 281-82. In John Wiley, the successor employer was obliged
In Service Employees' International Union Local 36 v. General Services Administration,93 the union sued to compel the successor maintenance-services contractor to hire the predecessor's employees and to comply with the compulsory arbitration provision contained in the collective bargaining agreement negotiated between the union and the predecessor employer.94 The court first rejected the union's contention that under the NLRA successorship doctrine the employer was bound to follow the predecessor's agreement.95

Turning to the separate requirement imposed by the Service Contract Act, the court examined the legislative history of the 1972 amendments imposing successorship obligations. A Senate report described the obligation as one to pay the wages and fringe benefits "to which the service employees would have been entitled had they been employed under the predecessor contract."96 The court reasoned that "the

to comply with the compulsory arbitration clause in the agreement between the union and the predecessor. 376 U.S. at 550-51. The Court later refused, in Burns, to bind the successor to the previously existing contract. 405 U.S. at 287. In so holding, the Court did not overrule Willy, but distinguished it. Id. at 285-86. Thus, it appears that although a successor employer is generally not bound by the substantive terms of the predecessor's collective bargaining agreement, it may, under some conditions, be obligated to comply with a compulsory arbitration provision.


94. Id. at 576. The contract involved was a one-year agreement under which Ken-Rich Services, Inc. took over cleaning services at the Social Security Building in Philadelphia, chores which had previously been performed by Prudential Building Maintenance. Id. When Prudential told Ken-Rich that Ken-Rich would be obligated to use Prudential's employees, Ken-Rich sought advice from the General Services Administration (GSA). Id. The GSA advised Ken-Rich that it "could hire its own employees so long as the new employees were to be paid at levels established by the Secretary of Labor and set out in the contract." Id. (footnote omitted). Thereupon, the union representing the predecessor's employees filed suit challenging the GSA's opinion, seeking to compel Ken-Rich to utilize the Prudential employees. Id.

95. Id. at 577-78. In a workforce of 40, only one employee had worked for the predecessor. Id. at 576.

96. Id. at 579 (emphasis supplied) (quoting S. Rep. No. 1131, 92d Cong., 2d Sess. 3, reprinted in 1972 U.S. CODE CONG. & ADM. NEWS 3534, 3536). The union had relied on the statement of Sen. Gurney that regardless of how loyal or how hard working or how skilled an employee is, regardless of how long he has been working under one of these service contracts, he faces the possibility every year or so, that a new company will come in and successfully underbid his employer.

When this happens he finds himself possibly out of work, definitely reduced in income, fringe benefits, seniority and stripped of pension rights.

This legislation confronted the Congress with the decision as to whether or not it is moral to trade men's wages and careers for the sake of expediency. And Congress has today decided in the negative.

118 CONG. REC. 31,282 (1972) (remarks of Sen. Gurney). However, the court characterized these remarks as merely broad statements, and found the legislative history to lead to the conclusion that employers, even when succeeding to a service contract, are free to hire their own workforces. For example, the court quoted the arguments
phrase emphasized above clearly show[ed] Congress anticipated that successor contractors would not always retain employees of their predecessors. Relying on this legislative history and the lack of explicit language in the 1972 amendment requiring a successor to hire the predecessor's work force, the court concluded that the Local 36 employer had not violated the Service Contract Act in hiring a new work force. Furthermore, the court refused to find the employer bound by the predecessor's compulsory arbitration provision because the Service Contract Act was designed only to protect wage and benefit levels.

The next case on successorship further narrowed the successor employer's obligations. In Trinity Services, Inc. v. Marshall, the court, agreeing with the Local 36 opinion, held that in the 1972 Amendment Congress did not intend to ensure job continuity for individual employees, but rather desired to maintain wage and benefit levels despite turnover in contractors. The court then found that neither seniority rights nor severance pay are "wages or fringe benefits" within the meaning of the successorship provision of the Act: "Seniority is not a form of compensation that the employer can pay. It is not specifically listed as a . . . fringe benefit, and it is not in the same class as the other benefits listed there." As for severance pay, the court held that there is no "obligation . . . to adhere to a provision in a collective bargaining agreement that requires the successor to make a payment to the predecessor's employees if that work force is not hired by the successor."

made by Rep. Blackburn in opposing the 1972 amendments, that the wages and benefits paid by a successor employer could not be less than those paid by the predecessor "even if the successor contractor employs his own work force and does not retain any of the predecessor contractor's employees." 118 CONG. REC. 27,139 (1972) (emphasis added) (remarks of Rep. Blackburn).

97. 443 F. Supp. at 579.
98. Id. at 579-80.
99. Id. at 580.
100. 593 F.2d 1250 (D.C. Cir. 1978). In making a wage determination binding on bidders for the successor contract, the DOL had excluded the severance pay and seniority provisions existing in the predecessor's contract. Id. at 1254-55. Both the existing contractor and the unions representing its employees sought to compel the inclusion of the provisions in the wage determination, particularly to insure that a successor contract would grant severance pay to any of the predecessor's employees not hired by the successor. Id. at 1255.
101. Id. at 1260-61.
102. Id. at 1262.
103. Id.
104. Id. at 1262. The court noted that all the examples of fringe benefits listed in the Service Contract Act required the employer "to incur a present cost or . . . risk of a future cost." Id. at 1257. However the severance provision at issue in Trinity Services was to apply only to the successor and never to the predecessor, and thus it
D. The Imposition of Penalties

The Service Contract Act provides as a sanction for violating the Act that "[u]nless the Secretary otherwise recommends because of unusual circumstances, no contract of the United States shall be awarded to the persons of firms [found by federal agencies to have violated the Act]. . . until three years have elapsed. . . ."105 Two arguments are available to a contractor who wishes to contest its ouster from participation in federal contracts. First, the contractor could argue that the agency incorrectly found that it had violated the Act. Under this approach, however, the contractor bears the burden of proving that the agency finding is not supported by a preponderance of the evidence.106 A second approach is to challenge the Labor Department’s finding of no “unusual circumstances” which would justify lifting the three-year bar.

Both these arguments were made by the contractor in Federal Food Services, Inc. v. Donovan.107 The district court in Federal Food Services upheld the Labor Department’s finding of violations based on repeated underpayments to employees.108 While this ruling was upheld on appeal,109 the appeals court went on to consider the issue of

did not qualify as a fringe benefit as there was no “present risk” or “future cost” to the predecessor. Id. at 1258. The court also expressed some concern that the provision for severance pay was not necessarily the result of “arms-length negotiations,” as required by § 353(c) of the Act. Id. at 1259. The Fifth Circuit has also held that seniority rights are not within the scope of the successorship obligations. Clark v. Unified Serv., 659 F.2d 49 (5th Cir. 1981).

105. 41 U.S.C. § 354(a) (1976). The Act directs the Comptroller General to compile and distribute a list of violators to all federal agencies. Id.


108. 10. Id. at 831. Federal, the contractor, had provided mess attendant services at scattered military installations for a two-year period. Id. During the contract period, the Labor Department instituted an investigation of Federal’s contract performance, resulting in the payment by Federal of just over $400 to seven employees at a South Carolina base for time worked but not paid. Id. Subsequent investigation revealed slightly over $3,100 in deficiencies in wages and benefits at five other locations. Id. at 832. After formal hearings, a Labor Department administrative law judge found Federal in violation of the Act and the Secretary affirmed refusing to find “unusual circumstances.” Id. Accordingly, Federal was barred from future contract participation. Id.

