

CRS Report for Congress

Migrant and Seasonal Agricultural Workers: Protective Statutes

Updated August 29, 2007

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Prepared for Members and
Committees of Congress

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Summary

Workers in agriculture, generally, have experienced a different pattern of labor-management relations and labor standards from those in the industrial workforce. In part, such disparity was related to the nature of the work and the characteristics of the workers. Some agricultural workers have tended to be migratory or seasonal. They have tended to be employed, more or less casually, for short periods by any single employer who, perhaps not surprisingly, did not want to be burdened by a regular employer-employee relationship. Some agricultural workers are skilled; the majority are probably marginally skilled or unskilled, though they perform necessary services.

Two pieces of legislation, sequentially, have dealt in a significant manner with migrant or seasonal agricultural labor. In 1964, Congress passed the Farm Labor Contractor Registration Act (FLCRA). For a decade, little attention was paid to the statute, but then, in 1974, it was amended, and suddenly, a storm of protest was heard. It was argued that the wrong people were being forced to register. Through the next nine years, various interests sought modification of the act to conform to their perceptions of the original intent of the Congress. In 1983, Congress repealed the FLCRA and replaced it with the Migrant and Seasonal Agricultural Workers' Protection Act (MSPA). With a very few exceptions, MSPA has operated without controversy. But, at the same time, some may ask, has the new enactment been effective?

The two statutes — FLCRA and MSPA — are intimately connected and have triggered similar reactions with respect to immigration policy, to the inability of agricultural workers to organize and to bargain collectively, and to more general labor standards. Some have suggested that practices under FLCRA and of MSPA have been unduly burdensome. Has the concept of *farm labor contractor* been defined with sufficient care? Have agricultural interests made effective use of their employees, providing them with training and with consistency of employment? Might better utilization of employees prove more productive and more profitable? And, might these changes, in turn, prove more attractive to domestic American workers?

This report is a summary and a survey, spelling out the considerations that Congress found were a part of the realities of agricultural employment in 20th (and 21st) Century America. It begins in the 1960s with the advent of FLCRA, and proceeds through the enactment of MSPA and to the end of the century. But, it is also a summary of developments in the history of the two statutes, written from the perspective of a labor economist. It may, from time to time, be revised as new developments occur.

Thus far, in the 110th Congress, no new legislation has been considered that would amend MSPA.

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Migrant and Seasonal Agricultural Workers: Protective Statutes

During the late 1950s, a general congressional interest had developed in the condition of migratory or seasonal farm workers in the United States. Several exploratory hearings had been held, but no new legislation had been adopted. Then, on a Friday evening, the day after Thanksgiving (1960), a television program aired: *Harvest of Shame*, with Edward R. Murrow.

Harvest of Shame was a report on the plight of the migratory farm workers ... who as virtual peons kept the nation's larders stocked. The public reaction to it was one of surprised horror at the conditions portrayed. Farm organizations were horrified for other reasons, charging 'highly colored propaganda' and 'deceit.' Farmers' spokesmen demanded 'equal time'....¹

The Murrow broadcast emphasized the risks and hazards associated with crew leaders and agricultural employment at large. Whatever the flaws of the film, it provided a context for various pieces of migrant and seasonal farmworker legislation that had been (and would continue to be) before the Congress.

Through the next several years, Congress would consider a number of pieces of remedial legislation focusing upon the farm environment. Two bills that became law are of special importance: the Farm Labor Contractor Registration Act (FLCRA: 1964-1983) and a successor statute, the Migrant and Seasonal Agricultural Workers' Protection Act (MSPA: 1983 ff.). The two statutes, sequentially, provide the basis for regulation of migrant agricultural and seasonal agricultural workers. A focal point of each of the statutes, however, has been the farm labor contractor.

Through nearly 50 years, intermittently, the Congress has debated the two statutes and their implications — for labor supply, for immigration, and for equity for the several parties involved. The issues have changed little, though their focus may have been altered. Initially (up to 1974), concern was voiced with respect to farm labor contractors and their alleged excesses. Then, after the 1974 amendments to FLCRA, concern moved away from contractors and toward those who used migrant and seasonal workers: essentially, the growers and their agents. In 1983, FLCRA was repealed and replaced with the Migrant and Seasonal Agricultural Workers Protection Act. The latter (MSPA), with few exceptions (notably, the case of *Adams Fruit*; see below), has remained as written. There have been numerous hearings on the act and, likely, more will follow. This report summarizes debate over the acts and, in that context, the evolution of agricultural labor.

¹ Alexander Kendrick, *Prime Time: The Life of Edward R. Murrow* (Boston: Little, Brown and Company, 1969), p. 453.

PART I: The Farm Labor Contractor Registration Act, Origins, and Congressional Enactment (1964)

The farm labor contractor (or crew leader) “is the bridge between the farm operator and the migrant laborer.” Farm operators would go south each year to “meet the crew leader” and arrange for migratory crews. A large majority of migrants belong to crews. In 1960, it was reported, the largest crew numbered 185 workers, the smallest 13 — with the usual size between 45 and 74 members. The crews grew out of “the need of inarticulate people to have someone to speak for them” and the farmer’s problem “of recruiting and handling labor.”²

In 1959, Senator Harrison Williams (D-NJ) introduced legislation seeking, through federal registration, “to eliminate the relatively few migrant labor contractors who are dishonest and immoral, and who exploit migrant workers and growers.” A slightly different bill was introduced by Senators Jacob Javits (R-NY) and Kenneth Keating (R-NY). In the House, Representative James Roosevelt (D-CA) was an early sponsor of such legislation.³ None of these early bills were approved. It would take hearings and subsequent refinement through three Congresses before their adoption.

The Various Roles of the Farm Labor Contractor

In theory, the crew leader is an “independent businessman” with varied tasks. Some crew leaders do little more than recruit for farm operators — but for a farmer several hundred (or several thousand) miles away from the areas of labor supply, that task is monumental. Others become more deeply involved in the management of the crew. The report to the Senate Subcommittee on Migratory Labor (1960) observed that:

Some ... provide transportation for the migrant. Others oversee the work of the crew upon its arrival; manage the camps where the migrants are housed; provide the commissary and food facilities; pay the crew members; haul the produce from the fields to the packing sheds....

The profit for the farm labor contractor “lies in the differential between what they are paid by the farmer and [what they] pay to the worker.” Some crew leaders work on a commission basis, taking a few cents from each item produced by crew members.⁴

The list of alleged abuses associated with the farm labor contractor appears to have been as long and varied as those engaged in the field. As the 1961 hearings commenced, William Batt, Pennsylvania’s Secretary of Labor and Industry, noted:

² U.S. Congress, Senate, Subcommittee on Migratory Labor of the Committee on Labor and Public Welfare. 86th Cong., 2nd Sess. (1960). Committee Print, *The Migrant Farm Worker in America*, p. 34. Report by Daniel H. Pollitt, et al. Cited hereafter as Pollitt, *The Migrant Farm Worker in America*.

³ Pollitt, *The Migrant Farm Worker in America*, pp. 36-38.

⁴ *Ibid.*, pp. 34-36.

“The good ones [crew leaders] say to me, ‘I preach to the men to save their money.’”
Of the less desirable crew leaders, Batt noted the then standard complaints:

- “Changing wage rates without explanation.”
- “Exploitation of child labor.”
- “Illegal sale of alcoholic beverages.”
- “Charging the workers a rental fee on housing provided free by the grower.”
- “Importation of prostitutes, with sharing of the ‘take.’”
- “Food profiteering in crew-leader-operated commissaries.”
- “Hunting deer out of season.”
- “Shooting and beating up other crew leaders.”
- “Rigged crew-leader-operated gambling games.”
- “Paying crew members in ‘scrip’ in lieu of cash.”
- “Charging exorbitant transportation fees.”

Batt continued. “In the case of one crew leader who kept accurate wage records, the services of a prostitute were a payroll deductible item.”⁵

Matt Triggs, speaking for the American Farm Bureau Federation and defending the contractors, suggested that stories of abuse were “told and retold” with a “misleading implication that there is more of this than there really is.”⁶ Another witness, with legislation in mind, argued that contractors “are educationally unequipped to perform the laborious clerical function this bill would impose.”⁷ A third stated that with their “limited education,” the contractors would be “unable to fill out the necessary forms” that the act will require.⁸ Yet another declared “They are not schooled.... Much recordkeeping, much bookkeeping is anathema to them. They are not trained for it.”⁹ Triggs asserted that “most leaders have previously been migratory workers. They are semi-literate.”¹⁰ And, Triggs affirmed, “You have got to realize that an awful lot of these crew leaders are very simple people....”¹¹

Nonetheless, contractors may undertake relatively sophisticated responsibilities. Secretary of Labor Willard Wirtz pointed out that, in Oregon, it was “the general

⁵ U.S. Congress, Senate Committee on Labor and Public Welfare, Subcommittee on Migratory Labor. *Migratory Labor*. Hearings, 87th Cong., 1st Sess., April 12-13, 1961, pp. 45-46. (Hereafter cited as Hearings, Senate, 1961.) See also U.S. Congress, Senate, Subcommittee on Migratory Labor, Committee on Labor and Public Welfare. *Migratory Labor Bills*. 88th Cong., 1st Sess., April 10, 23, and 24, 1963, pp. 38-40. (Hereafter cited as Hearings, Senate, 1963.)

⁶ Hearings, Senate, 1961, p. 53.

⁷ James B. Moore, National Apple Institute, Hearings, Senate, 1961, p. 183.

⁸ Charles M. Creuziger, Vegetable Growers Association of America, Hearings, Senate, 1961, p. 82.

⁹ Carroll Miller, West Virginia State Horticultural Society, Hearings, Senate, 1961, p. 125.

¹⁰ Hearings, Senate, 1961, p. 54. See U.S. Congress. House, Committee on Education and Labor, Subcommittee on Labor. *Migratory Labor*. Hearings, 87th Cong., 1st Sess., May 9-10, 1961, and May 19-20, 1961, p. 238 (Hereafter cited as Hearings, House, 1961.)

¹¹ Hearings, House, 1963, p. 15.

practice” of using the crew leader “as a paymaster.”¹² The “crew leader acts as an intermediary between the grower and the workers,” and in nearly “two thirds (63 percent) of the areas surveyed” nationally, the “workers were paid by the crew leaders....”¹³ Similarly, “the crew leader is responsible in certain circumstances for making the necessary deductions and keeping payroll records” with respect to social security participation.¹⁴ Sarah Newman, then of the National Consumers League, observed, “Because crew leaders are under no regulated responsibility to anyone, their many abuses have been able to flourish.”¹⁵

Issues in the Early Debate

During three Congresses (from 1959 to 1964), numerous bills (not always labor-related) were introduced to ameliorate the conditions of agricultural workers. As these bills evolved, it was difficult to keep their implications separate. The following section analyses, in a general way, deal with issues and concepts common to many of these proposals.

¹² Hearings, Senate, 1963, pp. 39-40. It would appear that the most frequent cause of concern, where farm labor contractors are involved, were problems associated in some manner with transportation. In the U.S. Congress, Senate, Committee on Labor and Public Welfare, 87th Cong., 1st Sess., Senate Report No. 695 to accompany S. 1162, August 9, 1961, p. 5, it is noted that “These abuses include overcharging workers for transportation advances, collecting for transportation expenses from both employers and workers, accepting transportation advances from employers and failing to report to work or reporting with a smaller crew than contracted for, abandoning a crew without means of transportation, and failure to return workers to their homes.” (Cited hereafter as Senate Report No. 695, 1961.)

¹³ Hearings, Senate, 1963, p. 39. The reference was to a brochure, “Summary of Farm Labor Crew Leader Practices,” November 1962, prepared by the Farm Labor Service, Bureau of Employment Security, Department of Labor.

¹⁴ Senate Report No. 695, 1961, p. 5. During Hearings, House, 1963, p. 97, there was a dialogue between Representative James Roosevelt and Edith E. Lowry, testifying on behalf of the National Advisory Committee on Farm Labor.

“Mr. Roosevelt: ... We would also, for social security purposes, have a better way of seeing whether the proper deductions were being made and forwarded to the Federal Government rather than having, as we now suspect, but have very little way of proving, many of them pay social security to the crew leader and yet get no credit for it by the social security headquarters.”

“Would you consider this was too onerous a task for us to impose upon a crew leader?”

“Miss Lowry: I don’t think so because it seems to me it is essential for anybody who carries the responsibility of handling the affairs for so many people that find difficulty in fitting into our society to be required to handle these things in an orderly way.”

“I do know there is a real problem in the social security matter.”

¹⁵ U.S. Congress, House, Committee on Labor, House Committee on Education and Labor, 88th Cong., 1st Sess., *Hearing, Registration of Farm Labor Contractors*, April 3, 5, and 10, 1963, p. 70. (Cited hereafter as Hearings, House, 1963.) Newman, p. 69, notes: “Because of their dependency on the crew leader, migrant workers are particularly vulnerable to exploitation and abuse by these contractors. Migrants,” she explained, “are usually isolated from the community, sometimes never even meeting the grower whose crop they pick. They are dependent on the crew leader for the next job, and for their daily living arrangements.”

State Versus Federal. “We do not believe this bill would serve any useful purpose since most farm labor contractors are already registered with one or more State employment services,” stated Charles Kreuziger, spokesperson for the Vegetable Growers Association of America. “We believe, as a matter of principle, that regulation of the contractors can best be handled by the States.”¹⁶

Industry and non-industry forces divided on the issue of federalism. J. Banks Young of the National Cotton Council urged that the issue was strictly local and that federal intervention “would adversely restrict the availability and mobility of such workers and unnecessarily increase farm costs.”¹⁷ Noting the alleged abuses under the current system, Richard O’Connell of the National Council of Farmer Cooperatives stressed the local character of the problem. Most states, he suggested, have “laws prohibiting gambling, prostitution, unlawful narcotics, and liquor sales.” If so, “the crew leaders should be indicted under the appropriate laws” and, having “paid their debt,” should not be harassed.¹⁸ Triggs also thought local government could handle the issue. “Even if the 9 or 10 farm labor bills now before the Congress were to be enacted, we believe they would represent an ineffectual approach to the problem, and in some cases would be decidedly harmful to the interests of workers and farmers.”¹⁹

Observing that the states already had regulations dealing with labor camps, Triggs stated that “... only a handful of these laws are really adequate.” Crew leaders “can evade their regulations by ... going to other States with their crews that do not have licensing requirements.” If the federal government were to act, it should focus on “the licensing of crew leaders or contractors of migratory labor.”²⁰

The problem “requires the leadership of the Federal Government,” Secretary Wirtz advised, because of the movement of contractors across state lines. A person “... involved in malpractice in this area is simply likely not to be there when somebody charges him.”²¹ Others concurred. “A fellow who is fined or barred in one State will simply duck into another State and there perhaps commit the same practices,” suggested Arnold Mayer of the Amalgamated Meat Cutters and Butcher Workmen of North America. “The migrant labor stream is an interstate stream and dealing with it needs interstate legislation.”²²

Authority for the Secretary. Industry spokespersons questioned the wisdom of granting new authority to the Secretary of Labor to manage agricultural labor

¹⁶ Hearings, Senate, 1963, p. 150. References to “this bill” or to “the bill” are generic. In some cases, it is not clear to which bill a speaker is referring or to an abstract bill. Further, reference is to a series of hearings with different bills.

¹⁷ Hearings, House, 1963, pp. 141-142.

¹⁸ Hearings, House, 1963, p. 22.

¹⁹ Hearings, House, 1963, p. 8.

²⁰ Hearings, Senate, 1961, pp. 23-24.

²¹ Hearings, House, 1961, p. 116.

²² Hearings, House, 1963, p. 139.

supply. “Many of the terms used ... are not clearly defined,” stated Young, of the Cotton Council. As it stands, the “... power to issue regulations under the authority of the bill is extremely broad.”²³

The authority granted to the Secretary, remarked James Moore of the National Apple Institute, would “inevitably result in control by the Secretary ... of the agricultural migratory labor market.”²⁴ The requirement “as to their financial responsibility would impose burdens which few individuals recruiting labor could meet.”²⁵ The proposed legislation would establish the Secretary “as judge, jury, and prosecutor,” stated Delmer Robinson of the Frederick County (Virginia) Fruitgrowers Association. “We do not feel that a man’s livelihood [the contractor’s] should depend on the benevolence of the Secretary of Labor.”²⁶ The Secretary, in accord with his own rules, can put out of business any contractor who has “failed without justification” to comply with the regulations — but the proposal “is completely silent as to who would decide whether or not there was ‘justification.’ It is presumed the Secretary ... could arbitrarily decide this point.”²⁷

Defining Terms. Through the hearings, concepts to be used in the act were gradually defined. Still, numerous concerns were voiced by industry with respect to the several bills that came before the committees.

Defining a Contractor. The Farm Bureau favored a narrow definition of *contractor* with registration “limited to crew leaders proper, and not extended to all persons who may recruit or transport workers.” But how might one distinguish between a labor contractor (to be registered) and *persons who may recruit or transport workers*?²⁸

The National Cotton Council argued that the concept of contractor, thus far defined, “would require registration of fraternal, religious, social and other organizations which frequently provide temporary agricultural employment for their members” and processors “who provide workers to farmers.”²⁹ Others argued that the term might include “charitable and religious organizations” and “4-H advisers.”³⁰ The proposal, it was suggested, “seems to make a crew leader out of everyone who contacts more than nine people”³¹ and could include groups such as “sugar

²³ Hearings, Senate, 1963, pp. 302-303.

²⁴ Hearings, Senate, 1961, pp. 182-183.

²⁵ Statement from the National Cotton Council, Hearings, House, 1961, p. 216.

²⁶ Hearings, Senate, 1961, p. 63.

²⁷ Hearings, House, 1963, p. 141.

²⁸ Hearings, House, 1963, p. 10.

²⁹ Hearings, House, 1961, p. 216.

³⁰ Hearings, House, 1961, p. 206.

³¹ Hearings, Senate, 1961, p. 129.

companies, canneries, and cotton gins” that provide labor only as “incidental to the main services they offer farmers.” These, some felt, should be excluded.³²

Even true crew leaders often work through “responsible employees” who should not have to register. It was argued “... that employees of any registered entity should not be required to register” but, rather, have “a single certificate of registration for the overall recruitment activity...”³³ The definition of contractor, it was urged, “... should be changed to cover the individual ... who gathers a crew of workers in one State and transports them to another State and *stays with them in a supervisory capacity* ... and is the actual crew leader.”³⁴ Again: “We would strongly recommend that you eliminate at least the resident concern, the canner who recruits workers for farmers in the territory, the sugar companies, the cotton gins, ... labor associations, and others that are responsible financially...”³⁵

Duration of Registration? “Registration should be permanent and continue in effect until revoked for cause,” the Farm Bureau spokesman held. “We see no valid reason for the annual licensing of crew leaders.”³⁶

The Department of Labor (DOL), however, *did* recognize a need for annual licensing. “The common phrase, ‘fly by night’ applies, I suppose, more aptly to this economic situation than to almost any other which I can think of,” observed Secretary Wirtz.³⁷ “All the evidence we have indicates that there is considerable turnover among the crew leader personnel,” observed Robert Goodwin of DOL’s Bureau of Employment Security, making it “necessary, really, to have an annual certification....” Goodwin took note of auto and other insurance.

This would be issued on an annual basis and would require a determination as to whether the insurance had been purchased and was adequate, and only after that determination was made could the certification be completed. This would require the annual certification.³⁸

The International Apple Association raised the issue of fees for service. While the current Secretary may not anticipate a significant fee, a future Secretary “might wish to put the contractors out of business” and could set an unreasonable sum.³⁹

³² Hearings, House, 1963, p. 143.

³³ Hearings, House, 1961, p. 206.

³⁴ Hearings, House, 1961, p. 176. (Italics added.)

³⁵ Hearings, Senate, 1963, p. 161. On this issue, see Hearings, House, 1963, pp. 10-13, where there is a dialogue between Representative Roosevelt and Triggs of the Farm Bureau.

³⁶ Hearings, House, 1963, p. 10.

³⁷ Hearings, House, 1963, p. 120.

³⁸ Hearings, Senate, 1963, p. 144.

³⁹ Hearings, Senate, 1963, p. 227.

Senator Williams tended to agree. “My feeling is if there were a fee,” he said, “it should be limited to taking care of the administrative costs...”⁴⁰

Rulemaking Authority of the Secretary. “Eliminate the rulemaking authority...” stated a Farm Bureau spokesman. “The statute is complete in itself and requires no supplemental rulemaking authority.”⁴¹

The rulemaking authority may have posed something of a dilemma for critics. On the one hand, many of the concepts “used in the bill are not clearly defined and will be given meaning only by regulation by the Secretary...” Conversely, the terms of the bill “... would permit the Secretary to require almost any kind of information he might desire” and “... could lead to the control of a large segment of domestic migrant farmworkers.” This “broad ... grant of authority ... should be deleted.”⁴²

“We feel,” asserted Robert Rea of the Virginia State Horticultural Society, “that it should be mandatory” for the Secretary to issue a certificate of registration as a migrant labor contractor to any person who files the required information and carries a reasonable amount of insurance. “The mere threat of withholding a certificate,” Rea stated, “... places the labor contractor under direct control of the Secretary of Labor. This allows the Secretary to, in effect, dictate wage rates, housing and working conditions that the crew leader must agree to or be threatened with loss of the right to earn a livelihood.” The proposal, “as written,” he said, could “make the cure worse than the disease.”⁴³

Crossing State Boundaries. Concerning interstate commerce, Delmer Robinson’s ranch straddled the Virginia-West Virginia frontiers. “You can almost figure that an employee of mine operating a wagon with 10 people on it going from one side of the orchard to the other is a migrant labor contractor, according to this definition. I am sure,” he stated, “that is not what is meant” in the context of the legislation.⁴⁴

The definition of contractor is so broad, stated Joseph Dorsey, Frederick County, Virginia, that it would “include any growers who hire and transport workers across State lines, which many of our members have to do daily in making use of labor within their various locations. Our association,” by virtue of its location, “draws on several States for both regular and seasonal labor.”⁴⁵ These definitions, stated another grower, are so broad that even a Greyhound bus would require registration if “10 or more” migrants were aboard.⁴⁶

⁴⁰ Hearings, Senate, 1963, pp. 227-228.

⁴¹ Hearings, House, 1963, p. 10.

⁴² Hearings, House, 1963, pp. 142-143.

⁴³ Hearings, Senate, 1961, pp. 199-200.

⁴⁴ Hearings, Senate, 1961, pp. 62-63.

⁴⁵ Hearings, Senate, 1961, p. 174.

⁴⁶ Hearings, House, 1961, p. 176. See also: Hearings, Senate 1961, pp. 62-63.

Financial Responsibility. During hearings in the House, Richard O’Connell, the National Council of Farmer Cooperatives, was asked,

Is it not a fair and reasonable requirement to expect these crew leaders who transport families of workers from one State to another to be financially responsible to the migrant workers which they transport for personal injuries... and property damage?

O’Connell thought the requirement was appropriate if the question were, in fact, that explicit. However, O’Connell found the term “Financial Responsibility” to be obtuse and questioned whether it meant bonding. “This is one of these vague terms that if you start writing regulations on it it can mean anything.”⁴⁷

Braceros Versus Domestic Workers

During the hearings of 1961, C. H. Fields (of the Farm Bureau of New Jersey) was questioned by Representative Herbert Zelenko (D-NY).

Mr. FIELDS. ... New Jersey farmers do not use migrant labor because they want to. They would much prefer not to use it if there were any other labor available at a wage they could afford to pay....

Mr. ZELENKO. You said the New Jersey farmer would not engage migrant labor if he could help it, but that he could not get local labor at the price he wants to pay.

Mr. FIELDS. At the price that he can afford to pay, I said.

Mr. ZELENKO. Would you be good enough to give this Committee ... what the prevailing wage is in New Jersey for a farm laborer doing the type of work that a migrant would do ...?

Mr. FIELDS.... \$1.10 an hour.⁴⁸

In the early 1960s, Congress had under consideration not only legislation dealing with farm labor contractors but, as well, with the braceros.⁴⁹ As it has evolved, the bracero program (and later, the H-2A program) has been based upon two premises.

⁴⁷ Hearings, House, 1961, pp. 32-33.

⁴⁸ Hearings, House, 1961, p. 235. Mr. Fields went on to state that, in South Jersey, the prevailing wage was then \$1.00.

⁴⁹ The term *bracero* has a number of translations; but, in general, it refers to Mexican workers brought into the United States under a guest worker program. The bracero is a documented worker and should not be confused with the undocumented worker who has entered the United States illegally and, if employed, is employed illegally. See Howard N. Dillon, “Foreign Agricultural Workers and the Prevention of Adverse Effect,” *Labor Law Journal*, December 1966, pp. 739-748; and CRS Report RL32044, *Immigration: Policy Considerations Related to Guest Worker Programs*, by Andorra Bruno.

(A) there are not sufficient workers who are able, willing, and qualified, and who will be available at the time and place needed, to perform the labor or services involved ...

(B) the employment of the alien in such labor or services will not adversely affect the wages and working conditions of workers in the United States similarly employed.⁵⁰

An adverse effect wage rate was devised that must be paid to both foreign and domestic workers (where an effort has been made to employ the former), and which was intended, nominally, to prevent a negative impact from employment of braceros.

Comparing Braceros with Domestic Workers. Gradually, domestic employment and utilization of braceros became intertwined. “The documentation is clear,” stated Vera Mayer, National Consumers’ League, “that the massive importation of cheap foreign labor has lowered wages to American farmworkers and taken away job opportunities from them.”⁵¹ Labor Secretary Arthur Goldberg seemed to agree. “There is increasing evidence of the correlation between this large-scale use of foreign workers in agriculture and the employment situation of our own farmworkers.” He stressed that the central problems of migrant farmworkers were the “lack of reasonably attractive employment opportunities” and “low wages.”⁵²

Here, the Secretary and Ms. Mayer were not alone. The Rev. John Wagner, associated with the National Council for the Spanish Speaking (of San Antonio), suggested that the impact of the bracero program “is very great.” Father Wagner opined, “... it throws another large number of unskilled workers into a pool that is already overloaded with unskilled workers, and there becomes a mad scramble for jobs.”⁵³ Meanwhile, Father James Vizzard, then associated with the National Catholic Rural Life Conference, posed the question: “What other group of farmers or workers have to compete in the marketplace with ... workers brought into this country by an agency of the Government, partly at taxpayers’ expense?”⁵⁴

Triggs of the Farm Bureau explained that the “... domestic worker is often severely disabled, physically, mentally, or psychiatrically or by reason of age. In such cases,” he stated, “the employer should not be required to pay the same wages as for an able bodied man. Whereas,” he added, “the Mexican workers are carefully screened, they are mostly young, vigorous, able bodied.”⁵⁵ Twigg added, “If the farmer prepays transportation for Mexican nationals it is with the assurance that the worker will not leave the job after he arrives to work for somebody else.” Further, he stated, the Mexican workers “are unaccompanied by their families” and, as a

⁵⁰ 8 U.S.C. 1188(a)(A) and (B). See also CRS Report RL32861, *Farm Labor: The Adverse Effect Wage Rate (AEWR)*, by William G. Whittaker.

⁵¹ Hearings, House, 1961, p. 211.

⁵² Hearings, House, 1961, p. 4.

⁵³ Hearings, Senate, 1963, pp. 125-126.

⁵⁴ Hearings, House, 1961, p. 145.

⁵⁵ Hearings, House, 1961, p. 101.

result, “they need barracks type housing.” Finally, he stated, “... the hours of employment are generally uniform and standardized.”⁵⁶

Both labor and management witnesses seemed in agreement with respect to domestic and Mexican crews. Arnold Mayer, of the Amalgamated Meat Cutters and Butcher Workmen of North America (AFL-CIO), stated:

In the first place, the bracero is very docile, more so than even the domestic migrants are. Over the bracero’s head hangs the threat that he may be sent back to Mexico if he complains too much or if he kicks up too much of a fuss. He has left his family, he expects to come back with some money, so he does not want to be sent back without money.

Mayer agreed that the “bracero is carefully screened so that the workers that do come from Mexico are prime labor.” As “single men,” the braceros have an impact on housing. “The growers can erect barrack-type housing for them.” American migrants “very often move with their families and housing and facilities for them are more expensive.” Mayer stated, “... the growers know that this importation causes a surplus of labor and that this surplus is very, very useful in keeping wage rates down.” And, rather than “compete for labor,” the foreign workers are simply made available.⁵⁷

Sorting Out the Workers. “There is a clear interrelationship between the administration of the migratory labor program and the administration of Public Law 78 [the bracero program],” stated Secretary Wirtz. If we can put domestic labor on a sounder administrative basis, “which this bill would help us very much to do, it would mean a lesser need for the use of Mexican nationals....” He referred to the “floating group of American migratory workers” and observed, “I feel quite strongly that the proper use of the crew leader can be of real advantage to the employing farmer as well as to the employees.”⁵⁸

During hearings in 1963, Representative Thomas Gill (D-HI) entered into a dialogue with Richard Shipman of the National Farmers Union. Gill observed that undocumented farm workers were sometimes cheated out of their earnings. Shipman replied, “Of course, if a person is in this country illegally, he is at the mercy of anybody, they have no rights....” Gill concurred: “... they are fair game for a shoddy operator.”⁵⁹ In some parts of Oregon, Gill speculated, undocumented labor makes up

⁵⁶ Hearings, House, 1961, p. 103.

⁵⁷ Hearings, House, 1963, pp. 136-137. Father Vizzard urged against the use of immigrant workers. On page 149, he suggested “... I don’t think the way to help the Mexican economy or the individual Mexican people is by using them as, in effect, strikebreakers against our own people, for undercutting the wages and working conditions of our own citizens.” See also comments of Senator Williams, Hearings, House, 1961, p. 53.

⁵⁸ Hearings, House, 1963, p. 124.

⁵⁹ Hearings, House, 1963, pp. 50-51.

about 20% of the workforce. In that particular region of Oregon, Representative Roosevelt stated, “practically all of the recruiting was done for a sugar company.”⁶⁰

Shipman concurred that the “wetback problem is of long standing.” He stated: “In the total Spanish-speaking migrant group, approximately 20 percent enter the United States on ‘border crosser permits’ ... on forged documents, or in the old-fashioned wetback manner.” Licensing would help. Roosevelt suggested that, under the current proposal, suspension would follow if the contractor “has recruited, employed or utilized the service of a person with knowledge that such a person is violating the provisions of the immigration and nationality laws.” Such a person can be refused a license, but is also “subject to penalty under the Act.” He further pointed to a provision allowing the Secretary, under authority to obtain information, to conduct a more specific investigation.⁶¹

Congressional Action on Contractor Registration

During the late 1950s and early 1960s, Senator Williams had sought controls on farm labor contractors, and, though the measures were not adopted, he kept trying. In 1963, legislation began to move. The contractor registration bill was called up for Senate consideration on June 11, 1963. Williams explained the nature of farm labor contracting, concluding that many contractors “perform their functions in [a] satisfactory and responsible manner” — but that others “have exploited both farmers and workers.”⁶²

At that point, Senator John Tower (R-TX) objected to passage of the bill, stating, “I do not believe the measure is needed.” Tower agreed that there were “occasional instances of crew leaders who don’t deal fairly with workers or farmers,” but these cases “are disputable” and “exaggerated.” Since many states already register farm labor contractors, the proposed legislation would be redundant, he stated.⁶³ No other Senator rose in opposition, and the Senate moved on to other business. A few minutes later, the Senate switched back to the farm labor contractor legislation and, following a brief discussion, passed the bill on a voice vote.⁶⁴

It was more than a year before Representative Roosevelt called up the measure in the House. The bill, he declared, was “essentially noncontroversial.”⁶⁵ Representative Gill, the author of the bill, agreed that the bill was “a very minimal piece of legislation” but “the need for this ... is very obvious.” Gill stated,

⁶⁰ Hearings, House, 1963, p. 51. Reference was to prior comments that sugar companies would not need to be covered since they were not involved (or only marginally involved) in recruitment, and they are fixed site employers.

