dealers a substantial period of notice before termination.[83] To prevent avoidance of the statute, it would be necessary to provide further that during the entire period of the franchise relationship, including the notice period, the manufacturer must deal in good faith. Good faith should be defined and limited to the readiness of the manufacturer to deliver as many cars in proportion to the number ordered as are provided to dealers in similar territories both within and without the state.[84] This is sufficiently objective so that variation from the standard can be readily proved. The express terms of the statute should give dealers a right to sue for breach of good faith.[85] If a dealer received notice of termination or if he elected to terminate,[86] he would have the opportunity to make a profit during the notice period or the equivalent in damages. This scheme[87] gives the dealer a chance to liquidate or convert his investment and make arrangements for a new enterprise. It removes the fear of imminent termination, yet leaves the producer free to adjust his sales organization as he sees fit with a minimum of restriction.

VALIDITY OF MINIMUM WAGE DETERMINATIONS AND A CONSIDERATION OF THE NEED FOR THE WALSH-HEALY ACT

The Walsh-Healy Public Contracts Act,[1] enacted in 1936, gave the Secretary of Labor power to prescribe minimum wages[2] for industries

be achieved voluntarily. See the Wall Street Journal, Dec. 12, 1955, p. 3, col. 1.

83. The minimum period should be six months. Perhaps this is not long enough because dealers usually make their profits in the first half of the model year; consequently, if notice of cancellation were received at the end of the first six months of the model year, there would be little opportunity for a profit during the notice period.

84. This would not require the manufacturer to deliver on all orders accepted from the dealers, but it would require the manufacturers to treat each dealer equitably if total orders received were in excess of ability to supply.

85. Under this good faith requirement the manufacturer would be liable to the dealer for reducing shipments of cars as a means of coercing a dealer. The manufacturer could still terminate if he believed his policies would be better carried out by another dealer.

86. The right to profits during the notice period would accrue to the dealer who terminated only if the manufacturer failed to give his orders the same treatment accorded other dealers' orders. He would also be entitled to damages for loss of profits caused by a previous failure to similarly honor orders.

87. It would be necessary to phrase the statute so that the manufacturer could not coerce the dealer to bargain away his rights. Similarly, it must be phrased so that the dealer's right can not be lost by a term of the franchise agreement. Most franchises provide for interpretation under the laws of Michigan; therefore, a state statute which instructs the courts on interpretation can be avoided.

1. 49 STAT. 2036 (1936), as amended, 41 U.S.C. §§ 35-45 (1952). The act bears the names of the two Massachusetts congressmen who sponsored it.

2. Before the passage of the act, the Federal Government was in the untenable position of urging the betterment of labor conditions, on the one hand, and of hamper-

contracting to supply materials to the Government.[3] He is given three standards upon which to base his determinations: ". . . prevailing minimum wages for persons employed on similar work or in the particular or similar industries or groups of industries currently operating in the locality. . . ."[4] This power has been the subject of recent attack in the federal courts by industries which claim that the Secretary, in setting industry-wide minimum wages, has violated the standards set by the

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ing the improvement of labor conditions by a requirement that its own supply contracts be awarded to the lowest responsible bidder, on the other. See 12 STAT. 220 (1861), as amended, 41 U.S.C. § 5 (1952). The lowest responsible bidder requirement was an outgrowth of judicial and executive construction. See Scott v. U.S., 44 Ct. Cl. 524 (1909).

The statute was enacted as a stop-gap economic measure in a depression economy, because Congress had been stymied by the Supreme Court's invalidation of more comprehensive labor standards legislation. A.L.A. Schechter Poultry Corp. v. U.S., 295 U.S. 495 (1935). In 1923, the Supreme Court had declared unconstitutional a District of Columbia law providing for the fixing of minimum wages for women and children. Adkins v. Children's Hospital, 261 U.S. 525 (1923).

Government regulation of labor conditions through its contracts was not an innovation of the Walsh-Healey Act. By statute Congress had fixed conditions in contracts awarded by the Navy, 5 STAT. 617 (1843), 34 U.S.C. § 561 (1928), and the Army, 23 STAT. 109 (1884), 10 U.S.C. § 1200 (1927). Congress passed various statutes which cumulatively became known as the "Eight-Hour-Law," placing an eight-hour day ceiling on work done on government contracts, 27 STAT. 340 (1892); 37 STAT. 347 (1912); 37 STAT. 726 (1913); 39 STAT. 1192 (1917); 54 STAT. 884 (1940); 62 STAT. 989 (1948), 40 U.S.C. §§ 321-26 (1952). On March 3, 1931, Congress enacted the Bacon-Davis Act, giving the Secretary of Labor power to set minimum wages for laborers and mechanics employed by contractors or subcontractors on federal government contracts for construction or repair of public buildings or works. 46 STAT. 1494 (1931), as amended, 40 U.S.C. § 276a (1952). The constitutionality of this act was upheld in Gillioz v. Webb, 99 F.2d 585 (5th Cir. 1938).