109. Id. at 833-34. Initially, the court considered the question of whether the agency action was reviewable at all, but held that there was neither clear and convincing evidence of legislative intent to preclude review nor statutory authority so broadly drawn as to preclude review. Id. at 832-33. The court noted particular legislative history showing an intent to specifically limit the Secretary’s authority to avoid the debarment sanction. Id. at 832-33 (citing S. REP. No. 1131, 92d Cong., 2d Sess. 3-4, reprinted in 1972 U.S. CODE CONG. & AD. NEWS 3534, 3536). See also Midwest Maintenance & Constr. Co. v. Vela, 621 F.2d 1046, 1051 (10th Cir. 1980).
unusual circumstances.

Under DOL guidelines, unusual circumstances are to be determined on the basis of the facts of the individual case, with particular emphasis on six factors: 1) whether there is a history of repeated violations; 2) the nature and extent of violations; 3) the willfulness of the defendant's conduct; 4) the existence of bona fide legal issues of doubtful certainty; 5) the existence of good faith cooperation in the resolution of issues; and 6) the promptness with which employees were paid money owed.\(^\text{110}\)

In interpreting these guidelines, the Federal Food Services court noted the Labor Department's opinion that

\[\text{[i]t is clear that the mere payment of sums found due employees after an administrative proceeding, coupled with an assurance of future compliance, is not in itself sufficient to constitute "unusual circumstances" warranting relief from the ineligible list sanction. It is also clear that a history of recurrent violations of identical nature, such as repeated violations of identical minimum wage or record-keeping provisions, does not permit a finding of "unusual circumstances."}\(^\text{111}\)

The court advised that in a case such as the one before it, where each violation taken separately was virtually "de minimus," the Labor Department must consider carefully the particular circumstances of the business under review before barring it from further contract work.\(^\text{112}\) This, the court stated, was because the Congress clearly did not intend for the bar penalty to be levied lightly: "The very absence of any sanction other than the catastrophic one of three years debarment supports the legislative history that use of debarment against innocent and petty violations was not intended."\(^\text{113}\) Given that these circumstances were present in the Federal Food Services case, the court remanded the matter to the district court with an order to vacate the bar penalty.\(^\text{114}\) The court did, however, acknowledge the broad discretion given to the Labor Department: "We do not suggest that a 'pure heart' and a lack of willfulness are sufficient to show unusual circumstances. The Secretary was accorded broad discretion by Congress. However, when findings are made they must respect the guide-

\[\text{110} \text{. } 658 \text{ F.2d at 833 (quoting Washington Moving & Storage Co., No. SCA-168, March 12, 1974).}\]
\[\text{111} \text{. } \text{Id.}\]
\[\text{112} \text{. } \text{Id. at 834.}\]
\[\text{113} \text{. } \text{Id.}\]
\[\text{114} \text{. } \text{Id.}\]
lines by which the Secretary exercises his discretion."\textsuperscript{115} The court found that without evidentiary support for a finding of negligence in the management of the company, the bar on Federal Food's federal contract participation was arbitrary.\textsuperscript{116}

E. Standing to Sue Under the Service Contract Act

While the Service Contract Act expressly provides for enforcement actions by the United States,\textsuperscript{117} it contains no provision for a private right of action. Nonetheless, litigants have sought damages against contractors for alleged violations of the Act based on an implied right of action.\textsuperscript{118} However, three federal appellate courts have held, for varying reasons, that the Act does not sustain a private right of action for damages.

In perhaps the most definitive opinion to date, the Court of Appeals for the Ninth Circuit held in Miscellaneous Service Workers, Drivers & Helpers, Teamsters Local 427 v. Philco-Ford Corp.\textsuperscript{119} that the Act does not provide a private remedy for the employees of a successor contractor against that contractor for failure to comply with the fringe-benefit provisions of a predecessor contract.\textsuperscript{120} The Ninth Circuit analyzed the question as one of legislative intent.\textsuperscript{121} The court found that while the plaintiffs unquestionably were members of "a class for whose especial benefit the statute was passed," the legislative history indicated a congressional intent to provide for exclusive administra-

\textsuperscript{115} Id. The court held that where the Secretary "relies on a history of previous violations to support debarment, he must apply the standards of reasonable management to them as well." Id. (emphasis added).

\textsuperscript{116} Id. Particularly, the court noted the "small ratio of violations to value of contracts." Id. Additionally, the court noted that "[t]here are no facts in the record to refute the judicial belief that no rational precautions could reduce violations to absolute zero." Id.

\textsuperscript{117} 41 U.S.C. § 354(b) (1976). The Act provides as follows:

If the accrued payments withheld under the terms of the contract [as provided in 41 U.S.C. § 352(a)] are insufficient to reimburse all service employees with respect to whom there has been a failure to pay the compensation required pursuant to this chapter, the United States may bring action against the contractor, subcontractor, or any sureties in any court of competent jurisdiction to recover the remaining amount of underpayments.

\textit{Id.}

\textsuperscript{118} This should, however, be distinguished from an action by a disappointed contract bidder to compel compliance with the Act by a federal contracting agency. In this situation the contract bidder has uniformly been found to have standing. See American Fed. of Gov't Employees v. Dunn, 561 F.2d 1310, 1313 (9th Cir. 1977); Descomp, 377 F. Supp. at 258-59.

\textsuperscript{119} 661 F.2d 776 (9th Cir. 1981).

\textsuperscript{120} Id. at 781.

\textsuperscript{121} Id. at 780 (citing Middlesex County Sewage Auth. v. National Sea Clammers Ass'n, 453 U.S. 1 (1981)).
tive enforcement of the Act. 122 It should be noted that the Philco-Ford decision is the only decision on this issue to apply the appropriate Supreme Court implied private rights precedent. 123

In two remaining cases, presenting a somewhat different factual pattern, suit was brought by federal civil service employees who were displaced by private contracting to set aside the grant of a federal contract. 124 Both the Fifth and Ninth Circuits found that the former civil service employees were not within the "zone of interests" intended to be protected by the statute. 125 Additionally, both courts found that the former employees could not assert the interests of the allegedly underpaid present employees of the contractor because the plaintiff's interests were plainly antithetical to those of the present employees. 126

F. Other Issues Arising in Service Contract Act Litigation

The remaining cases under the statute have dealt with a plethora of issues. These cases have raised the following issues: the scope of the Act's application to government agencies as contracting agencies; the applicable statutes of limitations on permissible actions under the Act; contract annulment; and the circumstances under which preliminary injunctive relief will be available to unsuccessful bidders.

122. 661 F.2d at 780-81. The court applied the Supreme Court's four-part test for determining the existence of a private right of action. Id. at 780. This test requires an examination of 1) whether the plaintiff is "one of a class for whose special benefit the statute was created"; 2) whether there is any indication of a legislative intent to fashion such a remedy; 3) whether such a remedy is consistent with the underlying legislative scheme; and 4) whether the cause of action is one traditionally relegated to state law. Id. (citing Cort v. Ash, 422 U.S. 66 (1972)). The court particularly noted that a private right of action would be "flatly inconsistent with the express provision of a limited governmental cause of action." 661 F.2d at 780. See note 120 supra.