⁶¹ Hearings, House, 1963, pp. 51-53.

⁶² *Congressional Record*, June 11, 1963, pp. 10619-10621.

⁶³ *Congressional Record*, June 11, 1963, p. 10621.

⁶⁴ *Congressional Record*, June 11, 1963, p. 10625.

⁶⁵ *Congressional Record*, August 17, 1964, pp. 19894-19895.

These crew chiefs deal with a type of labor ... which is often undereducated or in many instances completely uneducated. The literacy level is generally low. Their ability to understand their rights is ... minimal.

Many of these migrant laborers have no voting residence. They have no Congressman ... nor do they have access to other officials who may help them with their problems. Therefore, they are easy to victimize.

The bill "... would be of great assistance to the good crew leaders ... the vast majority. It will prevent them from being daubed with the same brush used on the bad."⁶⁶

Indeed, the bill was noncontroversial. Representative Robert Griffin (R-MI) rose "in support of this legislation." Representative Charles Bennett (D-FL) similarly expressed his "strong support" of the bill. "The migrant laborer should no longer be neglected," stated Representative William Fitts Ryan (D-NY). "This bill is belated recognition of his plight."⁶⁷

Thereupon, the House passed the farm labor contractor registration legislation by 343 yeas to 7 nays, though with several changes from the Senate-passed version.⁶⁸ As amended, the bill was taken up in the Senate, passed by voice vote, and sent to President Lyndon Johnson, becoming P.L. 88-582 on September 7, 1964.⁶⁹

The Farm Labor Contractor Registration Act of 1964

Congress finds, the act began, that "certain irresponsible contractors," by their activities in the migrant labor field, have "impeded, obstructed, and restrained" the flow of interstate commerce. Thus, Congress mandates that "all persons engaged in the activity of contracting for the services of workers for interstate agricultural employment comply with the provisions of this act and all regulations prescribed hereunder by the Secretary of Labor."⁷⁰ In general, the act provided the following:

Definitions

- "The term 'farm labor contractor' means any person, who, for a fee, either for himself or on behalf of another person, recruits, solicits, hires, furnishes, or transports ten or more migrant workers ... at any one time in any calendar year for interstate agricultural employment."
- "Such term shall not include (1) any nonprofit charitable organization, public or nonprofit private education institution, or

⁶⁶ *Congressional Record*, August 17, 1964, p. 19895.

⁶⁷ *Congressional Record*, August 17, 1964, pp. 19895-19896.

⁶⁸ *Congressional Record*, August 17, 1964, p. 19896.

⁶⁹ *Congressional Record*, August 21, 1964, pp. 20874-20877.

⁷⁰ All quotations, here, are from P.L. 88-582. However, the reader is urged to consult the statute for more specific details.

similar organization; (2) any farmer, processor, canner, ginner, packing shed operator, or nurseryman who engages in any such activity for the purpose of supplying migrant workers solely for his own operation; (3) any full-time or regular employee of any entity referred to in (1) or (2) above; or (4) any person who engages in any such activity for the purpose of obtaining migrant workers of any foreign nation for employment in the United States, if the employment of such workers is subject to (A) an agreement between the United States and such foreign nation, or (B) an arrangement with the government of any foreign nation under which written contracts for the employment of such workers are provided for and the enforcement thereof is provided for in the United States by an instrumentality of such foreign nation.”

- “ ‘State’ means any of the States of the United States, the District of Columbia, the Virgin Islands, the Commonwealth of Puerto Rico, and Guam.”
- “ ‘Migrant worker’ means an individual whose primary employment is in agriculture ... or who performs agricultural labor ... on a seasonal or other temporary basis.”

Certificate of Registration Requirement

- “No person shall engage in activities as a farm labor contractor unless he first obtains a certificate of registration from the Secretary, and unless such certificate is in full force and effect and is in such person’s immediate possession.”
- The act observes of a “full-time or regular employee” holding a valid certificate of registration: “Any such employee shall be required to have in his immediate personal possession when engaging in such activities such identification as the Secretary may require showing such employee to be an employee of, and duly authorized to engage in activities as a farm labor contractor for, a person holding a valid certificate of registration under the provisions of this Act.”
- “Any such [regular or full-time] employee shall be subject to the provisions of this Act and regulations prescribed hereunder to the same extent as if he were required to obtain a certificate or registration in his own name.”

Issuance of Certificate of Registration

- The Secretary shall issue a certificate of registration to any person who “has executed and filed with the Secretary” whatever documents “the Secretary may require in order effectively to carry out the provisions of this Act;” has filed with the Secretary documentation “satisfactory to the Secretary of the financial

responsibility of the applicant” with respect to motor vehicles; and “has filed ... a set of his fingerprints.”

- “The Secretary may refuse to issue, and may suspend, revoke, or refuse to renew a certificate of registration to any farm labor contractor if he finds that such contractor” (inter alia):
 - knowingly has given false or misleading information to migrant workers concerning the terms, conditions, or existence of agriculture employment
 - has failed, without justification, to perform agreements entered into or arrangements with farm operators
 - has failed, without justification, to comply with the terms of any working arrangement he has made with migrant workers
 - has failed to show financial responsibility satisfactory to the Secretary ... or has failed to keep in effect a policy of insurance required by subsection (a)(2) of this section
 - has recruited, employed, or utilized the services of a person with knowledge that such person is violating the provisions of the immigration and nationality laws of the United States
 - has been convicted of any crime under State or Federal law
 - has failed to comply with any of the provisions of this Act or any regulations issued hereunder.”
- “A certification of registration ... shall be effective for the remainder of the calendar year during which it is issued, unless suspended or revoked by the Secretary as provided in this Act. A certificate of registration may be renewed each calendar year upon approval by the Secretary of an application for its renewal.”

Obligations and Prohibitions

- The contractor will “ascertain and disclose to each worker at the time the worker is recruited the following information to the best of his knowledge and belief: (1) the area of employment, (2) the crops and operations on which he may be employed, (3) the transportation, housing, and insurance to be provided him, (4) the wage rates to be paid him, and (5) the charges to be made by the contractor for his services....”
- “Upon arrival at a given place of employment, post in a conspicuous place a written statement of the terms and conditions of that employment....”

- “In the event he manages, supervises, or otherwise controls the housing facilities, post in a conspicuous place the terms and conditions of occupancy....”
- In the event he pays migrant workers, to keep close and careful records of all transactions and to make them generally available.

Authority To Obtain Information

- “The Secretary or his designated representative may investigate and gather data with respect to matters which may aid in carrying out the provisions of this Act.” He “... may investigate and gather data respecting such case, and may, in connection therewith, enter and inspect such places and such records (and make such transcriptions thereof), question such persons, and investigate such facts, conditions, practices, or matters as may be necessary or appropriate to determine whether a violation of this Act has been committed.”

Agreements with Federal and State Agencies

- The secretary is allowed to enter into compacts with various state and federal agencies with respect to enforcement of the act and related activities.

Penalty Provisions

- A penalty of not more than \$500 is prescribed for violations of the act.

Judicial Review

- A limited system of judicial review is prescribed under the act.

Rules and Regulations

- “The Secretary is authorized to issue such rules and regulations as he determines necessary for the purposes of carrying out” certain provisions of this act.

PART II: The First Years of the Farm Labor Contractor Registration Act (1964-1974)

From 1964 until 1974, the FLCRA was given institutional life. Administration of the act was set in motion and patterns of interpretation were developed. There was, however, some criticism of the act and a sense that it had not lived up to the hope and expectations of its authors.

The Inaugural Period

FLCRA focused upon one aspect of the issue of migrant and seasonal worker protections: the farm labor contractor. In late December 1964, Secretary Wirtz issued regulations under the act, and the Manpower Administrator, Bureau of Employment Security, was given the responsibility as the authorized designee of the Secretary.⁷¹

There followed a series of directives published in the *Federal Register* dealing with insurance and financial responsibility.⁷² However, some terms used in the legislation seem to have lent themselves to vague patterns of interpretation. For example, see the definition of farm labor contractor.

The term ‘farm labor contractor’ means any person ... [who] recruits, solicits, hires, furnishes, or transports ten or more migrant workers ... at any one time in any calendar year for interstate agricultural employment.

The official interpretation of the statute explores each of these concepts at some length but, seemingly, without resolution.⁷³

In 1969, under Secretary George Shultz, DOL underwent administrative restructuring with FLCRA (and 28 other programs) assigned to the Assistant Secretary for Manpower.⁷⁴ Then, in 1972, under Secretary James Hodgson, a split was effected with the labor standards aspects of FLCRA assigned to the Wage/Hour

⁷¹ See *Federal Register*, December 22, 1964, p. 18157, and February 3, 1965, p. 1139. It was not until late 1972 that responsibility for FLCRA was shifted to the Wage/Hour Division which normally deals with labor standards issues. See *Federal Register*, January 17, 1973, p. 1636.

⁷² See *Federal Register*, October 12, 1966, pp. 13174-13176, November 22, 1966, pp. 14772-14775, May 9, 1967, pp. 7025-7026, and July 20, 1967, p. 10649.

⁷³ *Federal Register*, March 6, 1965, pp. 2945-2950. For example, the rule states, “... if a person intends to recruit five (5) migrant workers one day for Farmer A and the next day is requested to recruit and does recruit eight (8) migrant workers for Farmer B, these are separate and independent acts and do not total up to thirteen (13) for purposes of the statutory requirement. However, if he has contracts to hire a total of eighteen (18) migrant workers for Farmers X, Y, and Z and he hires this number as a result of three days effort, the statutory amount of ‘ten or more’ would be present.” But it concludes, “... the application of these principles to other situations will depend on all the facts.”

⁷⁴ *Federal Register*, April 15, 1969, pp. 6502-6504.

Division in the Employment Standards Administration. For more general administration, authority was left with the Assistant Secretary for Manpower.⁷⁵ Under the act, the Secretary was permitted to enter into a cooperative agreement with state authorities where the states had roughly comparable laws. Where there might be a refusal to authorize (or re-authorize) issuance of a certificate of registration, a hearing would be scheduled before the Solicitor (after 1973, the Associate Solicitor) of DOL or his designee.⁷⁶ For a marginally educated farm labor contractor (if that assessment were true), one might expect the total impact to have been a little confusing.⁷⁷

A Certain Dissatisfaction. FLCRA had not been entirely successful. “Complaints have grown through the years,” observed Senator Gaylord Nelson (D-WI), “that this first effort of the Congress was lacking in several areas....”⁷⁸

During 1973 and 1974, further hearings were conducted on the issue. The current system, some suggested, “... has been the source of massive abuse and exploitation of agricultural workers.” Though Congress had recognized the problem with adoption of FLCRA, the abuses have shown “no signs of moderating.”⁷⁹ No matter “how strong the vote in the Congress, it [farmworker legislation] usually seems to be filed away in some cubbyhole without any appropriations, without any committee staff, and the result in almost all cases has been nonenforcement.” In the “9 years of the existence of this bill,” it was suggested, there “has been no enforcement. It has been totally ineffective. It has been a dud.”⁸⁰

⁷⁵ *Federal Register*, October 20, 1972, p. 22660.

⁷⁶ See *Federal Register*, January 17, 1973, pp. 1636-1637, and August 24, 1973, p. 22778.

⁷⁷ Father John Kelly, Our Lady of Lourdes Church, Seaford, Delaware, stated that there had been “a tremendous overlapping of intermeshing authorities....” He continued: “... we have federal regulations, we have state regulations and we have local county implementation.” Kelly further observed, “When one has a problem you have to deal with the hour and wage [laws] and to deal with social security, you have to deal with health, education and welfare, you have to deal with the local labor office and no one in any of these departments is quite clear where” the migrant worker is located with respect to the several jurisdictions. “You can spend days trying to establish a relationship with any particular office and no one is sure at the end of the day whether he has a reason or not to handle your problem. Now for an illiterate perhaps non-English speaking person, the difficulty is multiplied 1,000 times. And the man who is supposed to solve all these problems is the crew leader.” Representative William Ford (D-MI) would later concede, “We are painfully aware that it is very difficult to tie it all together because of the multitude of Federal agencies that have fragmented responsibilities in this area.” See U.S. Congress, House, Subcommittee on Agricultural Labor, Committee on Education and Labor, *Farm Labor Contractor Registration Act Amendments of 1973*, pp. 179 and 183. (Cited hereafter as Hearings, House, 1973.)

⁷⁸ U.S. Congress, Senate, Subcommittee on Employment, Poverty, and Migratory Labor, Committee on Labor and Public Welfare. *Farm Labor Contractor Registration Act Amendments, 1974*. Fresno, Cal., February 8, 1974, and Washington, D.C., April 9, 1974, p. 2. (Cited hereafter as Hearings, Senate, 1974.)

⁷⁹ Hearings, Senate, 1974, p. 107.

⁸⁰ Hearings, Senate, 1974, pp. 152-153. The speaker was Father James Vizzard, then of the (continued...)

Problems Associated with FLCRA. New legislation may take time to work through various impediments: FLCRA was no exception. From the testimony before the House and Senate Committees, it was clear that problems were numerous.

A Lack of Penalties. The Departments of Labor and Justice seemed to feel “that present penalties are insufficient to deter repeated violations,” and this “deters them from pressing prosecutions,” a witness stated, urging “greater penalties.”⁸¹

Representative Augustus Hawkins (D-CA) posed the question to a group of DOL Administrators: Bernard DeLury, Assistant Secretary for Employment Standards; Warren Landis, Acting Administrator, Wage/Hour Division; and Eugene Bonfiglio, Chief, Branch of Farm Labor Contractor Registration.

Mr. HAWKINS. What is the penalty at the present time for failure to register?

Mr. LANDIS. There is no specific penalty in the present law, unless there is a willful violation, and then the present law provides a fine of up to \$500.

Mr. HAWKINS. Has anyone been fined, and if so, how many?

Mr. LANDIS. I think one....

Mr. BONFIGLIO. Since the act became operative in January 1965, we have had four cases that went to criminal court for prosecution. Of those four, two were thrown out by the Justice Department, and two were finally prosecuted and fined \$100 in each case, and in one of the cases the fine was lifted.

Mr. HAWKINS.... I assume that under the law those who commit violations can either have their registration revoked or other penalties imposed. Can you give us any idea how many registrations have been revoked.

Mr. DeLURY. None, sir.

Mr. HAWKINS. None.

Mr. DeLURY. None this year.

What about last year?

Mr. BONFIGLIO. Last year we revoked three certificates and suspended two, I believe. We had one employee who was denied based on a past criminal action.

A DOL spokesman stepped in to explain. The record “does not mean that crew leaders are not violating [the law] or that we are not attempting to enforce the law. Under the regulations ... the due process is required, we have to notify the crew leader that we intend to revoke this certificate and give him time to request a

⁸⁰ (...continued)

United Farm Workers.

⁸¹ Hearings, Senate, 1974, pp. 115-116.

hearing.” Then, there is the time factor. “If he requests a hearing ... the time element usually goes beyond his stay in one place, and by that time he is gone or the end of the season is on us.” Landis then observed that unless the violation “is pretty bad we think it is better to get him into compliance and let him continue his work....” The dialogue moved on.

Mr. HAWKINS. Well, the problem itself is not evaporating though; is it?

Mr. LANDIS. No sir. There still is a problem for the migrant workers, a big problem.⁸²

Lack Of Staff. In response to Representative Hawkins, it was noted that there were probably about 5,000 interstate crew leaders and another 3,000 intrastate crew leaders. The figures “are not accurate,” Landis observed. “They are the best estimates that we could make.” And, Landis continued, “... a little under 2,000” are registered.⁸³

With more than eight years of experience under the act, Mr. Hawkins queried, “Are you making any effort to see that those who are not registered become registered? Who does the job of enforcing that?” Landis replied, “Well, that is our job, of course, to register them and to call them to account when they are not registered.” DOL was trying to deal with that “through investigations” and “through public service announcements on radio and TV ... in both English and Spanish.”⁸⁴

We are not here “to be critical of you gentlemen,” Representative William Ford (D-MI) stated, when introducing the Department witnesses, but “to determine whether ... we can find a way to make the law finally do what it was originally intended to do.”⁸⁵ However, a certain amount of criticism did emerge.

The 1963 Act “was never enforced because the bureaucrats who were given the responsibility to enforce it did not get out of the regional offices,” argued Elijah Boone of the Community Action Migrant Program in Immokalee, Florida. He alleged that most of DOL’s staff (where crew leaders were concerned) were recycled “from old rural manpower, which had already been shown to be ineffective.”⁸⁶ Alcario Samudia, now with the Wisconsin Department of Labor, recalled that when the crew leader Act came into being in 1963, “... I registered ... but then we found out that the Government did not have anybody to enforce the new laws, so many of us did not even bother to register” after that.⁸⁷ “It is a law,” explained Barbara Rhine, an

⁸² Hearings, House, 1973, pp. 108-109.

⁸³ Hearings, House, 1973, p. 107.

⁸⁴ Hearings, House, 1973, pp. 107-108.

⁸⁵ Hearings, House, 1973, p. 60.

⁸⁶ Hearings, Senate, 1974, pp. 230-231.

⁸⁷ Hearings, Senate, 1974, pp. 217-218.

attorney for the United Farm Workers, “that everyone here claims and knows is not enforced.”⁸⁸

Was the act fatally flawed? Or were enforcement officials jaded? Might the problem have more to do with appropriations? According to Luke Danielson, a former investigator for the Colorado Migrant Legal Services Agency, DOL officials had advised him that “they lack[ed] sufficient investigative staff to process complaints” — which resulted in this “abominable enforcement record.”⁸⁹ Again:

Mr. FORD. How many field enforcement people were actually involved in trying to check registrations ... of crew leaders prior to October 1972?

Mr. BONFIGLIO. We had five field men in 1972. In 1965, we had 40. In 1966, that dropped to 17, and each year after that it declined down to 1972 when we had 5.⁹⁰

Elsewhere, Representative Ford concluded, “It would appear that if we were operating with five people throughout the country to enforce this, knowing that we have in excess of 6,000 possible people to be policed, that we have not very aggressively ...” gone about enforcement of the statute.⁹¹

Other Issues. Clearly, other problems dogged enforcement of FLCRA during its first 10 years rendering the act either unenforceable or, perhaps, innocuous. Among allegations were the following:

The Language Question. Investigators were not always fluent in the language spoken by the workers: Spanish, particularly in the West. Though some announcements appear to have been made in Spanish, the cultural division was such that, often, they were inappropriately positioned. Even in terms of payment and Social Security, the pay stub may have been written in English, which “people don’t understand.”⁹²

Crew Leader Versus Grower. There had been, through the decade, an intermittent conflict between the grower and the crew leader. If we could just “make the grower responsible,” Landis stated for DOL, “... this would be the biggest boost to getting these crew leaders registered.”⁹³ Conversely, Daniel Boone of the United Farm Workers charged that labor contractors “are used by the real employers, the growers, to maximize the insecurity of the worker” by adding yet another level of authority. The grower (farmer or company) “by the use of the contractor has insulated itself from any responsibility” for payment, insurance, and related costs

⁸⁸ Hearings, Senate, 1974, p. 36.

⁸⁹ Hearings, Senate, 1974, p. 110.

⁹⁰ Hearings, House, 1974, p. 109.

⁹¹ Hearings, House, 1973, p. 55.

⁹² Hearings, Senate, 1974, p. 50. See also Hearings, Senate, 1974, p. 110, and Hearings, House, 1973, p. 108.

⁹³ Hearings, House, 1973, p. 108.

associated with migratory employment.⁹⁴ Luke Danielson argued “If the crew leader is not in fact registered, make the farmer liable for the wrongdoings of the crew leader.”⁹⁵

Inflating Crew Levels. Guadalupe Murguia, a United Farm Worker rank-and-filer, testified that contractors exploit the growers by padding their payrolls with grandchildren and great-grandchildren. “As an example, we discovered that the contractors had people on their lists who had been dead for 4 or 5 years.” Where there is contract work, the company “pays for the people that the contractor has on his payroll.”⁹⁶ Pablo Espinosa, also a rank-and-filer, affirmed, “I used to work for a labor contractor where he used to come and tell me, put two or three more people on the books. Put so and so and so on. Well, so and so don’t exist, I would say. Well, you put them on. Who pays for that? The grower.”⁹⁷

Inspector/Grower Collusion? There was a sense, among some workers, that inspectors had become an adjunct to the growers. They, the inspectors, were educated and, often, spoke a language different from the field workers. When abuses were complained of, the inspectors “let them know that they are coming” to inspect, which, from the workers’ perspective, tended to stack the deck against honest inspection. “It doesn’t do any good to report anybody,” observed Jessie de la Cruz of the United Farm Workers. “Nothing is done about it.”⁹⁸ It was only by contacting inspectors “on repeated occasions,” Danielson noted, “that we were able to get them to take this complaint at all.”⁹⁹ Again, “There is no incentive to understand the Act as contractors know that the Act is not being enforced.”¹⁰⁰

Amending the Statute

In some respects, FLCRA appeared to have had little impact. Demands for its repeal (during the early years) seem to have been few.

“... I think it is appropriate for me to express a kind of personal ‘mea culpa,’” suggested Father James Vizzard, an early backer of FLCRA. In the early 1960s, he stated that “under the leadership of Senator Harrison Williams and his Senate Migratory Labor Subcommittee, we were able to formulate and pass this legislation....” But, he added: “Hindsight tells us now that, despite a great deal of good will and technical competence, we really didn’t do a very good job of it.” Father Vizzard opined,

⁹⁴ Hearings, Senate, 1974, pp. 49-50.

⁹⁵ Hearings, Senate, 1974, p. 105.

⁹⁶ Hearings, Senate, 1974, p. 43.

⁹⁷ Hearings, Senate, 1974, p. 45.

⁹⁸ Hearings, Senate, 1974, p. 41.

⁹⁹ Hearings, Senate, 1974, p. 105.

¹⁰⁰ Hearings, House, 1973, p. 165. The speaker, Joe Alexander, is a former farm labor contractor from Homestead, Florida.

First, at the time there was no organized grassroots body with sufficient knowledge and experience to advise us of the day-to-day realities of farm worker problems in all parts of our country. Despite extensive studies and hearings it still was principally a group of us here in Washington ... who did what we thought best, and as it turned out that wasn't good enough.

Second, once a legislative battle had been won and a bill passed, our forces tended to disperse and forgot the second half of the battle, namely, appropriations. Almost every act we passed, therefore, was grossly underfunded and continues to be so even to this day.

Third, and perhaps most important of all, we failed to build into the program adequate and continuous enforcement. Without any exception that I can recall, the agencies charged with enforcement have never done a satisfactory or, in very many cases, even an honest job of enforcing these laws passed by Congress.¹⁰¹

Amendments would bring forth a new phase (and, in some respects, a more turbulent phase) of the regulation of agricultural labor. As revision of the statute proceeded, a number of issues emerged: some old, others new.

Changing Character of the Farm Labor Contractor. During hearings in the early 1960s, the farm labor contractor had been somewhat disparaged. A decade later, that view had mellowed. There were still tales of “short-counts” and beatings of workers who ran into “disfavor” with the crew chief — but these were issues with which DOL did not seem to become involved.¹⁰²

“The great majority of these people,” suggested C. H. Fields of the Farm Bureau, “are responsible businessmen who have made a significant investment in their businesses and who make every effort to abide by the law.” Again:

... these people are small businessmen; they operate under extremely difficult circumstances; they do not have the services of accountants, bookkeepers, or legal advisors; and the more paperwork that is required the more apt they are to call it quits and go out of business.¹⁰³

Definitional elements entered the picture as well. Elijah Boone of the Community Migrant Action Program (Immokalee, Florida) said that there were different kinds of crew leaders. “A contractor might be a very well to do, upper middle-class white businessman, who has money to invest in necessary machinery that a farm worker would know of.” The contractor might be the person in charge of the contract and “... then he would hire the crew leader who would recruit the labor...”¹⁰⁴ Who might be charged with the payment of the workers (and with making deductions for Social Security and related matters) seems to have been unclear.

¹⁰¹ Hearings, House, 1973, p. 63.

¹⁰² Hearings, House, 1973, p. 155. See also Hearings, House, p. 118. DOL did have grower complaints concerning funds forwarded to cover transportation costs of farmworkers.

¹⁰³ Hearings, Senate, 1974, pp. 154-156.

¹⁰⁴ Hearings, Senate, 1974, pp. 323-324.

Defining a Labor Dispute or Strike. Immigration officials, argued Father Vizzard, appear “to be in the pocket of large-scale employers,” while “notorious labor contractors have been allowed repeatedly to build up their strike-breaking crews with these known illegals recruited throughout the Southwest.”¹⁰⁵ Dan Pollitt, now special counsel to the Subcommittee, questioned Vizzard. A contractor, Pollitt suggested, was required to explain to contract workers “where they are going, wages, housing conditions, and so on.” Pollitt asked, “Do you think it would be helpful to add that you must also say whether or not there is a strike going on or whether a contract is at its last stages of negotiations.” Father Vizzard responded: “Yes. I would.”¹⁰⁶

But again, there were problems. Guinn Sinclair, president, National Farm Labor Contractors Association, suggested an almost “complete lack of legislation” on labor-management relations in the agricultural field as to what “constitutes a labor dispute.” Sinclair questioned: “Why should a contractor be the judge when our courts have issued conflicting decisions?” And: “Does a labor dispute exist when the United Farm Workers Union issues a boycott of lettuce and table grapes?” Or, again, when the Teamsters or the United Farm Workers, then in a contest for farmworker loyalties, “claim jurisdiction and yet no laws exist to determine the will of the workers themselves?” Sinclair protested, “... I don’t think the contractor should be the one to decide that there is a dispute.”¹⁰⁷

The Farm Bureau argued that agriculture “is exempt from the National Labor Relations Act and farmers have no legal method to deal with labor disputes” and “unfair labor practices.” Again, there were definitional issues: “... what constitutes a strike, slowdown or labor-management dispute,” and when does “such a condition exist at a particular farm.” Were a farmer to become engaged in such issues, the proposal “could have the effect of determining whether or not his crop would be harvested.” The Bureau continued, “Fruits and vegetables tend to reach the harvest stage as determined by the inexorable laws of nature,” and a farm “cannot wait around until someone,” perhaps the state or the federal government, “decides whether there is a legally-constituted strike or labor dispute.” The provision, it stated, “would seem to be an unworkable and unreasonable responsibility” to place upon contractors.¹⁰⁸

DeLury of DOL took a cautious attitude, suggesting that the provision was “pretty broad” as written.¹⁰⁹ Later, Bruce Burkdoll, speaking for the Central California Farmers Association, charged that “a union or group of workers” could create “a labor dispute, even though the union does not represent” the workers

¹⁰⁵ Hearings, House, 1973, p. 64.

¹⁰⁶ Hearings, House, 1973, p. 92.

¹⁰⁷ Hearings, Senate, 1974, p. 32-33.

¹⁰⁸ Hearings, Senate, 1974, p. 163.

¹⁰⁹ Hearings, Senate, 1974, p. 142.

involved. He concluded, "... just because a student or someone else that never saw you on your ranch stops in front and waves a flag, we just cannot live with that."¹¹⁰

The Day Haul and the Shape-Up. The *shape-up* exists in most regions from which growers or contractors recruit. "That is the place where the people gather to find out whether there will be work that day, sometimes as early as 2 a.m...." The shape-up varies from one locality to another. So does the nature of the work sought.¹¹¹

"The contractor ... will have the pick of the lot," according to Barbara Rhine, United Farm Workers attorney. "He will choose the strong, the young, the healthy.... Or the attractive women who have to turn a pretty face and act at the driver's bidding ... Or the illegal alien, whom he can have taken back by the border patrol before he pays the day's wages." If the character of the work is marginal, "then the shape-up area will be filled with the local winos, the sad, stumbling men and women who are so abject that all it takes is the promise of wine to get them into the fields." Rhine stated,

And so the people get on the buses and hard-seated trucks and try to sleep on their way to work. If they get miles into the fields and find that it's not the first picking that they have been promised, or that there are no toilets and drinking water, or that the gloves to protect their hands are torn, missing, or not provided at all, then their choice is to work anyhow or walk back to town and miss the whole day. If they complete the day's work, they frequently get paid less than the promise, and with deductions made for fees and transportation.

Further, she alleged that "If they get their slips showing the deductions for social security and disability, they find out later when they are old and sick that the money somehow never found its way to the proper State or Federal agency."¹¹²

Rhine's comments focused upon California, but, Theodore Dietz of the New Jersey Department of Community Affairs explained the conditions of *day-haul* workers in his part of the country — casual workers employed on a daily basis.

- Both federal and state minimum wage laws are consistently broken.
- "Many crew leaders go unregistered." They disguise their function as crew leaders by using a number of cars and "by carrying less than ten people per vehicle."
- The crew leader provides "either insufficient information or misinformation" to the worker. "Because there is no written contract between the crew leader and worker, the worker may agree to pick one crop and end up picking another at a different piece rate."

¹¹⁰ Hearings, Senate, 1974, p. 172.

¹¹¹ Hearings, Senate, 1974, p. 35.

¹¹² Hearings, Senate, 1974, p. 35. See also Hearings, Senate, 1974, p. 154, for an analysis by C. H. Fields of the Farm Bureau.

- “Social Security deductions are never made for day haul workers, eliminating many of them from eligibility when they reach 65.”
- No statement of earnings, deductions or hours worked is provided to the worker.
- “Day haul workers rarely are provided toilet facilities in the field and occasionally no water....”
- Children of a very young age are a part of the system.
- “Arbitrary dismissals and blacklisting” are part of the day haul system.
- “No protective clothing against weeds, rain or pesticides are ever provided....”
- “No health or first aid services are available to day haul workers.”¹¹³

Proposed amendments tended to exclude day haul workers. Father Vizzard (now of the United Farm Workers) expressed concern. “Our experience,” he stated, “tells us that some of the grossest abuses against both farm workers and employers are perpetrated by day haulers.” The rationale for this exemption is “‘because there are so few inspectors.’ We think that the proper response to this fact is ... a notable increase in enforcement staff.”¹¹⁴ David Sweeney, Political and Legislative Director for the Teamsters, agreed. “We concur with the statement made by the United Farm Workers in their testimony ... ‘We think that the proper response to this fact is, as stated above, a notable increase in the enforcement staff.’”¹¹⁵ Further, Dietz observed that exclusion of day hauling left him “in a word, dumbfounded.”¹¹⁶

Even DeLury affirmed DOL’s opposition to eliminating day haulers from coverage. “This exclusion would deprive laborers working for a day-haul contractor of guaranteed insurance protection and basic information about the job. These guarantees,” DeLury stated, “are as important to the day worker as to the laborer who works for a contractor over an extended period.”¹¹⁷

The Administration, however, was divided on the issue. Jack Donnachie, Rural Manpower Service, DOL, raised the issue of practicality. “We do have some points where we supervise day haul, as well as they can be supervised,” Donnachie stated. But he cautioned that “... you are out on a public corner with a day haul” and you “cannot stop a man,” he argued, when the recruitment takes place in a public space. “We received a lot of criticism ... for day haul operations and justifiably so,” he

¹¹³ Hearings, House, 1973, p. 174.

