An Agricultural Law Research Article

A Defense of the Farm Labor Contractor Registration Act

by

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Notes

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> [W]e see families crowded into shelters that are more like coops for animals, with children undernourished and in poor health, 2 or 3 years behind in school, with little chance to develop their talents and become fully useful to themselves or their country. This is the ugliest kind of human waste. The plight of the migrant and his family is a charge on the conscience of all of us.[1]

The Farm Labor Contractor Registration Act[2] (FLCRA) protects migrant and seasonal farmworkers from abuses of the farm labor contracting system.[3] The Act guarantees that farmworkers receive notice of the terms and conditions of employment offers, and generally deters employers from exposing farmworkers to hazardous conditions, breaching employment agreements, or denying farmworker employees the rights and benefits secured by other federal statutes. Congress in 1980 rejected amendments to FLCRA (Boren Amendment)[4] that would have excluded many agricultural employers and most farmworkers from the Act's scope.[5] FLCRA has weathered similar assaults,[6] but none so well organized, and none so nearly successful. Most certainly, there will be future attacks.[7] This Note is a defense of FLCRA.

1. STAFF OF SUBCOMM. ON MIGRATORY LABOR OF THE SENATE COMM. ON LABOR AND PUBLIC WELFARE, 86TH CONG., 2D SESS., THE MIGRANT FARMWORKER IN AMERICA vii (Comm. Print 1960) [hereinafter cited as 1960 SENATE MIGRANT REPORT].

2. 7 U.S.C. §§ 2041-2055 (1976).

3. The farm labor contracting system is the mechanism through which farmers and growers obtain workers for the labor-intensive periods of agricultural production.

4. *See* notes 76-77 *infra*.

5. *See* parts III & IV *infra*.

6. *See Proposed Amendments to the Farm Labor Contractor Registration Act: Hearings on H.R. 8232 [and Other Bills] Before the Subcomm. on Economic Opportunity of the House Comm. on Education and Labor*, 95th Cong., 2d Sess. (1978) [hereinafter cited as *1978 FLCRA Amendment Hearings*]; *Proposed Amendments to the Farm Labor Contractor Registration Act: Hearings on H.R. 14254 Before the Subcomm. on Agricultural Labor of the House Comm. on Education and Labor*, 94th Cong., 2d Sess. (1976) [hereinafter cited as *1976 FLCRA Amendment Hearings*].

7. The amendments Congress rejected in 1980 were reintroduced, essentially unchanged, in April 1981. *See* S. 922, 97th Cong., 1st Sess. (1981), 127 CONG. REC. S3685, S3686 (daily ed. April 8, 1981) (remarks of Sen. Boren). Since Congress to date has neither held hearings nor debated the 1981 version, this Note will focus on the 1980 proposed amendments, discussing the 1981 proposals only when they differ from the 1980 proposals.

I. Introduction

A. The Agricultural Industry and Seasonal Farmworkers

Until the mid-1950s, individual farmers in the United States made the basic decisions concerning what to produce and how to produce it.[8] Crops were sold in the open market at prices set by the vagaries of the marketplace.[9] The farmer and his family contributed a high proportion of the total labor used on the farm,[10] hiring temporary workers in harvest seasons as needed. Historically, farmers other than subsistence farmers, instead of hiring and managing seasonal farmworkers themselves, engaged farm labor contractors[11] to recruit, transport, oversee, and pay the farmworkers. The contractor's unique position as the only person with close and continuous contact with both the farmer and the farmworker allowed him to profit from both.[12] Contractors exploited farmers by failing to show up at scheduled workdays because better opportunities existed elsewhere.[13] Contractors' abuses of farmworkers, more the rule than the exception,[14] were more shocking.[15] While the farmer enjoyed some bargaining power and economic sophistication, the seasonal farmworker,[16] then as now, was the perfect victim. Most farmworkers are only marginally literate, many do not speak English,

8. Reimund & Martin, *Structure, Control, and Use of Agricultural Resources*, in U.S. DEP'T OF AGRICULTURE, LOOKING FORWARD: RESEARCH ISSUES FACING AGRICULTURE AND RURAL AMERICA 199, 204 (1978).

9. *Id.* at 203-04.

10. *Id.* at 202.

11. Farm labor contractors are also known as crewleaders, gang bosses, and crew pushers.

12. *Registration of Farm Labor Contractors: Hearings on H.R. 5060 and Similar Bills Before the Gen. Subcomm. on Labor of the House Comm. on Education and Labor*, 88th Cong., 1st Sess. 5 (1963) [hereinafter cited as *1963 House Hearings*] (statement of Rep. Roosevelt).

13. H.R. REP. NO. 1493, 93d Cong., 2d Sess. 5 (1974).

14. *Id.*

15. *See* text accompanying notes 26-36 *infra*.

16. The Census Bureau does not know how many seasonal farmworkers there are. In fact, it has no idea how to count them. *See Oversight Hearings on the 1980 Census Before the Subcomm. on Census and Population of the House Comm. on Post Office and Civil Service*, 96th Cong., 2d Sess. 14-18 (1980) (testimony of Alice Larson, Migrant Coordinator, Department of Labor). Even though many farmworkers no longer migrate with the harvest, the Department of Labor estimates that there are still almost 200,000 migrants, and 1.3 million other seasonal farm laborers. *Basket Three: Implementation of the Helsinki Accords: Hearings Before the Joint Commission on Security and Cooperation in Europe*, (VOL. VIII), 96th Cong., 1st Sess. 223 (1979) (testimony of Ray Marshall) [hereinafter cited as *1979 Helsinki Accords Hearings*]. Their work begins in February with the citrus harvest in California, Texas, and Florida, and ends in November with the apple harvest in New York or in January in the cotton gins of the South. Most farmworkers who still migrate work their way north during the summer months and return home to southern California, Texas, and Florida in the autumn. *See* STAFF OF SUBCOMM. ON MIGRATORY LABOR OF THE SENATE COMM. ON LABOR AND PUBLIC WELFARE, 92D CONG., 2D SESS., FEDERAL AND STATE STATUTES RELATING TO FARMWORKERS 307-21 (Comm. Print 1972). Most of those who no longer migrate have settled in and around agricultural communities in the latter three states, where they live from crop to crop, blending in with the rest of America's rural poor.

and few know anything about the laws that are supposed to protect them.[17]

The past quarter century has seen a structural change in agriculture: family farms produce increasingly smaller shares of farm output; large national or regional marketing firms control the marketing of farm products; and increasingly farmers, processors, and distributors vertically coordinate activities through contracts.[18] As the trend toward regionalization and vertical integration accelerates, control over agricultural production shifts away from the family farmer to the processors, distributors, and financiers.[19] The family farmer in the modern agriculture structure, although technically independent, performs the same function as a hired farm manager.[20] The farmer supplies the land and his labor, but often contracts with suppliers or distributors to buy and select feed, fertilizer, and insecticides; supervise and select the time and method of planting, harvesting, and delivery; and supply equipment and any needed specialized labor.[21]

The supplier or distributor often uses seasonal farmworkers to work on the farms. Organized large-scale agribusiness today no more guarantees humane treatment for seasonal farmworkers than did the agricultural structure based around the independent farm labor contractor. The system may in fact be worse since the decisionmakers often never see, much less care for, the plight of the farmworker. The seasonal farmworker is still the perfect victim. The Taft-Hartley Act,[22] which guarantees employees the right to engage in collective bargaining, does not cover him.[23] More importantly, a chronic surplus of unskilled agricultural labor hinders unionization efforts, keeps wages low, and prevents the farmworker from having any effective bargaining power. If a farmworker complains or attempts to bargain, an employer easily can replace him with a more docile worker. The farmworker usually has no employment options and is too poor to chance unemployment.

Early congressional inquiries discovered that employers took ad-

17. *See* T. EWALD, COURT ACTION FOR MIGRANTS 53 (1975).
18. Reimund & Martin, *supra* note 8, at 200.
19. *Id.* at 203.
20. M. HARRIS & D. MASSEY, VERTICAL COORDINATION VIA CONTRACT FARMING 21 (U.S. Dep't of Agriculture Misc. Pub. No. 1073, 1968).
21. *Id.* at 20.
22. Labor Management Relations (Taft-Hartley) Act, 29 U.S.C. §§ 141-187 (1976).
23. *Id.* § 152(3).

vantage of their farmworkers;[24] later investigations uncovered the variety and extent of the abuses.[25] Farmworkers were lured from their home states with false promises of long hours, high pay, and good housing.[26] They died on the road when the overloaded and worn out vehicles that carried them crashed or overturned.[27] Farmworkers were housed, when the promised housing existed at all, in overcrowded, unfurnished, vermin-infested shacks.[28] When they found work, it offered wages or effective piece rates far below the minimum wage for nonagricultural labor.[29] And when they worked nonetheless, the farmworkers were routinely cheated out of their wages. Contractors sometimes simply absconded with money owed to their workers, leaving migrants thousands of miles from home without funds or transportation.[30] In other cases contractors would deny owing wages due, undercount hours worked or units harvested, or retroactively reduce the piece rate or wage rate paid to the worker.[31] After paying farmworkers, some contractors would make inflated deductions from the farmworkers' earnings for housing, food, equipment rental, transportation, taxes, or interest on personal loans.[32] Contractors often managed to recoup wages paid to the farmworkers by forcing them to purchase all necessities at inflated prices from company stores[33] or from storekeepers with whom the contractors maintained kickback arrangements;[34] or the contractor for a fee would furnish alcohol, narcotics, or prostitutes to

24. S. REP. NO. 1098, 87th Cong., 1st Sess. ix-x (1961) [hereinafter cited as 1961 SENATE MIGRATORY LABOR PROBLEM REPORT].