123. 661 F.2d at 780. The other courts of appeals decisions on the issue of standing have focused on the nature of the plaintiff's injury. See American Fed. of Gov't Employees v. Stetson, 640 F.2d 642, 646 (5th Cir. 1981); American Fed. of Gov't Employees v. Dunn, 561 F.2d 1310, 1312 (9th Cir. 1977); International Ass'n of Machinists & Aerospace Workers v. Hodgson, 515 F.2d 373, 378 (D.C. Cir. 1975).


Brink's, Inc. v. Board of Governors of the Federal Reserve System\(^{127}\) involved an action to restrain the performance of a federal service contract allegedly in violation of the Act. The Federal Reserve Bank of Richmond, the contracting agency, argued that it should not be bound by the requirements of the Service Contract Act because it was essentially a private bank.\(^{128}\) In determining that the Federal Reserve Bank was bound by the Act's requirements, the court relied on the general remedial nature of the Act, which supports an inclusive rather than an exclusive interpretation in order to protect as many workers as possible.\(^{129}\) Furthermore, the court noted that "[w]hile the Act does not define its use of the terms 'United States' or 'Federal Government,' they must be liberally construed to effectuate the Act's humanitarian purposes. . . ."\(^{130}\)

In United States v. Deluxe Cleaners & Laundry, Inc.,\(^{131}\) the Fourth Circuit was called upon to determine the applicable statute of limitations in an action to recover Service Contract Act underpayments.\(^{132}\) The contractor argued for a two-year statute of limitations, based on the federal Portal-to-Portal Act\(^{133}\) which specifically bars actions by the government to enforce the minimum wage requirements of the Walsh-Healey Act\(^{134}\) not brought within two years of accrual.\(^{135}\)


\(^{128}\) Id. at 117. In Brink's, the prior contractor sought to restrain the performance of a contract between the Federal Reserve Bank (FRB) and a successor contractor where that contract was entered into without a wage determination. Id.

\(^{129}\) Id. at 118. In response to the Bank's contention that it was essentially a private bank, the court noted that while the FRB is owned by its member banks, there is a "long-standing relationship between the Federal Reserve Banks and the federal government and its economy." Id. Furthermore, the court noted that under the Federal Reserve Act of 1913, "[t]he Reserve Banks are corporate instrumentalities of the federal government." Id. (citing 12 U.S.C. § 221 (1982)). Additionally, the court referred to past federal case precedent recognizing the Federal Reserve Banks as agencies of the federal government for purposes other than Service Contract Act analysis. Id. at 119 (citing Federal Reserve Bank of Richmond v. Kalin, 77 F.2d 50, 51 (4th Cir. 1935); Raichle v. Federal Reserve Bank of New York, 34 F.2d 910, 916 (2d Cir. 1929); A.M.R., Inc. v. Federal Reserve Bank of San Francisco, No. 44387 (N.D. Cal. 1966) (unreported); Federal Reserve Bank of Minneapolis v. Register of Deeds, 288 Mich. 120, 284 N.W. 667 (1939)).

\(^{130}\) 466 F. Supp. at 120. The court noted that the Service Contract Act was "designed to provide 'much needed labor standards protection for employees of contractors and subcontractors furnishing services to or performing maintenance service for Federal agencies.'" Id. (quoting H.R. REP. NO. 948, 89th Cong., 1st Sess. 1).

\(^{131}\) 511 F.2d 926 (4th Cir. 1975).

\(^{132}\) Id. at 927.

\(^{133}\) 29 U.S.C. § 255(a) (1976). The Portal-to-Portal Act requires that "any action . . . to enforce any cause of action for unpaid minimum wages" must be brought within two years. Id.

\(^{134}\) For a discussion of the Walsh-Healey Act, see notes 14-15 and accompanying text supra.

\(^{135}\) See note 133 supra.
However, the Fourth Circuit rejected the contractor's analogy by observing that unlike the Portal-to-Portal Act, the Service Contract Act contains no limitations provision, and instead applied the general six-year limitations period applicable to actions brought by the federal government.

In *Curtiss-Wright Corp. v. McLucas* the New Jersey district court was asked to determine the circumstances under which an unsuccessful bidder may compel annulment of a contract granted by a federal agency not complying with the Act, where that failure results from the acts of the federal agency. The court held that where the federal agency fails to subject the contract in question to the requirements of the Act in the good faith belief that the Act does not apply to that contract, annulment may not be compelled. However, the court rejected any notion that mere "inconvenience" to the contracting agency would, by itself, be enough to justify the continuation of a noncomplying contract.

In another "unsuccessful bidder" case, the Court of Appeals for the District of Columbia, in *Serv-Air, Inc. v. Seamans*, was asked to determine the grounds under which the disappointed bidder could obtain a preliminary injunction to restrain performance of a federal contract. The court affirmed the district court's findings that the plaintiff bidder had failed to show either a "probability of success on

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136. 511 F.2d at 929. The defendant argued that the Portal-to-Portal Act should apply because of the specific inclusion of the minimum wage standard of the Fair Labor Standards Act and the administrative procedure requirements of the Walsh-Healey Act. Id. at 928. In response, the Fourth Circuit noted "substantial differences in the Government's cause of action under Section 2 of the Walsh-Healey Act and Section 5 of the Service Act." Id. at 929. In a thinly-veiled rebuke to Congress, the court noted that "this controversy stems from the structure and draftsman-ship of the Service Act which, conceded, leaves something to be desired." Id. at 928.

137. 28 U.S.C. § 2415(a) (1976). Section 2415(a) provides that "except as otherwise provided by Congress, every action [by the United States] for money damages . . . shall be barred unless the complaint is filed within six years after the right of action accrues. . . ." Id.


139. Id. at 658-59. The contract in question involved the overhaul, repair and maintenance of jet engines for the U.S. Air Force. Id. at 660.

140. Id. at 664-65. The court noted that "an agency must come to some initial determination, under its own discretion, as to whether the SCA applies to work to be performed in a service contract." Id. at 664 (emphasis added). At the time, there was substantial doubt as to whether the Act was intended to cover a jet engine repair contract. See id. at 665 n.12. For a discussion of past ambiguities in the scope of the Act's coverage, see notes 47-51 and accompanying text supra.

141. 381 F. Supp. at 664. The Air Force cited potential delay and harm to the "defense posture" of the United States. Id.


143. Id. at 159.
the merits” or that there was no rational basis for the grant of the contract.\textsuperscript{144} Specifically, the court found that the losing bidder’s unsupported affidavit alleging that the contract failed to comply with the Act was insufficient to support a preliminary injunction.\textsuperscript{145}

IV. PRAGMATIC ISSUES IN AGENCY ENFORCEMENT

More than simply posing difficult legal problems, the Service Contract Act presents serious pragmatic problems which also undermine the effective administration of the Act. The January, 1983 GAO report\textsuperscript{146} levels its most severe criticism at the practical problems encountered by the Labor Department in determining accurate “prevailing” wages and fringe benefits.\textsuperscript{147} Two other pragmatic issues, the “locality” question\textsuperscript{148} and the “service employee” question, further weaken the efficacy of the Act.\textsuperscript{149} Moreover, haphazard compliance with the Act by federal agencies and political vacillations inherent in the federal rulemaking and enforcement process must be added to this web of practical difficulties.\textsuperscript{150}

A. Difficulties in the Determination of “Prevailing” Wages and Benefits

According to the recent GAO report, the Labor Department is vividly aware of inherent ambiguities in the Act and of the effect of those ambiguities on the establishment of minimum wages and benefits.\textsuperscript{151} However, the Department has established two basic principles for the determinations. First, where one rate is paid to most employ-

\textsuperscript{144} Id. at 158. See Wheelabrator Corp. v. Chafee, 455 F.2d 1306 (D.C. Cir. 1971) (a preliminary injunction restraining performance of a contract granted under the Armed Services Procurement Act should not be granted without a showing of a likelihood of success on the merits); Steinthal & Co. v. Seams, 455 F.2d 1289 (D.C. Cir. 1971) (a preliminary injunction should not issue against performance of a military contract unless it is shown that the agency action is without any rational basis).