3. The act provides that any contract thereunder exceeding $10,000 shall contain the representations and stipulations that the contractor is the manufacturer of, or a regular dealer in, the materials used in the performance of the contract; that no person employed by the contractor in the performance of the contract shall be permitted to work in excess of eight hours in any one day or in excess of forty hours in any one week; that no male person under 16 years of age or female under 18 or convict labor will be employed; and that no part of the contract will be performed under working conditions which are unsanitary or hazardous or dangerous to the health and safety of employees. 49 STAT. 2036-37 (1936), 41 U.S.C. § 35 (1952). Furthermore, the act gives the Secretary power to hold hearings and issue orders requiring attendance and testimony of witnesses and production of evidence under oath in investigating a breach or violation. 49 STAT. 2038 (1936), 41 U.S.C. § 39 (1952). The President is authorized to suspend the representations required by the act during a time of emergency. 54 STAT. 681 (1940), 41 U.S.C. § 40 (1952). The act does not apply to purchases of materials ". . . as may usually be bought in the open market." 49 STAT. 2039 (1936), 41 U.S.C. § 43 (1952).

4. 49 STAT. 2036-37 (1936), 41 U.S.C. § 35(b) (1952). The act further provides for the payment by the contractor of sums equal to the amount of underpayment of the minimum wages as set by the Secretary and for a "blacklisting" of certain violators by the Government, since " unless the Secretary of Labor otherwise recommends, no contracts shall be awarded . . . until 3 years have elapsed from the date the Secretary of Labor determines such breach to have occurred." 49 STAT. 2037-38 (1936), 41 U.S.C. §§ 36-37 (1952). For an excellent discussion of these provisions and the adjudication of disputes arising under them, see Gellhorn and Linfield, *Administrative Adjudication of Contract Disputes: The Walsh-Healy Act*, 37 MICH. L. REV. 841 (1939).

statute.[5] Subsequent legislation and economic development create grave doubts of the necessity for a separate wage and hour statute for industries supplying materials through government contracts.[6]

The general purpose of the Walsh-Healy Act was to permit the Government to refuse to deal with "sweat shop" contractors.[7] Its legislative history[8] shows that Congress also intended to bolster consumer purchasing power[9] and to deter migration of industry from high to low wage areas,[10] and there is substantial evidence that it was to be a measure for raising labor standards in American industry generally.[11]

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5. See discussion at pp. 250-54 *infra*.

6. See pp. 254-56 *infra*.

7. The House Report of the bill stated that its purpose was to require ". . . persons having contracts with the Government to conform to certain labor conditions in the performance of the contracts and thus to eliminate the practice under which the Government is compelled to deal in the sweat shops." H.R. REP. No. 2946, 74th Cong., 2d Sess. (1936).

8. The Walsh Bill, S. 3055, 74th Cong., 1st Sess. (1935), was introduced on June 14, 1935, and was passed by the Senate on August 12, 1935. The House did not act on the bill during 1935; Representative Healy introduced his bill, H.R. 11554, 74th Cong., 2d Sess. (1936), on March 2, 1936. The Walsh Bill was much broader in scope than the subsequently adopted act, since, in effect, it would have required contractors to conform to the N.R.A. codes then in effect. The Healy Bill was referred to the House Judiciary Committee which held extensive hearings (See *Hearings Before the Subcommittee on Judiciary of the House Committee on Judiciary on H.R. 11554*, 74th Cong., 2d Sess., ser. 12, pt. 2 (1936)), but no affirmative action was taken by the full committee. As a result, an entirely new bill was drafted by the House Committee on the Judiciary, which was reported on June 6, 1936, and passed by the House on June 18, 1936. It passed the Senate without discussion on June 20, 1936, and was signed into law on June 30, 1936. "It is thus apparent that there was very little opportunity for expression of considered opinion as to the meaning of the specific language of the Bill which was enacted into law." Brief for Defendant, p. 68, Covington Mills v. Mitchell, 129 Fed. Supp. 740 (D.D.C. 1955).

9. See H.R. REP. No. 2946, 74th Cong., 2d Sess. (1936). The Senate Report stated that ". . . the insistence on such standards on projects financed . . . with Federal funds should . . . encourage private industry voluntarily to adopt like standards in private undertakings, thereby increasing purchasing power and improving the general condition of our citizens." S. REP. No. 1157, 74th Cong., 1st Sess. 4 (1935). Various statements were made in Congress that Government should not do business with those who ". . . would break down our high American standards . . ." of employment. 80 CONG. REC. 10009 (1936).

10. Representative Citron pointed out that he was worried about firms moving to other sections ". . . where they can take advantage of low-standard wages." *Ibid.* Senator Walsh also showed concern since companies were moving to places where they could pay ". . . one half the wages that are paid in localities where the labor organizations have been able to demand and exact a living wage." *Hearings before the House Judiciary Committee on S. 3055*, 74th Cong., 1st Sess., ser. 12, pt. 1, 117 (1935).

11. The United States Supreme Court has commented on the purposes of the act in only two opinions. In Endicott Johnson Corp. v. Perkins, 317 U.S. 501, 507 (1942), the Court made the broad statement that "its purpose is to use the leverage of the Government's immense purchasing power to raise labor standards." In Perkins v. Lukens Steel Co., 310 U.S. 113, 128 (1940), the Court pointed out that the act's purpose was ". . . to obviate the possibility that any part of our tremendous national expenditures would go to forces tending to depress wages and purchasing power and offending fair social standards of employment."