For some idea of what the farmworker's life is like, read J. STEINBECK, THE GRAPES OF WRATH (1939), or watch Edward R. Murrow's famous documentary, *Harvest of Shame* (broadcast by NBC in 1960). For factual evidence and hard data, see S. REP. NO. 83, 91st Cong., 1st Sess. (1969). *See also* STAFF OF SUBCOMM. ON AGRICULTURAL LABOR OF THE HOUSE COMM. ON EDUCATION AND LABOR, 94TH CONG., 2D SESS., FEDERAL AND STATE STATUTES RELATING TO FARMWORKERS 95-135 (Comm. Print 1976).

25. *See, e.g., 1963 House Hearings*, *supra* note 12, at 41, 77-93 (article by Dale Wright submitted by Sarah H. Newman).

26. 1960 SENATE MIGRANT REPORT, *supra* note 1, at vii.

27. *Id.* at 39-40.

28. *Migratory Labor Bills: Hearings on Bills Relating to Various Migratory Labor Programs Before the Subcomm. on Migratory Labor of the Senate Comm. on Labor and Public Welfare*, 88th Cong., 1st Sess. 129-31 (1963) [hereinafter cited as *1963 Senate Hearings*] (testimony of Augustine Castillo).

29. *See, e.g., 1963 House Hearings*, *supra* note 12, at 65. For example, in 1960 a farmworker received 70 cents an hour for cultivating beets; this was approximately one-half the prevailing rate paid for nonagricultural unskilled labor. *Id.* at 60.

30. *1963 Senate Hearings*, *supra* note 28, at 39 (statement of W. Williard Wirtz, Secretary of Labor).

31. *1963 House Hearings*, *supra* note 12, at 69 (testimony of Sarah Newman); 110 CONG. REC. 19895 (1964) (remarks of Rep. Bennett).

32. *1963 Senate Hearings*, *supra* note 28, at 39-41 (statement of W. Williard Wirtz, Secretary of Labor).

33. *See 1963 House Hearings*, *supra* note 12, at 83 (material submitted by Sarah Newman).

34. *Id.* at 65.

farmworkers who had no way to get into town.[35] Because the farmworkers needed work to survive, they could neither escape nor resist: "They are unable to raise their voice when they suffer injustice . . . . Because of their poverty and insecurity they will take any job for whatever pay they can get. Employers and their own crewleaders often take advantage of them but beyond bitterness they know of no recourse."[36]

B. The 1974 Amendments

Horrified at what it learned during its investigations,[37] Congress passed the Farm Labor Contractor Registration Act of 1963[38] (Act) to end the "exploitation and abuse by irresponsible crew leaders."[39] The Act, however, was completely ineffective and virtually unenforceable.[40] It defined "farm labor contractor" to include only interstate operators,[41] and it exempted from coverage nearly all fixed-situs agricultural employers[42] and their full-time and regular employees.[43] Although Congress authorized both the Department of Labor and the Department of Justice to enforce the Act,[44] it did not order enforcement by either. The Act included no private cause of action, and the federal courts refused to imply one.[45] The sole penalty it provided, a five-hundred dollar fine,[46] was assessed only once during the Act's first ten years.[47]

After specially comissioned Senate reports pointed out these weaknesses and shortcomings,[48] Congress adopted sweeping amendments in

35. *1963 Senate Hearings*, *supra* note 28, at 41.

36. *Id.* at 122 (testimony of Father John A. Wagner). The findings mentioned in text do not exhaust the abuses farmworkers suffer, or even what Congress heard before passing FLCRA. *See* hearings cited notes 12, 24, 25 *supra*. A survey of other literature reveals dozens more, including many that cross the line from abuse to outrage. *See generally* T. DUNBAR & L. KRAVITZ, HARD TRAVELING: MIGRANT FARMWORKERS IN AMERICA (1976).

37. *See* 110 CONG. REC. 19894-96 (1964).

38. Pub. L. No. 88-582, 78 Stat. 920 (1963) (current version at 7 U.S.C. §§ 2041-2053 (1976)).

39. S. REP. NO. 202, 88th Cong., 1st Sess. 1, *reprinted in* [1964] U.S. CODE CONG. & AD. NEWS 3690, 3690.

40. S. REP. NO. 1295, 93d Cong., 2d Sess. 3, *reprinted in* [1974] U.S. CODE CONG. & AD. NEWS 6441, 6443 [hereinafter cited as 1974 SENATE REPORT]; 3 N. HARL, AGRICULTURAL LAW § 19.01[1], at 19-4 & n.6 (1980).

41. 7 U.S.C. § 2042(b) (1970) (amended 1974).

42. *Id.* § 2042(d).

43. *Id.* § 2042(b)(2)-(3).

44. *Id.* § 2047.

45. *See* Chavez v. Freshpict Foods, Inc., 456 F.2d 890 (10th Cir.), *cert. denied*, 409 U.S. 1042 (1972).

46. 7 U.S.C. § 2048 (1970) (amended 1974).

47. 1974 SENATE REPORT, *supra* note 40, at 3, [1974] U.S. CODE CONG. & AD. NEWS at 6443.

48. S. REP. NO. 83, 91st Cong., 1st Sess. 81-85 (1969); S. REP. NO. 1006, 90th Cong., 2d Sess. 36 (1968); S. REP. NO. 71, 90th Cong., 1st Sess. 27 (1967).

1974[49] to remedy FLCRA's deficiencies, "to provide for the extension of coverage and to further effectuate the enforcement of [the] Act."[50] FLCRA, as amended, requires farm labor contractors to register with the Department of Labor; prohibits unregistered persons from acting as farm labor contractors; imposes substantive obligations and prohibitions on farm labor contractors and on persons furnished farmworkers by contractors; grants corresponding substantive rights to farmworkers; and creates mechanisms for implementation and enforcement of the Act.[51]

1. The Registration Requirement.—FLCRA requires that all farm labor contractors[52] obtain a certificate of registration from the Department of Labor.[53] Persons not registered are prohibited from engaging in farm labor contracting activities.[54] The Department of Labor can deny, revoke, or suspend the certificate of registration of any person who has violated the Act[55] or who has been convicted of certain enumerated felonies.[56]

This registration requirement,[57] the cornerstone of FLCRA, is designed to minimize dangerous and unhealthy housing and transpor-

49. Farm Labor Contractor Registration Act Amendments of 1974, Pub. L. No. 93-518, 88 Stat. 1652-59 (amending 7 U.S.C. §§ 2041-2053 (1970)).

50. 1974 SENATE REPORT, *supra* note 40, at 1, [1974] U.S. CODE CONG. & AD. NEWS at 6441.

51. For a detailed explanation of these functions of FLCRA, see 3 N. HARL, *supra* note 40, §§ 19.01-.04.

52. FLCRA defines "farm labor contractor" broadly as "any person, who, for a fee, either for himself or on behalf of another person, recruits, solicits, hires, furnishes, or transports migrant workers (excluding members of his immediate family) for agricultural employment." 7 U.S.C. § 2042(b) (1976). Exemptions to the coverage definition will be discussed in parts III & IV *infra*.

53. 7 U.S.C. § 2043(a) (1976). To obtain a certificate of registration, a farm labor contractor must file with the Department of Labor a sworn application containing: His fingerprints, *id.* § 2044(a)(3); consent designating the Secretary of Labor as his agent to receive service of process, *id.* § 2044(a)(5); if he plans to transport farmworkers, a statement identifying each vehicle he will use for that purpose, proof that each such vehicle complies with applicable federal and state safety and health standards, proof of liability insurance or financial responsibility, and proof of a medical examination within the past three years, *id.* §§ 2044(a)(2), 2044(a)(4); and if he plans to house farmworkers, a statement identifying the housing, and proof that the housing meets federal and state safety and health standards, *id.* § 2044(a)(4).

54. *Id.* § 2043(a).