\textsuperscript{145} 473 F.2d at 159.

\textsuperscript{146} COMPTROLLER GENERAL’S REPORT, supra note 10.

\textsuperscript{147} For a discussion of difficulties in the determination of “prevailing” wages and benefits, see notes 151-75 and accompanying text infra.

\textsuperscript{148} For a discussion of practical implications of the “locality” question, see notes 176-89 and accompanying text infra.

\textsuperscript{149} For a discussion of practical implications of the “service employee” question, see notes 190-203 and accompanying text infra.

\textsuperscript{150} For a discussion of agencies’ compliance and enforcement of the Service Contract Act, see text accompanying notes 204-25 infra.

\textsuperscript{151} CONGRESS SHOULD CONSIDER, supra note 8, at 10-11. The Labor Department’s 1978 manual, entitled “The Predetermination of Wage Rates and Fringe Benefits under the Service Contract Act, A Manual of Policies and Procedures,” recognizes the ambiguity of the term “prevailing.” Id. at 10. The manual states that the term “prevailing” “is not subject to any precise single formula nor to any exact definition which would be appropriate in all instances,” but rather must be viewed in light of all relevant information. Id.
ees in a locality, that rate will be "prevailing." Second, if there is no single rate, the prevailing rate is to be based on "central tendencies"—that is, the median or mean.152

The Labor Department's practice of using central tendencies to establish minimum pay for service contract workers has had an inflationary result, according to the GAO.

Such prevailing rates, by their nature, do not recognize the limited skills and experience of newly-hired or entry-level workers and assume that all workers in a job classification are entitled to the same wage rate. Moreover, once a prevailing rate is established in a wage determination as the minimum that can be paid, it becomes the floor for adjusting the wage differentials for higher skilled and more experienced workers in the same job class and for later revising that rate in future determinations. This can quickly escalate wages paid service workers on federal contracts and can create or widen a gap between the federally-mandated rates on [Service Contract Act] covered contracts and those being paid private sector workers in the same job classifications...153

Additionally, the GAO reports that the Labor Department's principles and its methods for making wage determinations have resulted in inaccurate, unrealistic determinations. Specifically, the determinations do not (and perhaps can not) consider work experience, economic changes, industrial technological obsolescence (or advances), or working conditions.154

In a review of the 150 Labor Department wage determinations, the GAO found that the Department has used a variety of data sources, particularly Bureau of Labor Statistics (BLS) data, Service Contract Act and Davis-Bacon Act wage surveys, collective bargaining agreements within a particular industry, non-appropriated fund wage schedules, incumbent nonunion contractor rates, state and local government rates, and the Fair Labor Standards Act minimum wage.155 Despite this variety of available data sources, however, in thirty-four of the 150 wage determinations surveyed, the prior rate

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152. Id. at 11. If the second principle is applied, the Labor Department prefers using the median rate rather than the mean. Id.
153. Id.
154. Id. at 11-12. Weather and physical facilities are examples of working conditions which may affect the prevailing wage determination. Id. at 12. The presence or absence of tariffs may also be a determining factor. Id.
155. Id. at 16-17.
was simply increased without the benefit of any current data to establish a current rate. Further, the GAO contended that these data sources were, in many cases, inapplicable to the job classifications or the localities for which wage rates were being determined. In particular, the GAO findings indicated that the Labor Department "relied heavily" on BLS data compiled for purposes other than Service Contract Act determinations; that the Department erred in using non-appropriated fund system wage rates for Service Contract Act purposes; that it improperly used Davis-Bacon Act wage rates for incomparable job classifications under the Service Contract Act; and that it improperly used union contract wage rates.

As a single example of how the data source utilized could result in inappropriate wage determinations, consider that the bulk of Labor Department wage determinations reviewed by the GAO relied, for data, on BLS surveys of businesses with more than fifty employees. In larger metropolitan areas, the BLS generally excluded businesses with less than 100 employees. Nonetheless, requests to federal agencies by contract bidders for Service Contract Act wage determinations have generally indicated a need for fewer than fifty employees. In fact in 77.5% of those requests, ten or fewer employees were needed. Since GAO wage surveys had already shown that larger organizations are likely to pay higher wages than the smaller organizations expected to be competing for contracts requiring only a

156. Id. at 17.
157. Id. The GAO's conclusions were based on a review of docket files supporting the wage determinations and interviews with officials from the Labor Department's Wage and Hour Division. Id.
158. Id. The BLS Wage Surveys relied upon data not necessarily representative of the wages and benefits of most government service contract employees, or of the localities for which the determinations were requested. Id.
159. Id. The nonappropriated-fund system-wage rates were used for job classifications which, if not contracted, would have been performed by higher-paid federal appropriated-fund wage-system employees. Id.
160. Id. Construction-worker wage rates, developed for Davis-Bacon Act wage decisions, were applied to service employees on non-construction jobs. Id.
161. Id. Collective bargaining rates were applied within and beyond specific localities on the basis of asserted union dominance in the locality, according to the GAO. Id.
162. Id. at 19. Businesses with less than 50 workers were included only in the surveys of the laundry and dry cleaning, moving and storage, refuse hauling, and food service industries. Id.
163. Id.
164. Id.
165. Id. In 241 out of 311 contracts, 10 or fewer workers were estimated to be needed. Id. In 193 of those 241 contracts, five or fewer workers were estimated to be needed. Id. In only 16 of the 311 contracts, was it estimated that 50 or more workers would be needed. Id.
few workers, the data garnered from surveys of larger businesses would seem to be of questionable relevance.

In addition, the GAO found that the types of businesses included in BLS surveys relied on by the Labor Department were not representative of federal services contractors. In particular, the GAO noted that the Labor Department tended to rely on a BLS "all-industry" wage rate. The "all-industry" rate combined high-paying manufacturing job rates with non-manufacturing rates, resulting in an artificially high wage determination for service contracts.

The GAO found that, compounding the problem of inappropriate data sources, the Labor Department made inappropriate adjustments to already inappropriate BLS figures. For example, the GAO found that the DOL combined BLS data from several individual locations as a basis for statewide or even multistate applications, despite wide variance among the locations. Moreover, the DOL adjusted BLS survey rates to reflect national patterns without considering major differences in wage structures among various localities.

In most cases, according to the GAO, Labor Department determinations have resulted in requiring contracts subject to the Service Contract Act to provide for higher wages and benefits than those actually prevailing in the particular location. In cases where specific wage data was available, contract costs were up to 11.6% higher than they would have been if actual prevailing wages and benefits were

166. The GAO's wage surveys did, in fact, indicate that large organizations with many employees generally paid higher wages than smaller organizations with fewer employees. Id. at 18.