Pursuant to the act, the Secretary of Labor divided the United States into six regions for the purpose of fixing a minimum wage for the steel industry.[12] This determination was challenged in *Lukens Steel Co. v. Perkins*[13] on the ground that the word "locality" could not embrace such large geographic areas.[14] The United States Supreme Court held that in the absence of constitutional legislation recognizing that damage in consequence of the Secretary's action was a source of standing to sue, the steel companies had no legal remedy.[15] Thus, until 1952, interested parties had no right to judicial review of the determinations of minimum wages under the act.

To overcome the effect of the *Lukens Steel* holding, Congress, in

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In this statute the Government is using its contracts as instruments of social control. The historical concept of "contract" involves the idea of consensual agreement between two parties; the government contract in modern times falls outside this historical concept. Rather than agreement to terms in the contract after bargaining on a basis of equality, as a matter of fact, the terms are dictated by the Government and submitted to by the industry which desires to obtain the contract. This unequal position of the Government and the contracting industry enables the Government to prescribe minimum standards of labor conditions for industries which contract to supply materials. "The relationship between the parties, thus, is often one of *power,* not contract in its traditional sense." Miller, *Administrative Discretion in the Award of Federal Contracts,* 53 MICH. L. REV. 781, 782 (1955). See also, Miller, *Government Contracts and Social Control,* 41 VA. L. REV. 27 (1955).

12. The Secretary initiates the wage determination process by inviting representatives of employers and employees in the industry to be affected, who form an advisory panel, to discuss with the Department of Labor the questions pertinent to the wage determination. Thereafter, the panel meets to discuss matters relating to the definition of the industry, methods of gathering wage data, and a time for a public hearing. Then a wage survey is made either by the Bureau of Labor Statistics, trade unions, trade associations, or a combination of these. Following this the Secretary publishes notice of the hearings in the *Federal Register.* The hearings are held before the Secretary or a hearing examiner, who may subpoena witnesses or documents. After the hearings, the experts of the Department's Wage and Hour and Public Contracts Divisions make their confidential recommendations to the Secretary. On the basis of these recommendations, the Secretary proposes a wage determination which is published in the *Federal Register.* All interested persons then have 15 days in which to object to the proposed determination, and at the end of this time the Secretary issues a final minimum wage determination which takes effect not less than 30 days after the publication. 41 C.F.R. § 203, Sub-part C (Supp. Jan. 1955).

13. 107 F.2d 627 (D.C. Cir. 1939), *rev'd,* 310 U.S. 113 (1940).

14. The Court of Appeals held that the lumping together of so many states as a "locality" was a violation of the statutory mandate. The court stated that the Secretary's construction went ". . . so far beyond any possible proper application of the word as to defeat its meaning and to constitute an attempt arbitrarily to disregard the statutory mandate." 107 F.2d 627, 630 (D.C. Cir. 1939).

15. The Court based its decision on the unrealistic and debateable conclusion that the Walsh-Healy Act ". . . does not represent an exercise by Congress of regulatory power over private business or employment. In this legislation Congress did no more than instruct its agents who were selected and granted final authority to fix the terms and conditions under which the Government will permit goods to be sold to it." Perkins v. Lukens Steel Co., 310 U.S. 113, 128-29 (1940).

1952, passed the Fulbright Amendment[16] to the act. As originally conceived, the amendment not only would have granted a right to have the Secretary's wage determinations reviewed in the courts, but also would have changed the "locality" section of the act to require the Secretary to determine minimum wages on a city or town basis.[17] The section designed to change the "locality" language of the act was abandoned by the Senate Committee on Banking and Currency.[18] The adopted amendment, a product of several compromises between southern and northern senators,[19] offered the Secretary no legislative definition or direction and made only a subtle plea to the federal courts to correct any arbitrary abuse of the power to set minimum wages under the act.[20]

16. 66 STAT. 308 (1952), 41 U.S.C. § 43a (1952). The amendment, a rider to the Defense Production Act of 1952, became Section 10 of the Walsh-Healy Act, and provides:

"a. Notwithstanding any provision of section 4 of the Administrative Procedure Act, such Act shall be applicable in the administration of sections 1 to 5 and 7 to 9 of this Act.

"b. All wage determinations under section 1(b) of this Act shall be made on the record after opportunity for a hearing. Review of any such wage determination, or of the applicability of any such wage determination, may be had within ninety days after such determination is made in the manner provided in section 10 of the Administrative Procedure Act by any person adversely affected or aggrieved thereby, who shall be deemed to include any manufacturer of, or regular dealer in, materials, supplies, articles or equipment purchased or to be purchased by the Government from any source, who is in any industry to which such wage determination is applicable.

"c. Notwithstanding the inclusion of any stipulations required by any provision of this Act in any contract subject to this Act, any interested person shall have the right of judicial review of any legal question which might otherwise be raised, including, but not limited to, wage determinations and the interpretations of the terms 'locality', 'regular dealer', 'manufacturer', and 'open market'."

17. This clause of the proposed amendment would have changed the language to read ". . . city, town, village or other civil subdivision in which the materials, supplies, articles, or equipment are to be manufactured or furnished under said contract. . . ." 98 CONG. REC. 4128 (1952).