55. A certificate of registration may be denied, revoked, or suspended if the Department of Labor finds that the farm labor contractor has knowingly made any false statements in his application for a certificate; has knowingly given false or misleading information to workers concerning the terms, conditions, or existence of agricultural employment; has failed, without justification, to comply with terms or perform agreements entered into with farmworkers or farm operators; has knowingly recruited or utilized the services of any undocumented alien; has been convicted of one or more of a list of felonies within the preceding five years; has violated any provision of FLCRA or any regulation issued thereunder; has failed to maintain in effect required vehicle liability insurance; or has exposed workers to conditions in transportation or housing that fail to conform to federal and state safety and health standards. *Id.* § 2044(b).

56. The listed felonies, such as narcotics, alcohol, and gambling offenses, generally involve moral turpitude. 3 N. HARL, *supra* note 40 § 19.02, at 19-37.

57. 7 U.S.C. § 2043(a) (1976).

tation conditions, to ensure that farm labor contractors can be located and brought within the jurisdiction of the courts, and to guarantee that the contractor bears some financial responsibility for transportation accidents.

2. Substantive Rights, Obligations, and Prohibitions.—Although Congress specifically prohibited only a few of the abuses it discovered, it enacted notice, disclosure, and recordkeeping provisions designed to prevent and make actionable the misrepresentations and failures to inform that account for most abuses of farmworkers. In addition to imposing disclosure and recordkeeping requirements on the farm labor contractor,[58] the 1974 Amendments required producers and processors to deal only with registered farm labor contractors[59] and to maintain payroll records for every farmworker employed.[60]

With passage of the 1974 Amendments, therefore, the producer, processor, or farm labor contractor defendant can no longer simply deny a farmworker's allegations and rely on the farmworker's inability to prove an oral contract. FLCRA requires written notice and disclosures to the farmworker and forces both the producer and the farm labor contractor to keep written records. Aggrieved farmworkers can now use these written reports, or their absence, as evidence in court.[61]

58. A farm labor contractor must carry his certificate of registration and display it to anyone prior to dealing with them as a farm labor contractor; give each worker when recruited a detailed statement, written in a language in which the worker is fluent, describing the area of employment, the crops and operations on which he may be employed, the transportation, housing, and insurance to be provided, the wage rates to be paid, the charges the contractor will make for his services, the period of employment, and the existence of a strike or other concerted job action by workers at a place of contracted employment; upon arrival at a place of housing or employment, post in a conspicuous place a written statement of the terms and conditions of said housing or employment; keep payroll records for each worker he pays, whether directly or on behalf of another person, and provide a copy of those records to his employer; provide each worker with an itemized statement of that worker's earnings, deductions, and withholdings; refrain from knowingly using undocumented alien workers; refrain from engaging in any company store arrangements; disclose to all workers any benefits received on account of their labor or from sales to the workers by commercial or retail establishments; and promptly turn over to workers all monies received from a farm operator on their behalf. 7 U.S.C. § 2045 (1976).

59. *Id.* § 2043(c).

60. *Id.* § 2050c.

61. *See, e.g.,* Strong v. Williams, 89 Lab. Cas. ¶ 33,928 (M.D. Fla. 1980); Davis v. Fletcher, 84 Lab. Cas. ¶ 33,693 (M.D. Fla. 1978); Brennan v. Brown, 75 Lab. Cas. ¶ 33,184 (S.D. Fla. 1974). In addition to helping the farmworker remedy FLCRA violations, the FLCRA requirements aid the farmworker under other federal statutes. For example, FLCRA interrelates with the Fair Labor Standards Act (FLSA), 29 U.S.C. §§ 201-219 (1976), to provide important protections and remedies for farmworkers. Although FLSA requires all agricultural employers to maintain payroll records showing the hours worked and the wages paid, *id.* § 211(c); Records To Be Kept By Employers, 29 C.F.R. § 516.33 (1980), it contains no private enforcement mechanism if the employer fails to maintain such records. Since workers rarely keep similar records on their own, farmworker minimum wage actions under FLSA § 206 usually dissolve into swearing matches in which farmworkers are at a great disadvantage. FLCRA, however, requires contractors and users

The farmworker plaintiff, still less than formidable, at least is no longer impotent.

3. Penalties and Enforcement Mechanisms.—The 1974 Amendments give the Department of Labor general authority to monitor and investigate activities of farm labor contractors, including the authority to investigate any reported or suspected FLCRA violations.[62] The Department has the power to subpoena witnesses and documents,[63] petition federal district courts for injunctive relief,[64] assess civil penalties,[65] and seek criminal penalties.[66] Finally, and perhaps most importantly, the 1974 Amendments give farmworkers a private right of action in the federal district courts without regard to diversity of citizenship, exhaustion of administrative remedies, or amount in controversy.[67] They also protect workers against discrimination or retaliation for having taken legal action.[68]

II. A General Defense of FLCRA

In response to suits by the Department of Labor and by farmworkers, agribusiness mobilized to amend FLCRA.[69] Its proposed

of contractors to maintain the payroll records prescribed by FLCRA itself and payroll records required by *any other federal statute*. 7 U.S.C. § 2050c (1976). Thus the FLCRA $500 penalty per violation can be used to address the failure to maintain FLSA records. *See, e.g.,* Cantu v. Owatonna Canning Co., 90 Lab. Cas. ¶ 33,968 (D. Minn. 1980). An employer forced to maintain proper payroll records is not likely to maintain records showing him to be guilty of minimum wage violations. Thus, he is deterred from committing FLSA violations. In this manner FLCRA functions to enforce rights created by, but unenforceable under, FLSA.

62. 7 U.S.C. § 2046 (1976).

63. *Id.*

64. *Id.* § 2050a(c).

65. *Id.* § 2048(b)(1) (up to $1000 per violation).

66. *Id.* § 2048(a) (up to $500 and imprisonment up to one year for an initial violation; up to $10,000 and imprisonment up to three years for repeat violators); *id.* § 2048(c) (up to $10,000 and imprisonment up to three years for unregistered farm labor contractors who knowingly recruit or employ undocumented aliens).

67. *Id.* § 2050a(a). The Act grants the farmworker actual damages, liquidated damages of $500 for each violation, or equitable relief. *Id.* § 2050a(b). Plaintiffs requesting liquidated damages need not show actual injury, but only that defendant violated the Act. Flores v. Mondinga Ignacio, 90 Lab. Cas. ¶ 33,962 (S.D.N.Y. 1981).

68. 7 U.S.C. § 2050b (1976).

69. Agribusiness' moves against FLCRA were not provoked by the 1974 Amendments, but rather by a rapid increase in Department of Labor and private enforcement actions that began two years later. In 1976 a federal district court struck down the Department of Labor's voluntary compliance program and ordered the Department to use its coercive powers to enforce FLCRA. *See* Alexander v. Brennan, 80 Lab. Cas. ¶ 33,846 (D.D.C. 1976). Combined with the appointment of Ray Marshall, a long-time farmworker advocate, as Secretary of Labor, this order caused the Department of Labor to begin enforcing the Act with vigor. From 1974 to 1978 both the number of departmental compliance actions and the number of man-years the Department dedicated to FLCRA enforcement more than quadrupled. *See 1978 FLCRA Amendment Hearings*, *supra* note 6, at 73-74 (statement of Donald Elisburg); *1979 Helsinki Accords Hearings*, *supra* note 16, at 258 (statement of Ray Marshall). At the same time the growth of a contingent of specialized

amendments focus on section 2042, which first defines "farm labor contractor"[70] and then exempts certain persons[71] from the definition. Each time the agricultural industry tries to amend the section,[72] it claims it does not want to change FLCRA, but only to clarify the congressional intent.[73] Distinguishing most fixed-situs operators from the individual crewleader, the industry has steadfastly maintained that Congress never intended FLCRA to cover anyone but the independent, itinerant, impecunious crewleader.[74] Despite evidence presented to Congress that processors and producers do mistreat farmworkers,[75] they argue that Congress never saw any evidence that fixed-situs agricultural employers committed such abuses, and hence could not have intended to include those operators within the statutory definition of farm labor contractor.[76]

Most proposed amendments, like the Boren Amendments of 1980,[77] seek to narrow the number of employers subject to FLCRA by

farmworker advocates within the federally funded Legal Services Program allowed injured farmworkers to bring an increasing number of private actions against violators of the Act, many of which resulted in large damage awards. *See, e.g.*, Espinoza v. Stokely-Van Camp, Inc., 641 F.2d 535 (7th Cir. 1981); Strong v. Williams, 89 Lab. Cas. ¶ 33,920 (M.D. Fla. 1980); Davis v. Fletcher, 84 Lab. Cas. ¶ 33,693 (M.D. Fla. 1978). By 1980, when the Boren Amendments were introduced, organized agribusiness and its supporters in Congress had endured FLCRA long enough. *See generally* 126 CONG. REC. S9792-94 (daily ed. July 24, 1980) (remarks of Sens. Boren and Helms); *id.* at S9800-03 (remarks of Sens. Tower, Boren, Lugar, and Dole).