167. Id.

168. Id. at 19. The BLS wage surveys covered six broad industry categories: manufacturing; transportation; communication and other public utilities; wholesale trade; retail trade; finance, insurance and real estate; and other selected services. Id. The surveys usually excluded agriculture, mining, construction, educational and medical services, and government operations. Id.

169. Id. The BLS wage-survey reports generally broke down wage data into three categories: manufacturing; nonmanufacturing; and "all industries," which combined the first two categories. Id. The reports did not differentiate among the particular industries surveyed. Id.

170. Id. The GAO report noted that the nonmanufacturing jobs were more indicative of the work done by service contractors on government contracts than those in the manufacturing industries. See id. at 20.

171. Id. at 22. The Department of Labor adjusts the BLS data to eliminate abnormalities in the data caused by different methods of compensation. Id. The BLS data is also adjusted to give "due consideration," as required by the Service Contract Act, to the wages which would be paid the service workers if they were federal direct-hire employees. Id.

172. Id. at 23.

173. Id.
used.\textsuperscript{174} The Labor Department’s use of inappropriate data and methodology has resulted in improper wage and benefit determinations, undercutting the basic purpose of the Service Contract Act to require adherence to the prevailing local wage rate.

B. \textit{Practical Implications of the “Locality” Issue}

In a previous section, the “locality” question was discussed in the context of litigation, focusing primarily upon congressional intent.\textsuperscript{175} There are, however, substantial practical considerations involved in the determination of “locality.” Each possible definition of “locality” presents its own strengths and weaknesses. In applying the statutory provision, locality might logically mean the place of the contracting federal facility, the principal place of business of the contractor, or the place where the work is actually to be done. Moreover, in each alternative, the scope of the locality must be determined.\textsuperscript{176}

1. “\textit{Locality}” as the Place of the Contracting Federal Agency

The application of “locality” as the place of the contracting federal agency presents inherent difficulties. For example, in a contract for government printing services, the contracting agency would often be in Washington D.C., while potential bidders could be anywhere in the country. It is certain that wages for printing employees differ widely among the various regions of the nation. However, by the application of this standard of “locality,” federal contractors will be required to pay the “prevailing” wages for printing employees in Washington D.C.

Assuming, hypothetically, that the contract were awarded to a printer in Mississippi and that wages for printing employees were lower in Mississippi than in Washington, the award of the contract to the Mississippi printer would have an inflationary effect upon Mississippi wages and benefits. It would follow that only contractors whose

\textsuperscript{174} \textit{Id.} at 34. Contract costs were estimated to be 9.9 to 11.6\% higher than they would have been had the prevailing rates been used. \textit{Id.} In addition, in a majority of the surveyed localities, the fringe benefits the department required service contractors to provide to their workers were significantly higher than those found to be actually prevailing. \textit{Id.} at 34-35.

\textsuperscript{175} For a discussion of case law considering the “locality” question, see text accompanying notes 68-86 supra.

\textsuperscript{176} The “locality” may be interpreted to mean a single town, a county, a metropolitan area or some other measure. “Locality” has also been unsuccessfully argued as nationwide. \textit{See} Southern Packaging and Storage Co. v. United States, 618 F.2d 1088 (4th Cir. 1980). For a discussion of \textit{Southern Packaging} and the nationwide “locality” issue, see notes 80-81 and accompanying text supra. For a discussion of Labor Department practices in defining “locality,” see notes 184-88 and accompanying text infra.
wages and benefits were already higher than those “prevailing” in Washington, would bid on the contract in this situation. Potential contractors from areas of lower wages, perhaps the less industrialized areas of the country, would be discouraged from participation in the bidding process.

2. “Locality” as the Principal Place of the Contractor’s Business

Defining “locality” as the principal place of the contractor’s business is equally fraught with difficulty. A wage determination set on this basis may be just as artificial as one set on the basis of the place of the contracting facility, since the work will not necessarily be performed at the principal place of business.

For example, a large chemical company might contract with the federal government to perform certain research. If, hypothetically, the company’s principal place of business were in Georgia, wages “prevailing” there would control the determination of wages to be paid for the contract work. If, however, the contract were to be performed in northern New Jersey, where, hypothetically, wages are higher than in Georgia, the Labor Department wage determination would be artificially low and the Act’s purpose to prevent “wage-busting” would be weakened.

3. “Locality” as the Place of Performance

In view of the protective purposes of the Act, the most logical interpretation of “locality” is that place where the work is to be performed. The governmental interest should be to protect service workers in light of the earnings of workers around them who must exist in the same economic climate. This commonsense approach seems the most practical until the 1972 “successorship” requirements are taken into account.

For example, if a contract bidder located in Detroit were awarded a federal service contract for work to be performed in Detroit, it would make sense for the Labor Department to determine the minimum wages to be paid on the basis of those “prevailing” in Detroit. If, however, the contract were to be re-bid five years later and awarded to a bidder operating in Pueblo, Colorado, where, hypo-

177. For a discussion of the prevention of “wage-busting” as the purpose behind the Service Contract Act, see notes 15-23 and accompanying text supra.

178. For a discussion of the 1972 amendments, see notes 35-46 and accompanying text supra.

179. Multi-year contracts are permitted up to a maximum of five years. Service Contract Act of 1965, § 4(d) (codified as amended at 41 U.S.C. § 353(d) (1976)).
thetically, wages are lower than in Detroit, the new contractor would be obligated to pay at least the wages specified in the Detroit contract. Clearly, this also presents the potential of wage inflation and lends no particular support to the protective purposes of the Act.

4. Administrative Difficulties Inherent in the "Locality" Issue

None of the possible alternatives for defining "locality" is completely acceptable. Moreover, the additional question of the proper scope of the applicable "locality" also presents a difficult administrative dilemma. It should be noted that if the widest possible scope is given to the term "locality"—the Labor Department's "nationwide" standard—the entire concept of locality becomes meaningless. The Service Contract Act would then become its own Fair Labor Standards Act with a national minimum wage applicable to service workers based on broad Labor Department wage determinations. Alternatively, if a highly restrictive "locality" standard is applied, severe practical problems in the administrative setting of wage determinations will arise.

For example, if the "place of performance" standard of locality were applied and 100 potential contractors from 100 localities were to bid for the contract, the Labor Department would be responsible for 100 determinations of "prevailing" wages and benefits. As discussed above, the Labor Department's record for making the requisite determinations has left much to be desired. Any interpretation of the Act multiplying the potential number of wage determinations will threaten even further the efficiency of Service Contract Act enforcement.

The Labor Department's recognition of the inherent administrative difficulties with the "locality" standard is evident in regulations promulgated under the Service Contract Act. The Department has contended that "[i]t is . . . not possible to devise any precise single formula which would define the exact geographic limits of a 'lo-

180. For a discussion of wage inflation resulting from difficulties in determining "prevailing" wages, see notes 178-80 and accompanying text supra.

181. The Labor Department has argued, unsuccessfully, for a "nationwide" standard for the term "locality." See Southern Packaging and Storage Co. v. United States, 618 F.2d 1088 (4th Cir. 1980). For a discussion of Southern Packaging and the nationwide "locality" issue, see notes 80-84 and accompanying text supra.