¹¹⁴ Hearings, House, 1973, p. 63.

¹¹⁵ Hearings, House, 1973, p. 94. Sweeney proposed inclusion of day haulers in the bill.

¹¹⁶ Hearings, House, 1973, p. 174.

¹¹⁷ Hearings, House, 1973, p. 97. DeLury also stated: “In addition, some day-haul work is interstate; this activity is covered under the current act. We oppose a change which would exempt this interstate activity.” See also DeLury, Hearings, Senate, 1974, pp. 117, 147-148.

stated, "... so we are getting out of the day haul business as fast as we can get out because we cannot control it."¹¹⁸

As the hearings progressed, Representative Ford noted a certain level of caution. If day haulers were included in the bill, "... it is obvious that we are going to be picking up ... a situation that for some period of time would require constant day-by-day monitoring." He continued:

Mr. FORD. So we are talking about more manpower than we have heretofore been using. Do you have any idea about what your additional manpower needs would be, taking into account the additional enforcement power of the Act. Have you given that any thought.

Mr. DeLURY. Yes, we have. Recently we went up before Mr. [Daniel] Flood's Appropriations Subcommittee and requested a supplemental budget for the Employment Standards Administration, and in the area of farm labor contractor registration work we ear-marked ... 10 additional positions for the coming years."¹¹⁹

In an aside to Father Vizzard, Ford stated that "... there was not any intent on the part of the authors of this bill to diminish our capacity to deal with the problem" of day haulers: "... we are just trying to deal in priorities with the resources we have."¹²⁰

Interstate Versus Intrastate. The original labor contractor legislation focused upon interstate transportation of migrant and seasonal workers. Ben Robertson of the Wage/Hour Division explained that Florida crew leaders, under current law, "would not need to be registered ... until they indicated or got ready to move North. They would then come under the coverage of the act because of the interstate character of the work."¹²¹

An amendment to the act proposed to cover interstate intrastate operations. Fr. Vizzard applauded the new section, noting that "many — and I would say perhaps most — of the contractors operate wholly within one state. It is long overdue that they be covered by the provisions of the law."¹²² DeLury was equally supportive.¹²³ And Alcario Samudia, the former crew leader from Wisconsin, urged that all crew leaders "who recruit interstate or intrastate[,] regardless of whether they only recruit for themselves or a combination of employers," be registered.¹²⁴

¹¹⁸ Hearings, House, 1973, p. 23.

¹¹⁹ Hearings, House, 1973, p. 102.

¹²⁰ Hearings, House, 1973, p. 86.

¹²¹ Hearings, House, 1973, p. 23.

¹²² Hearings, House, 1973, p. 63. David Sweeney and William Grami, both from the Teamsters, noted their support of intrastate coverage. See Hearings, House, 1973, p. 187.

¹²³ Hearings, House, 1973, p. 97.

¹²⁴ Hearings, Senate, 1974, p. 220. Under the 1964 legislation, growers who recruited "solely for his own operation," were not covered.

Fields of the Farm Bureau argued against this expansion. “We strongly urge that it be made clear ... that it is not the intent of Congress to cover the intrastate activities of farm labor contractors,” he stated.¹²⁵ George Sorn, of the Florida Fruit and Vegetable Association, urged that FLCRA continue to apply “only to crew leaders who cross state lines.” Sorn stated that registration of other workers would be a “needless expenditure of taxpayers’ money.” He continued: “We believe leaders who operate only on an intrastate basis should not become subject to the Federal Act in those states which have adequate crew leader laws of their own.”¹²⁶

Establishing Responsibility: Growers Versus Farm Labor Contractors. In FLCRA, as originally adopted, a “farmer, processor, canner, ginner, packing shed operator, or nurseryman who engaged in” farm labor recruitment “solely for his own operations,” shall not be included within the concept of a *farm labor contractor*.¹²⁷ Under the proposed amendments, the issue was raised anew.

There was a sense, among advocates of a stronger FLCRA, that growers had, by use of the contractor, “insulated” themselves from responsibility for a diverse range of employer-associated responsibilities.¹²⁸ At the same time, it was argued that the farm labor contractor does not set policy but, rather, merely follows orders laid down by growers. In south Texas, it was explained, the contractor does not set the rate of pay or determine the hours of work. He merely follows established policy and is nothing more, in effect, “than a crew foreman.”¹²⁹ Barbara Rhine of the United Farm Workers explained that “whoever recruits labor for the grower is nothing more or less than his employee....”¹³⁰

Some were willing to assign the contractor the role of an employee of the grower. DeLury of Labor, however, supported a provision in the draft bill making “growers liable for damages resulting from acts or omissions of unregistered farm labor contractors with whom they have contracted for services.” He also recommended “a provision to prohibit outright the use of unregistered crew leaders by growers.”¹³¹ Joseph McAuliffe of the Wage/Hour Division noted an absence of responsibility. Someone, “we don’t care which,” has to assume responsibility.¹³²

This issue, grower versus contractor, would remain central to the debate on FLCRA through the next decade. Much agricultural work seems to have been conducted on a quasi-cash basis. Or, where there were more formal processes, it may

¹²⁵ Hearings, Senate, 1974, p. 156.

¹²⁶ Hearings, House, 1973, pp. 190-191.

¹²⁷ See Section 3(b)(2) of P.L. 88-582.

¹²⁸ Hearings, Senate, 1974, p. 49.

¹²⁹ Hearings, Senate, 1974, p. 249.

¹³⁰ Hearings, Senate, 1974, p. 37.

¹³¹ Hearings, Senate, 1974, p. 116. (Italics added.)

¹³² Hearings, House, 1973, p. 104.

have been unrealistic to expect a worker, thirty years hence, to attempt to prove that he or she actually worked, for what period, and what was (or was not) taken out of his pay. Pay stubs may be written in English and may be basically unintelligible for non-English speaking workers. Given the migratory character of such workers, compensation information may well have been lost with the passage of time.¹³³

Immigration and Adverse Effect. Section 5(b)(6) of FLCRA provided that the Secretary might “refuse to issue” or “suspend, revoke, or refuse to renew a certificate of registration” if the farm labor contractor had “with knowledge” hired workers in violation of the immigration and nationality laws of the United States.

As the 1974 amendment moved through the legislative process, there was an effort to restructure this provision. Everyone, it seems, knew that undocumented aliens were employed in American agriculture but, beyond that awareness, there seemed little agreement as to a course to follow. Father Vizzard concluded: “It is too easy for the crew leader or labor contractor to escape the impact of that section of the law by simply claiming innocence, and who can prove to the contrary?”¹³⁴

Much of the discussion focused upon knowledge. Rudy Juarez, a former farm worker experienced with crew leading operations, suggested that “contractors and the farmers [they represent] are heavily recruiting illegals from Mexico. Many times we have reported this to the border patrol,” Juarez stated, “but they do not seem to be interested until the harvest is over.” Senator Nelson inquired of Juarez: “I understand you to say that the employers frequently pay transportation of the illegals.” Juarez replied, “Yes, sir. For many years I was a contractor myself.”¹³⁵

With one witness after another, though from different perspectives, the issue of use of undocumented workers was raised. Identity papers, it was alleged, were easy to acquire; but, once armed with fraudulent documents, who was to judge? “Since the Border Patrol cannot determine who is an illegal in the United States,” opined Guinn Sinclair, “we do not feel you should impose upon the contractor the absolute law that he should know.” Sinclair and Nelson discussed the problem of identification. “You know,” Sinclair suggested to Nelson, “that the magnitude of Mexicans working in the United States is much greater than I think is conceived here.” Part of the problem, the farm labor contractor suggested, rests with the governments of the United States and of Mexico. But, notwithstanding the source of the problem, “the contractor has no way of knowing who should be here and who should not be here.”¹³⁶

Mabel Mascarenas, wife of a farm labor contractor, questioned the “should know” proposal. “Are people going to wear a sign that says ‘I am an alien,’ or are we expected to act as Immigration Officers and know all the details of immigration papers?” Much of the work on the farms deals with perishable commodities. “When

¹³³ Hearings, Senate, 1974, pp. 49-50.

¹³⁴ Hearings, House, 1973, pp. 87-88. See also Hearings, Senate, 1961, p. 130.

¹³⁵ Hearings, Senate, 1974, pp. 226-227.

¹³⁶ Hearings, Senate, 1974, pp. 183-184. See also, *ibid*, pp. 170-172.

we need people, and people come to us seeking work,” she said, “we hire them. We are the most integrated business in America.”¹³⁷

“It is our view,” suggested Joseph Phelan, National Council of Agricultural Employers, “that the imposition of the provision prohibiting the employment of illegal aliens would be tantamount to transferring to the employer a responsibility which correctly lies with the Immigration and Nationalization Service.”¹³⁸ The Farm Bureau took a similar position. “On the surface,” it noted, the premise, “‘know or should know’ to be in violation of the immigration laws,” some may find appealing. But, “the question arises as to how a labor contractor is expected to know or determine whether a given worker is in this country illegally.” The bill “is silent with regard to any procedure a contractor would be expected to follow.” We urge “that this subsection be deleted.” And it further stated: “The Immigration Service itself has not been too successful in stopping illegal entries or discovering those who enter illegally.”¹³⁹

Father Vizzard seemed unimpressed with arguments for use of illegals. He suggested that if one were “to raise the wages and improve the working conditions” under which aliens worked, American workers would be found. “When that happens traditionally in any part of American economic life, there are American workers to do the jobs.” The system, he stated, “... is simply a fraud and the disguise has to be stripped back again and again and again.”¹⁴⁰

A New Statute through Amendment

Although the issues raised during hearings on revision of FLCRA were of substance, they seem to have attracted relatively little attention. With hearings concluded, the Congress moved on to enactment of the farm labor amendments of 1974.

Bipartisanship Emerges in the House. In March 1974, Representative Ford introduced a nonpartisan bill incorporating the findings of the hearings — at least as they were understood.¹⁴¹ Ford thanked Earl Landgrebe (R-IN), especially, for helping to invoke “a spirit of bipartisanship” that has resulted in a “unanimous vote”

¹³⁷ Hearings, Senate, 1974, pp. 245-246. (Italics added.)

¹³⁸ Hearings, Senate, 1974, p. 260. Phelan added: “Moreover, this provision poses the question of whether you are crossing jurisdictional lines with the Committee on the Judiciary. You will recall that this language was included in the proposed amendment to the Fair Labor Standards Act last year and was subsequently dropped for that reason.”

¹³⁹ Hearings, Senate, 1974, p. 163.

¹⁴⁰ Hearings, House, 1973, pp. 89-90.

¹⁴¹ *Congressional Record*, March 7, 1974, p. 5694. Original sponsors were: Earl Landgrebe (R-IN), Ella Grasso (D-CN), Frank Thompson (D-NJ), Gus Hawkins (D-CA), William Lehman (D-FL), James O’Hara (D-MI), Lloyd Meeds (D-WA), Albert Quie (R-MN), David Towell (R-NV), William Steiger (R-WI), John Erlenborn (R-IL), and Orval Hansen (R-ID).

in committee. The bill is “cosponsored by every member of the Subcommittee on Agricultural Labor” and by other members on each side of the aisle.¹⁴²

Bipartisan support was evident. “H.R. 13342 provides,” explained James O’Hara (D-MI), “for stiffer penalties ... A civil remedy is made available in Federal court for those aggrieved under the act.”¹⁴³ Frank Thompson (D-NJ), with others, emphasized that day haul workers would now be under the act.¹⁴⁴ The bill “broadens the definition of those covered,” stated William Lehman (D-FL), “to include crew leaders recruiting for work done in the same State....”¹⁴⁵ Landgrebe affirmed that the Secretary will now “have an affirmative duty to monitor and investigate violations of the law.” Both he and Albert Quie (R-MN) stressed that the grower will need to “observe a certificate of registration in the possession.” At present, Representative Quie stated, “the crew leader is required to display it, but no one is required to observe it.” Quie reassured the growers: “We are not attempting to make the growers joint employers with the crew leaders, nor are we attempting to make them responsible for the crew leader’s unlawful actions.”¹⁴⁶

At the end of the colloquy, the rules were suspended and the bill was passed on a voice vote.¹⁴⁷ The following day, the bill was dispatched to the Senate where it was assigned to the Committee on Labor and Public Welfare.¹⁴⁸

The Senate Concurs. It was October, six months later, before the bill reached the Senate floor. Then, the Senate moved to strike everything after the enacting clause and to insert its own language. Only two speakers addressed the issue, each expressing disenchantment with the original FLCRA. Recent testimony, observed Senator Williams, “... indicates that the act of 1963 has failed to achieve some of its original objectives.”¹⁴⁹ Similarly, Senator Javits noted: “After 10 years of experience, ... we find that this act has largely been ignored and cannot be effectively enforced.”¹⁵⁰

While the provisions of the bill were briefly discussed, Senator Williams took note of “one new provision which I deem to be of such importance, that I wish to discuss it in some detail.” Williams explained that farm labor contractors

... will be subject to a criminal penalty of up to a \$10,000 fine or a prison sentence of up to 3 years (or both), if such contractor has knowingly engaged the

¹⁴² *Congressional Record*, May 7, 1974, pp. 13402-13405.

¹⁴³ *Congressional Record*, May 7, 1974, p. 13405.

¹⁴⁴ *Congressional Record*, May 7, 1974, p. 13406.

¹⁴⁵ *Congressional Record*, May 7, 1974, p. 13406.

¹⁴⁶ *Congressional Record*, May 7, 1974, pp. 13408-13409.

¹⁴⁷ *Congressional Record*, May 7, 1974, p. 13409.

¹⁴⁸ *Congressional Record*, May 8, 1974, p. 13619.

¹⁴⁹ *Congressional Record*, October 3, 1974, pp. 33745-33746.

¹⁵⁰ *Congressional Record*, October 3, 1974, p. 33746.

services of an illegal alien. Illegal alien has been defined to mean any person who is an alien not lawfully admitted for permanent residence, or who has not been authorized by the Attorney General to accept employment....

Illegal aliens have become an increasingly large source of farm labor in this country, and the services of a contractor are often utilized to procure this clandestine workforce. The existing act generally prohibits such activities by making it grounds for revoking or suspending the contractor's registration. However, if this tide of illegal immigration is to be stemmed, stricter enforcement and stronger penalties must be applied against those who violate the act. *These additional steps are necessary in light of the adverse effect such importation of illegal aliens has had on the wages and job security of our citizens, especially in times such as these of high unemployment.* (Italics added.)

Williams quoted Leonard Chapman of the Immigration and Naturalization Service. "There are probably from six to 10 million illegal aliens in the country today. They are occupying jobs that unemployed Americans ought to have." No doubt, Williams asserted, "illegal farm labor would account for a sizable share."¹⁵¹

No one else spoke. Apparently regarded as routine, the bill was read a third time and passed on a voice vote, but in a form different from that of the House.¹⁵²

Compromise Is Reached. The Senate-passed bill was sent back to the House where Representative Ford reported it. "Certain provisions in the Senate amendment," explained Mr. Landgrebe, "were very broad, would probably discourage registration, and possibly make the act more difficult to enforce." Landgrebe stated, "Since this is a 'crew leader' bill, *and not a bill covering farmers or growers,*" certain adjustments seemed in order. (Italics added.) Representative Quie defended the growers. "The Senate version implicitly imposed upon growers and processors — all those with whom a labor contractor provided migrant workers — the obligation to enforce the act. In other words," Quie stated, "the Senate version held them responsible for the crew leaders' abuses and failures. We did not believe that it was necessary to hold a farmer criminally liable for the acts and omissions of another." He concluded, "... the responsibility for enforcing the act is where it belongs — on the Secretary of Labor and not on the farmer."¹⁵³ The new version retained the provisions concerning undocumented aliens.

Once again, the House voted to approve the measure on a voice vote and sent the new bill back to the Senate.¹⁵⁴ To this point, the two bodies had worked separately. No conference had been requested: none was deemed necessary. However, there now developed within the Senate a colloquy among Senators from the Pacific Northwest and from Florida.

¹⁵¹ *Congressional Record*, October 3, 1974, p. 33746.

¹⁵² *Congressional Record*, October 3, 1974, p. 33747.

¹⁵³ *Congressional Record*, October 11, 1974, pp. 35468-35471.

¹⁵⁴ *Congressional Record*, October 11, 1974, p. 35471.

Senator Mark Hatfield (R-OR) commenced. Out in the Pacific Northwest, “... we have a number of row crops and berries which lean heavily upon the use of student labor.... This is usually under the leadership of school teachers or other public education employees who take the responsibility of acting as crew leaders for these students” or are under the supervision of parents who, collectively, act “as crew leaders.” Hatfield asked a question: Does the bill “include or does it exempt such cases as I have indicated — namely, teachers and public education employees and parents who act as crew leaders?” Second, does the bill as, currently drawn, include (or exclude) the permanent employee of the farmer (or, perhaps, the farmer himself) who hired these people? Senator Nelson, for the subcommittee, concurred with Senator Hatfield — and with Senator Warren Magnuson (D-WA) — in affirming that the Department of Labor was “not to consider this type of activity” when enforcing the act.¹⁵⁵

A second colloquy occurred with Senator Lawton Chiles (D-FL). In the bill, the contractor could be exempt if his “recruitment activity is solely for his employer on no more than an incidental basis.” Chiles agreed that “registration should be required of the individual whose sole job is to hire and recruit migrant labor” but he had concerns about the term “incidental.” He stated: “I do not feel that the committee intended that regular employees who may perform some duties for their employer relative to securing migrant labor are to be required to register. It is my understanding,” he stated, “that the bill aims at those who on a full-time basis hire or recruit migrant labor.” Senator Nelson noted that “the purpose of this provision is to prevent farm labor contractors from avoiding registration by becoming the employee of each and every grower for whom they recruit and hire migrant workers....” But, *it was not the intent* of the act to include the “regular employee” of the grower. Chiles was not yet entirely clear. “Even though this duty might be considered to be an important aspect of his job responsibility by his employer ... , if he were a permanent employee and continued to have other duties, he would not be considered to have to register,” Chiles inquired. “The Senator is absolutely correct in the manner in which he has stated it,” Nelson replied.¹⁵⁶

Following a summary statement by Senator Williams, the Senate concurred in the House-passed version of the bill. The vote was a voice vote.¹⁵⁷

On October 19, President Gerald Ford returned the bill with a veto message. “This bill contains provisions designed to strengthen the protections of migrant farm workers ... which I support.” But he noted that the Senate has added certain extraneous materials to the bill dealing with the federal personnel system. He directed that Congress remove them and promised to “approve” the bill as

¹⁵⁵ *Congressional Record*, October 16, 1974, pp. 35901-35902. Both Senators Hatfield and Magnuson specifically endorsed the day haul provisions of the bill. However, for the next several Congresses, that provision (in the context of youth labor under the Fair Labor Standards Act) would remain very controversial.

¹⁵⁶ *Congressional Record*, October 16, 1974, p. 35902.

¹⁵⁷ *Congressional Record*, October 16, 1974, p. 35903.

amended.¹⁵⁸ Senator Nelson had introduced S. 3202 in March 1974.¹⁵⁹ That bill was now resurrected, modified, and reported to the Senate on November 21¹⁶⁰ — and was adopted by a voice vote on November 22.¹⁶¹ The House concurred (by a voice vote) on November 26.¹⁶² On December 7, 1974, the bill was signed into law (P.L. 93-518).¹⁶³

The 1974 FLCRA Amendments. The 1974 amendments represented a tightening up of the initial Farm Labor Contractor Registration Act. The focus was still primarily on the contractor. *Inter alia*, it provided the following:

- The concept of “interstate” was stricken, affirming by implication that the new act would apply as well to those persons operating within a state — but having an impact upon interstate commerce.
- The phrases “ten or more” and “at any one time in any calendar year” were deleted.
- It exempted from coverage any farmer or processor “who personally engages in any such activity.”
- Similarly exempt was any full-time or regular employee “who engages in such activity solely for his employer *on no more than an incidental basis....*” (Italics added.)
- In order to deal with students and their elders (but to include day haul operators), there was added: “any person who engaged in any such activity (A) solely within a twenty-five-mile intrastate radius of his permanent place of residence and (B) for not more than thirteen weeks per year....”
- Added to the concept of agricultural employment was “the handling, planting, drying, packing, packaging, processing, freezing, or grading prior to delivery for storage of any agricultural or horticultural commodity in its unmanufactured state.”
- “No person shall engage the services of any farm labor contractor ... unless he first determines that the farm labor contractor possesses a certificate from the Secretary that is in full force and effect at the time he contracts with the farm labor contractor.”
- The applicant (contractor) must file a statement affirming that “each vehicle” and the “housing” to be used by migrants “conform to all applicable Federal and State safety and health standards” — to the extent that they are under “the applicant’s ownership or control....”

¹⁵⁸ *Congressional Record*, November 18, 1974, pp. 36246-36247.

¹⁵⁹ *Congressional Record*, March 20, 1974, p. 7383.

¹⁶⁰ *Congressional Record*, November 21, 1974, p. 36822.

¹⁶¹ *Congressional Record*, November 22, 1974, pp. 37040-37042.

¹⁶² *Congressional Record*, November 26, 1974, pp. 37372-37376.

¹⁶³ *Congressional Record*, December 11, 1974, p. 39005.

- The applicant (contractor) shall designate the Secretary as his agent to accept “service summons” where he has departed from his original address/ jurisdiction or “has become unavailable to accept service....”
- The contractor must make known to the farm workers “the existence of a strike or other concerted stoppage, slowdown, or interruption of operations by employees at a place of contracted employment....”
- The contractor must “refrain from recruiting, employing, or utilizing, with knowledge, the services of any person, who is an alien not lawfully admitted for permanent residence or who has not been authorized by the Attorney General to accept employment....”
- Any agreement by an employee “to waive or to modify his rights” under the statute “shall be void as contrary to public policy” — except that a waiver to the Secretary for enforcement purposes is valid.

The rights and obligations of the several parties were spelled out in some detail.¹⁶⁴ Though certain segments of agriculture had reservations, the new amendments did not seem to represent a threat — and, indeed, they had been approved, repeatedly, with little debate and by voice vote.

PART III: Implementing a Revised Statute (1974-1983)

By nearly all assessments, FLCRA had not been entirely successful in alleviating problems associated with migratory labor.¹⁶⁵ Revisions crafted during the 1973-1974 hearings brought some refinement of the statute. Few voices in Congress had been raised against the statute. Still, the act was not perceived as threatening to users of migrant workers.

Pressures Begin to Mount

In October 1975, the House Subcommittee on Agricultural Labor conducted hearings on FLCRA. “As you may know,” commenced Representative John McFall (D-CA), “my District in California includes the central part of the San Joaquin Valley. This is one of the most productive agricultural areas in the country, and as a result, agricultural labor is a vital part of the economic foundation of the area.”¹⁶⁶

¹⁶⁴ See P.L. 93-518 for precise wording of the amendments.

¹⁶⁵ U.S. Congress, House, Committee on Education and Labor, Subcommittee on Agricultural Labor, *Oversight Hearings on the Farm Labor Contractor Registration Act*, Hearings, 94th Cong., 1st Sess., October 1 and October 11, 1975, pp. 113-136. (Hereafter cited as Hearings, House, 1975.)

¹⁶⁶ Hearings, House, 1975, p. 10.

McFall explained that DOL had failed “to adhere to ... clearly expressed Congressional intent” but had also failed “to provide its field personnel clear directions on the implementation of these [1974] amendments.” It (DOL) had required “a farm or ranch foreman” to register as a farm labor contractor though he performed “many other duties” beyond worker recruitment. McFall had written to Labor Secretary John Dunlop but had not yet received a response. While he was “not opposed” to FLCRA or to the 1974 amendments (“I believe there is a need to ensure that farm labor is not exploited by labor contractors,” he said.), his concern was over the DOL’s failure “to provide an equitable and clearly defined implementation of the Act.”¹⁶⁷

Prior to the 1974 amendments, the focus had been on the plight of agricultural workers. Now, it shifted to employers and to the structure of the industry. The wrong people, it was argued, were being caught up in the Department’s net.

General Problems of Administration

We have had “statements of concern” (and “some compliments”) that DOL was “too vigorous in its administration of the act” — and, conversely, that it “is not vigorous enough,” stated Chairman Ford of the House Agricultural Labor Subcommittee. The Congress has “used every device possible,” he noted, “... to prod, criticize, and sometimes castigate the Labor Department to push for vigorous enforcement of laws.” Still, the Committee does not want to “make compliance with the law so unpalatable” that we end up “litigating while farmworkers receive no real factual benefits from the enactment of the legislation.”¹⁶⁸ Regulations had not yet been proposed, Ford reminded DOL: “We are, in fact, developing a considerable body of controversy in administration of this law because of the absence of these regulations.”¹⁶⁹

DOL intends to continue our “enforcement efforts and our multi-media information campaign,” DeLury stated, “and will get as many farm labor contractors registered as possible so that the benefits of the law will be available” to the crews.¹⁷⁰ Then, he turned to administration. We have “a total of 19 man-years assigned to the

¹⁶⁷ Hearings, House, 1975, pp. 10-11. On Congressional opinion, see pp.85 and 93-94.

¹⁶⁸ Hearings, House, 1975, p. 15.

¹⁶⁹ Hearings, House, 1975, p. 16. DOL’s failure to publish regulations for the 1974 amendments seemed to permeate the entire proceedings. Robert Mills, Salinas Valley Independent Growers’ Association (p. 284), stated: “I think the whole effort of the testimony here today is, please, may we have some definitive regulations from the Department of Labor and not try to define what we believe the intent of Congress is....” Similarly, Donald Dressler, Western Growers’ Association (p. 273), taking note of litigation then before the courts, stated, “We would wish ... that the court would have required the Department to first draft regulations before they ran off in all these different directions.”

¹⁷⁰ Hearings, House, 1975, p. 13. As of Sept 20, 1975, DeLury testified, “we had issued 3,718 certificates” — more than in prior years but less than expected with “approximately 10,000 or more” contractors that should be subject to coverage under the act.

activities under this Act” to cover the entire country.¹⁷¹ As one of the later witnesses explained, “[m]ost of our [farm] workers are Spanish-speaking people.”¹⁷² As things then stood, “... we do not have a Spanish-speaking compliance officer.”¹⁷³

More Specialized Concerns with FLCRA

Older questions — whether dormant or never having been formally raised — assumed a sharper focus. Since the regulations had not been released at that time, there was a good bit of speculation about almost all aspects of FLCRA.

Internal Definitions. Representative Ford, speaking at the 1975 hearings on FLCRA, suggested that “that the lack of definitions and uniform regulations” seems to be the heart of complaints. He urged that the target date for release of the regulations (then, by the end of November) be moved up “so that we can start solving these problems before everybody ends up in court?”¹⁷⁴ Robert Chase, Deputy Assistant Secretary of Labor, assured Ford that regulations have received “priority attention” but that it was impossible, just then, to provide “an earlier date.”¹⁷⁵

For ten years under the act, it was assumed that everyone understood what was meant by *a crew leader* or *farm labor contractor* or *a migrant worker*. After 1974, however, definitions became more problematic. Some witnesses asserted that they “had no objections” to the act¹⁷⁶ and that FLCRA was “appropriate and reasonable”¹⁷⁷ — so long as it was not *their clients* who were affected. “In our wildest dreams we did not consider that the people which we represent,” stated industry spokesman R. V. Thornton, “would be covered” under FLCRA.¹⁷⁸

Who Is a Farm Labor Contractor? Representative McFall stated that he had received numerous inquiries concerning DOL’s efforts to register a farm or ranch foreman as a farm labor contractor. Under the 1974 compromise, a foreman might be FLCRA-exempt if, *in his regular work*, he performs duties other than assisting his employer in acquiring migrant workers. But, how might one distinguish between primary and secondary duties? “Clearly,” DeLury objected, “this language does not provide an exemption from the application of the law to all full-time employees.”¹⁷⁹

¹⁷¹ Hearings, House, 1975, p. 14.

¹⁷² Hearings, House, 1975, p. 106.

¹⁷³ Hearings, House, 1975, p. 53.

¹⁷⁴ Hearings, House, 1975, p. 15.

¹⁷⁵ Hearings, House, 1975, p. 16. Regulations were proposed, December 8, 1975, *Federal Register*, pp. 57332-5733.

¹⁷⁶ Hearings, House, 1975, pp. 258-259.

¹⁷⁷ Hearings, House, 1975, p. 270.

¹⁷⁸ Hearings, House, 1975, p. 252.

¹⁷⁹ Hearings, House, 1975, p. 14. DeLury continued: “Certainly an employee of a grower, whether full-time or not, who devotes all of his time or the majority of his time *to farm labor* (continued...)”

The relationship of the contractor to the grower was critical and, it would seem, difficult to define. Does the contractor provide services (employees) to one employer or to several? What services does he provide to the employees? What records does the contractor keep? Guinn Sinclair observed of California:

We have examples of where a contractor has been successfully prosecuted, his license has been revoked by the State, and the next day he is still with the same crews working the same ranches, only now he is an employee of the ranch. Clearly he is still a farm labor contractor....¹⁸⁰

Conversely, if a grower provides farm hands to a series of farmers, when does he cross the line from grower to contractor? Suddenly, such questions become relevant — and, ultimately, perhaps, a subject of litigation.

And Who is a Migrant? How long might a migrant remain in one location before he or she ceased to be migratory? Some workers are engaged by a firm (or firms) in an area for two, three — ten months out of the year. Can a migrant also be seasonal? “They come back every year. You see ... we have county housing.” “They come there and they live in those houses until the crops are over.” “They are really not migrant because they only come from Texas to Patterson [California]”¹⁸¹

Another witness stated, “To my way of thinking, a migrant worker is one who travels away from his regular place of residence. A great many of these migrant workers who move throughout the United States in agricultural labor, live and make their homes in our immediate area ...,” he stated. “They come back to that area about this time of year and stay there, generally, until about May again.”¹⁸²

Representative Ford asked about the responsibility for transportation while recruiting. “The only time we ever go out and recruit anybody, we don’t recruit them really, we just go down ... to Calexico. We have 23 foremen this year in cantaloups and those 23 foremen will go out.”¹⁸³ This would seem to recall the initial question implied by Representative McFall: When is a foreman a regular employee and when is he really a farm labor contractor? Conversely, does it really matter so long as he or she is engaged in the work of a farm labor contractor?

Interpreting the Word “Personally”. In 1974, the concept of *personally* was added to the list of exemptions. “While this language is clear with respect to sole proprietors,” DeLury stated, “interpretative problems do arise with respect to partnerships, associations, joint stock companies, trusts and corporations.” DeLury explained how it might apply to an individual with the responsibility of “a sole

¹⁷⁹ (...continued)

contractor activities is not within the exemption and such an employee should register under the law.” (Italics added.)

¹⁸⁰ Hearings, House, 1975, p. 261.

¹⁸¹ Hearings, House, 1975, p. 280.

¹⁸² Hearings, House, 1975, p. 68.