70. *Id.* § 2042(b), *reproduced at* note 78 *infra*.

71. *Id.*

72. *See* notes 6-7 *supra*.

73. Letter from Senator David L. Boren to his colleagues in the Senate (June 16, 1980) (copy on file at the *Texas Law Review*) [hereinafter cited as Boren Letter]. *See also* 126 CONG. REC. S9792 (daily ed. July 24, 1980) (remarks of Sen. Boren accompanying introduction of amendments).

74. *See, e.g., Oversight Hearings on the Farm Labor Contractor Registration Act: Hearings Before the Subcomm. on Agricultural Labor of the House Comm. on Education and Labor*, 94th Cong., 1st Sess. 100 (1976) (letter from Dante J. Nomellini); *id.* at 328 (testimony of Leon Gordon); *1976 FLCRA Amendment Hearings*, *supra* note 6, at 78-80 (statement of Roderick K. Shaw, Jr.); 126 CONG. REC. S8202 (daily ed. June 25, 1980) (remarks of Sen. Boren).

75. Letter from the Migrant Legal Action Program, Inc. to the U.S. House of Representatives (Nov. 12, 1980) (copy on file at the *Texas Law Review*). *See Farm Labor Contractors Registration Act Amendments of 1974: Hearings Before the Subcomm. on Employment, Poverty, and Migratory Labor of the Senate Comm. on Labor and Public Welfare*, 93d Cong., 2d Sess. 247-51 (1974) (statement of Alfredo DeAvila) [hereinafter cited as *1974 Senate FLCRA Amendment Hearings*]; *Farm Labor Contractor Registration Act Amendments of 1973: Hearings on H.R. 7597 Before the Subcomm. on Agricultural Labor of the House Comm. on Education and Labor*, 93d Cong., 1st Sess. 65-94 (1973) (statement of Father James Vizzard) [hereinafter cited as *1973 House FLCRA Amendment Hearings*].

76. *See, e.g., 1976 FLCRA Amendment Hearings*, *supra* note 6, at 80 (statement of Roderick K. Shaw, Jr.).

77. 126 CONG. REC. S9791 (daily ed. July 24, 1980) (remarks of Sen. Boren) [hereinafter cited as Boren Amendments]. Unlike previous attempts to amend FLCRA, the 1979-1980 assault was a concerted effort by virtually every major organization of the American agricultural industry. Supporters of the 1980 amendments included the American Farm Bureau Federation, the National Council of Agricultural Employers, the National Food Processors Association, the United Fresh Fruit and Vegetable Association, the Citrus Industrial Council, the American Association of

amending the section defining "farm labor contractor" to exempt from coverage corporations that hire farmworkers for their own operations, all the permanent and temporary employees of such corporations, and all agricultural cooperatives. They also seek to reduce the number of farmworkers who benefit from FLCRA by redefining "migrant worker" to mean workers who migrate rather than all seasonal farmworkers, and by redefining "agricultural employment" to encompass only work physically performed on a farm or ranch rather than all work performed in the agricultural process regardless of location.[78]

Implicit in the agricultural industry's arguments is the proposition that FLCRA need cover only the independent itinerant crewleader to

Nurserymen, and the Western Growers Association. Letter from the American Farm Bureau Federation to George E. Brown, Jr. (July 9, 1980) (copy on file at the *Texas Law Review*). For a more complete list, see 126 CONG. REC. S9792-93 (daily ed. July 24, 1980) (remarks of Sen. Boren).

The date and manner of the introduction of the Boren Amendments indicate a deft bit of legislative maneuvering. Senator Boren first introducted the proposal in June as an independent bill. S. 2875, 96th Cong., 2d Sess. (1980), 126 CONG. REC. S8202 (daily ed. June 25, 1980) (remarks of Sen. Boren). The bill would have been considered by the Subcommittee on Employment, Poverty and Migratory Labor of the Senate Committee on Labor and Human Resources, *see id.* at S8202, then chaired by Senator Gaylord Nelson, a long-time farmworker advocate. Senator Boren allowed his bill to die a strategic death and reintroduced the measure a month later as a rider to the Child Nutrition Amendments. Boren Amendments, *supra*. The reintroduced measure fell under the jurisdiction of the Senate Committee on Agriculture, Nutrition and Forestry, a forum more sympathetic to Senator Boren's cause. *See generally* 126 CONG. REC. S9793-94 (daily ed. July 24, 1980) (remarks of Sens. Nelson and Helms). By announcing the measure in late July, the Senator also succeeded in keeping the Boren Amendments out of the relatively more pro-farmworker House entirely—the House had already passed the Child Nutrition Amendments. *Id.* at S9799 (remarks of Sen. McGovern).

78. The existing law, together with the proposed Amendments, reads in part as follows (existing law the Amendments would omit is bracketed, new material the Amendments would add is italicized):

> As used in this chapter—
>
> (a) The term "person" includes any individual, partnership, association, joint stock company, trust or corporation.
>
> (b) 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 migrant workers (excluding members of his immediate family) for agricultural employment. Such term shall not include—
>
> (1) any nonprofit charitable organization, public or nonprofit private educational institution, or similar organization;
>
> (2) any farmer, processor, canner, ginner, packing shed operator, or nurseryman who [personally] engages in any such activity for the purpose of supplying migrant workers solely for [his] *such person's* own operation;
>
> (3) any full-time or regular employee of any entity referred to in (1) or (2) above who engages in such activity solely for his employer [on no more than an incidental basis];
>
> (4) any person who engages 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;
>
> . . . .
>
> (11) *Any nonprofit or cooperative association of farmers, growers, or ranchers, duly incorporated and qualified under the nonprofit association or farmer cooperative statutes of a State, and operated solely for the mutual benefit of the members thereof; and any full-time*

prevent abuses of farmworkers.[79] This proposition has three profound flaws, each of which is serious, the combined effect of which is fatal. First, fixed-situs agricultural employers, especially during the last decade, have begun to commit the very farmworker abuses that once were associated exclusively with the itinerant crewleader.[80]

Second, as the number of large agricultural operations increases, the independent crewleader, the only person FLCRA's critics would have the Act cover, is fast becoming an anachronism. Twenty-five years ago the independent producer, a family farmer, dealt on relatively equal terms with medium-sized processors or canners on the one hand and with an independent farm labor contractor on the other. Today regional and national agribusiness operations control the industry, either by vertical contracts or by vertical integration. The independent farm labor contractor is being replaced by a personnel manager, a

or regular employee of such association or cooperative who engages in such activity solely for his or her employer.

(c) The term "fee" includes any money or other valuable consideration paid or promised to be paid to a person for services as a farm labor contractor.

(d) The term "agricultural employment" means employment in any service or activity included within the provisions of section 203(f) of Title 29, or section 3121(g) of Title 26 and the handling, planting, drying, packing, packaging, processing, freezing, or grading *on a farm or ranch* prior to delivery for storage of any agricultural or horticultural commodity in its unmanufactured state.

. . . .

(g) The term "migrant worker" means an individual [whose primary employment is in agriculture, as defined in section 203(f) of Title 29, or who performs agricultural labor, as defined in section 3121(g) of Title 26, on a seasonal or other temporary basis] *engaged on a farm or ranch, on a seasonal or other temporary basis, in agricultural employment as defined in section 3(d) of this Act, who cannot regularly return to his or her domicile each day after working hours, or who is transported from and to his or her domicile each workday by the person who recruits, solicits, hires, or furnishes such worker for agricultural employment on a farm or ranch owned or operated by another person.*

(h) The term "for such person's own operation" refers to the operations of a person as a farmer, processor, canner, ginner, packing shed operator, or nurseryman, and includes all activities by such person or such person's employees with respect to the agricultural or horticultural commodities which are or will be the subject of or diverted from such operations, and regardless of whether such person has title to such commodities at the time such operations or activities are performed.

(i) The term "regular employee" includes an employee who is employed on a seasonal or part-time basis by any person referred to in subsection (b)(1) or (b)(2) of this section.

S.2875, 96th Cong., 2d Sess. (1980), 126 CONG. REC. S9791-92 (daily ed. July 24, 1980) (statement of Sen. Boren).

79. Occasionally this idea is stated more explicitly. *See 1976 FLCRA Amendment Hearings*, *supra* note 6, at 78 (statement of Roderick K. Shaw, Jr.). *See generally* 126 CONG. REC. S9792-93 (daily ed. July 24, 1980) (remarks of Sen. Boren and Sen. Helms).