182. For a discussion of the Labor Department's difficulties in determining "prevailing" wages and benefits, see notes 151-74 and accompanying text supra.

cality' that would be relevant or appropriate for the determination of prevailing wage rates and prevailing fringe benefits in all situations under the Act. Relying on "an elastic and variable meaning," the Labor Department's regulations provide that a locality may be "a city, a county, several counties comprising a metropolitan area, an entire state, a geographic region, or the entire country." Despite judicial rejection of the nationwide standard, the Department has continued to make wage determinations for broad regional and even nationwide "localities."

C. Practical Implications of the "Service Employee" Issue

A number of administrative difficulties have arisen from the broadened scope of the Act's application to "service employees" working under federal government contracts. While the original purpose of the Act was to prevent the exploitation of service workers comparable to federal blue-collar civil-service employees, the Act has clearly gone far afield from that purpose.

The Labor Department took to heart the 1976 amendments, which effectively brought beneath the Act's umbrella any service employee under a contract that had as a "principal purpose" the provision of services to the government. In 1979, when the Labor Department applied wage determinations to computer support service employees, several major firms rejected bid solicitations for government contracts rather than subject themselves to the terms of the Act. In the words of one company official, "Why apply a cure when there is no disease?" In congressional testimony, the Computer and Business Equipment Manufacturers Association (CBEMA) argued for permanent exemption from the Act's coverage on the ground that an administrative wage-setting approach was "totally incompatible with the merit pay wage policy prevalent in our indus-

185. Id. § 4.163.

186. See CONGRESS SHOULD CONSIDER, supra note 8, at 12-13 (citing the Labor Department's wage determination manual) (emphasis added). Determining factors include the geographic scope of the data on which the determination was made, the nature of the services being procured, and the procurement method being used. Id. at 13.

187. See notes 80-86 and accompanying text supra.

188. See COMPTROLLER GENERAL'S REPORT, supra note 10, at 14.

189. See notes 68-88 and accompanying text supra.

190. For a discussion of the Act's purpose of preventing exploitation of "blue collar" service workers, see notes 13-23 and accompanying text supra.


192. Id.
Comparing its employees with those the Act was meant to protect, the CBEMA noted that its workers were, for the most part, skilled, well-compensated, and highly sought-after, and stated:

The characteristics of our industry make SCA coverage unnecessary. The SCA was passed to prevent the procurement policy of awarding contracts to the lowest bidder, from inducing bidders on labor contracts to reduce wages to get government contracts, i.e., "wage bust." There is no such pattern of abuse in our industry, and one would not expect to find such a pattern. In general, our service workers are skilled and highly trained employees whose services are in demand in a highly competitive labor market. They are well-compensated, possess a high degree of job mobility and thus are not susceptible to wage busting.

Moreover, CBEMA testimony asserted that the application of the Act to contracts for computer services would "diminish innovation and productivity within the [contracting] company."195

A 1979 decision by the Department of Labor to apply the Act to federal contracts providing for maintenance and repair services connected with purchases and rentals of supplies and equipment led to a study by the United States Comptroller General. Its conclusion was similar to the assertions of the computer services industry.196 That report emphasized that the practice of "wage-busting" had never been a problem in the computer industry197 and concluded that the application of the Act to the computer industry would be unnecessary.

193. 1981 Oversight Hearings, supra note 6, at 501 (statement of Vico E. Hen-riques, President, CBEMA). See also id. at 600-03 (statement of Ed Truitt, Corporate Compensation and Benefits Manager, Hewlett-Packard Co., on behalf of the Scientific Apparatus Makers Association) (prevailing wage rates deemed incompatible with merit pay wage policy). But see id. at 157-59 (statement of George J. Poulin, Executive Vice-President, International Association of Machinists and Aerospace Workers, AFL-CIO) (merit pay system compatible with prevailing wage determinations).

194. Id. at 501 (statement of Vico E. Henriques, President, CBEMA).

195. Id. CBEMA claimed that abolition of the merit pay system would result in diminished innovation and productivity. Id. Though an alternative to abolishing the merit pay system, creation of a separate workforce to handle government contracts, CBEMA argues, would cause a deterioration in service support to the federal government and would also adversely affect the job mobility of the employees involved. Id. Consequently, CBEMA notes, a CBEMA member company faced with these alternatives may determine that continued servicing of government equipment is uneconomical and should be discontinued. Id.

196. See SCA, ADP and High Technology, supra note 53, at 2 (Maintenance and repair contracts previously were thought to be only subject to the Walsh-Healey Public Contracts Act).

197. Id. at 9, 42, 53.
rily costly and destructive of worker morale. At stake, the Comptroller General noted, were $5.4 billion of government computers in need of proper maintenance and repair, the space shuttle program, governmental health maintenance programs, and United States weapons development.

The Labor Department is still wrestling with the difficulties implicated by the 1976 amendment's inclusion of high technology automated data processing employees and other computer services employees. Since the enactment of the 1976 amendments there has been considerable debate over the possibility of a permanent exemption of these employees from the Act as well as a continuing general debate on the question of what exactly constitutes a contract "the principal purpose of which is to furnish services." Both matters are confronted in the new Labor Department regulations.

D. Inconsistent Agency Compliance and Enforcement

The history of inconsistent federal agency compliance is an important factor in evaluating the efficacy of the Act. In a 1973 review of compliance by the Defense and Labor Departments, the Comptroller General found that defense offices, in particular, were failing to ask for wage determinations or to include them in many of their service contracts. In many cases, procurement personnel were not aware of the Act's requirements and their procurement activities were not monitored for compliance by the Department of Labor. Furthermore, without an effective system for monitoring compliance, the Labor Department had no idea whether or to what extent contractors

198. Id. at 67-73. Application of the Act could cause a loss of the flexibility in staff assignment practices which promotes career development and maximizes the utility of each field service technician. Id.

199. Id. at 4, 90-91. As of September 1979, the United States government possessed over 14,000 computers, 10,551 of which were in use. Id. at 4. Approximately half of those in use were in the Defense Department. Id. The F-15 and F-16 fighters and B-1 bomber testing and research programs could be shut down altogether and nuclear weapons development hampered if there were interference with the operation of certain computers. Id. at 90-91.


202. Id. at 12. Procurement officials were not aware that the Act applied to contracts valued at less than $10,000. Id. In addition, though the manuals and guidelines provided to officials were considered adequate, the officials received no formal training regarding implementation of the Service Contract Act. Id. at 13-14.
themselves might be violating the law.\textsuperscript{203}

According to Labor Department regulations, federal contracting agencies must file a "Notice of Intention to Make a Service Contract" at least thirty days before inviting bids on a "service contract" exceeding $2,500.\textsuperscript{204} Obviously, this requirement leaves to the agency itself the initial determination of whether the procuring agency is dealing with a service contract. In nearly one-half of the service contracts reviewed for the 1978 compliance study, the Department of Defense failed to request wage determinations as required.\textsuperscript{205} In some cases where the Defense Department did request wage determinations, the request was untimely.\textsuperscript{206}

The study indicated that enforcement by the Labor Department was limited solely to the investigation of complaints, and that the Department itself initiated few reviews.\textsuperscript{207} In response, the Labor Department complained of a lack of adequate resources to conduct department-initiated reviews.\textsuperscript{208} One California official stated, "There are an estimated 1,000 [Service Contract Act] contractors in our area. It is estimated that 80 per cent of them are in violation. We can only get to those in which we receive a complaint."\textsuperscript{209}

With respect to the imposition of penalties,\textsuperscript{210} the compliance re-

\textsuperscript{203} \textit{Id.} at 18.