¹⁸³ Hearings, House, 1975, p. 280.

proprietor” if he “acts personally with respect only to farm labor contracting activities at the operation involved.” But, he concluded, such an interpretation may raise problems of proof to be resolved on a “case-by-case basis.”¹⁸⁴

Ford responded that he was “loath to suggest that his committee would ever write anything that is ambiguous,” stating: “What we are really trying to do is find the point at which we should ascribe responsibility for the employer/employee relationship.” Again: “The farm labor contractor that we are trying to reach is the body broker.”¹⁸⁵

Reaching the *body broker*, however, proved difficult. Some in agriculture objected to DOL’s interpretation of *personally*: i.e., “... a farmer who operates as an individual and performs all the activity ... without the assistance of any employee, agent or contractor...”¹⁸⁶ But firms have “a variety of arrangements” with the grower.

A small grower may produce a crop to the point of harvest, then through one of several arrangements, have that crop harvested by a shipper. The shipper will harvest, pack and sell the crop, based on financial arrangements with the grower. We also have large cooperatives which provide harvesting, packing, and sales facilities for its [sic] grower members.

It was asserted that, in a large company, there could be “between 10 and 30 small growers for whom some agricultural work is done by the company’s employees.” Obviously, it was explained, “the owner does not personally engage in such activity” but allows the duties to be “delegated.”¹⁸⁷

In other cases, ownership itself becomes a factor. Where crops are harvested in the field by a client (non-grower) making use of migratory labor (but, with the crops still owned by a separate entity, the grower), who is the responsible party? If ownership changes hands while the crop is in the field, does responsibility follow the crops? There seemed, suddenly, a host of issues that may not have been considered when FLCRA was largely unenforced — but, after the 1974 amendments, became critical.

On an Incidental Basis. “A full time or regular employee of a farmer is exempt,” wrote Dante Nomellini, a Stockton-based attorney for the growers, if he is engaged in farm labor contracting activity for his employer “on no more than an incidental basis.” The term, “‘incidental’ is not defined,” he declared, but the “plain meaning” would seem to render him exempt if his “labor contracting function was not his primary function or primary responsibility.”¹⁸⁸

¹⁸⁴ Hearings, House, 1975, p. 14.

¹⁸⁵ Hearings, House, 1975, pp. 16-18.

¹⁸⁶ Hearings, House, 1975, p. 97.

¹⁸⁷ Hearings, House, 1975, pp. 258-259.

¹⁸⁸ Hearings, House, 1975, p. 100.

What was plain to Nomellini was less so to DOL. DeLury, with other Departmental witnesses, objected that the agency had received virtually no guidance from Congress. “Unfortunately,” said Bobbye Spears, Associate Solicitor and charged with preparation of the regulations, “the act does not think in terms of the primary duty, nor does it tell us to look behind the subjective interest of the employer in hiring a particular person.”¹⁸⁹

Arguably, a case-by-case approach might have resolved the problem; but, in practice, such discretion may have been ill-advised. For example, “a farmer’s or processor’s operations manager, his personnel director, his foreman, or all of them, may find that they must, for a temporary period, devote an unusual amount of their time to soliciting, recruiting, or hiring workers.” In the process (for a brief period), the amount of time expended might “substantially exceed” the time taken by a farm labor contractor for roughly similar tasks.¹⁹⁰

‘Who for a Fee ..’. Another aspect of FLCRA administration that caused concern was interpretation of *who, for a fee...* Perry Ellsworth (National Council of Agricultural Employers) argued that the term, as used under the act, had several potential meanings. A “fee” would seem to mean “a payment asked or given for a specific service.” But DOL would argue that if a full-time employee “has any dealings with agricultural labor, a portion of the salary that employee receives is a ‘fee.’”¹⁹¹ On this matter, Representative Ford wrote to Secretary Dunlop: “... I would assume that the words ‘for a fee’ would not be construed to include any part of the salary of a full-time or regular employee who, as part of his job, is required to transport workers between a meeting place in the city and his employer’s farm.”¹⁹²

As with many areas of labor policy, an answer may have been complex. For example, the Benita Packing Company, one of the firms in contention, “goes into the field with its own employees, harvests the crop, brings it to the packing shed, packs it for market and sells the commodity on behalf of the grower,” stated attorney Donald Dressler. “*The grower pays a fee which covers the labor expense....*” Benita Packing “is in control of the workers at all times” and the “*grower has no control or involvement with them at all.*” (Italics added.) In this case, to whom would FLCRA apply — if, indeed, it would apply at all?¹⁹³

Leon Gordon, counsel for the Agricultural Producers Labor Committee (a labor co-op serving Arizona and California), also addressed the issue of fees. The Committee is non-profit, but operates a series of worker-related activities.¹⁹⁴ “Its

¹⁸⁹ Hearings, House, 1975, pp. 19-20.

¹⁹⁰ Comments of Perry Ellsworth for management, Hearings, House, 1975, pp. 89-93.

¹⁹¹ Hearings, House, 1975, p. 82.

¹⁹² Hearings, House, 1975, p. 94.

¹⁹³ Hearings, House, 1975, p. 270.

¹⁹⁴ Gordon testified, Hearings, House, 1975, p. 285: “They operate dining facilities, and in some cases provide hot meals in the orchards. These camps provide recreation facilities,
(continued...)”

books are zeroed out at the end of the year, and each grower defrays his exact proportionate share of the cost of the labor and overhead expenses of the association determined on a volume basis.” However, DOL “... has adamantly taken the position that *a fee is involved* even in the case of a cooperative labor association...” (Italics added.) The result was litigation — with Gordon drawn into court to protect the grower/co-ops.¹⁹⁵

Insurance. Under FLCRA, insurance was to have been roughly on a par with common carriers used to transport passengers in interstate commerce. Several concerns were voiced here — some focusing upon the character of the farm labor contractor.¹⁹⁶

The farm labor contractor “... is a small businessman. He has just one little truck that he is trying to make a living with.... If he owns two or three trucks, it is just that much more,” one witness stated. “It is the recordkeeping, the details. He does not have a bookkeeper. *In most instances, he cannot read and write himself very well.* He is being required to keep all these records that he just does not have any way of doing.” “In the first place, many of them cannot afford the insurance requirements even if they can find a company that will write the insurance.” Finally, he concluded, “We do not quite understand why we should be required to furnish all of these buses and all these high insurance requirements to transport people 5 or 6 miles. Many of our workers are not transported more than just 10 or 15 or 20 miles.”¹⁹⁷

Bobbie Spears, with the Solicitor’s Office, addressed the same issue — but with a somewhat different twist. She recalled a recent case in which a farmer said that “I have to have peas picked tomorrow and a neighbor farmer saying, I will be glad to round up a crew of people and transport them down to your farm and pick your peas tomorrow.” Ms. Spears noted: “The helpful farmer took his truck, which, in this case, was an open truck, transported them down to the neighbor’s farm, they picked the peas, and on the way back there was a wreck. There were several children under the age of 12. I believe that three were killed.”¹⁹⁸

Employment of Aliens

“Quite obviously, we anticipated that a central problem in dealing with this law would be the problem of illegal aliens,” stated Representative Ford, “because it was

¹⁹⁴ (...continued)

television rooms, chapels, and in some cases they provide counseling for the workers. This housing and attendant facilities are provided on a cost or below cost basis to the workers.”

¹⁹⁵ Hearings, House, 1975, pp. 285-287.

¹⁹⁶ See Section 5(a)(2) of the act. The Secretary had some measure of discretion in this matter.

¹⁹⁷ Statement of Scott Toothaker, Texas Citrus & Vegetable Growers & Shippers, Hearings, House 1975, pp. 67-69. Italics added.

¹⁹⁸ Hearings, House, 1975, p. 20. See also section on *Adams Fruit* litigation, below.

one of the purposes we had in mind in amended the law.”¹⁹⁹ Several factors were at issue: the bureaucracy, employer-employee relations, and the local reaction.

Dealing with the Bureaucracy. Warren Landis of the Wage/Hour Division affirmed that DOL had “worked very closely with ... Immigration and Naturalization” but suggested the issue was “quite thorny.” Landis speculated,

What, in fact, constitutes *knowing employment* of illegal aliens and what are the bona-fide efforts that a contractor would make so that he would be absolved of knowing employment of illegal aliens? (Italics added.)

I wish we had a full answer this morning, but we do not. This is another situation that we are addressing on a case-by-case basis.

Landis stated that he had “one case where we denied a certificate ... because of a history of employment of illegal aliens” and we have “some other — perhaps similar — cases that are pending.” John Silver of the Wage/Hour Division from Fresno noted that “... the Border Patrol indicates to us that they believe that 30 percent of the farm-workers who are harvesting crops in California are illegal aliens. So,” he stated, “... you can see that our problems are great.” Part of the problem may have been linguistic. “There are groups where very few of them speak English. They cannot communicate,” observed Joe Fernandez, with the Wage/Hour Division from Raleigh, North Carolina, and “we have had difficulty locating a crew leader.”²⁰⁰

Ford turned to Bobby Spears of the Solicitor’s Office. Do the contemplated regulations have “any specific requirements” to show that a grower or farm labor contractor actually “tried to know” the worker’s status? Spears replied, “We have been working very closely with the INS lawyers and with the Attorney General’s staff to see what would be reasonable within constitutional restraints.” She added, “What could we require within the constraints of the Constitution? What sort of affirmative duty could we place on the grower?” Spears stated, “We think we have a reasonable set of requirements which we do intend to propose when the regulations come out.” But, she added: “It is very tricky.”²⁰¹

Reaction from the Industry. “The burden placed ... on the employer,” stated Dante Nomellini, attorney for the growers, “to be able to identify an illegal alien” is “unfair and in most cases the labor contractor or the farmer or any employer is not in a position to accomplish an adequate interrogation of the individual involved.”²⁰²

Nomellini acknowledged that the statute says “knowingly,” but that the act still placed an unfair burden upon the employer. An illegal, picked up and deported, may end up back on the same farm — without the employer-grower being aware.

¹⁹⁹ Hearings, House, 1975, p. 52.

²⁰⁰ Hearings, House, 1975, pp. 52-54.

²⁰¹ Hearings, House, 1975, p. 54. This conversation took place some twenty years after the end of the bracero program.

²⁰² Hearings, House, 1975, p. 106.

You have to recognize that the farmer himself is not just one individual working on the farm and he is not the one who goes out and supervises the worker and he is not the one generally who has the contact. We have a language differential here ... most of the farmers are not fluent in Spanish nor are they capable, or their agents, of interrogating that man to find out if he is legal or illegal without violating that man's rights.

He suggested, after analysis, that it can be asked "if he is a lawful resident of the United States" and for "his name and social security number." "We don't have this capability to interrogate. The Border Patrol, a very sophisticated group of people who have been trained, even they have problems. The burden shouldn't be placed on industry."²⁰³

Nomellini's solution was direct. The State Department "ought to be asked to cooperate with Congress in coming up with a situation where the individual who is an illegal, once apprehended, is punished in a significant way so that ... he won't come back across the border." The problem, he stated, "has to be attacked at its roots and that is right at the border. If anything significant is going to be done to keep aliens out — *and I don't know whether we want to*, that's a matter of policy..." (Italics added.) It's a matter for the Congress and for those directly involved: "... not the farmers and not the labor contractors and not the general employers in industry."²⁰⁴

The Local Reaction. Scott Toothaker, a management attorney from Texas, lives right up against the Mexican border. And, that creates another dimension to the problem. Some Spanish-speakers may be illegal — but others may be local.

How is this truck driver [picking up job applicants] with nothing more than a second, third, fourth, or fifth grade education, to pass on whether that guy is an illegal alien or not? They all have some kind of a card.... But I defy anyone in this [hearing] room to tell me whether he is an illegal alien.

Ford responded that regulations — which "have not yet been written" — provide ways through which to render an analysis. The presumption of knowingly employing an alien "would have to be overcome by proving actual knowledge, and while it is less than perfect, we do know that there are ... people who habitually rehire people."²⁰⁵

Guinn Sinclair, representative of the farm labor contractors, voiced similar concerns, suggesting that "the Department of State should be the one" to determine

²⁰³ Hearings, House, 1975, pp. 106-107.

²⁰⁴ Hearings, House, 1975, p. 107. Nomellini questioned, p. 98, the ability of the "foreman and supervisors who are not sophisticated interrogators" to screen for illegal immigration. "If it is your desire to keep illegal aliens out of the country then cooperation from the State Department will be required and still penalties will have to be imposed upon the apprehended illegal alien himself." He added: "The slap on the hand and free transportation to Mexico is not an adequate deterrent." See also pp. 146-148.

²⁰⁵ Hearings, House, 1975, p. 77.

who is in the country illegally. “Trying to get the businessman to enforce the laws of the United States just is not good.”²⁰⁶

Zora Arredondo was equally direct. A self-described “hillbilly from Kentucky talking before all these lawyers,” queried: “Do you know what it is to need to have your crops thinned, or weeded before you can irrigate and you have 1 or 2 days before you get the water? Have you ever seen fruit that was falling on the ground ready to be picked?” Moving on to policy implications:

If you need people and some come to the field wanting to work, you are going to put them to work. The crop is the important thing, not who the man is or where he comes from. Besides, the place to stop the illegal aliens isn’t there in the fields, it is at the port of entry. (...) Do we have the right to ask people if they are citizens? The Department of Labor doesn’t know the answer.

Ms. Arredondo turned to the Members: “Do you? When we do ask people for papers, they tell you, ‘I don’t have to show you my papers.’ How many of us have anything to prove we are U.S. citizens? I don’t.”²⁰⁷

New Regulations Released

On June 29, 1976, final regulations were published. Of 61 substantive comments, items of principal concern were (a) the increased amounts of insurance coverage, (b) the applicability of the amended act to include intrastate, as well as interstate, farm labor activities, and (c) the proposed regulations relating to illegal aliens.²⁰⁸

On insurance coverage, DOL “concluded that the increased amounts ... were necessary to protect workers.” Coverage of intrastate farm workers was, of course, part of the 1974 Act and could not be changed without legislation.²⁰⁹ Concerning employment of aliens, the farm labor contractor was to give evidence of “an affirmative showing of a bona fide inquiry of each prospective employee’s status as a United States citizen or as a person lawfully authorized to work in the United States.” The regulation provides a series of acceptable routes — birth certificate, certificate of naturalization, passport, certain INS forms — through which a determination might be made.²¹⁰

²⁰⁶ Hearings, House, 1975, p. 262.

²⁰⁷ Hearings, House, 1957, pp. 277-279.

²⁰⁸ *Federal Register*, June 1976, p. 26820. See also *Federal Register*, December 8, 1975, pp. 57332-57339, for the proposed regulations.

²⁰⁹ *Federal Register*, June 29, 1976, p. 26820.

²¹⁰ *Federal Register*, June 29, 1976, pp. 26825-26826.

Coverage and Controversy

With the passage of time, some Members of Congress, with others, began to reassess the impact of FLCRA and to urge modification of coverage. At least three areas stand out: custom combining, poultry harvesting, and detasseling of corn.

Custom Combining, Hay Harvesting, and Sheep Shearing. On March 4, 1976, Representative Larry Pressler (R-SD) introduced legislation to exempt from FLCRA “contractors of workers engaged in custom cutting or combine operations” and “contractors of workers engaged in the shearing of sheep.”²¹¹ Roughly comparable legislation was introduced on March 9 with two more bills on March 11.²¹²

“In Nebraska, the major part of our extensive wheat acreage is harvested by ‘custom cutters,’” stated Representative Virginia Smith (R-NE). “These operations do not involve migrant labor in the accepted sense of the definition,” she stated, “... so all of the added precaution against abuses is not necessary.” Smith suggested that these contractors and crew leaders “... should not be required to be registered, or to be certified, or to meet the other requirements for insurance, transportation, and housing.” Seeking exemption, she stated: “Otherwise, we have placed a hardship on the agricultural equivalent of the small businessman and ... have subjected him to more of that over-regulation which strangles and can eventually destroy.”²¹³

Members from other grain growing states also suggested change. James Abourezk (D-SD) introduced a new bill (March 18), observing that the 1974 FLCRA amendments had “inadvertently expanded the scope of the law to cover sheep shearers and custom combine crews.” Senators Lloyd Bentsen (D-TX) and Abourezk had met with Department officials on the issue; Senator Nelson and Representative Ford had written to DOL. These informal efforts, however, were of no avail.²¹⁴

Senator Robert Dole (R-KS) explained the purposes of the exemption. FLCRA was intended “to end abuses against migrant workers and farmers” by farm labor contractors. While custom combining workers are migratory (starting in Texas and moving on to the far north), they were really not migratory in the sense that farm laborers might be. There was “no record of exploiting or abusing” of such employees. As for safety and health requirements, “custom operators are already meeting the standards necessary to protect their employees.” Thus, Senator Dole saw “no need for the additional safety and health requirements” of FLCRA. He objected to “time-consuming paperwork” and to requirements for “higher insurance. FLCRA was intended for farmworkers “from a poverty-stricken environment,” who have “little or

²¹¹ *Congressional Record*, March 4, 1976, p. 5571.

²¹² *Congressional Record*, March 9, 1976, pp. 5955, 5956-5957, and March 11, 1976, p. 6192.

²¹³ *Congressional Record*, March 17, 1976, pp. 6802-6803.

²¹⁴ *Congressional Record*, March 18, 1976, p. 7108. See letter of Representative Ford and Senator Nelson to William Usery, Secretary of Labor, February 23, 1976, reprinted in *Congressional Record*, March 23, 1976, p. 7611.

no knowledge of the English language,” and are moved in “unsafe transportation.” Dole concluded, “There is no similarity in any respect between farm labor contractors and custom combine operators”²¹⁵ — or sheep shearing crews, for that matter.

On March 23, Representative Pressler introduced yet another version of his FLCRA-exemption bill — as did Representative Berkeley Bedell (D-IA).²¹⁶ Bedell had written to the Department on February 23, 1976, and, his request for exemption having been denied, he called DOL and spoke with Herbert Cohen of Wage/Hour. Cohen acknowledged receiving communications from Members involved in drafting the act.

He [Cohen] then related that, despite this testimony, the Department decided to proceed with the implementation of the new requirements because its lawyers felt that the legislative history of the 1974 amendments did not specifically call for the exemption of such crews.²¹⁷

Bedell called the incident “a classic example of the executive branch using its rulemaking authority to usurp the legislative function of the Congress” and of “attempting to legislate by fiat.” Finally, he called upon the Congress “to thwart executive excesses in the rulemaking area” by enacting corrective legislation.²¹⁸

On March 23, as the Senate considered the Rural Development Act of 1972, Senator Dole proposed FLCRA exemption of custom combine, hay harvesting, and sheep shearing workers. Senators Abourezk, Bentsen, and Nelson were supportive; without dissent, the amendment was adopted.²¹⁹ The following day, Representative Tom Foley, a Democrat from Washington state, called up the Rural Development Act with the Dole amendment. Mr. Foley explained that the problem was “technical” — that the issues were neither “labor contractors [n]or migrant laborers” but, rather, “independent contractors who until now have not been subjected” to the FLCRA.²²⁰ The only other speaker was Representative Ford — who announced that, although the subject matter of the bill should have been directed to a subcommittee of the Committee on Education and Labor, he would not object.²²¹

²¹⁵ *Congressional Record*, March 18, 1976, pp. 7108-7110.

²¹⁶ *Congressional Record*, March 23, 1976, pp. 7719 and 7720.

²¹⁷ *Congressional Record*, March 23, 1976, p. 7689.

²¹⁸ *Ibid.* Representative Bedell explained: “The original act exempted crews employing less than 10 people from its registration requirements. However, in 1974, the statute was amended to include any group which ‘recruits or transports’ more than one employee. This numerical change technically brought small custom combiners and sheep shearers under the law despite the fact that there is no specific reference to these groups in the legislative history of the act.”

²¹⁹ *Congressional Record*, March 23, 1976, pp. 7608-7612.

²²⁰ *Congressional Record*, March 24, 1976, pp. 7785-7786.

²²¹ *Congressional Record*, March 24, 1976, p. 7786.

On April 5, 1976, the Rural Development Act (with the Dole amendment) was signed into law (P.L. 94-259).²²²

Poultry Services. During the spring of 1976, a seemingly uncontroversial bill was introduced dealing with internal Department of Agriculture administration. The measure was passed by the House²²³ and was forwarded to the Senate. There, it was reported on September 30, 1976, considered later that same day, and passed with an amendment.²²⁴

Referred back to the House, Representative Tom Foley presented the measure and the clerk read the title of the bill and the Senate amendments. At the conclusion, a paragraph had been added amending FLCRA.

(9) any custom poultry harvesting, breeding, debeaking, sexing, or health service operation, providing the employees of the operation are not regularly required to be away from their domicile other than during their normal working hours.

Representative Edward Madigan (R-IL) queried: “I wonder if the gentleman ... could explain the one amendment the Senate has placed on the bill.” Foley responded: “...the Senate has placed on the bill a provision relating to the Farm Labor Contractor Registration Act.” William Wampler (R-VA) added that the FLCRA amendment was the only change in the House-passed bill.²²⁵

The bill was approved, sent to the White House and signed into law on October 1976 (P.L. 94-561).

To Detassel and Rogue Hybrid Seed Corn. During hearings early in 1978, Representative Virginia Smith complained about the “narrowminded and ridiculous interpretations” of the “over-zealous bureaucrats at the Department of Labor who don’t have anything better to do than harass our businessmen.” Smith went on to discuss actions that “endanger yet another of the fragile freedoms that still exist for individuals in this country.”²²⁶ She observed that “thousands of farmers” have “come to Washington during the past few weeks in search of help to raise farm prices.” To raise farm income, she seemed to suggest, farmers should be permitted to pay less to the “several thousand high school students” who are hired each year “to detassel seed corn, thin out test plots or rogue sorghum.” She stated,

... in no way can the salary from this job be considered as their primary means of support. In many cases, it is more of a social event than a job. It also provides a

²²² *Congressional Record*, April 6, 1976, p. 9554.

²²³ *Congressional Record*, July 26, 1976, pp. 23735-23741. See H.R. 10133 (94th Congress).

²²⁴ *Congressional Record*, September 30, 1976, pp. 33815-33816, 33866-33867.

²²⁵ *Congressional Record*, October 1, 1976, pp. 35170-35171.

²²⁶ U.S. Congress, House, Committee on Education and Labor, Subcommittee on Economic Opportunity. *Farm Labor Contractor Registration Act*, Hearings, 95th Cong., 2nd Sess., February 22-23, 1978, pp. 35-36. (Cited hereafter as Hearings, House, 1978.)

good opportunity for a coach, high school teacher, or college student to pick up some extra money and for the students to keep in touch during part of the summer.

Ms. Smith stated, “I believe that unless this law is changed to stop the action proposed by the Department of Labor, we face a serious challenge to our freedom.”²²⁷

On April 11, Representative James Leach (R-IA) introduced H.Res. 1124 expressing the sense of the House “that certain individuals employed in the detasseling of hybrid seed corn should not be considered to be migrant workers” for purposes of FLCRA.²²⁸ Shortly thereafter, a bill was introduced by Leach that would have amended FLCRA to deal with the same issue.²²⁹ No hearings were held: in legislative terms, the issue seemed to disappear. Momentum, however, was building.

In September, the “Perishable Agricultural Commodities Act” (PACA) was under consideration. Senator Richard Clark (D-IA) proposed an amendment to FLCRA to correct “an example of government out of control.” The amendment would exempt “a portion of the seed industry” from FLCRA registration. “These are young people [with about 280,000 young persons who work seasonally] ranging in age from 14 to 16 years old who work for an average of 10 days to 2 weeks each summer,” Clark stated, and who “detassel seed corn, eliminate ‘rogue’ plants, and perform other functions, related to seed production.” The employees are from the local area, residing within a 30 to 40 mile radius, and who return to their home each evening, he suggested. These people are “clearly not migrants by any reasonable definition.”²³⁰ His constituents “are very much up in arms about this,” he stated, “and ... I do not blame them.”²³¹

It had only been through the past year, it was stated, that DOL had sought to enforce FLCRA against the seed corn industry.²³² On February 23, 1978, Senator

²²⁷ Hearings, House, 1978, pp. 36-37. Rep. Charles Grassley (R-IA), p. 49, questioned the “loss of an important source of youth employment.” Rep. Charles Thone (R-NE), p. 43, argued that “such stupid regulations” might force companies to turn “to mechanical methods of detasseling and then what would this do to our employment problems?” In a letter, February 28, 1978, pp. 40-41, later submitted for the record, Smith wrote to Secretary Marshall and explained: “We have thousands and thousands of workers who will be affected by this matter and are waiting to see if their government has the capacity to exercise some restraint in its authority, and some common sense in its actions.” See testimony of Representative David Stockman (R-MI), *ibid.*, pp. 45-48, and comments of Richard O’Connell, National Council of Farmer Cooperatives, Hearings, Senate, April 1963, pp. 199-200.

²²⁸ *Congressional Record*, April 11, 1978, p. 9697.

²²⁹ *Congressional Record*, April 25, 1978, p. 11363.

²³⁰ *Congressional Record*, September 8, 1978, pp. 28565-28566. Senator Richard Lugar (R-IN) stated, p. 28568: “Activities exempted include detasseling but also include activities such as roguing and hand pollination which are typically performed by young people.”

²³¹ *Congressional Record*, September 8, 1978, p. 28566.

²³² See comments of Senator Williams (D-NJ), September 8, 1978, *Congressional Record*,
(continued...)

Clark had addressed a letter to Secretary Marshall in which the issue was discussed and followed that up with a phone call to Marshall and a personal visit with Assistant Secretary Daniel Elisburg, but DOL “refused to change its position.”²³³ Senator Richard Lugar (R-IN) similarly wrote to Marshall in late July, but without apparent impact.²³⁴ Now, with no objection having been heard, an amendment was added to PACA and a quarter-plus million workers were exempted from FLCRA.

The Clark amendment was accepted and approved by the Congress.²³⁵ On November 1, 1978, the root bill was signed into law (P.L. 95-562).

The Lessening Coverage of FLCRA

Various segments of the agricultural industry had been eliminated from FLCRA coverage as, it was argued, the wrong people were brought under the act’s purview. Senator David Boren (D-OK) would later observe: “We could go through the entire food and fiber industry, sector by sector, adopting amendments to clarify the act.” He suggested that a wiser course would be to “enact legislation to clarify the act completely once and for all.”²³⁶

Hearings in the House: 1978

In mid-1977, Representative McFall wrote once more to Secretary Marshall concerning registration under FLCRA. McFall stated that farmers in his district (part of the San Joaquin Valley) would be forced to register as farm labor contractors under the definition of *personally*.²³⁷ Marshall’s response was less than some Members had hoped, providing the context for the 1978 hearings.²³⁸

Starting from the McFall/Marshall correspondence, the hearings explored a variety of FLCRA definitions. Most critics followed the lead of Perry Ellsworth (National Council of Agricultural Employers). He did not seek to diminish worker protections, but, that having been said, he continued to argue against the “untold

²³² (...continued)
pp. 28568-28569, about the seed corn industry.

²³³ *Congressional Record*, September 8, 1978, p. 28566.

²³⁴ *Congressional Record*, September 8, 1978, p. 28568.

²³⁵ *Congressional Record*, October 13, 1978, pp. 36707-36709, 37113-37114.

²³⁶ *Congressional Record*, June 25, 1978, p. 16748.

²³⁷ See John McFall to Ray Marshall, June 30, 1977, reprinted in U.S. Congress, House, Committee on Education and Labor, Subcommittee on Economic Opportunity, *Farm Labor Contractor Act*, Hearings, 95th Cong., 2nd Sess., February 22-23, 1978, pp. 13-14. (Cited hereafter as Hearings, House, 1978.) Others joining McFall in his inquiry to Marshall were Robert Leggett, John Moss, B. F. Sisk, and Harold Johnson, all Democrats from California.

²³⁸ Hearings, House, 1978, pp. 14-16.

harassment” of farmers and others — who were “by no stretch of the imagination crew leaders.”²³⁹ Many argued for the original intent of Congress.²⁴⁰

Day haul workers raised broader questions. Representative William Hefner (D-NC) acknowledged that such workers had not been “inadvertently included under the law.” Still, he urged the Members to “reexamine those intentions” and to exempt workers living within a 75-mile radius of agricultural operations. “In North Carolina,” he stated, “day haul workers are almost always, local, permanent residents of the area in which they work.” They do not necessarily go through a labor contractor and, when they do, “... it is more a matter of convenience rather than economic necessity.” He stated: “Day haul workers *are not migrant workers, as the term is commonly understood....* And day haul operators, who transport these workers ... are not crew leaders in the usual sense of this term.”²⁴¹ (Italics added.)

But, if not migratory, such workers may still have been subject to transportation provided by growers or contractors. “The gist of this problem seems to be in the insurance coverage required of anyone defined by the law as a farm labor contractor, whether he transports local day labor or true migrant labor,” Hefner stated. No one suggests that day haul workers go unprotected, he stated, but they still have under state insurance laws requirements similar to “all other workers in the State.”²⁴²

The issue was taken up by Representative B. F. Sisk (D-CA) in a letter to DOL. Elisburg replied that state coverage varied “in accordance with the mandate of the particular state legislation.” Such laws are work-related and apply only where “the passengers are clearly ‘employees’ of the insured employer.” Dependents of migrant workers are not covered, Elisburg continued. “In addition, liability under State workers compensation plans would not extend to the times migrant workers are being transported from one employer to a prospective employer.”²⁴³

These several issues were joined with respect to shared worker arrangements. Representative David Stockman (R-MI) proposed that FLCRA should not apply to farmers who shared the services of agricultural workers and who receive “no monetary consideration” other than actual expenses. “The potential for abuse,” Representative Stockman stated, “is in my view almost nil.”²⁴⁴ Elisburg responded that, “as an enforcement policy,” DOL “would prefer to put our resources elsewhere” rather than

²³⁹ Hearings, House, 1978, p. 78.

²⁴⁰ Hearings, House, 1978, pp. 13, 42-43, and 48.

²⁴¹ Hearings, House, 1978, pp. 21-28. Current radius was 25 miles.

²⁴² Hearings, House, 1978, p. 23.

²⁴³ Hearings, House, 1978, p. 8. The correspondence between Rep. Sisk and Elisburg appears on pages 7-12. See also comments by Rep. McFall on this issue, pp. 18-19.

²⁴⁴ Hearings, House, 1978, pp. 45-47. When introducing FLCRA legislation, Stockman referred to “predatory bureaucrats” that have turned the law into “a weapon against the farmer.” He explained (*Congressional Record*, June 20, 1977, p. 19982): “In the Department of Labor’s eyes, the expectation that the laborers would return to his farm became ‘valuable consideration’ to the farmer entering into a casual agreement with his neighbor. This play upon words turned the farmers, he said, into ‘farm labor contractors.’”

come after small farmers who, on a local basis, share workers.²⁴⁵ The response did not satisfy Stockman, and Representative William Goodling (R-PA) suggested: “He [Elisburg] is saying if we had more resources we would get after them, too....” But Elisburg stated, “... large or small, if we found abuses of the work force we would go wherever they are.”²⁴⁶

Some urged that legislation exempt “nonprofit charitable organizations,” “public or nonprofit private educational institutions,” and “bona fide nonprofit agricultural cooperatives engaged in labor contracting for their own members.” Elisburg suggested that such proposals were something of a ruse — and one that DOL would oppose — that they would “substantially narrow the act’s coverage and would deny its protection to large numbers of agricultural workers.” Elisburg stated,

We have been told by those who support this exemption that such organizations are fixed and have assets which would be reachable in a law suit by their employees. I think that we all have to recognize, generally, agricultural workers do not have the financial resources to independently assert their rights against such organizations, and we question why this economically disadvantaged group should be placed in this position.