80. *See, e.g.*, Hodgson v. Griffin & Brand, Inc., 471 F.2d 235 (5th Cir. 1973); Jenkins v. S & A Chaissan & Sons, Inc., 449 F. Supp. 216 (S.D.N.Y. 1978); Abraham v. Beatrice Foods Co., 418 F. Supp. 1384 (E.D. Wis. 1976); Exhibit A: Recruitment Practices and DOL Enforcement Actions By State, *reprinted in Administration of Laws Affecting Farmworkers: Hearing Before the Subcomm. on Manpower and Housing of the House Comm. on Government Operations*, 96th Cong., 1st Sess. 93, 96-100 (1979) (testimony of John F. Ebbott); *1976 FLCRA Amendment Hearings*, *supra* note 6, at 103-09 (testimony of John F. Ebbott); Letter from B. Beardall to Senators Gaylord Nelson and Richard S. Schweiker (Nov. 5, 1979), *reprinted in* 126 CONG. REC. S3365-66 (daily ed. April 1, 1980).

fieldman, or other employee of the regional operator.[81] It made sense for the small farmer to supply his labor needs through an independent crewleader. It is more sensible for a large agribusiness corporation, on the other hand, to contract farm labor itself or through a packer, a canner, or an agricultural cooperative. Congress purposely exempted the farmer who is so small that he personally, or one of his regular employees as an incident of his job, contracts farmworkers.[82] Now agribusiness interests, trying to limit FLCRA to independent farm labor contractors and identify themselves with the small farmer, seek to pervert FLCRA so that it no longer covers them or their employees who function as farm labor contractors.

Finally, and most importantly, the proposition that farmworker abuses can be prevented by regulating only the independent crewleader ignores the flexibility of employment relationships in agriculture. In the agricultural labor market, distinctions between employer, employee, and independent contractor are not only manipulable but practically meaningless. To import these artificial distinctions into FLCRA's regulatory scheme would render the statute wholly unresponsive to the realities it purports to regulate. Realistically, the independent crewleader remains independent only as long as the arrangement benefits both the crewleader and his client. If government regulation makes using the independent crewleader uneconomical, the producer will use a processor, packer, nonprofit cooperative, or its own "temporary employee" to contract labor.[83] Yet none of these arrangements inherently immunizes the farmworker from abuse. Although FLCRA currently applies to all of these arrangements, the Boren Amendments would exempt them all.

FLCRA's protections come at the expense of a burden imposed on virtually everyone who engages, directly or indirectly, in farm labor contracting activities. The Act does not protect farmworkers by prohibiting a limited set of enumerated abuses within a single type of

81. The days of the independent farmer are practically over. The large packing sheds and canners are in control of planting, harvesting, packing, canning and marketing. The provision of labor for the harvest and the pack is a service that the large agri-business corporations provide to the farmers with whom they contract.

Letter from James A. Herrmann to Senator Williams (Nov. 6, 1979), *reprinted in* 126 CONG. REC. S3367 (daily ed. April 1, 1980). *See also* text accompanying notes 8-23 *supra*.

82. 7 U.S.C. §§ 2042(b)(2)-(3) (1976).

83. The need to prevent this flexibility from allowing agricultural employers and labor contractors to evade FLCRA simply by adopting another form of business arrangement largely justifies the Department of Labor's controversial enforcement of the Act. *See* 126 CONG. REC. S9792-93 (daily ed. July 24, 1980) (remarks of Sen. Boren). The Department must enforce FLCRA against all farm labor contractors, or run the risk of one category's becoming a shelter for unscrupulous users of farm labor.

employment relation; rather, it does so by creating a broad prophylactic scheme within which almost any abuse of farmworkers is difficult, dangerous, and potentially expensive. The Boren Amendments and their predecessors, in order to lift the burden from fixed-situs agricultural employers, would narrow FLCRA's regulatory scheme to cover only the independent crewleader. Both the prudent businessman seeking to avoid needless expenses, and the unscrupulous exploiter seeking a free hand in abusing his workers, would respond to such a change by adopting one of the other available arrangements for farm labor contracting. The independent crewleader, already the exception, would probably almost disappear. Congress' attempt to prevent abuses of farmworkers would be frustrated. FLCRA would not be clarified, it would be *repealed*, and migrant and seasonal farmworkers, deprived of the Act's protections, would be exposed to the same mistreatment and exploitation they have suffered for decades.

III. Specific Defenses: Farm Labor Contractors Covered

This Note now examines proposed amendments to specific parts of section 2042. Part III defends section 2042 against amendments that would reduce the number of contractors classified as farm labor contractors. Part IV discusses amendments that would reduce the number of farmworkers benefiting from FLCRA.

A. Proposed Amendments to Section 2042(b)(2).

Section 2042(b)(2) of FLCRA exempts from coverage any agricultural employer "who personally engages in [farm labor contracting] activity for the purpose of supplying migrant workers solely for his own operations."[84] The Boren amendments would delete the word "personally," replace the word "his" with the phrase "such person's,"[85] and add a broad definition of the phrase "for such person's own operation."[86]

1. Deletion of "personally" and Substitution of "such person's" for "his."—The proponents of the Boren Amendments assert that Congress intended the section 2042(b)(2) exemption to apply to corporations as well as to individual persons, and that deleting "personally"

84. 7 U.S.C. 2042(b) (1976), *reproduced at* note 78 *supra*.

85. Boren Amendments, *supra* note 77, at S9791. The § 2042(b)(2) exemption would then read "any farmer, processor, canner, ginner, packing shed operator, or nurseryman who engages in any such activity solely for such person's own operation. . . ." *See* note 78 *supra*.

86. *Id.* at S9792, *reproduced at* note 78 *supra*.

and substituting "such person's" for "his" is necessary to prevent the Department of Labor and courts from denying this exemption to incorporated operations.[87] They reason that, because FLCRA itself defines "person" to include corporations,[88] the word "personally" must refer to corporations as well as to individual persons,[89] and any interpretation to the contrary violates congressional intent.[90]

Farmworker advocates reject this construction. They maintain that "personally," given its ordinary meaning, limits the exemption to *individuals* who personally undertake farm labor contracting activities solely for their own operations.[91] They argue that Congress intended "personally" to exempt only the small farmer, who employs only a few seasonal farmworkers, is likely to be more responsible toward those he does employ, and would be unduly burdened by the registration and recordkeeping requirements of FLCRA.[92] The Department of Labor, generally agreeing with farmworker advocates, denies the section

87. Letter from Russell Long and 51 other Senators to Secretary of Labor Ray Marshall (Oct. 24, 1979), *reprinted in* 126 CONG. REC. S8204 (daily ed. June 25, 1980); Boren Letter, *supra* note 72.

88. Position paper on FLCRA, National Food Processors Association (June 22, 1979) (copy on file at the *Texas Law Review*) [hereinafter cited as NFPA Paper].

89. Leather, *Surprise! You May be a Farm Labor Contractor: Recent Developments Under the Farm Labor Contractor Registration Act*, 1 AGRICULTURAL L.J. 261, 269-70 (1979). Leather argues that Congress inadvertently included the term "personally" in the 1974 amendments. According to Leather, the Senate divided the § 2042(b)(2) exemption into two parts: the first part exempted employers who *personally* did their own farm labor contracting; the second exempted employers who *indirectly*, through an agent, did their own farm labor contracting *if* they first determined that the agent was a registered farm labor contractor. The House of Representatives then deleted the second part because it duplicated the § 2043(c) prohibition against hiring unregistered farm labor contractors. Leather concludes that, because "personally" was supposed to be contrasted to "indirectly," "personally" has no independent meaning. *Id.* at 269-70. Leather's theory is more intriguing than it is compelling. Congress' actions may often seem inexplicable, but statutory construction requires examination of the words of the statute itself. Reiter v. Sonotone Corp., 442 U.S. 330, 337 (1979). In addition, the Senate report accompanying the 1974 amendments refers to § 2042(b)(2) as "the *personal* exemption for agricultural operators." 1974 SENATE REPORT, *supra* note 40, at 8, [1974] U.S. CODE CONG. & AD. NEWS at 6447 (emphasis added). However, one court's theory parallels Leather's. *See* Usery v. Paramount Citrus Ass'n, 475 F. Supp. 700, 703 (C.D. Cal. 1979).

90. NFPA Paper, *supra* note 88, at 1.

91. Legislative memorandum from the Migrant Legal Action Program, Inc. (Nov. 5, 1979) (copy on file at the *Texas Law Review*).

92. *1976 FLCRA Amendment Hearings*, *supra* note 6, at 92 (statement of Burton D. Fretz, California Rural Legal Assistance). Senator Javits, responding on the Senate floor to the introduction of the Boren Amendments, agreed:

> We added the "personally" requirement to the act for two reasons. First, to afford a complete exemption to the small farmer who has always done his own farm labor contracting, and for whom it was thought no likelihood of widespread worker abuse existed. Because the good name of his business was on the line when he recruited or hired workers, we felt he would be careful not to mislead them . . . . Second, we adopted this test as the way to define what we regarded as a narrow exemption for the small family farmer . . . without having to specify arbitrarily the numbers of workers involved or the amount of time the person spent performing these activities.