18. The Senate Report pointed out that the committee ". . . considered, and rejected, a proposal to change the word 'locality,' in section 1(b) of the act to 'city, town, village, or other civil subdivision' . . . which was subsequently modified to read 'local labor market area,' in order to include workers in a normal commuting area surrounding the place of manufacture, and avoid the artificial boundaries of a city, town, or county." U.S. CODE CONG. & AD. NEWS, p. 1821 (Vol. 2, 1952).

19. The minority report of the committee pointed out that the amendment was ". . . predicated, in part, on the theory that it will enhance the industrialization of one section: The South. To us, this is not, and should not be, a sectional issue." *Id.* at 1836. Senator Fulbright stated that "the amendment I now have called up is . . . in the nature of a compromise. . . . In offering this amendment, I do so with the understanding that [various Northern Senators] will withdraw their amendment, which proposes to strike out the entire committee amendment. I also understand that they will support the amendment I have offered." 98 CONG. REC. 6529 (1952).

20. As a result of the Fulbright Amendment, the Secretary had published in the *Federal Register* the "Rules of Procedure" to be followed in the determination procedure. 17 F.R. 7944, August 30, 1952, reprinted in 41 C.F.R. § 203 Sub-part C (Supp. Jan. 1955). However, even before the publication in the *Federal Register*, the Secretary adhered to a determination procedure which was in general conformance with Section 4 of the Administrative Procedure Act. See *The Walsh Healey Public Contracts Act*, 12

After passage of the Fulbright Amendment, the textile industries quickly filed for injunctive relief and a stay of the Secretary's wage determinations for their industries.[21] The companies objected to the Secretary's interpretation of the "locality" language of the statute to allow minimum wage determinations on an industry-wide basis.[22] The Secretary argues that to fix minimum wages on a local community basis would only foster the "sweat shop" labor which the Walsh-Healy Act intended to eliminate from consideration in the award of government

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N.A.M. LAW DIGEST 25, 35 (1950). The procedural requirements of the A.P.A. could not have been invoked against the Secretary prior to the amendment, since Section 4 of the A.P.A. exempted matters relating to public contracts from its rule-making provisions. Under the A.P.A. the Secretary in his administration of the act is subject to certain minimum procedural requirements applicable to executive agencies generally in their exercise of rule-making powers: for example, adequate notice of proposed rule making, opportunity for interested persons to participate in the rule-making process, and right of interested persons to petition for repeal of a rule.

21. The cotton textile cases, Covington Mills v. Mitchell and Alabama Mills v. Mitchell were combined and heard by the district court in Covington Mills v. Mitchell, 129 Fed. Supp. 740 (D.D.C. 1955). The Woolen and Worsted textile case is Allendale Co. v. Mitchell, Civil No. 1630-54 (D.D.C. 1955). These cases arose from hearings and proposed changes of the minimum wage by the Secretary for those industries in 1952. On January 23, 1952, a petition was filed by a union for a revision of the 1948 determination of the prevailing minimum wage in the cotton textile industry. Hearings were held in September of 1952. On the basis of those hearings and wage surveys, the Secretary proposed to raise the minimum wage from 87 cents to $1.00 per hour. See Brief for Defendant, pp. 1-2, Covington Mills v. Mitchell, 129 Fed. Supp. 740 (D.D.C. 1955). Hearing was held for the purpose of considering the possible minimum wage re-determination in the Woolen and Worsted Industry on May 19, 1952, which resulted in a proposed raise from $1.05 to $1.20 per hour in the Broad-Woven Goods, Yarn and Thread Branch of that industry on January 30, 1954. See Brief for Plaintiffs, p. 3, Allendale Co. v. Mitchell, Civil No. 1630-54 (D.D.C. 1955), September 30, 1955.

22. The complaining companies contend that the grammatical structure of the act shows that the "locality" language modifies all of the three standards offered. They point out that it is ". . . grammatically natural to speak of 'similar work . . . in the locality.'" As to "particular or similar industries," the companies state that even the Secretary admits that this phrase is aptly referred to by the phrase "currently operating in the locality." Brief for Appellees, pp. 22-23, Mitchell v. Covington Mills, Appeal Docketed, No. 12650 (D.C. Cir. 1955). Secondly, the companies, relying on statements made in the legislative history of the act, assert that Congress intended the "locality" language to modify all three standards. For example, Representative Healy made the statement that ". . . this bill merely provides that the Government shall have the right to refuse bids . . . to those . . . who pay less than the prevailing rate of wages in their community. . . ." 80 CONG. REC. 10002 (1936).

The companies state that the decision of the Court of Appeals in the *Lukens Steel* case should be controlling in the present action, because the Supreme Court did not reverse the Court of Appeals on the merits of the case. "(S)ince that decision establishes that the defendant has no power to make wage determinations under the Act for multi-state regions, *a fortiori,* the defendant has no power to make determinations on a nation-wide basis." Brief for Plaintiffs, p. 14, Allendale Co. v. Mitchell, *op. cit. supra,* note 21. The companies also assert that under no interpretation of the word "locality" could it be held to allow determinations on a natoin-wide basis. The Secretary's " . . contention would portray Congress as an incompetent fumbler in its wording of the Act and as haphazardly using a term 'locality,' completely inappropriate to the purpose which it had in mind." Brief for Appellees, Mitchell v. Covington Mills, *supra* at 36.

contracts.[23] Therefore, he utilizes geographical differentials only when the wage surveys for a particular industry show that such differentials should be established.[24]