Further, Elisburg stated that “... employment by a nonprofit organization has nothing to do with a need to protect agricultural workers under FLCRA, particularly if the nonprofit venture consists of profit-making organizations.”²⁴⁷

Concerns Grow

“These individuals,” registered under FLCRA, are “not farmers; they were ‘agents’ who arranged to provide migrant labor to farmers,” Representative Stockman affirmed. Many of them have “long criminal records. They stole from the workers, they stole from the farmers, and they needlessly endangered the health and safety of migrant workers.”²⁴⁸

Yet, it was with these same, perhaps unscrupulous, middlemen that farmers dealt. The contractors, some alleged, provided the services of low-wage and, often low-skilled workers: some Native Americans, some foreign-born — and some ineligible to work in the United States. They broke strikes, some said, and prevented domestic workers from organizing. Further, critics suggested that they provided cover for their farmer/business partners.

DOL, some urged, had “consistently misinterpreted” the rules governing such contractors. Though he believed “that agricultural workers must be protected from abuse by unethical crew leaders” (a consistent sub-theme of FLCRA critics), Representative Leon Panetta (D-CA) protested that “family farmers” were “forced to

²⁴⁵ Hearings, House, 1978, p. 52.

²⁴⁶ Hearings, House, 1978, p. 52.

²⁴⁷ Hearings, House, 1978, pp. 54-55.

²⁴⁸ *Congressional Record*, June 20, 1977, p. 19982.

comply with complicated registration forms, maintain detailed records, and are subject to a variety of investigations and inspections.” Faced with “growing anger” from the farming community, Representative Panetta proposed a substantial restructuring of FLCRA.²⁴⁹

Relations with the Department of Labor. Under date of October 24, 1979, fifty-two Senators [led by J. Bennett Johnston (D-LA)] wrote to Secretary Marshall expressing “our increasing concern” over DOL’s management of FLCRA.

The Johnston letter explained the purposes of the act (as the signers perceived them) and observed that “farmers and certain other agricultural employers” are being required to register — “a requirement we believe goes beyond any reasonable interpretation of the law.” DOL’s actions, “apparently based on its own extremely narrow interpretation” of the act, are “completely contrary to Congressional intent,” and impose “an undue penalty and economic burden on those specifically exempted” by Congress. “... these actions have resulted in a misdirection of the Department’s limited resources at the expense of those the law was intended to protect.”²⁵⁰

Marshall’s response, dated November 26, 1979, offered few accommodations. He agreed that enforcement of the act “be targeted on repeat and serious violations which jeopardize labor standards....” Marshall observed that the first ten years “under the Act” have not ended abuse. Thus, the 1974 amendments were enacted “to extend coverage and improve enforcement.”

The Secretary acknowledged that a farmer (or other agriculturally-related person) would be exempt if he or she “‘personally’ recruited migrant labor for their own operation” and that “any full-time or regular employees of any incorporated farm or agricultural business” might also be exempt if the employee “only performed farm labor contractor-type activities on an ‘incidental’ basis.” On both issues, DOL had been consistent.

We believe ... that FLCRA applies where there is a crewleader hiring or transporting workers or where there are company employees substantially engaged in activities generally performed by crewleaders. We also believe that it is critical to enforce the Act in a way which discourages evasion of its provisions — *to deter farm labor contractors from being placed on payrolls and appearing to assume the status of full-time or regular employees.* This enforcement approach is consistent with both the letter and spirit of the Act. (Italics added.)

The Secretary conceded that “the term ‘incidental’” may not have been defined “as specifically as possible.” He therefore stated that, for the future, such a person would be one “who does not spend more than 20 percent of his time in farm labor contracting activities and performs that activity solely for his employer.” These changes will

²⁴⁹ *Congressional Record*, May 21, 1979, p. 11996. The Panetta proposal was only one of a number of FLCRA-related bills that surfaced during the late 1970s and early 1980s.

²⁵⁰ See J. Bennett Johnston, with 51 other Members of the Senate, to F. Ray Marshall, October 24, 1979, reprinted in the *Congressional Record*, November 14, 1979, pp. 32322-32323.

provide “clarity [to] our enforcement position while at the same time preserving important protections for farm workers under the Act.”²⁵¹

The Senators were not entirely pleased with Marshall’s letter. On December 5, 1979, Senator Johnston [with Russell Long (D-LA)] concurred with Marshall’s emphasis on ““traditional farm labor contractors”” — and requested “a copy of instructions being prepared for enforcement officers.” But, they disagreed on the impact of such changes.

First, in order to know if an employee is engaged on more than an incidental basis, he must be engaged less than 20 percent of some time period. Logically, the time period should be his total manhours of employment. The failure of your letter to specify a time period leaves open the possibility that ‘20 percent of his time’ means 20 percent of any work week, any work day, or any pay period. Any one of these possible meanings would render the 20 percent standard ineffective as far as strengthening the exemption provided by Congress.

Second, your letter is not specific about the meaning of farm labor contracting activities. As we understand the Department’s interpretation of the Act, supervision is considered to be a farm labor contracting activity. Since your letter does not clarify this, the new definition of ‘incidental’ again becomes less significant.

Third, your letter does not indicate what regulatory standing the new definition of ‘incidental’ would have. The Department’s intent should have been set forth in formal regulations, subject to public comment. Similarly, the interpretative regulations for the Act itself are long overdue.²⁵²

Through the last year and a half that Marshall was in office, such correspondence took on a regular pattern as first one and then another Member of Congress became distressed with the provisions of FLCRA.

The Boren Amendment and the Panetta Bill (1980). During consideration of the Child Nutrition Amendments of 1980, Senator Boren proposed an amendment “to clarify the provisions” of FLCRA. “All of us,” he commenced, “... want to see an end to any abuse of migrant farm workers. But, at the same time,” he affirmed, “We very strongly want to assure that an additional regulatory burden is not placed upon the farmers, the farm co-ops, and others involving agriculture across the country.”²⁵³

Senator Boren was critical of DOL administration of FLCRA. It had moved, he stated, “far from the intent of the Congress” and of those who spoke on the 1963 legislation. The Department has been “subjecting farmers and other agricultural employers, including their employees, to civil and criminal penalties for failing to

²⁵¹ Labor Secretary Marshall to J. Bennett Johnston (with others), *Congressional Record*, December 18, 1979, pp. 36850-36851.

²⁵² Senators J. Bennett Johnston and Russell B. Long to Labor Secretary Marshall, reprinted in *Congressional Record*, July 24, 1980, p. 19561.

²⁵³ *Congressional Record*, July 24, 1980, p. 19557.

comply with” the requirements of the act. Senator Boren listed organizations that had “joined in support” of his amendment. He called upon DOL “to quit harassing the farmers” and “to curb ... unnecessary abuse of authority by the bureaucracy.”²⁵⁴

The Senate was split. Senator Gaylord Nelson noted that the bill was essentially similar to S. 2875, introduced with 39 cosponsors a month earlier. Nelson urged that Boren, having made his point, would “be willing to withdraw his amendment” and to wait for hearings that had already been scheduled by his (Nelson’s) Committee. “As the Senator knows, this law is within the exclusive jurisdiction of the Labor and Human Resources Committee.” There was yet another option: i.e., S. 2789, introduced by Senator Javits. Senator Nelson agreed that there have been “serious problems” since enactment of the 1974 amendments. “Numerous lawsuits have been filed, and both agricultural employers as well as farm workers have expressed dissatisfaction” with DOL’s administration of this law — “and justifiably so, in my opinion.” Senator Nelson noted that he had personally written to the Secretary “expressing my concern.” But, he also affirmed that the proper place for consideration of “corrective legislation” was the Labor and Human Resources Committee.²⁵⁵

The Boren amendment, however, was not withdrawn and, on a vote of 57 yeas to 37 nays, the measure was passed.²⁵⁶

The House was similarly divided on the issue. Representative Panetta, who had earlier introduced general reform of FLCRA, was now joined by Representatives Foley (of Washington State, chair of the Agriculture Committee) and William Goodling of the Committee on Education and Labor, with numerous others.²⁵⁷ Panetta affirmed,

The Farm Labor Contractor Registration Act was passed in 1963 to protect migrant farmworkers from abuse by unscrupulous crew leaders. This act was also intended to protect farmers and other agricultural employers from the

²⁵⁴ *Congressional Record*, July 24, 1980, pp. 19557-19558. Among groups backing his amendment, Senator Boren listed: “The American Soybean Association; the American Farm Bureau Federation, with some 3 million farmers as members; the American Frozen Food Institute; the American Mushroom Institute; the American Seed Trade Association; the American Sod Producers Association; the American Sugar Beet Growers Association; the Florida Citrus Processors Association; the Florida Sugar Cane League; the International Apple Institute; the National Broiler Council; the National Institute of Wheat Growers; the National Cattleman’s Association; the National Cotton Council; the National Council of Agricultural Employers; the National Council of Farmer Cooperatives; the National Food Processors Association; the National Grange, with more than 500,000 members, made up of farmers; the National Meat Association; the National Peach Council; the Pennsylvania Food Processors Association; the Rio Grande Valley Sugar Growers Cooperative; the Society of American Florists; the United Fresh Fruit and Vegetable Association; and the Western Growers Association.”

²⁵⁵ *Congressional Record*, July 24, 1980, pp. 19558-19564.

²⁵⁶ *Congressional Record*, July 24, 1980, p. 19574.

²⁵⁷ *Congressional Record*, December 18, 1979, p. 36851.

irresponsible action of some crew leaders. I firmly believe that the act should continue to serve that purpose.²⁵⁸

But it may need a few changes. “Unfortunately, in spite of the request of a majority of the Senate, the problem has not been resolved,” Representative Panetta observed, noting “misinterpretations by the Department,” “ambiguities in the act,” and “a particular interpretation of its statutory authority.”²⁵⁹ Representative Goodling (with John Ashbrook (R-OH), ranking Member on the Committee on Education and Labor) offered an amendment “to clarify the act.” DOL, Goodling stated, has engaged in “unnecessary and unproductive harassment” of many Pennsylvania farmers.²⁶⁰

In early September, Representative Goodling again addressed the House. His amendments, he said, “except for technical improvements,” basically parallel the Panetta and Boren proposals — which he urged his colleagues to support.²⁶¹ Goodling was not alone: “over 100 Members of the House” (including Panetta) endorsed the Boren option.²⁶² Representative Ford did not. “I strongly oppose the Boren amendment,” he stated. “... it would effectively repeal the FLCRA, the only Federal legislation that protects migrant farmworkers against the most common abuses they endure in their hiring, transportation, housing, and employment in agricultural labor.” Ford placed in the *Record* a letter from Ray Marshall in which he, too, expressed “my deep concern and strong opposition” to the Boren amendment.²⁶³

The Boren amendment, however, was caught up in parliamentary procedures and migrated to a series of proposals. In a report for 1980, the *CQ Almanac* noted: “An amendment restricting coverage of a 1963 law aimed at preventing exploitation of migrant farm workers was added to a continuing resolution (H.J.Res. 637) but later dropped.”²⁶⁴ For the present, FLCRA remained unchanged.

The Boren Bill and the Panetta Bill (1981). In the 97th Congress, critics of the Farm Labor Contractor Registration Act returned to the fray. On April 8, 1981, Senator Boren introduced S. 922, a measure designed “to provide for the proper administration and enforcement of” FLCRA. Conceding that one problem has been the “somewhat vague and ambiguous” language that had “resulted in gross misinterpretation,” Boren’s proposal sought “to clarify” the meaning of the act.²⁶⁵

²⁵⁸ *Congressional Record*, July 24, 1980, p. 19456.

²⁵⁹ *Congressional Record*, July 24, 1980, p. 19457.

²⁶⁰ *Congressional Record*, August 26, 1980, pp. 23411-23413.

²⁶¹ *Congressional Record*, September 9, 1980, pp. 28405-28406.

²⁶² *Congressional Record*, September 9, 1980, pp. 24805-24807.

²⁶³ *Congressional Record*, September 10, 1980, pp. 25102-25103.

²⁶⁴ *Congressional Quarterly Almanac* (1980), Washington: Congressional Quarterly Inc., 1981, p. 453.

²⁶⁵ *Congressional Record*, April 8, 1981, p. 6941. As a result of the 1980 election, Ray Marshall was replaced as Labor Secretary by Raymond J. Donovan.

Senator Chiles, co-sponsor of the Boren bill, having “stressed my support” for the purposes of the act, stated that FLCRA’s “vague language and convoluted format” allows DOL to “subvert ... the intent of Congress” and to take advantage “of these procedural defects in its unrelenting efforts to envelop farmers, packers, processors, and their employees within the regulatory scheme of the act.” The result has been “widespread harassment” of agricultural interests with “little discernable effect” with respect to crew leaders. Farmers “face enough problems in today’s economy without this one.”²⁶⁶

On May 20, 1981, Representative Panetta introduced H.R. 3636, similar in some respects to his bill from the 96th Congress.²⁶⁷ FLCRA remains, he stated, “a significant problem of unnecessary and burdensome regulation” which has “grown as more and more farmers and other fixed-base agricultural employers” have found that they are required to comply with its terms.²⁶⁸

In the interim between introduction of the Boren bill and Panetta bill, however, there had been a discernible change. The Education and Labor Committee, Representative Panetta announced, “is contemplating hearings” on the issue this year, and there is “no doubt in my mind that we can work out the problems that exist with the act.” Panetta wrote into his bill several proposals which may have been viewed as the start of compromise. *First:* He proposed to eliminate the “distinction between ‘full-time or regular’” and to make clear the distinction between “a bona fide employee and an independent contractor.” *Second:* He proposed to allow the Secretary some discretion in causing “a cooperative to register,” depending upon the purposes of the co-operative arrangement. *Third:* He proposed a modification in the definition of “day-haul worker” with the stated intention of securing their protection.²⁶⁹

“It is in this constructive spirit,” Panetta affirmed, “that I look forward to working with my colleagues on the Committee on Education and Labor, and particularly with my good friend from California (Mr. Miller), who is chairman of the Subcommittee on Labor Standards.”²⁷⁰ But, negotiations would be long and intense.

²⁶⁶ *Congressional Record*, April 8, 1981, p. 6943.

²⁶⁷ In the 96th Congress, the Panetta bill carried the names of 160 Members. See *Congressional Record*, May 20, 1981, p. 10353.

²⁶⁸ *Congressional Record*, May 20, 1991, p. 10353.

²⁶⁹ *Congressional Record*, May 20, 1981, pp. 10353-10354.

²⁷⁰ *Congressional Record*, May 20, 1981, p. 10354. Both the Boren and Panetta bills were superceded by the Administration’s bill, introduced by request by Representative Miller.

The Miller Hearings and Their Aftermath (1982)

From the spring of 1981 and into the fall of 1982, the several parties at interest met and reviewed proposals for revision of FLCRA. From all sides, there were serious concerns “with the existing law that they felt needed to be addressed,” according to Representative George Miller. Negotiations, he stated, “were long and, at times, frustrating.”²⁷¹ Finally, on September 1, 1982, Secretary of Labor Raymond Donovan sent to Congress a bill entitled the “Migrant and Seasonal Agricultural Worker Protection Act which was referred to the Committee on Education and Labor.”²⁷²

The Hearing. On September 14, 1982, Miller called together for a single hearing the Subcommittee on Labor Standards. The bill at issue was H.R. 7102, an Administration proposal but with more generalized backing. Robert B. Collyer, Deputy Under Secretary of Labor, was the first witness. Reviewing the recent history of the Administration’s bill, Collyer affirmed,

This cooperative effort has now resulted in a consensus bill, endorsed by the AFL-CIO, the migrant legal action program, and by major agricultural employer organizations, such as the American Farm Bureau Federation, the National Food Processors Association, and the National Council of Agricultural Employers.

While none of these groups believes the bill to be ideal from its individual standpoint, there is important agreement that the bill materially improves the law.²⁷³

The 1974 FLCRA amendments, Collyer explained, had resulted in “a great deal of litigation.”²⁷⁴ The essence of the new bill was compromise.

Representatives from industry and the AFL-CIO endorsed the changes in policy included within the new bill.²⁷⁵ Representatives of farmworkers were more skeptical, but acquiesced.²⁷⁶ As the hearing closed, Representative Miller thanked the witnesses

²⁷¹ U.S. Congress. House. Subcommittee on Labor Standards, Committee on Education and Labor, *Hearings on the Migrant and Seasonal Agricultural Worker Protection Act*, September 14, 1982, p. 1. (Cited hereafter as *Hearings, House, 1982.*)

²⁷² U.S. Congress, House, Committee on Education and Labor, *Migrant and Seasonal Agricultural Worker Protection Act*, H.Rept. 97-885, September 28, 1982, p. 4. (Cited hereafter as *House, Committee Report 97-885, September 28, 1982.*)

²⁷³ *Hearings, House, 1982*, p. 43.

²⁷⁴ *Hearings, House, 1982*, p. 44. Collyer, p.50, proceeded to thank “all those persons and organizations who participated in the cooperative effort over the past 18 months to develop this legislation.”

²⁷⁵ See testimony of Jay Power, Legislative Representative, AFL-CIO, and of Perry Ellsworth, National Council of Agricultural Employers, *Hearings, House, 1982*, pp. 54-60.

²⁷⁶ See testimony of William Beardall, staff attorney, Texas Rural Legal Aid, Marc Schacht of the Farmworker Justice Fund, and Garry B. Bryant, an attorney from Tucson with several

(continued...)

for their support. “I take a great deal of pride in seeing that I am not the victim of testimony 5 years down the road, that it didn’t work.” Miller stated: “... I do recognize that a good number of your associates and clients are very skeptical about entering into this agreement.” Again: “I don’t know if this law is perfect or not. I think it’s an improvement, and I gather from your testimony that you believe it is an improvement.”²⁷⁷

Consideration and Floor Action. “The failure of current law to achieve its goal of fairness and equity for migrant workers,” the House report stated, “combined with employer objections as to their treatment under the Act” gave the negotiations momentum and “made the attainment of legislative change obligatory.”²⁷⁸ FLCRA as amended, had “failed to reverse the historical pattern of abuse and exploitation of migrant and seasonal farm workers” and, as a result, argued for a “new approach.”²⁷⁹ The Committee on Education and Labor reported the bill on September 28, 1982.²⁸⁰

On September 29, Representative Miller urged that the rules be suspended and H.R. 7102 be passed. Recounting the “months of negotiations and compromise,” he noted the certainty that the legislation might bring.²⁸¹ John Erlenborn (R-IL), a co-sponsor, recalled that “for over 18 months the interested parties, including staff from the House and Senate majority and minority, have been engaged in negotiations” to work out a successor to FLCRA. Representative Panetta affirmed that the bill “eliminates undue red-tape and harassment for farmers ... while at the same time provides real protection to migrant and seasonal agricultural workers.” Representative Goodling, for his part, cited the “unwarranted and overzealous tactics of the wage and hour division” but, at the same time, he acknowledged that the “long negotiations between all parties” had made the new bill possible. Finally, the debate closed. The rules were suspended: the bill was passed — on a voice vote.²⁸²

In the Senate, the bill was held at the desk (not referred to a committee)²⁸³ until on December 19, 1982, Senator Howard Baker (R-TN) called up the measure for floor action. Senator Orrin Hatch (R-UH) remarked that the measure, now passed by the House, was “identical to the measure” that he had introduced in the Senate (S. 2930) — with Senators Boren and Edward Kennedy (D-Ma), among others, as co-

²⁷⁶ (...continued)

years representing agricultural employees, Hearings, House, 1982, pp. 60-173.

²⁷⁷ Hearings, House, 1982, p. 174. See also Representative Panetta’s statement, September 14, 1982, p. 23441. Panetta was a co-sponsor of the legislation.

²⁷⁸ House, Committee Report 97-885, September 28, 1982, p. 1.

²⁷⁹ House, Committee Report 97-885, September 28, 1982, p. 3.

²⁸⁰ *Congressional Record*, September 28, 1982, p. 25609.

²⁸¹ *Congressional Record*, September 29, 1982, p. 25609.

²⁸² *Congressional Record*, September 29, 1982, pp. 26008-26010.

²⁸³ *Congressional Record*, September 29, 1982, p. 25866.

sponsors. Senator Hatch reviewed the history of FLCRA and presented an analysis of H.R. 7102. As in the House, the bill was adopted by a voice vote.²⁸⁴

On January 14, 1983, H.R. 7102 was signed into law by President Ronald Reagan (P.L. 97-470). The new law “will result in substantially improved protection for migrant and seasonal agricultural workers,” he said, “many of whom are disadvantaged minorities.” Conversely: “We will continue our efforts to both reduce unnecessary regulatory burdens and at the same time, protect essential employment standards in America’s workplaces.”²⁸⁵

Part IV: A New Statute Emerges (1983 ff.)

With enactment of P.L. 97-470, FLCRA disappeared. In its place was a new statute: the Migrant and Seasonal Agricultural Workers Protection Act (MSPA). For more than twenty years, MSPA has been generally (though not entirely) free from controversy.

The Structure and Provisions of the New Law

MSPA has remained largely unchanged since its enactment.²⁸⁶ Although its terms are spelled out in detail adapted to specific farmworker employment situations, its structure is relatively simple.

The introduction states the purposes of the act: i.e., to require that farm labor contractors register with the Secretary of Labor and to assure “necessary protections for migrant and seasonal agricultural workers, agricultural associations, and agricultural employers.” It then proceeds to a list of definitions used: *inter alia*, “agricultural association,” “agricultural employer,” “agricultural employment,” “day-haul operation,” “employ,” “farm labor contracting activity,” “farm labor contractor,” “migrant agricultural worker,” “person,” and “seasonal agricultural worker.”²⁸⁷

The act includes exemptions — i.e., some family farms and related agricultural industries. Also exempt are labor organizations, any “nonprofit charitable organization or public or private nonprofit educational institution,” and any person “engaged in any farm labor contracting activity solely within a twenty-five mile interstate radius of such person’s permanent place of residence and for not more than thirteen weeks per year.” Custom combining, hay harvesting, or sheep shearing operations are exempt, as are persons engaged in custom poultry harvesting, breeding,

²⁸⁴ *Congressional Record*, December 19, 1982, pp. 32458-32466.

²⁸⁵ Public Papers of the President of the United States. *Ronald Reagan, 1983. Book 1, January 1 to July 1, 1983*. Washington, U.S. Government Printing Office, 1984, p. 47.

²⁸⁶ See the *Adams Fruit* case, discussed below.

²⁸⁷ All language, where in quotation marks, in this section is taken from P.L. 97-470. However, some variation may result from codification and from subsequent amendments that impinge upon the act. This is a summary. The reader may want to consult the current text of MSPA.

debeaking, etc., where workers are not required to be away from their permanent place of residence overnight. Persons are exempt when their “principal occupation ... is not agricultural employment” and who provide “full-time students” to detassel corn, etc., when such students are not required to be away from their permanent place of residence overnight. Any “common carrier” who would be a farm labor contractor solely because the carrier is engaged in transporting migrant or seasonal agricultural workers is exempt.

Title I explains the conditions under which farm labor contractors are required to register and the process of registration. The registrant must be of good character (specified in the act), with right to appeal if he or she is denied registration. A certificate of registration may not be transferred or assigned and will normally cover a twelve-month period. Any change of address (or other material variation in registration) must be made known to the Secretary. Finally, the farm labor contractor is restricted from hiring aliens not authorized to work in the United States.

(a) No farm labor contractor shall recruit, hire, employ, or use, with knowledge, the services of any individual who is an alien not lawfully admitted for permanent residence or who has not been authorized by the Attorney General to accept employment.

“(b) A farm labor contractor shall be considered to have complied with subsection (a) if the farm labor contractor demonstrates that the farm labor contractor relied in good faith on documentation prescribed by the Secretary, and the farm labor contractor had no reason to believe the individual was an alien referred to in subsection (a).²⁸⁸”

Title II deals with *migrant agricultural workers*.²⁸⁹ Each “farm labor contractor, agricultural employer, and agricultural association” who employs a migrant agricultural worker shall disclose to the worker at the time of his or her recruitment: the place of employment, the wage rates to be paid, the crops and kinds of activities on which the worker may be employed, the period of employment, matters with respect to housing, transportation, and “any other employee benefit to be provided, if any,” and “any costs to be charged for each of them.” The existence “of any strike or other concerted work stoppage, slowdown, or interruption of operations by employees at the place of employment” must be disclosed. Any commission arrangements must also be disclosed. At each place of employment, in a conspicuous place, a form from the Secretary “setting forth the rights and protections afforded” to such migrant

²⁸⁸ This section was subsequently repealed and its substance was moved to Title VIII, Aliens and Nationality, as part of the general restructuring under the Immigration Reform and Control Act of 1986.

²⁸⁹ In the section on definitions, discussed above, it is stated: “(8)(A) Except as provided in subparagraph (B), the term ‘migrant agricultural worker’ means an individual who is employed in agricultural employment of a seasonal or other temporary nature, and who is required to be absent overnight from his permanent place of residence. (B) The term ‘migrant agricultural worker’ does not include — (i) any immediate family member of an agricultural employer or a farm labor contractor; or (ii) any temporary nonimmigrant alien who is authorized to work in agricultural employment in the United States under sections 101(a)(15)(H)(ii) and 214(c) of the Immigration and Nationality Act.”

workers must be posted. Where housing is provided, the terms and conditions under which such housing is made available shall be provided to the migrant worker.

Each “farm labor contractor, agricultural employer, and agricultural association” who employs migrant workers shall keep specified records of his or her employment — and shall provide a copy to the migrant. The basic information (terms and conditions of employment) shall be provided in English “or, as necessary and reasonable, in Spanish or other language common to migrant agricultural workers who are not fluent or literate in English.”²⁹⁰ No company store arrangement is permissible.

Title III deals with *seasonal agricultural worker* protections.²⁹¹ Each “farm labor contractor, agricultural employer, and agricultural association” who recruits seasonal agricultural workers shall ascertain “and, upon request, disclose in writing,” the following: the place of employment, the wage rates to be paid, the crops and kinds of activities on which the worker may be employed, the period of employment, and the costs and terms of transportation. If there is a “strike or other concerted work stoppage, slowdown, or interruption of operations,” such information shall be made known. Any commission arrangement or day-haul operation shall also be made known. The various protections shall be posted in a conspicuous place.

Records will be kept with respect to an individual worker and a copy will be provided to such worker. Information to be provided will be in English or, as reasonable, “in Spanish or other language common to seasonal agricultural workers who are not fluent or literate in English.”²⁹² Wages are to be paid “when due.” There will be no company store arrangement.

Title IV deals with *further protections for migrant and seasonal agricultural workers*. The title deals primarily with insurance.²⁹³ It begins by specifying the type/mode of transportation in question.

This section *does not apply* [italics added] to the transportation of any migrant or seasonal agricultural worker on a tractor, combine, harvester, picker, or other similar machinery and equipment while such worker is actually engaged in the

²⁹⁰ DOL will make available the necessary linguistic forms.

²⁹¹ In the section on definitions, it is stated, “(10)(A) Except as provided in subparagraph (B), the term ‘seasonal agricultural worker’ means an individual who is employed in agricultural employment of a seasonal or other temporary nature and is not required to be absent overnight from his permanent place of residence — (i) when employed on a farm or ranch performing field work related to planting, cultivating, or harvesting operations; or (ii) when employed in canning, packing, ginning, seed conditioning or related research, or processing operations, and transported, or caused to be transported, to or from the place of employment by means of a day-haul operation. (B) The term ‘seasonal agricultural worker’ does not include — (i) any migrant agricultural worker; (ii) any immediate family member of an agricultural employer or a farm labor contractor; or (iii) any temporary nonimmigrant alien who is authorized to work in agricultural employment in the United States under sections 101(a)(15)(H)(ii) and 214(c) of the Immigration and National Act.”

²⁹² DOL will make available the necessary linguistic forms.

²⁹³ See discussion, below, under *Adams Fruit*.

planting, cultivating, or harvesting of any agricultural commodity or the care of livestock or poultry.

However, where this section does apply (to normal and/or regular vehicle usage), the “agricultural employer, agricultural association, and farm labor contractor” shall “ensure that the vehicle does comply” with “Federal and State safety standards,” and ensure that “each driver has a valid and appropriate license.” Such employer shall have in effect “an insurance policy or a liability bond” that insures the employer “against liability for damage to persons or property arising from the ownership, operation, or the causing to be operated, of any vehicle used to transport any migrant or seasonal agricultural worker.” The provision goes on to explain the various terms and conditions under which insurance may be applicable.

How might the individual employer confirm that the individual farm labor contractor has, indeed, complied with the terms of his or her craft?

No person shall utilize the services of any farm labor contractor to supply any migrant or seasonal agricultural worker unless the person first takes reasonable steps to determine that the farm labor contractor possesses a certificate of registration which is valid and which authorizes the activity for which the contractor is utilized. In making that determination, the person may rely upon either possession of a certificate or registration, or confirmation of such registration by the Department of Labor. The Secretary shall maintain a central public registry of all persons issued a certificate of registration.

Title V, at the close of the act, provides for *general provisions*. These are divided into three sections and, appear, in part, as follows.

Enforcement Provisions. Any person “who willfully and knowingly” violates the act (or regulations under this act) shall be fined “not more than \$1,000 or sentenced to prison for a term not to exceed one year, or both.” However, any “subsequent violation of this act (or regulation) carries with it, potentially, a fine of “not more than \$10,000” or a sentence of “not to exceed three years, or both.” A special provision applies for farm labor contractors who violate section 106: the provision against the employment “with knowledge” of aliens. Hearings are permitted and the rights of the defendant are specified.

There is a private right of action. Any person “... may file suit in any district court of the United States having jurisdiction of the parties ... without regard to the citizenship of the parties and without regard to exhaustion of any alternative administrative remedies provided herein.” Limitations on damages and equitable relief are spelled out.

No person shall be discriminated against for having, “with just cause, filed any complaint or instituted, or caused to be instituted, any proceeding under or related to this Act...” Appeal can be made to the Secretary of Labor. Any waiver of rights (except to the Secretary of Labor for enforcement purposes) “shall be void as contrary to public policy....”

Administrative Provisions. The Secretary of Labor “may issue such rules and regulations as are necessary to carry out this Act,” consistent with the U.S. Code.

As may be appropriate, the Secretary may “investigate, and in connection therewith, enter and inspect such places (including housing and vehicles) and such records (and make transcriptions thereof), question such persons and gather such information to determine compliance with this Act...” The Secretary “may issue subpoenas requiring the attendance and testimony of witnesses or the production of any evidence in connection with such investigations.”

The Secretary may “enter into agreements with Federal and State agencies” in carrying out the program under MSPA.

Miscellaneous Provisions. “This Act is intended to supplement State law, and compliance with this Act shall not excuse any person from compliance with appropriate state law and regulation.”