126 CONG. REC. S9805 (daily ed. July 24, 1980) (remarks of Sen. Javits).

2042(b)(2) exemption to corporations,[93] reasoning that corporations cannot act "personally," but only through their agents.[94] Early judicial decisions upheld the Department's stance,[95] but more recent cases generally tend to reject it[96] by reasoning that a corporation may "personally" contract for farm laborers through its employees.[97]

The Boren Amendments to section 2042(b)(2) would not by themselves significantly alter the coverage or impact of FLCRA. Deleting "personally" and substituting "such person's" for "his" would exempt corporate as well as individual agricultural employers from the definition of farm labor contractor as long as they employ the recruited workers solely in their own operations. Since most courts already permit this exemption, enacting it alone would not reduce the number of farmworkers currently protected by FLCRA.[98]

2. The New Definition of "for such person's own operation."—Section 2042(b)(2) exempts from the definition of a farm labor contractor the agricultural employer who personally engages in farm labor contracting "solely for his own operation." Department of Labor regulations issued in 1965[99] interpret "solely for his own operation" to deny agricultural employers the section 2042(b)(2) exemption if they engage

93. Farm Labor Contractor Registration, 29 C.F.R. § 40.5 (1980).

94. *1978 FLCRA Amendment Hearings*, *supra* note 6, at 65-66 (testimony of Paul Myerson and Donald Elisburg, Department of Labor). The Department of Labor exempts a corporate farmer "if the corporation is under the effective control of an individual whose authority is equivalent to that of a sole proprietor, and if that individual acts in person with respect to the farm labor contracting activities for the corporation." Opinion Letter of the Wage-Hour Administrator No. 1486 (WH-433) (Oct. 3, 1977), *reprinted in* [1973-1978 Transfer Binder] LAB. L. REP. (CCH) ¶ 31135, at 42802 [hereinafter cited as Wage-Hour Opinion Letter].

95. *See* Jenkins v. S & A Chaissan & Sons, Inc., 449 F. Supp. 216, 228 (S.D.N.Y. 1978); Marshall v. Souza Bros. Packing Co., 83 Lab. Cas. ¶ 33,625 (C.D. Cal. 1977).

96. Marshall v. Green Goddess Avocado Corp., 615 F.2d 851 (9th Cir. 1980); Espinoza v. Stokely Van-Camp, Inc., 89 Lab. Cas. ¶ 33,923 (N.D. Ill. 1980), *aff'd on other grounds*, 641 F.2d 535 (7th Cir. 1981); Torreblanca v. Naas Foods, Inc., 89 Lab. Cas. ¶ 33,927 (N.D. Ind. 1980).

97. Marshall v. Green Goddess Avocado Corp., 615 F.2d 851, 855 (9th Cir. 1980).

As noted in Marshall v. Green Goddess Avocado Corp., 615 F.2d 851 (9th Cir. 1980), this interpretation is necessary for employees of corporations to qualify for the § 2042(b)(3) exemptions. *Id.* at 855. It does not absolve employees solely because they work for an exempt corporation, however. Employees of exempt persons, even of sole proprietors, are not exempt unless they meet the more stringent requirements of § 2042(b)(3). *See* 7 U.S.C. § 2042(b)(3), *reproduced at* note 78 *supra*. Agribusiness' contention that FLCRA should exempt all employees of exempt employers, *see* note 119 *infra* & accompanying text, requires a reading of § 2042(b)(2) broader than Congress intended. *See* note 131 *infra* & accompanying text.

98. When farmworkers working for a corporation that does its own labor contracting are abused or cheated, an employee of the corporation who does not fit within any exemption is usually involved. This employee can be found liable under FLCRA even if the corporation itself cannot. The Boren Amendments, however, would exempt *all* employees of exempt employers. *See* notes 111-34 *infra* & accompanying text.

99. *See* Interpretations of Farm Labor Contractor Registration Act of 1963, 29 C.F.R. § 41.17 (1980).

in farm labor contracting activities on behalf of other employers.[100] According to the regulations, an employer engages in farm labor contracting activities "solely for his own operation" when he holds title to the commodities that are the object of the recruited farmworkers' labor.[101]

Although Congress has not changed the phrase, the Senate in 1974 expressly disapproved the Department of Labor's "title to the commodities" test, preferring a more subjective "economic realities" test.[102] The courts, to determine whether an operator meets the "solely for his own operation" qualification, look to the facts of each case to see if the operator claiming the exemption is a middleman; if so, he is engaging in "precisely the kind of activity that the . . . [Act] seeks to regulate."[103] The Ninth Circuit recently inquired whether a nonemployer received a "direct benefit"; finding it did because it held title to the crops, the court found the defendant to be a farm labor contractor.[104] Thus, there are currently at least three slightly different approaches for determining whether an employer hired workers "solely for his operation."

The proponents of the Boren Amendments dislike all three inter-

100. *Id.*

101. *Id.*

102. "The Committee intends that application of this provision shall not necessarily depend on where title to the commodities involved rests at the time, but shall in the future depend on a full consideration of the economic realities of agricultural production and processing." 1974 SENATE REPORT, *supra* note 40, at 7, [1974] U.S. CODE CONG. & AD. NEWS at 6447.

103. *See, e.g.,* Marshall v. Silver Creek Packing Co., 615 F.2d 848, 851 (9th Cir. 1980).

104. *Id.* Defendant, a corporate packing shed, harvested, processed, and marketed the melon crops of individual growers, deducted its expenses plus a fixed profit from what it received upon sale of the crops, and returned the balance to the growers. The court recognized that defendant hired workers for its own operations and benefited from their efforts. Nevertheless, the court denied defendant the exemption, reasoning that the hiring was not *solely* for its own operations because the farmers whose fruit was picked received a "direct benefit" from Silver Creek's hiring activities. The court explained the "direct benefit" concept by distinguishing Marshall v. Green Goddess Avocado Corp., 615 F.2d 851 (9th Cir. 1980), a case decided the same day. The packer in *Green Goddess* had *purchased* crops that were still in the fields. In contrast to the growers in *Green Goddess*, who were indifferent to the packer's subsequent activities because they had already been paid, the growers in *Silver Creek* had a continuing stake in the packer's operations: the more produce the packer managed to harvest, and the more efficiently it did so, the more money the growers would receive. Therefore the growers "directly benefited" from Silver Creek's farm labor contracting. Since Silver Creek's activities were not *solely* for its own operation, Silver Creek was a contractor covered by FLCRA. 615 F.2d at 850-51.

The 1981 version of the Boren Amendments would eliminate the "direct benefit" concept. The 1981 redefinition of "for such person's own operation" refers not only to "the operations of a person as a farmer, processor, canner, ginner, packing shed operator, or nurseryman," but also to "any other person engaged in agricultural production or processing," and "regardless of whether any other person . . . *directly benefits* from such operations or activities." (emphasis added). *Compare* S. 2875, 96th Cong., 2d Sess. § 5 (1980), 126 CONG. REC. S8203 (daily ed. June 25, 1980) (remarks of Sen. Boren), *with* S. 922, 97th Cong., 1st Sess. § 6 (1981), 127 CONG. REC. S3685, S3686 (daily ed. April 8, 1981) (remarks of Sen. Boren).

pretations. They want to redefine "for such person's own operation" to include "all activities by such person or such person's employees with respect to the . . . commodities which are or will be the subject of or diverted from such operations, and regardless of whether such person has title to such commodities at the time such operations or activities are performed.[105]" Thus, once the employer is exempted for any given operation, the Boren Amendments would exempt it for all collateral activities involving that operation. Proponents argue that this definition is needed to prevent the Department of Labor from improperly limiting the exemption to operators holding title to the commodity.[106] This, they claim, accords with Congress' intent not to penalize legitimate operations, but merely "to ensure that a crew leader would not evade regulation under the Act by claiming also to be a farmer."[107]

The proponents' reliance on congressional intent to justify redefining "solely for his own operation" is misplaced. During the House hearings considering the phrase in 1963, the Chairman of the General Subcommittee on Labor, the American Farm Bureau Federation, and the National Cotton Council indicated that the phrase required fixed-situs agricultural employers to register and otherwise be treated as farm labor contractors if they recruited workers or provided labor for anyone besides themselves.[108] And, except for the Senate's disapproval of the "title to the commodities" test in 1974, the phrase is mentioned nowhere else in the Act's legislative history.

Policy also weighs against the change. Exempting most fixed-situs employers would exempt the large corporations that profit most from the exploitation of farmworkers and are best able to control abuses. Exempted, they would be free to engage in the misrepresentations and overrecruitment that traditionally have characterized the agricultural labor market. The greatest damage to FLCRA, however, would result not from section 2042(b)(2)'s exemption of employers, but from its interaction with section 2042(b)(3), which exempts certain employees of exempt employers. The section 2042(b)(2) changes would exempt all stationary employers except, perhaps, nonprofit cooperatives,[109] making all employees of those stationary employers eligible for the section 2042(b)(3) exemption. Other provisions of the Boren Amendments

105. *See* S. 922, 97th Cong., 1st Sess. § 6 (1981), 127 CONG. REC. S3685, S3686 (daily ed. April 8, 1981) (remarks of Sen. Boren).