The district court sustained the contentions of the complaining companies in *Covington Mills v. Mitchell*,[25] holding that the phrase "currently

23. The Secretary defends his interpretation on the ground that the "locality" language modifies only the last of the three standards which the act offers. "The literal terms of Section 1(b), when read naturally and grammatically, seem plainly to authorize the Secretary to determine the prevailing minimum wages on either one or more of three bases: For persons employed (1) 'on similar work' or (2) 'in the particular or similar industries' or (3) in 'groups of industries currently operating in the locality'. . . ." Brief for Defendant, p. 44, Covington Mills v. Mitchell, *op. cit. supra,* note 21. Secondly, he is also supported by more than 19 years of administrative practice and legislative acceptance. "If the Congress which had passed the Walsh-Healy Act had, in fact, intended to limit the scope of its wage determinations to particular communities or groups of counties, it would hardly have remained passive after being made aware of such extreme divergence from this concept as the Secretary's early industry-wide determinations represent." *Id.* at 48. The Secretary contends that the present interpretation of the "locality" language is the one most consistent with the legislative purposes of the act and argues that the word "locality," in any event, is sufficiently flexible in the context in which it is used to include industry-wide determinations. "In the instant case, we are concerned with a term which not only has no 'plain meaning,' but which if given a rigid meaning would produce both absurd and unreasonable results 'plainly at variance with the policy of the legislation as a whole.'" *Id.* at 64.

24. The Department of Labor proceeds in the first instance ". . . .without regard to locality but with the objective of the Public Contracts Act before us. We assume that although the finding of prevailing minimum wages by locality is not a mandatory provision of the Act, geographical differentials may or may not be established according as the wage data in each industry indicate or not [*sic.*] that such differentials should be established." STRACKBEIN, THE PREVAILING MINIMUM WAGE STANDARD, 76-77 (1939). Unlike the Fair Labor Standards Act, which establishes a statutory minimum wage, the Walsh-Healey Act give the Secretary discretion to find what the prevailing minimum wage for an industry is and then to establish that wage as the minimum for laborers in that industry working on materials to be supplied under government contracts. No specific ceiling is established by the law, and the wage provisions the Secretary establishes do not apply retroactively.

The determinations by the Secretary, on the basis of the information gathered through the wage surveys and the hearings, generally are based on one or a combination of the following statistical theories: (1) The "Cluster" Theory. On the basis of the wage surveys of a particular industry, the Secretary breaks down the earnings of employees into 5-cent intervals. The Secretary then sets as the prevailing minimum wage that interval in the lower part of the wage structure which has a higher percentage of employees in it than in the interval either above or below it. (2) The "Union Contracts" Theory. In cases where the industry is highly organized, the Secretary sometimes utilizes the rates established in the labor contracts for common labor as the prevailing minimum. (3) The "Majority of Employees" Theory. Emphasis is laid by the Department in this statistical theory on the wages paid by half or more of the plants in the industry which employ half or more of the employees in the industry. For comment and criticism of these theories see, VAN SICKLE, THE WALSH-HEALEY PUBLIC CONTRACTS ACT, 13-16, No. 445 "National Economic Problems Series," American Enterprise Association, (1952) and LABOR LEGISLATION COMMITTEE OF RADIO-ELECTRONICS-TELEVISION-MANUFACTURERS ASSOCIATION, THE WALSH-HEALEY ACT: THE LABOR LAW THAT REALLY NEEDS REVISION, 26-35 (1954).

25. 129 Fed. Supp. 740 (D.D.C. 1955). The Covington Mills case and the Alabama Mills case were heard together before Judge Holtzoff, District Judge of the D.C. District Court on April 4, 1955; the Allendale Co. case is pending before this same district court. Before the publication of this issue of the INDIANA LAW JOURNAL the Court of

operating in the locality" limits all three of the available standards for setting the prevailing minimum wage.[26] The court was especially influenced by the fact that in the *Lukens Steel* case the Department of Labor did not advance the idea that the phrase modified only the last standard.[27] Conceding that the term "locality" is an indefinite word, and a great deal of discretion is granted the Secretary in defining it, the court nevertheless concluded that regarding the entire United States as a "locality" distorts the meaning of the word.[28]

It appears that the district court achieved results which differ little from those which would have been reached had the isolated paragraph from the act been interpreted by a professor of English grammar. In essence, the court jettisoned any consideration of the legislative purposes of the act and the administrative history of its interpretation and considered only the literal language of the paragraph it isolated from the act.[29] The construction of the Walsh-Healy Act should not, however, rest solely upon its grammatical structure, on the inclusion or omission of a comma,[30] nor upon the isolated remarks of congressmen concerning

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Appeals of the D.C. Circuit reversed the holding of the district court in the Covington Mills case. Mitchell v. Covington Mills, 24 U.S.L. WEEK 1081, 2239 (C.A.D.C. Dec. 1, 1955). The court of appeals sustained the thesis of this note in holding that the district court's interpretation would defeat the purposes of the Walsh-Healey Act. In holding that the Secretary could fix industry-wide minimum wages, the court pointed out that the "locality" language does not appear to modify all the standards the act gives the Secretary for setting minimum wages and that Congress by its inaction ". . . has chosen to leave the interpretation of the Act to the Secretary and the courts."