Adams Fruit Co., Inc. v. Barrett

Perhaps only a consensus bill (such as that creating MSPA) could have been enacted under the circumstances. Yet, that would not end complaints, both pro and con. Migrant farmworkers, observed Representative Mickey Leland (D-TX) in 1985, just two years after MSPA was adopted, “are among the most vulnerable workers in our Nation.” The conditions under which they live and work has resulted in “... an infant mortality rate that is two and one-half times the national average.”²⁹⁴ During the late 1980s, several Members protested about the alleged tendency of some Legal Services offices “to represent, or, I suggest, misrepresent, some of these migrant workers” in bringing complaints against farmers.²⁹⁵ And, in 1993, Representative Miller argued that “Working and living conditions for migrant agricultural workers remain deplorable and in some cases have deteriorated” — and he introduced a comprehensive revision of MSPA.²⁹⁶ The most serious complaint (one that would result in amendment of MSPA) grew out of the *Adams Fruit* case.²⁹⁷

A Ruling from the Court. In 1990, the U.S. Supreme Court ruled in *Adams Fruit Co. v. Barrett* that migrant farmworkers, employed by Adams Fruit Company, Inc., having “suffered severe injuries in an automobile accident” in an Adams Fruit van while traveling to work, had two options available for redress. They could file a claim under the Florida workmen’s compensation law *and* they could avail themselves under the private right of action provision of MSPA.²⁹⁸

At issue before the Court was the question of exclusivity (or dual coverage) under the state and federal acts: i.e., worker’s compensation *and* MSPA. The Court

²⁹⁴ *Congressional Record*, September 1985, p. 22927.

²⁹⁵ *Congressional Record*, September 30, 1986, pp. 27399-27401, March 6, 1987, pp. 5048-5049, and July 17, 1989, p. 14919.

²⁹⁶ *Congressional Record*, March 2, 1993, pp. 3953 and 3937. See also H.R. 1173 of the 103rd Congress.

²⁹⁷ *Congressional Record*, October 27, 1990, p. 37188.

²⁹⁸ 494 U.S. 638, 640 (1989).

ruled that although Congress “may choose to establish state remedies as adequate alternatives to federal relief, it cannot be assumed that private federal rights of action are conditioned on the unavailability of state remedies absent some indication to that effect.”²⁹⁹

In the view of the Court, no such alternative remedy was apparent. Adams Fruit argued that “in the absence of any explicit congressional statement regarding the preemptive scope” of MSPA, the Court should defer to the Department’s position: i.e., a single remedy. The Court, however, rejected that view. It found that a “‘gap’ is not created in a statutory scheme merely because a statute does not restate the truism that States may not pre-empt federal law.”³⁰⁰ In summary, the Court held, “[o]ur review of the language and structure of AWP [MSPA] leads us to conclude that AWP does not establish workers’ compensation benefits as an exclusive remedy....”³⁰¹

Hearings on Workmen’s Compensation. Representative Goodling branded the decision as “bad for employers” and “bad for workers” — allowing the worker “the ability to both recover workers’ compensation *and* sue for compensatory and punitive damages.” Goodling asserted: “As one who worked many long and hard hours in 1981 and 1982 to achieve the MSAWPA [MSPA] consensus[,] I intend to preserve it by pressing for early action next year ... to overturn the Adams Fruit decision.”³⁰²

On September 15, 1993, Representative Austin Murphy (D-PA) called together at Fresno, California, a hearing by the Labor Standards Subcommittee. Two bills were on the table: H.R. 1173 (Miller) and H.R. 1999 by Victor Fazio (D-CA). The Miller bill was a comprehensive measure which, among other provisions, would have codified the *Adams Fruit* decision. The Fazio bill had for its sole purpose the overturning of that decision.³⁰³ They had evolved, though from different perspectives, through “many months of unsuccessful negotiations aimed at producing consensus legislation to resolve the difficulties and concerns voiced by farmworker advocates and growers.”³⁰⁴

²⁹⁹ 494 U.S. 638, 639 (1989).

³⁰⁰ 494 U.S. 638, 649 (1989).

³⁰¹ 494 U.S. 638, 650 (1989).

³⁰² *Congressional Record*, October 27, 1990, p. 37188. At the close of the 102nd Congress, an amendment was added to the Legislative Branch Appropriations Act (H.R. 5427), suspending for a brief period the impact of the *Adams Fruit* decision. See *Congressional Record*, October 3, 1992, p. 31243, and October 5, 1992, p. 31598.

³⁰³ See also S. 1450 (Feinstein) to overturn *Adams Fruit*. None of the bills was enacted.

³⁰⁴ U.S. Congress, House, Subcommittee on Labor Standards, Occupational Health and Safety, Committee on Education and Labor, *Hearing on H.R. 1173 and H.R. 1999*. September 15, 1993, p. 1. (Cited hereafter as *Hearings, House, 1993*.) See also for general reaction to the MSPA, U.S. Congress, Subcommittee on Labor Standards, Committee on Education and Labor, *Oversight Hearings on the Migrant and Seasonal Agricultural Worker Protection Act*, July 13, 1987. The 1987 hearing was conducted in Biglerville, Pa.

As the Fresno hearings opened, several Members of Congress spoke. Richard Lehman (D-CA) and Calvin Dooley (D-CA) commenced with opposition to any new restrictions upon agricultural interests. They were followed by Howard Berman (D-CA) and by Miller, generally supportive of worker interests. The several Members emphasized the dichotomy existing over the prospective legislation. They were followed by representatives of organized labor, civil rights attorneys, and spokespersons for industry.³⁰⁵

On May 25, 1995, with a change in control in the House, Goodling became chair of the full Committee on Economic and Educational Opportunities. Cass Ballenger (R-NC) now chaired the Subcommittee on Workforce Protections with jurisdiction over agricultural labor. New hearings addressed the issues similarly. The Court, Ballenger stated, had interpreted MSPA “to provide for a private right of action for certain job related injuries, even if the individual was covered by workers’ compensation at the time of the injury” leaving employers “exposed to potentially enormous liability for damages in spite of the fact that they have contributed into the workers’ compensation system.”³⁰⁶ Conversely, Representative Major Owens (D-NY) suggested that “Instead of insuring work place protections, this committee is preoccupied with eliminating all inconveniences for the rich and privileged, at the expense of the working poor....”³⁰⁷

Bruce Wood, Senior Counsel for the American Insurance Association, argued that the Court’s opinion was “not grounded on public policy” and that the Court had acted “narrowly and mechanically.”³⁰⁸ The “doctrine of exclusivity” was emphasized by Walter Kates, an industry representative. MSPA was “a consensus bill,” he declared, with all parties in agreement that “the doctrine of workers’ compensation exclusivity was a part” of the bill. The failure “to reverse the Adams Fruit decision,” Kates stated, “could have adverse and unintentional consequences for both the farmer and the farmworker.”³⁰⁹ Steve Kenfield, a farm labor contractor from California, suggested that *Adams Fruit* “has complicated an already complex compliance situation.” It “created frustration” in that payment of premiums for workers’ compensation (mandatory in California) “is virtually meaningless.” And, it suggested that “we could also face open-ended” liability. With others from industry, Kenfield called upon Congress to “reverse” the *Adams Fruit* decision.³¹⁰ Finally, David Moody, a former farmworker and the victim of an accident in Florida, testified about

³⁰⁵ Hearings, House, 1993, p. 48.

³⁰⁶ U.S. Congress, House, Subcommittee on Workforce Protections, Committee on Economic and Educational Opportunities, *Hearings on Adams Fruit Co., Inc. V. Barrett*. May 25, 1995, pp. 1-2. (Cited hereafter as Hearings, House, 1995.)

³⁰⁷ Hearings, House, 1995, p. 2.

³⁰⁸ Hearings, House, 1995, p. 5.

³⁰⁹ Hearings, House, 1995, pp. 12-14. Kates is identified as representing the National Council of Agricultural Employers (as chairman of their Migrant and Seasonal Agricultural Worker Protection Act Committee), the Florida Fruit and Vegetable Association (as director of their Labor Relations Division), and the Workers’ Compensatory Integrity, Stability, and Equity Coalition.

³¹⁰ Hearings, House, 1995, pp. 16-19.

the problems and complexities of securing redress solely under the worker's compensation system.³¹¹

The Goodling Bill (1995). On May 25, 1995, Representative Goodling introduced H.R. 1715, a bill dealing with workers' compensation benefits and MSPA. The bill was referred to the Committee on Economic and Educational Opportunities and passed.³¹² Through the summer, discussions were conducted informally on the legislation and, in mid-October, Goodling was able to announce that a substitute would be offered for H.R. 1715 (with the same designation) that would carry with it the endorsement of Representatives Ballenger, Owens and William Clay (D-MO).³¹³

The substitute version of H.R. 1715 provided that "where a State workers' compensation law is applicable and coverage is provided ... the workers' compensation benefits shall be the exclusive remedy for loss of such worker under this Act in the case of bodily injury or death...." In effect, *Adams Fruit* was overturned. The bill went on to discuss the expansion of statutory damages, the tolling of the statute of limitations under state workmen's compensation laws, disclosure of coverage (and processes) to the workers involved, and other matters. Mr. Goodling explained that H.R. 1715 "clarifies the relationship between workers compensation benefits and the private right of action" available under MSPA.³¹⁴

Mr. Owens rose in support of the bill and expressed his appreciation to Representatives Goodling, Clay, and Ballenger — and to others: Representatives Miller, Berman and Fazio. "The efforts of all three gentlemen have been instrumental in the development of the amendment before us" — which he regarded as a "compromise."³¹⁵ Mr. Fazio argued that the bill "... is the result of 5 years of discussions, but it is a bill that needed to be enacted...."³¹⁶

At this juncture, the House suspended the rules and passed the compromise version of H.R. 1715.³¹⁷ The bill was promptly dispatched to the Senate where, under unanimous consent, it was adopted.³¹⁸ On November 15, 1995, the measure was signed into law (P.L. 104-49) by President William Clinton.

³¹¹ Hearings, House, 1995, pp. 21-22.

³¹² *Congressional Record*, May 25, 1995, pp. 14444 and 14641.

³¹³ *Congressional Record*, October 13, 1995, pp. 28027-28028. On October 17, 1995, p. 28126, Mr. Goodling explained that the original bill had been reported from the Committee on Economic and Educational Opportunities but, after several weeks of negotiations, he was now able to offer a consensus bill.

³¹⁴ *Congressional Record*, October 17, 1995, pp. 28125-28127.

³¹⁵ *Congressional Record*, October 17, 1995, p. 28127.

³¹⁶ *Congressional Record*, October 17, 1995, p. 28128.

³¹⁷ *Congressional Record*, October 17, 1995, p. 28129.

³¹⁸ *Congressional Record*, October 31, 1995, p. 30907.

Part V: Agricultural Workers in the New Century

For the most part, since the 1983 amendments (with the emergence of the Migrant and Seasonal Agricultural Workers Protection Act), the statute has remained largely unchanged, with the exception of the *Adams Fruit* legislation.³¹⁹

The history of FLCRA (and, now, MSPA) has been long and tedious. For almost ten years (1964 to 1974), legislation remained in place but was, largely, unenforced — or, perhaps, unenforceable. Revised in 1974, there were serious attempts to enforce the statute but these seem to have required that many of the wrong people register (i.e., fixed site farmers, growers, and a variety of other agricultural interests) and, generally to comply with the act's restrictions. In 1983, FLCRA was repealed, and Congress started over with a new statute: the Migrant and Seasonal Agricultural Worker's Protection Act. The latter remains in place.

Debate over FLCRA and, to a lesser extent, MSPA, seems to have been exhausting. It could well be that some may now be disinclined to revisit the statute and to raise new questions. However, the need for oversight would seem to remain a priority where agricultural policy is concerned.

Thus far, in the 110th Congress, no new legislation to amend MSPA has been considered.

³¹⁹ See U.S. Congress. House. Subcommittee on Workforce Protections, Committee on Education and the Workforce. *Field Hearing on Issues Relating to Migrant and Seasonal Agricultural Workers and Their Employers* (Newland, N.C.), 105th Cong., 1st Sess., September 12, 1997, 164 pp.; and U.S. Congress. House. Subcommittee on Workforce Protections, Committee on Education and the Workforce. 105th Cong., 2nd Sess., *The Effect of the Fair Labor Standards Act on Amish Families and H.R. 2028, The MSPA Clarification Act*. April 21, 1998, 167 pp.



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This material is based upon work supported by the National Agricultural Library, Agricultural Research Service, U.S. Department of Agriculture

Ag & Food Law Update

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National Agricultural Law Center

Agriculture is faced with a host of legal issues on an annual basis. This session will look at some of the top issues as identified by the National Agricultural Law Center. Topics will include: international trade, antitrust update, pesticide litigation, updates on WOTUS, the Endangered Species Act, right to farm litigation, and Proposition 12.

International Trade

Below is a listing of selected legal and regulatory developments relating to agricultural international trade issues during the past year.

United States Twice Rejects Canada's USMCA Dairy Tariff-Rate Quota Proposals

On May 5, 2022, U.S. Trade Representative Katherine Tai [met](#) with Canadian Minister of Trade Mary Ng in Ottawa and thereafter publicly announced, amongst other things, the "importance of Canada fully meeting its USMCA commitments, including its allocation of dairy tariff-rate quotas." This was the first meeting of the top trade officials from each country since the January

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4, 2022, disclosure of the [December 20, 2021 USMCA Arbitration Panel Final Report](#) concluding, in response to U.S. allegations, that Canada breached Article 3.A.2.11(b) of the United States-Mexico-Canada Agreement (USMCA) by reserving dairy tariff-rate quotas exclusively for the use of Canadian dairy processors. This was also the first public statement by Tai that Canada's first attempt to satisfy U.S. demands to cure the breach, a March 1, 2022 [proposal of revised TRQs allocation and policy changes](#), had been formally rejected.

U.S. and Japan Announce Beef Tariff Safeguard Trigger Agreement

On March 24, 2022, Office of the U.S. Trade Representative (USTR) Secretary Katherine Tai, with U.S. Department of Agriculture (USDA) Secretary Tom Vilsack, [announced](#) that the United States and Japan have agreed to a new "three trigger" beef tariff safeguard agreement, which the agencies state will decrease the likelihood that Japan will impose higher tariffs on U.S. beef imports. The agreement requires that all three "triggers" are met before Japan may impose additional beef tariffs: 1) U.S. beef imports must surpass the original safeguard level established under U.S.-Japan Trade Agreement; 2) Total beef imports from the United States and signatories to the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) must surpass the CPTPP safeguard level; and 3) U.S. beef imports in a given year must surpass U.S. beef imports from the previous year. The countries have yet to finalize the text of the agreement, but, according to the announcement, plan to do so and publish the final agreement at the "soonest, appropriate time."

USDA Publishes Report Detailing 2018 Retaliatory Tariffs' Effects

On January 11, 2022, the U.S. Department of Agriculture (USDA) Economic Research Service (ERS) published a report titled "[The Economic Impacts of Retaliatory Tariffs on U.S. Agriculture](#)." ERS was directed to prepare the report by the Consolidated Appropriations Act of 2021, signed into law on December 27, 2020. The report details the effects of retaliatory tariffs on U.S. exports imposed in 2018 by Canada, China, the European Union, India, Mexico, and Turkey in response to the U.S.'s 2019 Section 232 tariffs on steel and aluminum imports and Section 301 punitive tariffs on Chinese imports. The tariffs increased the price of U.S. agricultural products in those markets, anywhere from 2% to 140% and created overall U.S. agricultural product export losses valued at \$27 billion between 2018 and the end of 2019. Lost Chinese agricultural trade accounts for 95% of the total, with soybeans making up 71%, pork 6%, specialty crops 6%, and sorghum 5%. U.S. market share of Chinese agricultural imports decreased from 20% in 2017 to 12% in 2018 and further decreased to 10% in 2019. Canadian and Mexican tariffs were removed in May 2019 and some tariff exemptions were granted by China after the U.S.-China Phase One Trade Agreement signed on January 15, 2020. However, some retaliatory tariffs and resulting losses and loss of market share remain to date. The report concludes, "U.S. agricultural exports to China rebounded and hit record levels in 2020; however, some of this increase was likely driven by factors unrelated to trade policy, including China's pig-herd recovery in the wake of African Swine Fever and resulting increased feed demand. However, U.S. market share has not fully recovered to pre-retaliatory levels 1 year out from the Phase One Agreement signing."

India Allows U.S. Pork Imports

On January 10, 2022, U.S. Agriculture Secretary Tom Vilsack and Trade Representative Katherine Tai [announced](#) that the Indian government has approved for import into India U.S. pork and pork products previously disallowed.



Dispute Panel Finds Canada’s Tariff-Rate Quota Allocation in Violation of USMCA Agreement

On January 4, 2022, U.S. Trade Representative Katherine Tai [announced](#) that a dispute settlement panel, convened under the United States-Mexico-Canada Agreement (USMCA), found that Canada’s practice of reserving most of the country’s dairy tariff-rate quotas (TRQs) to Canadian processors was in violation of the USMCA. In accordance with the USMCA, Canada maintains [fourteen dairy TRQs](#), which allow for reduced import tariffs on those products. According to the panel’s final [report](#), since 1995, Canada has reserved access to 85–100% of those dairy TRQs exclusively for Canadian dairy processors—a supply side party in Canada’s dairy market—disallowing equal TRQ access to retailers—a demand side party. The panel found that Canada’s practice of reserving TRQs for processors was in violation of [USMCA Article 3.A.2.11\(b\)](#) in failing to “ensure that” the country’s practice “does not . . . limit access to an allocation to processors.”

National Cattlemen’s Beef Association Asks USDA to Suspend Brazilian Beef Imports Due to Delayed Animal Health Reporting

On November 12, 2021, the National Cattlemen’s Beef Association (NCBA) sent a [letter](#) to Agriculture Secretary Tom Vilsack asking the U.S. Department of Agriculture (USDA) to indefinitely suspend Brazilian beef imports into the United States until USDA conducts a risk assessment review of the Brazil’s Ministry of Agriculture, Livestock, and Food Supply (MAPA). Also [announced](#) by NCBA, the letter cited two June 2021 cases of atypical bovine spongiform encephalopathy identified in Brazil that were not reported to the World Organization for Animal Health (OIE)—which requires countries to report such findings within 24 hours—until September 3, 2021. The letter included additional examples of Brazil’s delayed OIE reporting from 2019, 2012, and 2014 and stated that “Brazil’s history of failing to report incidences of BSE calls into question its commitment to reporting other significant diseases such as African Swine Fever, Avian Influenza, or Foot-and-Mouth Disease.” NCBA asked that the beef suspension continue “until MAPA makes systemic changes and takes necessary steps to demonstrate Brazil’s commitment to an objective, science-based regulatory system that restores confidence in Brazil’s participation in the global food supply.”

Customs and Border Protection Detain Tomatoes from Two Mexican Producers Due to Forced Labor

On October 21, 2021, the U.S. Customs and Border Protection (CBP) [announced](#) its issuance of a Withhold Release Order (WRO) against Mexican tomato farms Agropecuarios Tom S.A. de C.V., Hortícola S.A de C.V., and their subsidiaries due to evidence of forced labor on the farms. According to the announcement, CBP will detain all fresh tomatoes from the farms arriving at all U.S. ports of entry. CBP stated that, during its investigation, it found at least five of the [International Labor Organization’s indicators of forced labor](#): abuse of vulnerability, **deception**, withholding of wages, debt bondage, and abusive working and living conditions. CBP specified that the WRO only applies to fresh tomatoes from the identified farms and their subsidiaries.

EU Parliament Passes Farm to Fork Resolution

On October 20, 2021, the European Parliament [announced](#) that Members of the European Parliament (MEPs) voted October 19, 2021, to adopt resolution [2020/2260](#), “A Farm to Fork Strategy for a fair, healthy and environmentally friendly food system.” The “Farm to Fork Strategy” recommends multiple strategies to produce sustainable, healthy food and safeguard



farmer income and food security. Such strategies include member state-binding pesticide reduction targets, agricultural emissions reduction targets, rigid biomass-based renewable energy criteria, and phasing out the use of cages in animal farming. The resolution provides a framework for future European Commission [legislation](#). According to the announcement, the vote passed with 452 votes in favor, 170 against, and 76 abstentions.

EU Postpones Dairy Export Health Certificate Deadline until January 2022

On August 10, 2021, the European Commission entered [Implementing Regulation \(EU\) 2021/1329](#), which extends the deadline by which U.S. dairy product imports must be accompanied by health certificates from August 21, 2021, to January 15, 2022. According to an August 13, 2021 [announcement](#) from the U.S. Department of Agriculture's (USDA) Agricultural Marketing Service (AMS), AMS will issue the new health certificates through its [EU Dairy Export Certification Programs](#). AMS will require producers and "entities throughout the supply chain" to maintain records showing that milk products produced for European Union (EU) export comply with either [Grade "A" Pasteurized Milk Ordinance](#) or [USDA AMS Milk for Manufacturing Purposes](#) program requirements. AMS states that it will inspect existing records and certify milk sources during compliance audits for current EU Somatic Cell Count and Bacteria Standard Plate Count requirements.

Agriculture Trade Groups Advocate for WTO Reform

On July 23, 2021, thirty-three U.S. agricultural trade organizations sent a [letter](#) to U.S. Ambassador Katherine Tai and Agriculture Secretary Tom Vilsack supporting World Trade Organization (WTO) reform and encouraging the two executives to promote their [principles and priorities](#) in the upcoming [12th Ministerial Conference](#). The groups call for market-based and sustainable trade liberalization and a more effective and efficient dispute settlement system. Also, they stress that the WTO should establish a graduation process to require that "significant developing country agriculture exporters meet the same level of ambition as developed countries." Signatories included American Farm Bureau Federation, American Soybean Association, Bayer US, National Association of State Departments of Agriculture, National Corn Growers Association, North American Meat Institute, and the U.S. Soybean Export Council.

EU Parliament, Council Announce New Common Agricultural Policy

On June 25, 2021, the European Commission [announced](#) that, after three years, the European Parliament and Council have agreed upon a new [Common Agricultural Policy](#) (CAP). The new CAP will include rigorous environmental standards, provide support for young farmers, and mandate adherence to European social and labor law. According to the announcement, all farms must dedicate at least 3% of "arable land . . . to biodiversity and non-productive elements" and member states "must allocate at least 25% of their income support budget to ecoschemes" which compensate producers for implementing "climate and environmentally-friendly practices" like organic farming and integrated pest management.

U.S. International Trade Commission Continues Investigation into Honey Imports from Argentina, Brazil, India, Ukraine, and Vietnam

On June 4, 2021, the U.S. International Trade Commission (USITC) [announced](#) that it will continue its [antidumping duty investigation of raw honey imports](#) from Argentina, Brazil, India, Ukraine, and Vietnam, initiated by the commission on May 12, 2021. The commission determined that



reasonable indication exists that the honey imports, purportedly sold below market value in the United States, are materially injuring the U.S. honey industry. According to import statistics listed by USITC, nearly \$900 million of honey has been imported into the United States from the five countries since 2018.

United States Initiates Formal USMCA Trade Dispute with Canada Over Tariff-Rate Quotas

On May 25, 2021, the Office of the U.S. Trade Representative [requested the initiation of a dispute settlement panel](#) under the terms of the United States-Mexico-Canada Agreement (USMCA) to challenge Canada's allocation of dairy tariff-rate quotas (TRQs), i.e. the ability to apply for reduced-tariff Canadian import of enumerated U.S. dairy products, to only processors and not retailers, an action which the United States alleges is in violation of the USMCA. Canadian processors would be direct competitors of U.S. dairy product manufacturers and unlikely to be interested in utilizing the TRQs set aside in the USMCA to import U.S. dairy products. The trade dispute, the subject of a December 9, 2020 request for consultation made to Canada, will now be decided by formal USMCA dispute resolution procedures. For more background, see *Agricultural Law in the Spotlight (December 10, 2020)*, [Office of U.S. Trade Representative Disputes Canada's Tariff-Rate Quotas for Dairy Products in First USMCA Enforcement Action](#).

Antitrust Update

Below is a listing of selected legal and regulatory developments relating to agricultural antitrust issues during the past year.

DOJ Files Notice Supporting Continued Prosecution of Poultry Executives in Price-Fixing Case

On April 25, 2022, the U.S. Department of Justice (DOJ) filed a notice in the U.S. District Court for the District of Colorado stating DOJ's intent to continue its prosecution of poultry executives Jayson Jeffrey Penn, Roger Born Austin, and William Wade Lovette of Pilgrim's Pride, and Mikell Reeve Fries and Scott James Brady of Claxton Poultry. *United States v. Penn*, No. 1:20-cr-00152 ([docket 1](#); [docket 2](#)). In the notice, DOJ states that it has performed a "thorough examination of the law" and "admissible evidence" and that the agency still believes that multiple factors support prosecution of the remaining executives, including "the significant impact of the charged conduct on the public, the deterrent value of the prosecution, and the nature and seriousness of the charged offense." The notice follows a hearing on April 14, 2022, during which Jonathan Kanter, Assistant Attorney General of the DOJ's Antitrust Division, appeared in person and commented on why the government should re-try the case against the executives a third time. On April 15, 2022, the court issued an order scheduling the case for a nineteen-day jury trial beginning on June 6, 2022.

Lawsuit Claims Dairy Farmers of America and Select Milk Conspired to Suppress Dairy Farmer Payments

On April 4, 2022, six New Mexico dairy cooperative members filed a complaint in the U.S. District Court for the District of New Mexico against Dairy Farmers of America (DFA) and Select Milk Producers, Inc. (Select), alleging that the defendant dairy cooperatives conspired to depress members' raw milk price in violation of the Sherman Act ([15 U.S.C. § 1](#)). *Othart Dairy Farms, LLC*



v. Dairy Farmers Of America, Inc., No. [2:22-cv-00251](#). The plaintiffs claim that DFA and Select—who the plaintiffs state control at least 75% of the Southwest dairy market—have used their market share to suppress dairy prices by sharing and coordinating pricing information and decisions and by “selective[ly] . . . nonpooling” milk, which the plaintiffs claim “allow[s] the cooperatives as entities to market members’ milk at higher prices without passing those increases on to farmers.” The plaintiff dairy producers further claim that the monthly rates DFA and Select pay their respective members “are almost always within a few pennies of each other,” which the plaintiffs state “would not be the case absent the conspiracy alleged herein.”

2022 Appropriations Act Provides \$1 Million for Cattle Contract Library Pilot Program

On March 10, 2022, the U.S. Senate approved (68–31) the Consolidated Appropriations Act of 2022 ([H.R. 2471](#)), previously approved by the U.S. House of Representatives on June 29, 2021. [Section 779](#) of the legislation allots \$1 million until September 30, 2023 for the U.S. Department of Agriculture’s (USDA) Agricultural Marketing Service (AMS) to create a Cattle Contracts Library pilot program to be maintained in AMS’s [Livestock, Poultry, and Grain Market News](#) Division, similar to USDA’s [Swine Contract Library](#) established under the Packers and Stockyards Act ([7 U.S.C. § 198a](#)). In response, the North American Meat Institute issued a [press release](#) on March 11, 2022, criticizing the [law’s provision](#) allowing AMS to promulgate rules for the program without public comment, calling the law “vague,” and stating that it will require producers to “report proprietary and sensitive data to the government for publication.” However, bipartisan legislation to create a cattle contract library passed the House in December 2021 ([H.R.5609](#)), which was [endorsed](#) by the American Farm Bureau Federation as a “common sense” move to increase cattle market transparency.

Federal Court Finds Pennsylvania Mushroom Cooperative Not Entitled to Antitrust Protection

On January 26, 2022, the U.S. District Court for the Eastern District of Pennsylvania issued an [order](#) and [opinion](#) holding that the American Mushroom Cooperative (AMC), formerly named “Eastern Mushroom Marketing Cooperative” (EMMC), was not entitled to protection under the Capper-Volstead Act, which exempts agricultural grower cooperatives from some antitrust laws. *Winn-Dixie Stores, Inc. v. Eastern Mushroom Marketing Cooperative, Inc.*, No. [5:15-cv-06480-BMS](#). Winn-Dixie Stores, Inc. brought suit against EMCC/AMC in 2015, claiming that the entity’s members had conspired among themselves and third parties to fix mushroom prices. In a [related 2009 ruling](#), the court held that EMCC/AMC could not claim antitrust immunity under Capper-Volstead because it found that the EMCC/AMC did not consist solely of producer members. In the 2015 case, EMCC/AMC claimed that it could still receive Capper-Volstead immunity despite its failure to previously gain the statute’s protections because the non-producer member issues in the 2009 ruling had since been resolved. However, the court found that EMMC/AMC member Bella Mushroom Farms (Bella)— a general partnership between Robert, Rosemarie, Peter and Robert Jr. Feranto—and its distributor, Buona Foods (Buona)—a corporation held by Robert and Rosemarie—could not be determined to be a “single entity incapable of conspiring with one another” and thus EMCC/AMC was not entitled to Capper-Volstead immunity because the entity contained a non-producer member. Although the court noted that “family relationships are not determinative,” the court stated that Buona buys 100% of Bella’s products. The court also noted that, while Peter negotiated for Bella, “Robert (who had no ownership interest in Buona) negotiated for Buona when it dealt with Bella,” which the court stated, “further muddies the waters with respect to whether the parties’ . . . impermissibly



‘joined together separate decisionmakers.’” Most importantly, the court found that Bella’s and Buona’s interests were not aligned and that the price fixing did not protect the grower’s economic interests because “EMMC/AMC prices were set at the distributor level and Buona’s sales were governed by the EMMC’s minimum pricing policies.” The court then granted summary judgment in favor of Winn-Dixie.

JBS Class Action Settlement Agreement Will Pay Direct Purchaser Plaintiffs \$52.5 Million

On February 1, 2022, the Direct Purchaser Plaintiffs (DPPs) in consolidated civil antitrust class action litigation against multiple large meatpacking companies filed a [memorandum](#) supporting a settlement between the DPPs and defendants JBS S.A., JBS USA Food Company, Swift Beef Company, and JBS Packerland, Inc. (JBS). *In re Cattle and Beef Antitrust Litigation*, No. [0:20-cv-01319](#). The DPPs claimed that the defendant meatpacking companies colluded to fix beef prices and suppress beef production. According to the agreement outlined in the memorandum, JBS will pay \$52.5 million into a settlement fund to compensate the DPPs, finance administration of the settlement, and cover litigation expenses. The settlement agreement, which names notice and claims administrator A.B. Data as the notice provider, calls for the court to require the non-settling defendants to turn over their customer contact information to assist in notification of the class within 30 days of court approval of the settlement. On February 4, 2022, the DPPs filed a [proposed order](#) for the court’s approval of the settlement.

USDA and DOJ Announce Online Portal for Anticompetitive Practice Complaint Submissions

On February 3, 2022, the U.S. Department of Agriculture (USDA) and the U.S. Department of Justice (DOJ) [announced](#) their new online tool, [farmerfairness.gov](#), where livestock and poultry producers can anonymously [submit complaints and tips](#) concerning unfair and anticompetitive industry practices. Submissions will be reviewed by USDA Packers and Stockyards Act (PSA) staff and DOJ Antitrust staff for potential PSA and antitrust law violations. Complaints that raise sufficient concern under the PSA or antitrust laws will be further investigated by USDA and DOJ. Submissions need not contain the name or information of the submitting party, but they should include the names of the parties involved in the alleged unfair conduct, a description of the conduct, how that conduct created harm, and who was harmed by the conduct. According to the agencies’ announcement, USDA and DOJ will sign a memorandum of understanding (MOU) to formalize their partnership and facilitate communication between the agencies.