106. Boren Letter, *supra* note 73.

107. *Id.*

108. *1963 House Hearings*, *supra* note 12, at 12 (discussion between Matt Triggs and Rep. Roosevelt); *id.* at 143 (statement of J. Banks Young).

109. A different section of the 1980 amendments would have exempted nonprofit agricultural cooperatives. *See* notes 145-51 infra & accompanying text.

would then remove the remaining restrictions in section 2042(b)(3).[110] With virtually all stationary employers exempt under section 2042(b)(2), and most of their employees exempt under section 2042(b)(3), FLCRA would be left covering only the itinerant independent contractor. FLCRA's protections and remedies would disappear for the great majority of farmworkers.

B. The Amendments to Section 2042(b)(3)

Section 2042(b)(3) of FLCRA exempts from coverage any "full-time or regular employee" of nonprofit educational and charitable instutions[111] and of agricultural employers who personally do their own farm labor contracting, if the employee engages in farm labor contracting activities "solely for his employer" on no more than an incidental basis.[112]

The Department of Labor interprets section 2042(b)(3) to provide a narrow exemption for permanent, year-round employees who, incidental to their overall duties, transport or supervise farmworkers for a single employer.[113] The courts have never had to construe "full-time or regular" because all employees who have been denied the exemption have failed to establish that they carried on farm labor contracting activities "on no more than an incidental basis."[114] A federal district court, in *Usery v. Golden Gem Growers, Inc.*,[115] recognizing that the Act does not define "on no more than an incidental basis,"[116] announced what has become the accepted construction[117] of the phrase:

> It is sufficient to be more than "on an incidental basis" if under the circumstances the farm labor contractor activities performed are one of the major or principal functions of the individual's job.

110. *See* notes 119-23 *infra* & accompanying text.

111. 7 U.S.C. §§ 2042(b)(1), 2042(b)(3) (1976), *reproduced at* note 78 *supra*.

112. *Id.* §§ 2042(b)(2), 2042(b)(3).

113. *See* Interpretations of Farm Labor Contractor Registration Act of 1963, 29 C.F.R. § 41.18(a) (1980); Wage-Hour Opinion Letter, *supra* note 94, at 42803; Leather, *supra* note 89, at 273.

114. According to the Department of Labor, "incidental" means no more than 20% of an employee's time. Letter from Secretary of Labor Ray Marshall to Senator Gaylord Nelson (Nov. 26, 1979), *reprinted in* 126 CONG. REC. S9795, S9796 (daily ed. July 24, 1980). Proponents of the Boren Amendments reject this construction as "vague and subject to different interpretations, as well as creating much difficulty in implementation." Boren Letter, *supra* note 72. The 1981 amendments substitute "bona fide employee" for "full-time or regular employee" and "solely on no more than an incidental basis," and then define "bona fide employee" to mean any employee who is not an independent contractor. *See* note 120 *infra*.

115. 417 F. Supp. 857 (M.D. Fla. 1976).

116. *Id.* at 861.

117. *See* Marshall v. Heringer Ranches, Inc., 466 F. Supp. 285, 290 (E.D. Cal. 1979); DeLeon v. Ramirez, 465 F. Supp. 698, 702 (S.D.N.Y. 1979); Marshall v. Bunting's Nurseries, Inc., 459 F. Supp. 92, 100 (D. Md. 1978).

> The test is whether the farm labor contractor's activities listed in Section 2042(b) constitute a substantial amount of his job performance, and not merely a limited portion of it.[118]

In contrast, the proponents of the Boren Amendments believe that, as a matter of "fairness and public administrative policy," Congress should eliminate the incongruous situation in which FLCRA exempts an employer from registration, but not its employee.[119] To this end, they would define "regular employee" broadly to include persons employed on a seasonal or part-time basis and would delete the phrase "on no more than an incidental basis."[120] The definition of "regular employee" clearly would encompass all employees.[121] Deleting "on no more than an incidental basis" would exempt even the employee who recruits farmworkers on a fulltime basis. Any farm labor contractor could qualify for the exemption simply by being hired as a temporary employee of every user of his services.[122] The only remaining restriction would be the "solely for his employer" requirement. To meet that requirement an employee-farm labor contractor would only have to avoid being employed by more than one employer at any given moment.[123]

118. 417 F. Supp. at 862.

119. Boren Letter, *supra* note 73.

120. Boren Amendments, *supra* note 77, at S9791. Section 2042(i), as proposed, is reproduced at note 78 *supra*. The 1981 version of those amendments would achieve the same result but in a slightly different manner. Like the 1980 amendments, they would strike "on no more than an incidental basis." But rather than simply defining "regular employee" broadly, they would replace "full-time or regular" with "bona fide," and then define bona fide employee to mean *any* employee who does not have the status of independent contractor. S. 922, 97th Cong., 1st Sess. §§ 3, 6 (1981), 127 CONG. REC. S3685, S3686 (daily ed. April 8, 1981) (remarks of Sen. Boren). This redefinition also places upon farmworker plaintiffs the heavy burden of proving a purported independent contractor to be an employee.

121. The purpose of the new definition of "regular employee" is to "state explicitly that, for example, a foreman, who in many agricultural sectors is employed on a seasonal basis, is excluded from the definition of 'farm labor contractor' if he meets the other limitations of [§ 2042] (b)(3)." Boren Letter, *supra* note 73.

122. Letter from Secretary of Labor Ray Marshall to Senator Carl Perkins (Sept. 4, 1980). The Ninth Circuit in a way foresaw this practice in Marshall v. Green Goddess Avocado Corp., 615 F.2d 851 (9th Cir. 1980). After ruling that corporations could indeed act "personally" within the meaning of § 2042(b)(2), the court recognized that "this interpretation of 'personally' may seem to present potential for abuse: corporations could simply hire 'crewleaders' and call them 'employees.'" The court then reasoned that such a loophole would not in fact be opened by *Green Goddess* because "most 'crewleaders-employees' would engage in labor contracting activities on more than an 'incidental basis,' and would [therefore] not be eligible for the (b)(3) exemption." *Id.* at 855. For an example of outrageous abuses by a regular, temporary employee, see the discussion of Marcos Portalatin in *Administration of Laws Affecting Farmworkers: Hearing Before the Subcomm. on Manpower and Housing of the House Comm. on Government Operations*, 96th Cong., 1st Sess. 121-31 (1979) (statement of Arthur Read, Camden Regional Legal Services); 126 CONG. REC. S9805 (daily ed. July 24, 1980) (remarks of Sen. Javits).

123. The 1981 version of these amendments would eliminate this restriction altogether by striking the word "solely." *See* S. 922, 97th Cong., 1st Sess. § 3 (1981), 127 CONG. REC. S3685, S3686 (daily ed. April 8, 1981) (remarks of Sen. Boren). With that change an employee-farm

The Boren Amendments would return section 2042(b)(3) almost to what it was before the 1974 Amendments—a blanket exemption for employees of any section 2042(b)(2) employer that hires workers solely for its own operation.[124] Congress did not intend that exemption to be so broad. The 1963 Act exempted all employees of exempt employers, but the report accompanying the original bill suggested that a temporary employee would not be eligible for the section 2042(b)(3) exemption unless he had duties other than contracting farm labor.[125] The 1974 FLCRA Amendments purposely narrowed that exemption. They qualified the "any full-time or regular employee" exemption by adding the clause, "who engages in such activity solely for his employer on no more than an incidental basis."[126]

Supporters of the Boren Amendments maintain that Congress added the clause solely to prevent independent crewleaders from avoiding FLCRA by entering into temporary employment agreements, not to make that exemption unavailable to bona fide employees.[127] Therefore, they continue, deleting "on no more than an incidental basis" would be consistent with that purpose because "solely for his employer" alone would carry out the congressional intent.[128]

As the basis for this conclusion, the Boren Amendments' support-

labor contractor could work for several employers simultaneously without losing his § 2042(b)(3) exemption. *See* note 120 *supra*.

124. Before the 1974 amendments, § 2042(b)(3) read simply, "any full-time or regular employee of any entity referred to in (1) or (2) above." 7 U.S.C. § 2042(b)(3) (1970) (amended 1974). Section 2042(b)(3), showing the proposed changes, is reproduced at note 78 *supra*. The 1981 version of these amendments would make this exemption even broader—"solely" in § 2042(b)(2) would disappear. *See* S.922, 97th Cong., 1st Sess. § 2 (1981), 127 CONG. REC. S3686 (daily ed. April 8, 1981) (remarks of Sen. Boren).

125. *See* S. REP. NO. 202, 88th Cong., 2d Sess. 5, *reprinted in* [1964] U.S. CODE CONG. & AD. NEWS 3690, 3694.