26. The court admitted that ". . . it is, perhaps, an unfortunate choice of words, but . . . . this is the interpretation, in the opinion of this Court, which should be accorded to those words." *Id.* at 741.

27. The court pointed out that in the *Lukens Steel* case ". . . it seemed to be assumed that the words . . . were applicable to and limited each of the three alternatives." *Ibid.*

28. The court stated that it was ". . . impelled to this conclusion . . ." by the opinion of the Court of Appeals in the *Lukens Steel* case. *"A fortiori,* if fourteen states is too large an area to be deemed a single locality, it necessarily follows that the United States of America is much too large an area to be so considered." *Id.* at 742. The court further held that the arguments made by the Secretary regarding the administrative difficulty and the social and economic desirability of fixing the rate on a nationwide basis were impressive, but that these arguments should be directed to the legislature and not to the court. *Id.* at 743.

29. This was a prevalent criticism of the opinion of the Court of Appeals in the *Lukens Steel* case. "The court in the instant case tears the term 'locality' from the context of the Act. . . . The court's definition of 'locality' discloses either a failure to recognize the purpose of the Act or an unrealistic conception of the steel industry. . . . The restricted definition of 'locality' in the *Lukens Steel* decision is thus objectionable, since it preserves the status quo of manufacturers in geographically isolated centers, permits the destructive competition to continue as a depressant on labor conditions, and, consequently, impairs the corrective purposes of the Act." Note, 49 YALE L.J. 548, 550-51 (1940).

30. From a grammarian's point of view, the Secretary has made a tenable interpretation of the act's standards. No comma separates the phrase "currently operating in the locality" from the last alternative offered by the act, so as to show that the phrase

the meaning of the "locality" language.[31] It is submitted that the act's standards should be construed in light of its *basic legislative purposes,* about which the parties are in general agreement.

For almost two decades the act has been administered according to the Secretary's interpretation without legislative expression of disapproval. If this interpretation has offended the construction which Congress wished placed upon the standards, there has been considerable opportunity to force a change; it seems that by its inaction Congress approved that interpretation. The fact that the Senate Committee on Banking and Currency expressly refused to adopt an amendment[32] which would have required the Secretary to accept the view of the complaining companies lends additional weight to the proposition that the Secretary's interpretation should be upheld by the courts.

Of primary importance is the fact that the Secretary's interpretation could fulfill the legislative purposes of the act, while the contrary view urged by the complaining companies would only subvert those purposes. Should the minimum wage determination be made on a city or community basis the Government would be forced to deal with "sweat shop" contractors if "sweat shop" wages were prevailing in that community. On the other hand, by setting nation-wide minimum wages the Secretary is able to require contractors in those areas where "sweat shop" labor might exist either to raise the level of their wages or to refrain from bidding on government contracts. Various sponsors of the act believed that the Walsh-Healy Act could prevent the migration of industry from high to low level areas. The companies' construction of the standards would make this impossible, since minimum wage determinations on a community basis would not alter existing wage differentials in the various sections of the country. Furthermore, minimum wages set on a local community basis would only foster the low wages existing in the area, thereby thwarting Congress' purpose of raising labor standards in industry generally.

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is meant to modify the previous two alternatives also.

31. These statements should not be credited too highly, because most of them were not directed toward a consideration of the "locality" language itself; the bill, as finally adopted, differed in language from those being discussed in a majority of the debate; and the final *language* of the act was a result of compromise, rather than sustained legislative purpose. The Secretary of Labor admits that ". . . unquestionably, some of the views expressed by the individual proponents and opponents of the legislation, in various stages of its draftsmanship, suggest a limited view of the 'locality' language." He goes on to point out, however, that ". . . there were just as many expressions of intent for the broader construction. The legislative history as a whole, in relation to this particular language, is admittedly somewhat confused and inconclusive. . . ." Brief for Defendant, p. 66, Covington Mills v. Mitchell, *op. cit. supra,* note 21.

32. See note 17 *supra.*

Although the Secretary's interpretation of the standards will carry out congressional purposes, there are valid reasons why the Walsh-Healy Act is no longer needed. It is true that, if the complaining companies position is upheld by the courts, these purposes could not be accomplished and the statute's administration necessarily would be curtailed; the discontinuance of the administration of this outdated law, however, would more properly be brought about by congressional, rather than judicial, action.

Less than two years after the passage of the Walsh-Healy Act, Congress enacted the Fair Labor Standards Act,[33] a more comprehensive labor standards statute.[34] The administration of both acts has been combined in the Department of Labor under one administrator. The two acts are not mutually exclusive;[35] thus, FLSA may apply to companies receiving government contracts, even though the contractor is also covered by the Walsh-Healy Act. Because FLSA seeks to raise wage levels generally and applies to the great majority of contractors covered by the Secretary's determinations,[36] it is clear that the Government would not be forced to deal with "sweat shop" labor, even if the Walsh-Healy Act were repealed. It seems that there is no longer any need for the Walsh-Healy Act.

When the actual operation of the Walsh-Healy Act is considered,[37]

33. 52 STAT. 1060 (1938), as amended, 29 U.S.C. § 201 (1952).

34. The act applies to employees of industries engaged in interstate commerce or in the production of goods for interstate commerce. The Supreme Court upheld the exercise of the power under the commerce clause in U.S. v. Darby, 312 U.S. 100 (1940). The Court also held that the act did not violate the due process clause of the Fifth Amendment.