One consequence of a lack of a wage determination may be to absolve the employer of liability for underpayments even where the wages paid are lower than the prevailing local rates. See International Ass'n of Machinists & Aerospace Workers v. Hodgson, 515 F.2d 373 (D.C. Cir. 1975). In Hodgson, the Court of Appeals for the District of Columbia held that a labor union could not recover damages on behalf of its members from a government contractor for insufficient wages where neither the contracting agency nor the Labor Department had made a wage determination. \textit{Id.} at 379. Specifically the court noted that "[w]hile the Act does provide for enforcement of wage determinations by the Government against offending employers, including the recovery of amounts of underpayment and contract cancellation, the Act does not provide any remedy against employers for the alleged omissions of the Secretary of Labor." \textit{Id.}

\textsuperscript{204} \textit{See} 29 C.F.R. § 4.4 (1983). This notice is commonly referred to as "Standard Form (SF) 98."

\textsuperscript{205} \textit{Review of Compliance, supra} note 207, at 9. This report reviewed 425 service contracts, and found that in 205 of these agreements, the wage determinations were not requested.

\textsuperscript{206} \textit{Id.} The Armed Service Procurement Regulations require a procurement official to provide a detailed explanation for wage determination requests which are submitted late. \textit{Id.}

\textsuperscript{207} \textit{Id.} at 19.

\textsuperscript{208} \textit{Id.} at 20. In both 1975 and 1976, the Employment Standards Administration estimated that 25,000 contracts were covered by the Act, but that the Labor Department was only capable of allocating 15 compliance officer staff years to enforcement. \textit{Id.}

\textsuperscript{209} \textit{Id.} The official was not identified.

\textsuperscript{210} For a discussion of sanctions under the Service Contract Act, see notes 105-16 \textit{supra}. 

https://digitalcommons.law.villanova.edu/vlr/vol29/iss2/3
view found enforcement of the Act's requirements erratic.\textsuperscript{211} At one office, the study noted, the agency director was without knowledge of the conditions requiring preclusion from participation in federal contracts, while another stated that the policy was simply not followed in his office.\textsuperscript{212}

Four years later, the General Accounting Office again undertook to study agency compliance with the Act.\textsuperscript{213} The GAO studied twenty-two federal installations and determined that procurement officials at twenty of them failed to request wage determinations from the Labor Department or to include current wage determinations in fully one-third of nearly a thousand procurements which were in fact subject to the Service Contract Act.\textsuperscript{214} The 1982 report was, however, careful to note that the GAO had found no evidence to suggest that federal agencies were acting with intent to circumvent the statute.\textsuperscript{215} Rather, the GAO contended that noncompliance resulted from a lack of understanding of "the varying interpretations developed by [the Department of] Labor since the regulations were first issued in 1968."\textsuperscript{216} Additionally, the GAO noted that there was "misinterpretation and misunderstanding of the Act's coverage in the current regulations and of other prevailing wage and procurement laws."\textsuperscript{217}

Thus, while the failure to comply continues, the reasons for noncompliance appear to have changed. In 1978, agency noncompliance was based largely on broad-scale ignorance of the Act. By 1982, procurement officers seemed to know of the existence of the statute, but could not understand, interpret, or apply it and its murky regulations

\textsuperscript{211} \textit{Review of Compliance}, supra note 201, at 22. In a study of seven area offices, the review identified four contractors in two area offices who violated the Act and should have been referred to the regional office for debarment consideration. \textit{Id.}

\textsuperscript{212} \textit{Id.} The latter official said he would only recommend for debarment cases involving intentional violations. \textit{Id.}

\textsuperscript{213} \textit{Comptroller Gen. of the U.S., Assessment of Federal Agency Compliance with the Service Contract Act (1982)} [hereinafter cited as \textit{Assessment of Federal Agency Compliance.}]


\textsuperscript{215} \textit{Assessment of Federal Agency Compliance, supra note 213, at 17.}

\textsuperscript{216} \textit{Id.; Review of Compliance, supra note 207, at 12.}

\textsuperscript{217} \textit{Assessment of Federal Agency Compliance, supra note 213, at 17.}
in light of other prevailing wage and procurement laws, and in light of federal policy.

The GAO report placed the burden for agency noncompliance not upon any inefficiencies in agency procedures, but rather upon the Labor Department itself. Principally, the GAO found that most cases of agency failure to subject contracts to the requirements of the Act resulted from an over-inclusiveness of Labor Department regulations and, thus, were excusable.\textsuperscript{218} For example, the Labor Department has consistently asserted that there is no "emergency services" exemption under the Act.\textsuperscript{219} The GAO excused the failure to comply with the statute on fifty-four federal contracts where the delay required to obtain a wage determination would have seriously impaired government operations.\textsuperscript{220}

After publishing the 1978 and 1982 studies detailing massive administrative difficulties with the enforcement of the Act, the GAO's only recommendation has been to repeal, rather than once again attempt to solve enforcement inadequacies through another amendment.\textsuperscript{221}

V. REVISED LABOR DEPARTMENT REGULATIONS

In October 1983, the Labor Department promulgated revised Service Contract Act regulations.\textsuperscript{222} These regulations reflect drastic revisions by the Reagan administration of proposed changes left pending at the close of the Carter administration.\textsuperscript{223} The regulations,

\textsuperscript{218} Id.

\textsuperscript{219} Id. The Labor Department maintains that emergency contracts may be awarded with a provision that the wage determination has been requested and will be incorporated by modification of the contract upon receipt. Id. at 18. In such a situation, the Labor Department claims it is capable of fulfilling requests for wage determinations on a priority basis in less than five days. Id.

\textsuperscript{220} Id. at 8. The government operations involved included the following: fighting floods in California, cleaning oil spills off the west coast, and providing medical support equipment in Veterans Administration medical centers. Id.

\textsuperscript{221} See Congress Should Consider, supra note 8, at 57-58.

Another recent attempt to improve the administration of the Act is the Labor Department's establishment of the Board of Service Contract Appeals. See 49 Fed. Reg. 10,636-10,640 (1984) (rule final March 21, 1984; to be codified at 29 CFR §§ 8.0-8.19). The new board will hear disputes involving wage determinations and enforcement proceedings, including debarment in appeals from the Administrator of the Wage and Hour Division and from decisions of administrative law judges. Id. at 10,638.


\textsuperscript{223} The revised regulations were originally proposed in January 1981, and were to be effective in August 1981. See 46 Fed. Reg. 4320, 4886 (1981). Implementation of the proposed regulations was delayed and a revised set of regulations was published in August 1981. See 46 Fed. Reg. 41,380 (1981). Interested persons were
now final and upheld by District Judge Gasch in February 1984, 224 make six major changes in current procedure under the Act. These changes are designed primarily to streamline the administrative process, though they are still subject to a variety of criticisms.