White House Announces Plan to Increase Competition in Meat and Poultry Industries; USDA and DOJ Announce Joint Antitrust Initiative

On January 3, 2022, the White House held a [roundtable conference](#) with Agriculture Secretary Tom Vilsack, Attorney General Merrick B. Garland, and several independent producers to discuss anticompetitive industry practices and announce the administration’s [Action Plan for a Fairer, More Competitive, and More Resilient Meat and Poultry Supply Chain](#). The plan encompasses four primary focus areas to increase competition in the meat and poultry industries: 1) a [joint initiative](#) between the U.S. Department of Agriculture (USDA) and the Department of Justice (DOJ), 2) \$1 billion in funding to expand independent processing facilities and support workers, 3) new regulations for the “[Packers and Stockyards Act](#)” (PSA) and “[Product of USA](#)” labeling, and 4) increased market transparency through new [market reports](#). Under the new USDA/DOJ [initiative](#), the agencies will develop a streamlined process by February 2, 2022 for concerned producers to submit complaints regarding potential PSA and antitrust violations, in which the agencies state



they will “protect the confidentiality of the complainants, if they so request, to the fullest extent possible under the law” and “support[] the strongest possible whistleblower protections.” The agencies also state that they will cooperate to share information and case data and that USDA will refer potential PSA violations to the DOJ for antitrust enforcement. The administration began working this past summer on the new regulations and implementing the market reporting and has [previously announced](#) some of the [funding measures](#). In response to the roundtable announcement, North American Meat Institute issued a [press release](#) denouncing the administration’s efforts and attributing meat prices to inflation and labor shortages while the American Farm Bureau Federation issued a [statement praising](#) the administration’s initiatives, stating that the antitrust reporting system and stronger regulations “will go a long way to ensuring fairness in the industry.”

White House Says Consumer Meat Price Increases Due to Anti-Competitive Practices in Industry

On December 10, 2021, the U.S. Department of Labor, Bureau of Labor Statistics released the [November Consumer Price Index](#) and the White House simultaneously released an [analysis](#) of it illustrating that meat prices are the “single largest contributor” to rising home-consumed food costs and that the increases in beef, pork, and poultry prices totaled 25% of the overall increase in food-at-home prices in November. According to the White House, four of the nation’s largest, publicly-traded meat processing companies who recently released quarterly financials —Tyson, JBS, Marfrig, and Seaboard—are “using their market power to increase prices and underpay farmers, while taking more and more for themselves.” The White House countered potential claims that the companies have been forced to raise their prices to offset higher production costs with an analysis of the companies’ latest quarterly earnings reports showing that “[g]ross margins are up 50% and net margins are up over 300%,” fueling \$3 billion in shareholder payments throughout the pandemic and recently announced \$1 billion in stock buybacks and new dividend payments.

U.S. Justice Department Files Suit to Prevent U.S. Sugar from Acquiring Imperial Sugar Company

On November 23, 2021, the U.S. Department of Justice (DOJ), Antitrust Division, filed a [complaint](#) in the U.S. District Court for the District of Delaware under Section 7 of the Clayton Act, [15 U.S.C. § 18](#), seeking to prohibit United States Sugar Corporation (U.S. Sugar) from purchasing Imperial Sugar Company (Imperial). *United States v. United States Sugar Corporation*, No. [1:21-cv-01644](#). In an accompanying press release, DOJ [announced](#) that Imperial’s acquisition by U.S. Sugar, a member of the marketing cooperative United Sugars Corporation which establishes prices for all sugar produced by U.S. Sugar and three other sugar producers, would result in just two companies, United and Domino, controlling 75% of all sugar sales in the Southeastern United States. DOJ states that under such a “cozy duopoly” by which “fragile supply chains would be further strained, and American families would pay more for sugar and many staple food and beverage products.”

Antitrust Review Completed of Kraft Heinz Cheese Lines

On November 10, 2021, the U.S. Department of Justice’s Antitrust Division [announced](#) the completion of its review of the French dairy company B.S.A. S.A’s (Lactilis) acquisition of the Kraft Heinz Company’s U.S. natural cheese business and filed a [civil antitrust lawsuit](#) in the U.S. District Court for the District of Columbia. The suit demands, via the proposed pre-negotiated settlement agreement, the divestiture of Kraft Heinz’s Athenos feta cheese brand and its Polly-O ricotta



cheese brand to other buyers in order for Lactilis to achieve U.S. antitrust law compliance for the purchase. Lactilis presently owns the President feta and Galbani ricotta cheese brands. Under the settlement, Athenos will be sold to Emmi Roth USA Inc. and Polly-O to Belgioioso Cheese, Inc., or to approved alternative buyers.

Broiler Chicken Antitrust Plaintiffs Oppose Defendants’ Judgment Sharing Agreement

On October 28, 2021, several *In re Broiler Chicken Antitrust Litigation* plaintiffs filed a [motion](#) in the U.S. District Court for the Northern District of Illinois opposing fourteen defendants’ use of a “judgment sharing agreement” (JSA) in which they “agree[d] in advance to their relative responsibility for any antitrust damages awarded at trial against any of them.” *In re Broiler Chicken Antitrust Litigation*, No. [1:16-cv-08637](#). In order to effectuate the JSA, if settling, participating defendants must utilize particular settlement agreement language that compels the settling plaintiff to reduce any final judgment in its favor by the respective proportion of responsibility assigned in the JSA to any defendant settling before trial. Of the U.S.’s four largest poultry producers, Pilgrim’s Pride (owned by JBS) and Tyson have already settled using the JSA-prescribed settlement language, but Perdue and Sanderson (owned by Cargill) have not yet settled any claims. Among other grounds, the objecting plaintiffs allege the use of this particular JSA is “antithetical to the federal antitrust regime carefully constructed and maintained by Congress.” The issue is apparently one of first impression in an antitrust case involving treble damages. If successful in having the use of the JSA prohibited in the case, the prior settlements with Pilgrim’s Pride and Tyson, as well as settlements with any other participating defendants, would become void and, if possible, be re-negotiated.

Court Dismisses Direct Action Purchaser Claims Against Pilgrim’s Pride

On October 25, 2021, the U.S. District Court for the Northern District of Illinois issued an [order](#) entering a stipulated dismissal of claims by multiple national grocery chains, including Kroger Co, and Publix Super Markets, Inc. — termed direct action purchaser (DAP) plaintiffs — against Pilgrim’s Pride Corporation (Pilgrim’s) in the consolidated civil antitrust class action case *In re Broiler Chicken Antitrust Litigation*, No. [1:16-cv-08637](#). Court filings do not disclose if a settlement payment of any kind was agreed to or made. Pilgrim’s joins Tyson Foods, Inc. in gaining identical stipulated dismissals in the last week from the DAP plaintiffs in the case. Of the top four poultry processors in the U.S., only Perdue and Sanderson Farms (recently [purchased by Cargill](#) and Continental Grain) remain exposed to claims from the DAP plaintiffs.

Court Dismisses Direct Action Purchaser Claims Against Tyson

On October 18, 2021, the U.S. District Court for the Northern District of Illinois issued an [order](#) dismissing claims of multiple direct action purchasers (DAPs) against Tyson Foods, Inc. in the consolidated civil antitrust class action case *In re Broiler Chicken Antitrust Litigation*, No. [1:16-cv-08637](#). Plaintiffs include, among others, the national grocery chains Kroger Co. and Publix Super Markets, Inc. In response to the parties’ stipulation, the court dismissed the claims with prejudice, barring the DAP plaintiffs from further action against Tyson on the same claims. Previously, Tyson agreed to pay \$99 million to settle end-user claims.

Minnesota Federal Court Denies All Motions to Dismiss Filed by Beef Packers in Consolidated Civil Antitrust Class Action Litigation

On September 14, 2021, the U.S. District Court for the District of Minnesota [issued](#) a



memorandum opinion and order denying approximately twenty motions to dismiss in a large consolidated civil class action antitrust case wherein multiple plaintiffs allege multiple beef industry participants, acting individually and in concert, committed various anti-competitive practices in violation of various federal laws. *In Re: DPP Beef Litigation*, U.S.D.C. Minn., consolidated to lead case [0:20-cv-01319 – JRT-HB](#). However, the opinion and order remain under seal and have not been released to the public. No portion of the case was dismissed, which means that no defendant was successful in having any portion of the anti-trust allegations against them dismissed and all cases will continue in litigation towards trial, pending possible motions for summary judgment at a later stage. The complaints in the various consolidated cases are public and the named defendants include Cargill, JBS, National Beef Packing Company, Swift Beef Company, and Tyson Foods. Plaintiffs are various class representatives, purchasers, wholesalers and retailers.

White House Announces Intent to Address Effects on Consumers, Farmers and Ranchers of Meat Processing Industry Consolidation

On September 8, 2021, the White House published a policy outline on its official website titled [“Addressing Concentration in the Meat-Processing Industry to Lower Food Prices for American Families”](#) and conducted a [Press Briefing](#) with Agriculture Secretary Vilsack and National Economic Council Director Brian Deese in support. According to the document and Press Secretary Jen Psaki, the administration will address the following: (a) a “corporate consolidation problem with meat-processing giants;” (b) measures to reduce consumer prices and increase farmer and rancher earnings and “create a more competitive food supply chain;” (c) “stepping up antitrust enforcement;” and (d) legislation “to make cattle markets more transparent and fair.”

Koch Foods and Pilgrim’s Pride Executives Charged With Price-Fixing

On July 28, 2021, a federal grand jury for the U.S. District Court for the District of Colorado returned separate indictments charging Park Ridge, Illinois-based [Koch Foods](#) and [four former Pilgrim’s Pride executives](#) with conspiring to rig bids and fix prices for broiler chicken prices. *United States v. Norman W. Fries, Inc.*, No. [1:21-cr-00168](#); *United States v. McGuire*, No. [1:21-cr-00246](#). These charges follow multiple related indictments over the past two years. [According to](#) the U.S. Department of Justice (DOJ), the companies and executives began conspiring as early as 2012 and continued until 2019. For background, see [ALWR—June 12, 2020](#), “Chicken Industry Executives Indicted on Antitrust Charges;” [ALWR—Oct. 9, 2020](#), “U.S. Department of Justice Indicts Six More Poultry Executives Over Alleged Price Fixing;” [ALWR—January 22, 2021](#), “Tyson Agrees to \$221.5 Million Partial Settlement in Poultry Antitrust Class Action;” [ALWR—February 26, 2021](#), “Pilgrim’s Pride Pleads Guilty to Poultry Price-Fixing; Fined \$107.9 Million;” and [ALWR—May 28, 2021](#), “Claxton Poultry Indicted on Anti-Trust Charges.”

White House Executive Order on Competition Features Agriculture Prominently

On July 9, 2021, President Biden issued an executive order titled, [“Executive Order on Promoting Competition in the American Economy”](#) requiring multiple executive agencies, including the U.S. Department of Agriculture, to assess industry practices, revise or promulgate regulations accordingly and develop and submit plans and analysis addressing topics of competition within their respective industries. The order also creates a White House Competition Council, which includes the Secretary of Agriculture (Secretary), to address unfair “concentration, monopolization, and unfair competition” in the U.S. economy. Specifically,



according to the text of a White House Fact Sheet issued simultaneously, the order:

- “Directs USDA to consider issuing new rules under the Packers and Stockyards Act making it easier for farmers to bring and win claims, stopping chicken processors from exploiting and underpaying chicken farmers, and adopting anti-retaliation protections for farmers who speak out about bad practices.
- Directs USDA to consider issuing new rules defining when meat can bear “Product of USA” labels, so that consumers have accurate, transparent labels that enable them to choose products made here.
- Directs USDA to develop a plan to increase opportunities for farmers to access markets and receive a fair return, including supporting alternative food distribution systems like farmers markets and developing standards and labels so that consumers can choose to buy products that treat farmers fairly.
- Encourages the FTC to limit powerful equipment manufacturers from restricting people’s ability to use independent repair shops or do DIY repairs—such as when tractor companies block farmers from repairing their own tractors.”

The order’s text is much more specific on these tasks and also directs the Secretary of Agriculture:

(1) within 180 days, to submit a plan to promote competition in agricultural industries and to support value-added agriculture and alternative food distribution systems, listing specific means to accomplish those objectives;

(2) within 300 days, in consultation with the Federal Trade Commission, to submit a report on the effect of retail concentration and retailers’ practices on competition in the food industries and means to enhance access to markets; and

(3) submit a report, in consultation with Department of Commerce and United States Patent and Trademark Office, outlining concerns and strategies for increasing competition in the intellectual property system in seed and other input markets.

USDA Announces Actions in Response to Executive Order on Competition

On July 9, 2021, the U.S. Department of Agriculture (USDA) [announced](#) several actions in response to President Biden’s “[Executive Order on Promoting Competition in the American Economy](#),” issued the same day. According to the announcement, USDA will initiate three rulemakings under the Packers and Stockyards Act that will: (1) define “unfair,” “deceptive,” and “unjustly discriminatory” conduct that USDA considers a violation of the Act; (2) address unjust practices in the poultry industry; and (3) clarify USDA’s stance that “it is not necessary to demonstrate harm or likely harm to competition in order to establish a violation of the Act.” USDA also states that it will develop a plan to increase opportunities for producers to access new markets and will initiate new labeling rules in accordance with the Federal Trade Commission’s “Made in USA” rule for products regulated by the Food Safety and Inspection Service (FSIS). Additionally, USDA will be [requesting comments](#) on how to best utilize \$500 million to improve meat and poultry processing infrastructure and has developed [overtime and holiday inspection fee reductions](#) for small meat, poultry, and egg production plants.



Poultry Antitrust Plaintiffs File Motion to Approve \$1.75 Million Tyson Settlement

On July 6, 2021, Representatives of the Commercial and Institutional Indirect Purchaser Plaintiffs (CIIPPs) Class filed in the U.S. District Court for the Northern District of Illinois a [motion](#) for preliminary approval of a \$1.75 million class action settlement agreement with Tyson Foods and Hillshire Brands of alleged civil antitrust violations committed in turkey marketing. *Sandee's Catering v. Agri Stats, Inc., et al.*, No. [1:20-cv-02295](#). According to the motion, Tyson will pay \$1.75 million into an escrow account within fourteen days of the court's approval and will provide "meaningful cooperation" to assist the Commercial and Institutional Indirect Purchaser Plaintiffs (CIIPPs) in pursuing their antitrust claims against the remaining defendant companies, including Butterball, Cargill, Hormel, and Perdue.

U.S. Senate Conducts Hearing on Beef Processing Consolidation and Pricing

On June 23, 2021, the U.S. Senate on Agriculture, Nutrition and Forestry conducted a legislative hearing titled *Examining Markets, Transparency, and Prices from Cattle Producer to Consumer.* In the wake of recent calls for U.S. Department of Justice Antitrust Division investigations, North American Meat Industry (NAMI) submitted comprehensive [comments](#) in advance stating the processing industry's perspective on price disparity between boxed beef and fed cattle over the last year and consolidation and processing capacity in only four processors accounting for approximately 85% of all U.S. processed beef. [Testimony](#) from the producer perspective included United States Cattlemen's Association and Gardiner Angus Ranch from Overland, KS, and research and academic testimony was provided by experts from Kansas State University and University of Missouri. The hearing covered approximately 2.5 hours and is viewable [here](#).

Pesticide Litigation

Ninth Circuit Upholds \$25 Million Award to Plaintiff in Glyphosate Case by Brigit Rollins

On May 14, 2021, the United States Court of Appeals for the Ninth Circuit, issued a decision upholding a \$25 million award to a plaintiff who claimed that he contracted non-Hodgkin's Lymphoma ("NHL") after being exposed to Roundup, a glyphosate-based pesticide. In its opinion, the court considered whether the plaintiff's state law claims were preempted by federal pesticide law, and whether the evidence introduced by the plaintiff at trial had been properly admitted by the court. Because the case is the first one to reach a federal appeals court, the conclusions reached by the Ninth Circuit will likely affect other glyphosate cases brought in that jurisdiction where the plaintiffs are making similar arguments or bringing similar evidence.

Background

Hardeman v. Monsanto Co., No. 19-16636 (9th Cir. 2021) was originally filed in a federal court in California on February 12, 2016. At the time, the case was one of hundreds that was filed against Monsanto Corporation ("Monsanto") alleging that the company's glyphosate pesticide, Roundup,



had caused the plaintiffs to develop NHL. Many of the cases were ultimately consolidated into a multidistrict litigation (“MDL”), a type of legal proceeding that allows federal cases from around the country that have questions of fact in common to be consolidated into one court. Of all the cases that were consolidated into the Monsanto Roundup MDL, the *Hardeman* case was the first one selected to go before a jury, making it the “bellwether” trial. In the federal court system, a bellwether trial is a case that the court and parties select to test their arguments. Bellwether trials are typically used in mass tort actions where hundreds or thousands of people are injured by the same product, and are bringing similar claims. The outcome of a bellwether trial will generally impact similar cases going forward.

The plaintiff *Hardeman v. Monsanto Co.* brought a variety of tort claims against Monsanto, including negligence, design defect, failure to warn, and breach of implied warranties. In essence, the plaintiffs argued that Monsanto either knew or should have known that the glyphosate in Roundup was dangerous to human health, and failed to properly warn the public of those dangers. The jury who heard the case returned an \$80 million verdict in favor of the plaintiff in March, 2019. Of that \$80 million, \$5 million were for compensatory damages to cover the actual harm done to the plaintiff, and \$75 million were for punitive damages. Ultimately, the judge reduced the punitive damages to \$20 million, bringing the total award to \$25 million. In late 2019, Monsanto, which had since been bought by Bayer, appealed the verdict to the Ninth Circuit Court of Appeals. It was the first time a verdict in a glyphosate case had been appealed in federal court. In the appeal, Monsanto raised two main arguments.

First, it claimed that that the pesticide labeling requirements under the Federal Insecticide, Fungicide, and Rodenticide Act (“FIFRA”) preempted any state requirement to place cancer warnings on pesticide labels. One of the claims the plaintiff had brought in the lower court was that Monsanto had failed to warn consumers of the risks of glyphosate by putting a warning label on Roundup products. Under FIFRA, states are not permitted to enact any labeling or packaging standards for pesticides that are “in addition to,” or “different from” federal standards. 7 U.S.C. § 136v(b). In *Bates v. Dow Agrosciences LLC*, 544 U.S. 431 (2005), the United States Supreme Court interpreted the preemption language in FIFRA to mean that states may only enact labeling and packaging standards for pesticides that are “equivalent to,” or “consistent with” federal standards. In its appeal, Monsanto argued that the plaintiff’s failure to warn claims were preempted by FIFRA because the Environmental Protection Agency (“EPA”) has consistently registered Roundup labels, and approved sale and use of Roundup without cancer warnings. Monsanto’s second main argument on appeal was that the lower court improperly admitted the plaintiff’s expert testimony on the alleged link between glyphosate and NHL. According to Monsanto, the lower court improperly applied what is known as “the *Daubert* standard,” a legal standard that is used by trial judges to determine whether an expert witness’s scientific testimony is based on scientifically valid reasoning that can be properly applied to the facts of the case. Monsanto claims that the lower court misapplied the *Daubert* standard in such a way that it allowed the plaintiff to rely on flawed findings with an “analytical gap” between the data and conclusions of the expert witnesses. Had the court applied the standard correctly, Monsanto argues that the case never would have been allowed to go to trial because none of the evidence linking glyphosate exposure to cancer would have been admitted.

Ninth Circuit Decision

The decision issued by the Ninth Circuit on May 14 rejected both of Monsanto's main arguments. According to the court, FIFRA did not preempt the plaintiff's failure to warn claims, nor had the lower court improperly allowed testimony from the plaintiff's expert witnesses. Therefore, the Ninth Circuit upheld the lower court's verdict and the award of \$20 million.

The court first considered whether FIFRA preempted the plaintiff's state law failure to warn claims. In order to determine whether the claims were preempted, the court applied the two-part test adopted by the Supreme Court in *Bates v. Dow Agrosciences, LLC*. Under that test, a state law will only be preempted by FIFRA if it is (1) a requirement for pesticide labeling or packaging, and (2) is also in addition to or different from FIFRA requirements. A state requirement for pesticide labeling or packaging that is equivalent to, or consistent with FIFRA requirements will not be preempted.

According to the Ninth Circuit, the plaintiff's failure to warn claims satisfied the first step of the *Bates* test because the claims were based on Monsanto's failure to provide a warning label under California law. Next, the court considered whether a warning label would be consistent with FIFRA requirements. State law is consistent with FIFRA when both impose "parallel requirements," meaning that a violation of the state law is also a violation of FIFRA. Therefore, if a violation of the California state law duty to warn would also be a violation of the FIFRA. Under FIFRA, a pesticide may not be "misbranded." 7 U.S.C. § 136j(a)(1)(E). A pesticide will be considered "misbranded" if "the label does not contain a warning or caution statement which may be necessary ... to protect health and the environment." 7 U.S.C. § 136(q)(1)(G). Under California common law, the duty to warn requires a manufacturer to warn consumers of any health risk that is "known or knowable" or of risks that "a reasonable prudent manufacturer would have known and warned about." According to the court, the FIFRA requirements and the California requirements are parallel because the FIFRA requirement to provide any "necessary" warning to protect human health is broader than the California requirement to warn against any "known or knowable" risks. Therefore, the plaintiff's failure to warn claims were not preempted by FIFRA.

Next, the Ninth Circuit considered whether the lower court had improperly applied the *Daubert* standard by admitting the plaintiff's expert witness testimony. Ultimately, the court found that the *Daubert* standard had been applied correctly according to precedent within the Ninth Circuit. Under the *Daubert* standard, judges can consider the following non-exclusive factors when determining an expert witness's reliability: (1) whether the theory or technique employed by the expert is generally accepted in the scientific community; (2) whether it has been subject to peer review; (3) whether it can be or has been tested; and (4) whether the known or potential rate of error is acceptable. Monsanto argued that the lower court improperly allowed expert witnesses to make assumptions in violation of how the *Daubert* standard is usually applied in Ninth Circuit cases. The court rejected this argument, noting that in the Ninth Circuit, the guiding principle when applying the *Daubert* standard is to exclude expert evidence when the flaws in theory or methodology are so large that the expert lacks "good grounds" for their conclusions. Because the lower court concluded that the plaintiff's expert witnesses were relying on theories and



methodologies that could reasonably support their conclusions that glyphosate exposure is linked to NHL, the Ninth Circuit concluded that the *Daubert* standard had been correctly applied.

Conclusion

Because *Hardeman v. Monsanto Co.* is a bellwether case, the court's conclusions are indicative of how future courts in the Ninth Circuit may rule in similar lawsuits. While the court noted that many of its holdings were fact-specific, and would not necessarily be the same if the facts of the case were different, there are still important takeaways that may be applicable in other glyphosate lawsuits. At least in the state of California, it seems likely that additional claims that Monsanto failed to warn consumers that glyphosate may cause cancer will not be preempted by FIFRA. Additionally, expert witnesses in other glyphosate cases that rely on the same theories and methodologies as the expert witnesses in *Hardeman v. Monsanto Co.* will likely be able to testify in Ninth Circuit courts without violating the *Daubert* standard.

Currently, settlement negotiations for the glyphosate MDL are on-going. If the negotiations are successful, many plaintiffs in the MDL and in the Ninth Circuit will settle their claims and drop their lawsuits. However, some plaintiffs may choose to continue with litigation, and may rely on the decisions reached by the Ninth Circuit.

Going forward, Bayer has said that it intends to pursue all available legal options, including petitioning the Supreme Court to review the case. Should the Supreme Court take the case, it would likely have an impact on future glyphosate cases, regardless of the outcome.

To read the Ninth Circuit's opinion in *Hardeman v. Monsanto Co.*, click [here](#).

To read Monsanto's appellate brief, click [here](#).

To read the plaintiff's initial complaint, click [here](#).

To read the text of FIFRA, click [here](#).

For more information on FIFRA preemption, click [here](#).

For more pesticide resources from the National Agricultural Law Center, click [here](#).

Waters of the United States

WOTUS Update: EPA Releases Proposed Rule to Redefine WOTUS by Brigit Rollins

On December 6, 2021, the Environmental Protection Agency ("EPA") published in the Federal Register its highly-anticipated proposed rule to redefine the term "waters of the United States" ("WOTUS") under the Clean Water Act ("CWA"). The term is critical to the CWA because it determines which water bodies receive CWA protection. Since 2015, the definition of WOTUS has been subject to various changes, both as the result of new regulations adopted by EPA, and court decisions concerning those regulations. The newly proposed rule aims to return the definition of WOTUS to its pre-2015 regulatory regime, with the hope that the final rule will fulfill CWA obligations, and appropriately reflect the scope of the CWA, so that the rule withstands legal challenges.



Background

The CWA was passed by Congress in 1972. The goal of the CWA is to “restore and maintain the chemical, physical, and biological integrity of that Nation’s waters.” 33 U.S.C. § 1251(a). To accomplish this goal, the CWA employees different permitting programs that restrict the discharge of pollutants into “navigable waters.” The CWA goes on to define navigable waters as “the waters of the United States, including the territorial seas.” 33 U.S.C. § 1362(7). However, the CWA does not define the term “waters of the United States.” Instead, EPA is responsible for drafting regulations that clarify what types of waterbodies fall under the definition of WOTUS. It is important that the definition of WOTUS be clear and understandable so that anyone, including agricultural producers, who may be subject to CWA regulation know whether an action requires a permit in order to avoid CWA violations.

In the nearly 50 years since the CWA was passed, EPA has adopted various regulatory definitions of WOTUS. However, since 2015, the definition has been in a seemingly constant state of flux. Prior to 2015, the same definition of WOTUS had been in place since 1986. Under the 1986 regulations, seven basic categories of waterbodies fell under the definition of WOTUS. To learn more about the 1986 regulations, see [here](#). In 2015, EPA adopted the Clean Water Rule (“2015 rule”) which expanded the definition of WOTUS in response to two United States Supreme Court cases. The 2015 rule was controversial. It faced several legal challenges, and by 2019 the 2015 rule was legally effective in only twenty-two states. To address this issue, EPA adopted a new WOTUS definition in 2020. Known as the Navigable Waters Protection Rule (“Navigable Waters Rule”), the 2020 regulations presented a narrow definition of WOTUS that was restricted to six categories of waterbodies. The Navigable Waters Rule was also the target of various lawsuits, and was ultimately vacated by a federal court in 2021. To learn more about the Navigable Waters Rule and subsequent lawsuits, see [here](#) and [here](#).

When President Biden took office in January 2021, he issued an Executive Order directing several federal agencies to review a variety of recent regulations, including the Navigable Waters Rule. After review, EPA determined that it would once again revisit the definition of WOTUS and attempt to draft a rule that would advance the objective of the CWA while accurately reflecting the scope of the statute’s jurisdiction. During 2021, EPA conducted multiple listening sessions with stakeholders to receive feedback on previous WOTUS rules and expectations for a future rule. After considering input from stakeholders, reviewing previous WOTUS regulations, and Supreme Court cases, EPA drafted and published a proposed rule in December 2021.

What’s in The Proposed Rule

According to EPA, the newly proposed rule intends “to interpret ‘waters of the United States’ to mean the waters defined by the familiar 1986 regulations” with certain amendments to reflect the statutory limits of WOTUS informed by Supreme Court cases.

Under the proposed rule, WOTUS would be defined to include: traditional navigable waters,



interstate waters, and the territorial seas, and their adjacent wetlands; most impoundments of “waters of the United States”; tributaries to traditional navigable waters, interstate waters, the territorial seas, and impoundments, that meet either the relatively permanent standard or the significant nexus standard; wetlands adjacent to impoundments and tributaries, that meet either the relatively permanent standard or the significant nexus standard; and “other waters” that meet either the relatively permanent standard or the significant nexus standard. All of these categories of protected waters can be found in the 1986 regulations. The major change made by the proposed rule is to condition the inclusion of some waters on whether they meet either the relatively permanent standard or the significant nexus standard, both of which are derived from a Supreme Court decision.

In *Rapanos v. United States*, 547 U.S. 715 (2006), the Supreme Court considered the scope of WOTUS as it applied to certain wetlands. The Court did not reach a majority decision, but instead published a plurality opinion authored by Justice Scalia, a concurring opinion authored by Justice Kennedy, and a dissent. The plurality opinion interpreted WOTUS to include wetlands and tributaries which were “relatively permanent, standing or continuously flowing bodies of water” or that shared a “continuous surface connection with” traditionally navigable waters. That interpretation is the source of the proposed rule’s relatively permanent standard. Similarly, Justice Kennedy’s concurrence provides the basis for the proposed rule’s significant nexus standard. According to the concurrence, a waterbody that is not a traditional navigable water could still be a WOTUS if it possesses a “significant nexus to waters that are or were navigable in fact or that could reasonably be made so.” It goes on to explain that a significant nexus exists if the water body or wetland “significantly affect[s] the chemical, physical, and biological integrity of other covered waters more readily understood as ‘navigable.’”

Since *Rapanos*, courts that have considered the question have determined that CWA jurisdiction can be found for at least those waters that satisfy the significant nexus standard, with most concluding that CWA jurisdiction can be established under either the significant nexus standard or the relatively permanent standard. While EPA did not revise the WOTUS regulations after *Rapanos*, it did issue guidance documents concluding that a water would fall under CWA jurisdiction if it met either standard. The proposed rule would officially codify both standards. According to the proposed rule, the definition of WOTUS would include traditional navigable waters, the territorial seas, and their adjacent wetlands. This language comes directly from the 1986 regulations, and has generally been included in every definition of WOTUS. Like the 1986 regulations, the proposed rule defines traditional navigable waters as “all waters that are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide.” The inclusion of interstate waters in the WOTUS definition is also a return to the 1986 regulations. Interstate waters will be defined as “all rivers, lakes, and other waters that flow across, or form a part of, State boundaries” regardless of whether those waters are also traditionally navigable.

Impoundments of protected waters, such as dams and reservoirs, is another carry over from the 1986 regulations with one change. Waters that are determined to fall under CWA jurisdiction because they fit into the “other waters” category will be excluded from the definition of

impoundments. In other words, only impoundments of waters that do not fall into the “other waters” category will be granted CWA protection under the impoundments category. Impoundments of “other waters” may still receive CWA protection, but only if they meet other requirements. EPA is specifically seeking comments on whether impoundments of “other waters” should be assessed under the “other waters” category.

The proposed rule also retains the tributary category from the 1986 regulations, updated to reflect relevant Supreme Court decisions. Under the 1986 rule, “tributaries” was defined to include “tributaries of traditional navigable waters, interstate waters, ‘other waters,’ or impoundments.” In contrast, the proposed rule defines tributaries as “tributaries of traditional navigable waters, interstate waters, impoundments, or the territorial seas if the tributary meets either the relatively permanent standard or the significant nexus standard.” The updated definition of tributaries removes the “other waters” language so that a tributary of a waterbody that falls under the “other waters” category does not automatically receive CWA protection as a tributary. Instead, such a tributary would be evaluated independently under the “other waters” category. The proposed rule also adds territorial seas to the definition of tributary so that any water which is a tributary to a territorial sea will fall under CWA jurisdiction. The final change the proposed rule makes to the tributary category is the requirement that the tributary meet either the relatively permanent standard or the significant nexus standard in order to determine CWA jurisdiction.