35. Powell v. U.S. Cartridge Co., 339 U.S. 497 (1950). See Note, 99 U. PA. L.R. 255 (1950).

36. Stuart Rothman, Solicitor of Labor, in a letter to the INDIANA LAW JOURNAL, October 31, 1955, pointed out that ". . . wherever the Walsh-Healey Act applies, we generally find that the Fair Labor Standards Act also applies because practically all production for the Government involves transportation of the product across State boundaries."

37. The effect of the Secretary's determinations upon the wages in the affected industries is difficult, if not impossible, to measure statistically. The Department of Labor has no information indicating the effects of the determinations. In some cases, plants which pay lower than the minimum wage do not bid on federal contracts, and thus are unaffected by the minimum wage set by the Secretary. In other cases, the inflationary economy of the United States in recent years has pushed wages up so far that the actual prevailing minimum wage is far above the established minimum of the Secretary. A prime example of an industry where wages are far above the standard is the iron and steel industry. "(T)he minimum wage in the basic iron and steel industry is so far above the minimum wage required under the Walsh-Healey Act, it is doubtful whether the Act has had any impact on the wage structure or wage level in the steel industry." Letter from Leo Teplow, Industrial Relations Consultant of the American Iron and Steel Institute, New York, N.Y., to the INDIANA LAW JOURNAL, October 3, 1955. In the paper and pulp industry, for which the Secretary plans to redetermine the prevailing minimum wage, ". . . the effect will be of an academic nature in light of the

it is evident that very little is accomplished which would not be effectuated under FLSA standing alone. When the FLSA rate was raised to 75 cents in 1949, the Secretary of Labor increased all minimum wage rates which were under 75 cents to conform to the FLSA statutory minimum. At the present time, 28 of the 43 determinations of the Secretary are identical with the FLSA minimum of 75 cents.[38] The minimum wage rate of FLSA will be $1.00 per hour after March 1, 1956;[39] if present determinations are continued, only seven industries will have a determination under Walsh-Healy which is higher than the FLSA minimum after that date. These few determinations do not present a compelling case for a separate wage and hour statute for government contractors.

Two wage and hour statutes applying simultaneously to many industries cause confusion, unnecessary cost, and a duplication in obligations and liabilities under the acts.[40] The requirements of the two acts are sufficiently different that industries need to keep double records, resulting in confusion and increased expense. The Department of Labor, in administering the two acts, must maintain a larger staff at a greater cost to the taxpayer.

The Walsh-Healy Act has not, apparently, influenced the migration of industry from one section of the country to another. Recent studies[41] indicate that the labor market is *not* the most significant reason for industry moving from New England to the South. More important reasons seem to be availability of materials and closeness to the market.[42] The

existing wage scales in the industry." Letter from George V. Johnson, Secretary, Industrial Relations Committee, American Paper and Pulp Association, New York, N.Y., to the INDIANA LAW JOURNAL, September 29, 1955.

38. Wage and Hour and Public Contracts Divisions, Summary of Minimum Wage Determinations, PC-14, December, 1954.

39. 69 STAT. 711, August 12, 1955.

40. "The inevitable result of the co-existence of these two statutes has been confusion, overlapping and duplication since almost all employers performing government contracts are subject to the Fair Labor Standards Act." *The Walsh-Healey Public Contracts Act,* 12 N.A.M. LAW DIGEST 25, 37 (1950). "Both business administration and government operations would be simplified if there were one rather than two federal laws, inconsistent in some aspects, dealing with the subject of minimum wage and hours worked." Letter from Leo Teplow to the INDIANA LAW JOURNAL, *op. cit. supra,* note 36. "The Walsh-Healey Act is an unnecessary burden on industry, involving onerous record keeping, high administrative costs, and subtle in its use to effect results which should be the matter of collective bargaining." Letter from George V. Johnson to the INDIANA LAW JOURNAL, *op. cit. supra,* note 36.

41. See, NATIONAL PLANNING COMMITTEE OF THE SOUTH, REPORT No. 1, NEW INDUSTRY COMES TO THE SOUTH (1949) and McLAUGHLIN AND ROBUCK, WHY INDUSTRY MOVES SOUTH (1949).

42. "Of new plants covered by the study, it turned out that companies that located in the South primarily to be close to the market accounted for 45 percent of the total number. Plants that were drawn mainly by the availability of materials represented 30 percent of the total and the South's labor supply was the chief reason for the location

surveys further show that the wage differential was only one of several attractive features of the southern labor market which cause industry to move.[43] The surveys point out that the wage differentials for similar sized communities in the North and South have been narrowing since World War II, and in some plants wages have become higher in the South than in the North. The studies also show that the wage differential is expected to narrow still more and probably disappear.[44] Thus, there is no reason to continue the Walsh-Healy Act in operation to accomplish Congress' purpose in this respect.

It appears that the act has become of little value in maintaining consumer purchasing power. The act was passed during the period of recovery from the depression, when there was an urgent need to stimulate higher wages in order to put more money into the economy and thus battle the effect of the depression. Today's inflated economy has eliminated the need for the accomplishment of this purpose of the act. Moreover, the act is being used in some instances to aid trade unions in their attempts to achieve the union wage in all plants.[45] The fact that the Secretary applies the "Union Contracts" theory[46] in determining wages in certain industries shows that this use has had some influence on departmental procedure. The Walsh-Healy Act was not intended to serve this purpose.