First, the regulations initiate a two-step wage determination for contracts for which the place of performance is not known at the time bids are solicited. 225 Under this procedure, the contracting agency is to solicit bids without a wage determination and later issue wage determinations for the identified bidders. 226 The winning bidder, however, will be obligated to comply with the determination for the place of performance identified in his initial "step-one" bid regardless of any later move to an area subject to a different wage determination. 227

While this two-step approach appears to accept a "place of performance" standard of locality, it still does not resolve the pragmatic question of the scope of the locality. 228 Moreover, it does nothing to resolve the artificiality of certain ramifications of the successor requirement. 229

Second, the revised regulations redefine the scope of the Act's coverage by specifying the purpose of covered contracts and the type of employee who will perform the work. Previously, the Labor Department considered subjected to the Act separate line items or specifications for services, even where the whole contract was not

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224. AFL-CIO v. Donovan, No. 83-3608 (D.D.C. 1984). The AFL-CIO sought a declaration that the regulations were "arbitrary, capricious, an abuse of discretion and otherwise not in accordance with the [Service Contract Act]." Id. The district court upheld the regulations in the face of eight specific challenges. Id. Although the regulations were expected to be implemented following this decision, the AFL-CIO has filed an appeal with the D.C. Circuit Court seeking to overturn Judge Gasch's order. See note 9 supra.

225. Id. at 49,764-66 (to be codified at 29 C.F.R. §§ 4.3, 4.4, 4.53).
226. Id. (to be codified at 29 C.F.R. § 4.4(a)(2)(i)).
227. Id. (to be codified at 29 C.F.R. § 4.4(a)(2)(i)).
228. Id. at 49,773 (to be codified at 29 C.F.R. § 4.53). There is "no precise single formula" by which to define "locality" in every case. Id. It may mean a "county or cluster of counties comprising a metropolitan area." Id. It may also be "a city, a state, or under rare circumstances, a region." Id. Locality may even be nationwide. Id.
229. For a discussion of the successor requirements, see notes 87-104 and accompanying text supra.
principally for the provision of services. The new regulation requires that the provision of services be not merely a principal purpose of the contract, but rather the principal purpose. This change exempts from the Act's coverage the incidental service components of contracts involving the purchase or lease of computer and high technology equipment by the federal government.

The second aspect of the revised definition of contracts subject to the Act is an exemption for contracts for services which are not performed principally by "service employees." Previously, where service employees performed more than a minor part of the contract, the contract was deemed to come within the coverage of the Act. The new regulations restrict the application of the Act by providing that service workers must contribute a majority of the performance of the contract.

Third, the regulations attempt to clarify ambiguities in the coverage by the Act of contracts for repair and maintenance of government equipment. In somewhat conclusory fashion, the guidelines state that contracts for the remanufacture of equipment are excluded from the Service Contract Act and that contracts for repair are included. While the provisions do provide some examples of such...

230. Labor Standards, supra note 222, at 49,742 (commentary to revised regulations).

231. Id. at 49,777, 49,783-84 (to be codified at 29 C.F.R. §§ 4.110-4.111) (if services are "only incidental to the performance of a contract for another purpose, the Act does not apply").

232. See 1981 Oversight Hearings, supra note 6, at 675 (statement of Eben S. Tisdale, Acting Director of Public Affairs, Scientific Apparatus Makers Association) (where "principal purpose" of contract is to supply product, not perform service, SCA should not apply). See also Labor Standards, supra note 222, at 49,742-743 (commentary on revised rules).


234. Id. at 49,776 (to be codified at 29 C.F.R. § 4.113(a)(3)). In close cases, or where one cannot predict whether service employees will contribute the majority of time for performance, other factors must be considered. Id. Those factors include "the nature of the contract work, the type of work performed by service employees, how integral the work performed by the service employees is to the contract and the total number of service employees to be employed on the contract." Id.

235. Id. at 49,780 (to be codified at 29 C.F.R. § 4.117). The purpose of this revision is to eliminate the previous overlap in coverage of the Service Contract Act and the Walsh-Healey Act. Id.

236. Id. (to be codified at 29 C.F.R. § 4.117(b)(1)(3)). Remanufacture includes the "major overhaul of an item, piece of equipment, or material which is degraded or inoperable" or the "major modification of an item, piece of equipment, or material which is wholly or partially obsolete." Id. (to be codified at 29 C.F.R. § 4.117(b)(1)-(2)). "Remanufacturing does not include the repair of damaged or broken equipment which does not require a complete teardown, overhaul and rebuild." Id. (to be codified at 29 C.F.R. § 4.117(b)(3)).
contracts, they do not offer any particular assistance in distinguishing between remanufacture and repair.

Fourth, the Labor Department exempts by regulation contracts for the repair and maintenance of automated data processing equipment. Such equipment would include office information systems, related scientific and medical equipment, and office and business machines.

Fifth, the successorship provisions of the Act will be applied only to situations where the successor will perform the contract in the same locality as the predecessor. While this proposal would apparently eliminate the problem of "imported" wages in the successor contract context, it will not resolve all the problems inherent in the successorship provisions. Moreover, it again leaves open the question of the proper scope of the term "locality."

These provisions represent the first major attempt to revise procedures under the Act since 1965. The purpose here is not to evaluate the full impact of the new rules, but to point out the new regulation's radical changes in the interpretation and application of the Act. While many of these changes may be positive, it is questionable whether they comport with the mandates of Congress. For example, there is little indication that Congress intended for the total exclusion of high technology service contracts from the Act. Moreover, the limitations imposed by the Labor Department on the application of the successorship provisions have little support in the language of the Act.

VI. Conclusion

The Service Contract Act, which may have had a commendable purpose, does not adequately express its own intent. In the years since its adoption, it has been used to bring under federal wage-setting requirements workers who do not need, and industries which do not require, the Act's regulation. It has raised legal issues of statutory

237. Id. (to be codified at 29 C.F.R. § 4.117(b)(3)(i)-(v)). For example, repair of vehicles, typewriters, office equipment, appliances, and furniture and replacement of or work on internal parts of equipment are all subject to the Act. Id. (to be codified at 29 C.F.R. § 4.117(b)(3)(i)-(v)).
238. Id. at 49,781-82 (to be codified at 29 C.F.R. § 4.123(e)(i)).
239. Id. at 41,403-04 (to be codified at 29 C.F.R. § 4.123(e)(1)(i)(A)-(C)).
240. Id. at 49,789-90 (to be codified at 29 C.F.R. § 4.163(i)).
241. For a discussion of the impact of these proposed regulations, see 1981 Oversight Hearings, supra note 6, at 783-877 (Preliminary Regulatory Impact Analysis on Proposed Service Contract Act Regulations).
242. For a discussion of the debate over the application of the Act to the high technology industry, see notes 189-200 and accompanying text supra.
interpretation which cannot be adequately answered by the courts. It suffers from practical administrative difficulties including inadequate agency compliance and erratic Labor Department enforcement.

The latest attempt to shore up the Act—the revised Labor Department regulations—raises as many difficulties as it alleviates. The regulations seek by administrative process to fix once again a statute which has seen two significant amendments since its inception and still does not work. They fail to clearly address some issues, such as locality, which have presented the most persistent legal and practical problems. Further, in those areas where the regulations arguably have clarified confused areas, the Department of Labor may well have exceeded its legislative mandate.

The difficulties with this statute are significant enough that the resolution must come from the source of the burden: the Congress. The Act—a "cure where there is no disease"—must either be repealed, as suggested most recently by the General Accounting Office and the President's Private Sector Survey on Cost Control, or it must be completely overhauled to deal with the multitude of problems it has created. No matter which alternative is selected, the time has come for congressional action.