Similarly, the adjacent wetlands category will also retain language from the 1986 regulations, with some updates. The definition of “adjacent” will remain unchanged from the 1986 regulations, which defined “adjacent” as “bordering, contiguous, or neighboring. Wetlands separated from other waters of the United States by man-made dikes or barrier, natural river berms, beach dunes and the like are adjacent wetlands.” Wetlands that are adjacent to traditional navigable waters and interstate waters received protection under the 1986 regulations without further analysis. The proposed rule will do the same. However, wetlands that are adjacent to impoundments or tributaries will need to be evaluated to determine if they meet either the relatively permanent standard or the significant nexus standard before receiving CWA protection.

Finally, the “other waters” category is another carry over from the 1986 regulations with an update to reflect relevant Supreme Court precedent. Under the 1986 regulations, “other waters” that did not fit into any other category of WOTUS could still fall under CWA jurisdiction if the use, degradation, or destruction of the water could affect interstate or foreign commerce. The proposed rule would remove the requirements relating to interstate or foreign commerce and instead conclude that “other waters” would fall under CWA jurisdiction only if they meet either the relatively permanent standard or the significant nexus standard.

Going Forward

EPA published the proposed WOTUS rule in the Federal Register on December 6, 2021. At that time, the comment period opened, and it is expected to run until February 7, 2022. While EPA may extend the comment period if it finds additional time necessary, parties looking to submit a



comment should try to do so before the current cut-off date.

After the comment period on the proposed rule closes, EPA will review all comments and develop a final rule.

To read the proposed rule, click [here](#).

For a timeline of the definition of WOTUS from 1972 to present, click [here](#).

To read the text of the CWA, click [here](#).

For more National Agricultural Law Center resources on the CWA, click [here](#).

Treading Water: WOTUS Once Again Before Supreme Court by Brigit Rollins

In January 2022, the United States Supreme Court announced that it would once again hear arguments in the long-running case of Sackett v. EPA. This will be the second time that the Supreme Court has agreed to take up the Sackett case since it was first filed in federal court in 2008. The underlying case involves a dispute concerning a wetland located on the plaintiffs' property, and whether it falls under the jurisdiction of the Clean Water Act ("CWA"). A ruling from the Supreme Court could impact how wetlands are treated under the CWA.

Background

The controversy at the heart of this case occurred in 2007 when the plaintiffs, Michael and Chantell Sackett, began to fill in a wetland located on their property near Priest Lake, Idaho in order to start constructing a home. Shortly afterward, the Environmental Protection Agency ("EPA") intervened. According to EPA, the wetland that the Sacketts were filling in was a "water of the United States" and therefore fell under CWA jurisdiction. Because EPA identified the wetland as a WOTUS, the Sacketts were required to obtain a CWA permit before they could continue their fill activities. The Sacketts disputed EPA's claim and ultimately filed suit.

WOTUS & the CWA

The CWA is the primary federal statute regulating water pollution in the United States. It functions in part by requiring parties to obtain a CWA permit prior to discharging pollutants into any "navigable waters." The Act goes on to define navigable waters as "the waters of the United States, including the territorial seas." 33 U.S.C. § 1362(7). The term "waters of the United States," often shortened to "WOTUS" is central to the CWA because it determines which waters fall under the Act's jurisdiction. However, Congress did not define the term when the CWA was first passed, and instead left it up to EPA to define in the Act's implementing regulations. For decades, EPA has grappled with how to appropriately define WOTUS according to statutory authority. At the time the Sacketts began construction on their property in Idaho, the EPA was defining WOTUS according to regulations passed in the 1980s. Under those regulations, wetlands that were adjacent to other waters identified as WOTUS were themselves WOTUS and therefore fell under the jurisdiction of the CWA.

In 2006 the Supreme Court released the landmark decision *Rapanos v. U.S.*, 547 U.S. 715 (2006) concerning the regulation of wetlands under the CWA. Prior to *Rapanos*, the Supreme Court had only addressed wetland jurisdiction under the CWA once before in *U.S. v. Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985) when the Court concluded that EPA had the authority to regulate wetlands that were “adjacent” to navigable waters. At question in *Rapanos* was whether CWA jurisdiction extended to nonnavigable wetlands that did not directly “abut” a navigable water. The case did not result in a majority decision from the court. Instead, it produced a plurality opinion authored by Justice Scalia and an opinion by Justice Kennedy writing for himself. The plurality opinion concluded that a wetland should only be considered a WOTUS if it had a “continuous surface connection” to another WOTUS. The opinion authored by Justice Kennedy suggested that the jurisdiction of each wetland should be determined on a case-by-case basis based on whether the wetland had a “significant nexus” to another WOTUS. According to Justice Kennedy, a significant nexus would exist if a wetland “significantly affect[ed] the chemical, physical, and biological integrity” of a WOTUS. Since the *Rapanos* decision was first issued, courts and EPA have struggled to determine which test to apply when determining whether a particular wetland is subject to CWA jurisdiction. So far, courts have tended to apply either Justice Kennedy’s significant nexus test on its own or in combination with the plurality’s test. EPA, on the other hand, has tended to follow the significant nexus test. To learn more about the 1980s WOTUS regulations and the *Rapanos* decision, [click here](#).

Journey to the Supreme Court

In 2007, after EPA inspected the Sacketts property after being made aware of a potential CWA violation, the Agency issued an administrative compliance order formally concluding that the Sacketts’ property contained a wetland subject to CWA jurisdiction. According to EPA, the wetland located on the Sackett property was a WOTUS because it was part of a wetland system that drained into a tributary which fed nearby Priest Lake which has long been considered a WOTUS due to its use in interstate commerce. Although the wetland on the Sackett property did not share a surface connection with Priest Lake due to manmade barriers, EPA found that it nevertheless shared a significant nexus with the Lake that was sufficient to declare the wetland a WOTUS.

The Sacketts filed suit against EPA in 2008 challenging the conclusion of the administrative compliance order. According to the Sacketts, the wetland on their property was not a WOTUS because it does not share a continuous surface water connection with Priest Lake or any other navigable body of water. The Sacketts argue that EPA’s application of the significant nexus test was incorrect because it is the *Rapanos* plurality opinion that should govern CWA jurisdictional questions. In other words, the controversy at the heart of this case is which *Rapanos* opinion should control the jurisdiction of wetlands under the CWA – the plurality’s continuous surface water opinion, or Justice Kennedy’s significant nexus opinion.

However, before the courts were able to address that particular controversy, they first had to determine whether the Sacketts were able to challenge EPA’s administrative compliance order in a court of law. That question ultimately came before the Supreme Court which concluded that the



order could be challenged. After reaching that decision, the Supreme Court sent the case back to the lower federal courts so that the question of wetland jurisdiction could be appropriately considered. Both the federal district court and the Ninth Circuit Court of Appeals concluded that the significant nexus test was the correct one to apply. Both courts upheld EPA's finding that the wetland on the Sackett property was a WOTUS because it shared a significant nexus with Priest Lake. The Sacketts have appealed that finding to the Supreme Court which has once again agreed to take up the case.

Question Before the Supreme Court

This time, the issue before the Supreme Court in *Sackett v. EPA* will involve the actual controversy at the heart of the case. The question presented to the Court in the plaintiffs' brief is "should *Rapanos* be revisited to adopt the plurality's test for wetlands jurisdiction under the [CWA]?"

The Sacketts argue that the Court should formally endorse the plurality's opinion as the correct way to determine CWA jurisdiction for wetlands for two main reasons. First, the Sacketts argue that the plurality opinion is the more constitutionally sound interpretation of the CWA. Traditionally, the term "navigable waters" has been defined to include those waters which are used in interstate commerce. The Sacketts claim that the plurality opinion is the more constitutionally correct approach because it would limit CWA jurisdiction to navigable waters and those wetlands that share a continuous surface connection with navigable waters. Limiting the term "navigable waters" in such a way would bring the CWA more in line with other laws and regulations that use the same term.

Second, the Sacketts claim that by adopting the plurality opinion, the Supreme Court the Court could resolve over a decade of confusion that followed the split decision in *Rapanos*. Since the *Rapanos* decision, courts, EPA, and ordinary citizens have been uncertain about how to properly determine the jurisdiction of a wetland. Courts have been split on whether to apply the significant nexus test or the continuous surface connection test, with some federal circuits opting to apply only the significant nexus test while others have chosen to apply the two in conjunction. EPA has also wrestled with how to best apply *Rapanos*. Since the decision was issued in 2006, EPA has adopted three different rulemakings aimed at defining WOTUS post-*Rapanos*. All of those rulemakings faced court challenges, and two were found to be unlawful. EPA is currently in the middle of another rulemaking effort to create a lasting WOTUS definition. Meanwhile, private citizens have also been confused over which jurisdictional test applies. According to the Sacketts, the absence of a clear jurisdictional rule has left private landowners such as themselves "feel their way" through CWA regulation on a case-by-case basis. For those reasons, the Sacketts urged the Supreme Court to adopt the *Rapanos* plurality opinion.

In its response brief, EPA argued that the Supreme Court should not revisit *Rapanos* both because the courts of appeals are not as confused as the Sacketts claim, and because EPA is currently in the middle of a rulemaking to revise the definition of WOTUS. According to EPA, since the *Rapanos* decision was issued, federal courts have consistently found that at least those wetlands that meet Justice Kennedy's significant nexus test fall under CWA jurisdiction. Additionally, EPA



claims that every definition of WOTUS that the Agency has adopted since the CWA was originally passed has included some wetlands that do not share a continuous surface connection with a navigable water. The wetland on the Sackett property was identified as a WOTUS because EPA found it was part of a larger wetland complex that drained into a tributary which flows into nearby Priest Lake. EPA argues that this satisfies the significant nexus test which has been applied by federal courts since the Rapanos decision was issued, as well as EPA's authority to regulate wetlands "adjacent" to navigable waters which the Supreme Court identified in *Riverside Bayview Homes*.

Going Forward

It is currently unclear what impact the Supreme Court will have on the future of WOTUS by agreeing to take up the Sacketts' case. The Court may choose to issue a broad decision regarding wetland jurisdiction under the CWA. If it does so, that decision would likely affect CWA regulation across the entire country as well as impact the WOTUS rulemaking currently being undertaken by EPA. However, it is also possible that the Supreme Court could choose to narrowly tailor its decision so that the outcome would only affect the particular wetlands located on the Sackett property.

Endangered Species Act

EPA Adopts New Policy For ESA Consultations & New Pesticide Active Ingredients by Brigit Rollins

On January 11, 2022, the Environmental Protection Agency ("EPA") announced that effective immediately it had changed its policy regarding Endangered Species Act ("ESA") consultations for newly registered pesticide active ingredients. According to EPA, the new policy is expected to allow the agency to consistently assess the impacts conventional pesticides have on species listed under the ESA which should help to reduce litigation and ultimately provide greater stability to the agricultural producers who rely on pesticide use.

Under Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA"), the term "active ingredient" is defined as "any substance (or group of structurally similar substances, if specified by [EPA]) that will prevent, destroy, repel or mitigate any pest, or that functions as a plant regulator, desiccant, defoliant, or nitrogen stabilizer[.]" 40 C.F.R. § 158.300. EPA has noted that its new policy will apply only those active ingredients being registered under FIFRA for the first time. Other pesticides which are already registered under FIFRA, or which contain active ingredients already registered by EPA may not be subject to the same policy. Registering those pesticides may still require ESA consultation, but the decision to do so may not necessarily be directed by EPA's new policy.

What is ESA Consultation?

The main purpose of the ESA is to prevent imperiled wildlife species from becoming extinct, and



to recover species at-risk of extinction to the point where the ESA's protections are no longer needed. One of the ways that the ESA accomplishes this goal is by requiring all federal agencies to consider the impact their actions have on listed species and areas designated as critical habitat for listed species. If an agency finds that its action "may affect" a listed species, then the ESA requires the agency to engage in consultation with the U.S. Fish and Wildlife Service ("FWS") or the National Marine Fisheries Service ("NMFS") (collectively "the Services") to determine how much of an affect the action will have and what, if any, mitigation measures can be adopted.

In order to begin ESA consultation, a federal agency must first determine if consultation is even necessary. The text of the ESA states that consultation is required for any action an agency has "authorized, funded, or carried out[.]" 16 U.S.C. § 1536(a)(2). Registering a new pesticide active ingredient is an agency action because it is authorized by EPA. Therefore, whenever EPA registers a new active ingredient, the ESA would require the agency to go through consultation.

There are two types of ESA consultation, formal and informal. Informal consultation can begin during the planning stage of a project. At that point, the federal agency taking the action (otherwise known as "the action agency") can reach out to the Services to begin discussions about what listed species may be affected by the proposed action. It is during informal consultation when the action agency will determine whether its proposed action "may affect" any listed species or critical habitat. A may affect finding includes actions that are "not likely to adversely affect" as well as actions that "are likely to adversely affect" listed species or critical habitat. If the agency finds that the proposed action will have no effect, then informal consultation is the end of the road and no further action is needed. If an agency determines that it's proposed action may affect listed species or habitat, but that it is not likely to adversely affect species or habitat, and the Services agree with that conclusion, then no further action is required. 50 C.F.R. § 402.13(c). However, if an agency concludes that it's proposed action is likely to adversely affect listed species or critical habitat, then it is required to begin formal consultation. 50 C.F.R. § 402.14(a).

Formal consultation is a mandatory process for any proposed federal agency action that may adversely affect listed species or critical habitat. 50 C.F.R. § 402.14(a). The ultimate goal of the formal consultation process is to ensure that the proposed agency action will neither jeopardize the continued existence of a listed species, or destroy or adversely modify critical habitat. Under the ESA, jeopardy is defined as "an action that reasonably would be expected, directly or indirectly, to reduce appreciably the likelihood of both the survival and recovery of a listed species in the wild by reducing the reproduction, numbers, or distribution of that species." 50 C.F.R. § 402.02. Additionally, destruction or adverse modification of critical habitat is defined to mean "a direct or indirect alteration that appreciably diminishes the value of critical habitat as a whole for the conservation of a listed species." 50 C.F.R. § 402.02. During formal consultation, the consulting Service to develop a document known as a biological opinion ("BiOp") which states the opinion of the Service as to whether the federal action is likely to jeopardize listed species or result in the destruction or adverse modification of critical habitat. If the Service concludes that jeopardy or adverse modification will occur, the BiOp will also contain recommended mitigation measures intended to minimize the impacts of the action.

Formal consultation may take up to 90 days to complete. Once the action agency completes consultation with either a finding from the Services that the action will not result in jeopardy or adverse modification, or a completed BiOp, the agency can go forward with its proposed action.

EPA's New Policy

Before a pesticide may be legally used in the United States, it must be registered under FIFRA. In order to register a pesticide under FIFRA, EPA must make a finding that the pesticide will not cause "unreasonable adverse effects on the environment." 7 U.S.C. § 136a(c)(5)(C). FIFRA goes on to define "unreasonable adverse effects on the environment" as "any unreasonable risk to man or the environment, taking in account the economic, social, and environmental costs and benefits of the use of any pesticide[.]" 7 U.S.C. § 136(bb). In other words, EPA conducts a risk/benefit analysis to determine whether registering a pesticide under FIFRA will cause unreasonable adverse effects on the environment. This differs from the ESA's "may affect" standard which requires federal agencies to consult with either FWS or NMFS any time they determine that an action may impact listed species in any way.

According to its January 11 announcement, prior to registering a new pesticide active ingredient for use under the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA"), EPA will evaluate the potential effects of the ingredient on listed species and critical habitat and will initiate ESA consultation when appropriate. Before enacting the new policy, EPA states that it "did not consistently assess" the possible effects of active ingredients on listed species prior to registering new ingredients. EPA claims that failing to do so resulted in insufficient protections for listed species, as well as "resource-intensive litigation" against EPA that caused uncertainty over registered pesticide ingredients. In essence, EPA's new policy is intended to bring stability and consistency to the process of registering new pesticide active ingredients.

To achieve those goals, the new policy will direct EPA to complete ESA consultation prior to officially registering a new pesticide active ingredient for use. If formal consultation with the Services is necessary, EPA will initiate such consultation before granting the new registration. Additionally, if the Services conclude that use of the active ingredient may jeopardize the continued existence of a listed species or adversely modify designated critical habitat, then EPA will require the ingredient's use label to contain mitigation measures before the ingredient is registered for use. Additionally, EPA may require the party registering the pesticide active ingredient to incorporate a link to Bulletins Live! Two (EPA's online system showing use limitations for registered pesticides by geographic area) into the product's labeling. Under FIFRA, a violation of a pesticide's labeling instructions is a violation of federal law. Any mitigation measures included in the label of a newly registered pesticide active ingredient would be subject to FIFRA's requirements.

Going Forward

In its announcement, EPA stated that the new policy would be immediately effective. Going forward, EPA will complete ESA consultation for any new pesticide active ingredient prior to



registering under FIFRA. EPA has also stated that the new policy will apply to those active ingredients that were submitted to EPA before the new policy was announced, but which have yet to receive registration. Additionally, EPA noted that it is currently considering how it may apply the policy to antimicrobials and biopesticides in the future.

Right to Farm Statutes

Georgia and Vermont Right to Farm Bills by Rusty Rumley

The legislatures in two states, Georgia and Vermont, are attempting to strengthen the protection provided by their right to farm statutes. All fifty states have enacted right to farm statutes to protect qualifying farmers and ranchers from nuisance litigation filed by their neighbors. Right to farm statutes traditionally protect against nuisance lawsuits brought by neighbors that are affected by odor, lights, noise, dust, or other things that can create a substantial and ongoing interference with the neighbor's use and enjoyment of their property. The language and the level of protection provided by the right to farm statute vary significantly between the states. States with a strong agricultural sector tend to have stronger right to farm statutes than other states; however, there are exceptions and states amend their right to farm statutes from time to time often spurred by significant court cases.

Georgia

In Georgia, HB 1150 makes several changes; however, two of the changes are especially significant. The primary change to strengthen the protections of the statute is the removal of language surrounding "changed conditions." The triggering language in the current statute states that "No agricultural facility, agricultural operation, ... shall be or shall become a nuisance, either public or private, as a result of changed conditions in or around the locality of such facility or operation if the facility or operation has been in operation for one year or more. Ga. Code Ann. § 41-1-7(c). This provides for a two-part trigger before the statute provides a defense to a nuisance lawsuit. There must be a "changed condition in or around the locality of such facility or operation" and the farm must have been in existence for at least one year. "Changed condition" was the exact phrase from an older version of the North Carolina right to farm statute, NC Gen Stat § 106-701 (2013), and was at issue in the Smithfield Foods litigation (to read more about these cases [click here](#).) In that case a judge ruled that the North Carolina right to farm statute did not apply because the nuisance lawsuits were not brought as a result of "changed conditions" in the area. By removing the language regarding "changed conditions" the state legislature would simplify the trigger to only requiring a farm to be in operation for more than one year in order to receive the protection of the statute.

The second change in the bill addresses confined animal feeding operations (CAFOs) and swine feeding operations and would establish a new operation date when one of these two types of operations are created. For example, a farm has been established for ten years growing primarily specialty crops so that operation would be entitled to protection under the proposed bill;



however, if that same farm wanted to transition over to a CAFO then that protection would be lost for the first year that it operates as a CAFO.

Vermont

Vermont’s proposed bill, SB 268, would significantly amend and strengthen their right to farm statute. The current version of Vermont’s right to farm statute creates a rebuttable presumption that a farming operation is not a nuisance if certain criteria are met. Vt. Stat. Ann. tit. 12, § 5753. Those conditions are:

- it is conducted in conformity with federal, state, and local laws and regulations (including required agricultural practices);
- it is consistent with good agricultural practices;
- it is established prior to surrounding nonagricultural activities; and
- it has not significantly changed since the commencement of the prior surrounding nonagricultural activity.

Vermont is unique in that their right to farm statute merely creates a rebuttable presumption that an agricultural operation is not a nuisance. A rebuttable presumption means that even if an agricultural operation is successful in meeting all of the conditions needed to trigger the right to farm act protections the plaintiff bringing the nuisance lawsuit can still prevail on the merits of the case during the trial if they are able overcome the presumption that the operation is not a nuisance. Instead, other states’ right to farm statutes create an affirmative defense to nuisance lawsuits if the necessary factors in triggering their protections are met. An affirmative defense is where the law creates a statutory defense that, if certain factors are met, result in a nuisance lawsuit being dismissed even if the plaintiff can prove their case.

The significant changes of the proposed bill would rewrite the triggering language discussed above and award attorney fees to prevailing agricultural operations. The new bill would establish three separate triggers and any one of which would be sufficient to create an affirmative defense for the agricultural operation. The three proposed triggers in SB 268 are:

1. The farm or farm operation existed before a change in the land use or occupancy of land in proximity to the farm, and if before that change in land use or occupancy of the farm, the farm or farm operation would not have been a nuisance.
2. The farm or farm operation alleged to be a nuisance is in good standing with the Secretary of Agriculture, Food and Markets under 6 V.S.A. chapter 215.
3. The farm or farm operation has been conducting the agricultural activity at issue for two or more years prior to the date a nuisance action is commenced. In determining the duration of an agricultural activity on a farm or farm operation, the initial date of operation shall be when the agricultural activity commenced on the farm or farm operation.

The other substantial change to the Vermont right to farm statute deals with the awarding of attorney fees. In the American legal system, each side of a lawsuit is generally responsible for the payment of their own legal fees; however, this can be modified by statute, or courts may award costs for frivolous litigation. SB 268 would modify this “American rule” by requiring the plaintiff to



pay the reasonable legal costs of the defendant if the agricultural operation prevails in the nuisance lawsuit.

Conclusion

All fifty states have a right to farm statute; however, the statutes differ across the country and do not remain static. Changes to state right to farm statutes occur on a regular basis and these changes can impact other states that are either in the process of updating their statute or are considering an update in the near future.

California Prop 12 Update

What is Going on With Prop 12? By Jana Caracciolo

In 2018, voters in California passed Proposition 12 (Prop 12). Prop 12 was a ballot initiative that enacted a law requiring farmers to provide a minimum amount of square feet to egg-laying hens, veal calves, and breeding pigs. Prop 12 also requires California stores to verify that the eggs, veal meat, and pork they sell were derived from animals raised in accordance with Prop 12's square footage requirements. There are two compliance dates associated with Prop 12. The first compliance date required farmers raising egg-laying hens and veal calves to provide a certain number of square feet to each hen and veal calf by January 1, 2020. At that time, California stores were required to sell eggs and veal meat that were produced in a way that complies with Prop 12. The second deadline required egg-laying hen producers to have cage free facilities, and hog producers to provide their animals a certain number of square feet by January 1, 2022. After January 1, 2022, California stores selling eggs and pork must ensure those products were raised in compliance with Prop 12.

Since Prop 12 was enacted, it has been the subject of litigation. Particularly, plaintiffs have focused on the provisions pertaining to hogs and pork. Due to this litigation, Prop 12 is currently unenforceable. This blog post examines the two on-going court cases involving Prop 12, and how it affects raising hogs and selling pork. The first case is in federal court and deals with the constitutional law concept known as the Dormant Commerce Clause. The second case is in state court and deals with statutory interpretation and administrative procedure.

National Pork Producers Council v. Ross

In December 2019 the National Pork Producers Council and the American Farm Bureau Federation (Plaintiffs) filed a lawsuit in the United States District Court for the Southern District of California against the California Department of Food and Agriculture (CDFA) and the California Department of Public Health (CDPH). In their complaint, the Plaintiffs in *National Pork Producers Council v. Ross*, 456 F.Supp. 3d 1201 (S.D. Cal. 2020), argued that Prop 12 violated the Commerce Clause of the United States Constitution.



The Commerce Clause states that Congress has the power “to regulate commerce with foreign nations, and among the several states, and with Indian tribes.” U.S. Const. art. I, § 8, cl. 3. Additionally, courts have read into this clause a concept called the Dormant Commerce Clause, which is the idea that states cannot pass laws that excessively burden interstate commerce, or commerce across state borders. In other words, states cannot pass laws that favor that state’s citizens or businesses over citizens and businesses from other states without violating the Dormant Commerce Clause. However, this legal doctrine is not clear and courts in different jurisdictions may come to different conclusions when presented with the same facts in a Dormant Commerce Clause dispute.

The Plaintiffs in *National Pork Producers Council v. Ross*, claimed Prop 12 violated the Dormant Commerce Clause because Prop 12 requires any hog producer—including those located outside of California—who sells pork in California to provide a minimum amount of square feet to each hog. To successfully argue that Prop 12 violated the Dormant Commerce Clause, the Plaintiffs needed to prove that Prop 12 has both an “extraterritorial effect,” and a substantial burden on interstate commerce. At both the District Court and Circuit Court levels, the judges felt the Plaintiffs did not meet these requirements, and therefore concluded that Prop 12 does not violate the Dormant Commerce clause.

District Court

In *National Pork Producers Council v. Ross*, the District Court found that Prop 12 has neither an extraterritorial effect nor does it substantially burden interstate commerce.

To determine whether Prop 12 has an extraterritorial effect, the District Court asked whether Prop 12 controls conduct that occurs only outside of California’s borders. The District Court explained that, under its precedent, a “statute that applies both to California entities and out-of-state entities does not target wholly extraterritorial activity.” The District Court also noted that the Supreme Court of the United States has held that a law violates the Dormant Commerce Clause if it controls commerce occurring wholly outside the boundaries of the state. See *Healy v. Beer institute, Inc.*, 491 U.S. 324, 336 (1989). This means that if a law controls commerce that takes place fully within the state the same way it controls commerce that stretches beyond the state’s borders, then the law does not have an extraterritorial effect. The District Court found that Prop 12 “does not regulate extraterritorially because it does not target solely interstate commerce and it regulates in-state and out-of-state conduct equally.”

The second part of the test to determine whether a law violates the Dormant Commerce Clause is to determine whether the law places a substantial burden on interstate commerce. A law places a substantial burden on interstate commerce when it regulates activities that inherently require a uniform system of regulation, or impairs the free flow of materials and products across state borders. *Nat’l Ass’n of Optometrists & Opticians v. Harris*, 682 F.3d 1144, 1154-55 (9th Cir. 2012). The District Court found that “the fact that some Proposition 12 compliant pork might reach states other than California does not mean Proposition 12 has the effect of requiring a uniform system of regulation.” Under the District Court’s reasoning, an unconstitutional state law would



require all pork produced in the United States to comply with Prop 12.

In arguing Prop 12 places a substantial burden on interstate commerce, the Plaintiffs reasoned that the law will incentive consolidation in the pork industry. The District Court explained that this argument does not address Prop 12’s constitutionality. Instead such an “argument relates to the wisdom of the statute, not its burden on commerce.” Quoting *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117, 128 (1978).

Because the District Court found that Prop 12 does not have an extraterritorial effect and does not substantially burden interstate commerce, it held that Prop 12 does not violate the Commerce Clause of the United States Constitution.

Ninth Circuit

After the District Court ruled in favor of CDFA and CDPH, the Plaintiffs appealed the case to the United States Court of Appeals for the Ninth Circuit. *National Pork Producers Council v. Ross*, 6 F.4th 1021 (9th Cir. 2021). Again, the Plaintiffs claimed that Prop 12 impermissibly regulates “extraterritorial conduct outside of California’s borders by compelling out-of-state producers to change their operations to meet California standards”; and that Prop 12 imposes an excessive burden on interstate commerce without advancing any legitimate local interest.

Although the Ninth Circuit dealt with the same facts and legal concept as the District Court, it had a different way of explaining impermissible extraterritorial effects. The Ninth Circuit explained that even “if a state’s requirements have significant upstream effects outside of the state, and even if the burden of the law falls primarily on citizens of other states, the requirements do not impose impermissible extraterritorial effects. [. . .] A state law is not impermissibly extraterritorial unless it directly regulates conduct that is wholly out of state.” The Ninth Circuit found that although Prop 12 has upstream effects (requiring out-of-state pork producers to gain California certification to sell their products in California), Prop 12 does not have impermissible extraterritorial affects because it simply regulates the sale of pork within California.

For the second part of the Dormant Commerce Clause test, the Ninth Circuit explained that a statute imposes a substantial burden on interstate commerce if it is discriminatory, or if the statute regulates an activity that requires uniform regulations in every state such as taxation and interstate transportation. The Ninth Circuit found that Prop 12 does not have a discriminatory effect and does not fall into the narrow class of activities that require uniform regulation.

Additionally, the Ninth Circuit explained that “laws that increase compliance cost, without more, do not constitute a significant burden on interstate commerce.” In response to the Plaintiffs’ claim that Prop 12 will increase pork production costs, the Ninth Circuit explained that even “if producers will need to adopt a more costly method of production to comply with Proposition 12, such increased costs do not constitute a substantial burden on interstate commerce. [. . .] Nor do higher costs to consumers qualify as a substantial burden on interstate commerce.” Therefore, the Ninth Circuit agreed with the District Court and held that Prop 12 does not violate the

Dormant Commerce Clause.

After the Ninth Circuit filed its opinion on July 28, 2021, the Plaintiffs appealed the decision to the Supreme Court of the United States. On March 28, 2022, the Supreme Court announced it will hear the case during its 2022-2023 term. This means that the Supreme Court will have the ultimate say on Prop 12's constitutionality. The Supreme Court did not announce why it decided to hear the case, but its decision, which will be published after the Court hears the case, may help clarify the Dormant Commerce Clause doctrine.

California Hispanic Chamber of Commerce v. Ross

A lawsuit challenging Prop 12 has also been filed in California state court. On January 21, 2022 a California Superior Court judge decided that CDFA and CDPH cannot enforce Prop 12 until the state agencies promulgate regulations implementing Prop 12. *California Hispanic Chamber of Commerce v. Ross*, No. 34-2021-80003765, 2022. The text of Prop 12 required CDFA and the CDPH to finalize regulations by September 1, 2019. These regulations are to create a certification process to help stores verify they are selling eggs, veal, and pork in compliance with Prop 12. However, the state agencies have not yet published final regulations.

To avoid potentially facing criminal charges for unknowingly violating Prop 12 due to the lack of regulations, the California Hispanic Chamber of Commerce (the Chamber), and others, sued CDFA and CDPH. The Chamber asked the state court to determine both whether CDFA and CDPH may enforce Prop 12 before finalizing regulations, and if not, how long after such regulations are finalized may CDFA and CDPH start enforcing the law.

Prop 12 states that CDFA and CDPH “shall” jointly promulgate rules and regulations before enforcing the law. When interpreting laws, the term “shall” typically designates a command or something that must be done. Despite this command, the state agencies argued that regulations are not needed for entities regulated by Prop 12 to know how to comply. However, the court found this argument “inconsistent with textual evidence that the voters wanted regulations before the square-footage requirements took effect.” Thus, the court held that CDFA and CDPH must finalize regulations before enforcing Prop 12. The court also held that the state agencies must give regulated entities 180 days to come into compliance after the regulations are finalized before taking enforcement actions.

This opinion came out of a superior court, the lowest court in California's court system. This means that the decision is appealable to a Court of Appeal. CDFA and CDPH have 60 days after the superior court rendered its opinion to file an appeal. Therefore, if CDFA and CDPH decide to appeal the superior court's decision, the state agencies must do so before March 22, 2022.

What's to Come

Although no court has found that Prop 12 is unconstitutional, the law is not currently enforceable in California. Without further judicial intervention, it will likely be enforceable 180 days after CDFA



and CDPH publish final regulations implementing Prop 12. However, the fate of Prop 12 remains unclear.