In conclusion, although the present procedure of the Secretary of Labor in determining minimum wages under the Walsh-Healy Act should be upheld by the federal courts as a valid exercise of administrative discretion in carrying out the purposes which Congress intended, there is no existing need for the accomplishment of these purposes through the Walsh-Healy Act. Since the effectuating of congressional

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of 25 percent of the plants. . . ." NATIONAL PLANNING COMMITTEE OF THE SOUTH, REPORT No. 1, *Id.* at 4.

43. "With few exceptions, these companies that are paying lower wages in their southern than in their northern plants told the committee that they would not have risked their funds in a new southern location simply because of the wage scale differences. They considered these differences only temporary. What they were primarily interested in were lower labor costs—less labor turnover and absenteeism with greater opportunity of operations—not chiefly cheap labor. *Id.* at 18. *Contra,* Wecht, *The Walsh-Healey "Locality" Problem,* 4 LABOR L.J. 399, 401 (1953).

44. MCLAUGHLIN and ROBUCK, *op. cit. supra,* note 41 at 70. The companies pointed out to the committee that they couldn't justify a large investment founded on such an uncertain matter as a North-South wage differential.

45. "In the ten determinations made in the three year period 1948-50 the initiative was taken only once by the Department of Labor. In the other nine cases the request came from a union." VAN SICKLE, *op. cit. supra,* note 24 at 9. "In the ten determinations made in the three year period 1948-50. . . . in six of these cases the Union made the wage survey; in one it shared the task with the Bureau of Labor Statistics. . . ." *Ibid.*

46. See note 24 *supra.*

purposes through two wage and hour laws is an unnecessary duplication, it would be advisable for Congress to repeal the Walsh-Healy Act. To provide for those infrequent cases where the materials supplied under government contracts might not be introduced into interstate commerce, a stipulation in the Fair Labor Standards Act to the effect that its minimum wage and other standards of labor conditions shall apply to manufacturers supplying materials under public contract would accomplish these purposes just as effectively and would eliminate duplication and administrative difficulty as well.

POSTAL SANCTIONS: A STUDY OF THE SUMMARY USE OF ADMINISTRATIVE POWER

To protect the general public from certain undesirable activities, Congress has delegated to the Postmaster General responsibility for regulating and supervising the flow of material through the channels of the United States mail.[1] Power to carry out this responsibility rests in statu-

1. The Constitution empowers Congress to legislate concerning post offices and post roads. U.S. CONST. art. I, § 8, cl. 3. Initially, Congress considered this power limited strictly to providing for a physical expansion of the embryonic department and its services necessary to meet the needs of a rapidly growing nation. RICH, THE HISTORY OF THE UNITED STATES POST OFFICE TO THE YEAR 1829, at 68-90 (1924). Even at this stage the potential danger to free circulation of intelligence implicit in the power to control use of the mails was a matter of congressional concern. There was strong suspicion that the postal service had been used as a tool in an attempt to obstruct the adoption of the Constitution. RICH, *op. cit. supra* at 65, 114-15. General distrust in the use of administrative power, coupled with a firm belief that the regulation of mail content was not within the power of Congress, led to the defeat of President Jackson's proposal to prohibit incendiary abolitionist publications from the mails. S. Doc. No. 118, 24th Cong., 1st Sess. 1-4 (1836). For debates on the issues, see 12 CONG. DEB. 26-34, 1123-34, 1722-36 (1836). The Post Office Department, however, chose to circumscribe use of the mails on its own initiative, with the approval of the Attorney General. Yazoo City Post Office Case (1857), 8 OPS. ATT'Y GEN. 489 (1853-1857); Case of Emory & Co. (1860), 9 OPS. ATT'Y GEN. 454 (1857-1860). While this action met with criticism sufficient to initiate a congressional inquiry, it was continued with the approval of both houses of Congress. H.R. MISC. Doc. No. 16, 37th Cong., 3d Sess. 1 (1863); S. Doc. No. 19, 37th Cong., 3d Sess. 1 (1863).

The exigencies of the Civil War apparently dulled the keen edge of opposition shown a generation earlier to controlling expression by regulating use of the mails, for the Reconstruction Congress had little difficulty in adopting a statute prohibiting the transmission of obscenity through the mails. 13 STAT. 507 (1865). A flood of similar legislation followed. 15 STAT. 196 (1868) (lottery); 17 STAT. 283 (1872) (codifying existing postal laws, prohibiting use of the mails to defraud, mailing matter physically dangerous to the postal service, obscene matter, material or information concerned with contraception, and lottery information and equipment); 25 STAT. 496 (1888) (defamatory matter); 39 STAT. 1069 (1917) (liquor advertising) (later repealed by 48 STAT. 316 (1934); Securities Act, 48 STAT. 84 (1933), 15 U.S.C. § 77q (1952); Securities and Exchange Act, 48 STAT. 885 (1934), 15 U.S.C. § 78e (1952); Public Utility Holding Company Act, 49 STAT. 812 (1935), 15 U.S.C. § 79d (2) (1952) (use of the mails by persons not registered under these acts).