126. Farm Labor Contractor Registration Act Amendments of 1974, Pub. L. No. 93-518, § 2(3), 88 Stat. 1652, 1653 (*codified at* 7 U.S.C. § 2042(b)(3) (1976)), *reproduced at* note 78 *supra*.

127. *1976 FLCRA Amendment Hearings*, *supra* note 6, at 76-77 (statement of Roderick K. Shaw, Jr., Citrus Industrial Council).

128. *Id.* at 76. To bolster this position, proponents of the Boren Amendments point to a fragment of the debates on the Senate floor preceding enactment of the 1974 Amendments, in which Senator Nelson, the floor manager of the bill, appears to endorse a similar theory and to accept a broad reading of § 2042(b)(3) as amended. *See, e.g., id.* (mentioning 120 CONG. REC. 35902 (1974) (colloquy between Sen. Nelson and Sen. Chiles)).

This position is based on a distortion of the record produced by a very selective reading of legislative history. The 1974 version of § 2042(b)(3) was intended to exempt only *permanent* employees who perform farm labor contracting activities as only one aspect, and evidently a very limited aspect, of their overall duties. This selective reading conveniently overlooks the notion of permanency. However, in the very colloquy containing the words of Senator Nelson that the proponents of the Boren Amendments find so supportive, Senator Lawton Chiles, the leader of the opposition to the 1974 amendments, while questioning Senator Nelson regarding the scope of the employee exemption, repeatedly conceded that § 2042(b)(3)'s exemption from coverage was limited to *permanent* employees. *See* 120 CONG. REC. 35902 (1974) (colloquy between Sen. Nelson and Sen. Chiles).

ers assert that a crewleader, to be successful, must take most of his crew with him from job to job, and therefore would fail the "solely for his employer" test because his hiring activities necessarily would be undertaken for more than one employer.[129] This is simply not true. Many crewleaders work for the same grower for an entire season and, therefore, do not change jobs. Others routinely change crews each time they change jobs since there is almost always a surplus of seasonal workers. Some, especially day-haul operators in the citrus-growing areas where large numbers of farmworkers reside, recruit a crew for only a day or a few days at a time. Furthermore, deciding whether a crewleader actually uses the same crew on all jobs or recruits new crews that happen to include some of the same workers involves the same kind of factual issues and resulting proof problems that the disclosure and recordkeeping scheme of FLCRA seeks to eliminate. Finally, the Senate report accompanying the 1974 FLCRA Amendments, explaining the section 2042(b)(3) revision, states that "foremen and similar bona fide employees will not have to register . . . [if] they are full-time and *permanent* employees of an employer, who utilizes a *limited* portion of their time for activities as defined in [section 2042](b) of the Act."[130] Senator Williams, moments before the Senate passed the 1974 Amendments, explained how the bill was to change the legislation he had sponsored more than a decade previously:

> [A]s amended, [the bill] is intended to eliminate existing loopholes which arise from artificial distinctions between "farm labor contractors," "crew leader," and "crew pusher," or between an ostensibly independent contractor and the employee of another who engages in substantially the same activity. *All persons who engage in defined activity as a labor contractor are covered under the bill unless they do so on a basis purely incidental to other primary duties.*[131]

129. *1976 FLCRA Amendment Hearings*, *supra* note 6, at 76-77 (statement of Roderick K. Shaw, Jr., Citrus Industrial Council).

130. 1974 SENATE REPORT, *supra* note 40, at 7-8, [1974] U.S. CODE CONG. & AD. NEWS at 6447 (emphasis added).

131. 120 CONG. REC. 33746 (1974) (remarks of Sen. Williams) (emphasis added). In 1976 the House Subcommittee on Agricultural Labor held hearings on a bill almost identical to the 1980 Boren Amendments. *See 1976 FLCRA Amendment Hearings*, *supra* note 6. When a representative of the Citrus Industrial Council presented the agricultural industry's interpretation of § 2042(b)(3), Committee Chairman William D. Ford responded:

> You are saying very directly that you feel full time means full time during a growing season. That's not what this member of the committee thought full time meant. . . . When we're talking about exempting an employee, we're talking about somebody who is a full time, regular ranch hand who, when this picking season comes along, devotes some time to the workers there.

Id. at 83 (remarks of Chmn. Ford). Chairman Ford later analyzed the effects the proposed amendments would have on § 2042(b)(3):

> If you put a period there and strike out "on no more than an incidental basis," then the

The proposed amendments to section 2042(b)(3) alone would reduce greatly the number of farmworkers FLCRA protects. Since courts currently construe section 2042(b)(2) to exempt most fixed-situs agricultural producers and processors,[132] the changes to section 2042(b)(3) would exempt all employees of these employers regardless of the nature or extent of their farm labor contracting activities. Any farm labor contractor able to establish an employment relationship with a stationary employer, even if temporary, would be exempted. If Congress amends the Act, those relationships will certainly be established, since farmers, growers, packers, and processors are relieved of the recordkeeping requirements if their farm labor contractors fall within the section 2042(b)(3) exemption. As a practical matter, when eliminating the costs to the farm labor contractor directly benefits both the producer and the farm labor contractor, through lower recordkeeping costs to the producer and through savings passed on because the contractor legitimately or illegitimately reduces costs by being exempted from the Act, both will be motivated to enter into an employer-employee relationship.[133]

The Boren Amendments to sections 2042(b)(2) and 2042(b)(3) together would exempt almost the entire agricultural industry—not only fixed-situs employers, but also all farm labor contractors with any bargaining power and minimal knowledge of the law. Only the smallest of the small-time, independent crewleaders would remain covered.

> person, whose sole and singular job for a canning or processing plant is recruiting, transporting, directing the activities and otherwise doing everything a crew leader does for this processor and maybe 50 different growers, becomes exempt. He is a full-time regular employee of that processor or canner and if you take out "on an incidental basis," he can be a full-time regular employee for no other purpose than recruiting, transporting, or otherwise acting as a crew leader. That flies in the face of what we were trying to do.

Id. at 114-15 (remarks of Chmn. Ford). Senator Javits agrees with Chmn. Ford's interpretation of the intent behind the 1974 changes in § 2042(b)(3). *See* 126 CONG. REC. S6268 (daily ed. June 4, 1980) (remarks of Sen. Javits). *See also* note 92 *supra*. The Ninth Circuit apparently agrees with Chmn. Ford's explanation of what changes like the Boren Amendments would do to that section. *See* note 122 *supra*.

132. *See* notes 87-98 *supra* & accompanying text.

133. In some cases, the contractor can demand that a farmer "employ" him. When a farmer has a fast-ripening crop in his fields awaiting harvest, and a contractor has workers ready, willing, and able to harvest the crop, the bargaining between them can involve significant give and take. The more a contractor intends to make his profit by exploiting his crew, the more important it is to him to avoid FLCRA coverage, and the more he will be willing to give up, and the more he will push, to have the farmer "employ" him. The farmer, on the other hand, should be willing to concede this point, because this employment relationship need not be burdensome to him. For example, instead of paying the crewleader as an independent contractor five cents for every box of tomatoes the crew picks, the farmer can pay him as an employee a weekly salary at the minimum wage, and add a bonus of four cents for every box of tomatoes the crew picks, and leave the crewleader in charge of disbursing pay to the crew. The crewleader then could cheat and otherwise exploit his workers and yet escape the provisions of FLCRA that would make such abuse more difficult and more dangerous.

FLCRA has little effect on the behavior of the small-time crewleader, or on the fortunes of his victims.[134] However, it can protect, and since 1974 has begun to protect, the majority of the seasonal agricultural labor force. Adopting changes to sections 2042(b)(2) and 2042(b)(3) as proposed by the Boren Amendments would end these protections for most farmworkers.

C. The New Exemption for Nonprofit Cooperatives

Nonprofit cooperatives exist at several stages of the production cycle because economies of scale lower production costs for joint producers. For example, it is more economical for a group of growers to build a water extraction and irrigation system or to buy expensive harvesting equipment than for each producer individually to construct, buy, or rent them.

Economies of scale also apply to the use of farm labor during harvest seasons. Producers, especially fruitgrowers, commonly establish nonprofit harvesting cooperatives to meet their farm labor needs. Typically the cooperative owns or leases housing, trucks, and harvesting equipment. It then either hires supervisors or engages farm labor contractors to recruit and oversee the farmworkers. The cooperative then harvests and markets its members' crops. At the end of the season, the cooperative either returns surplus funds to its members or assesses them a surcharge to cover deficits.[135]

Organized agribusiness challenges the characterization of these cooperatives as farm labor contractors even though FLCRA's coverage provision,[136] the Department of Labor's regulations,[137] and courts[138] all

134. Not only do the small-time crewleaders employ only a minuscule part of the seasonal agricultural work force, but whether FLCRA covers them is of little importance. These individuals usually are simply farmworkers who have managed to buy vans or small trucks. They ignore FLCRA, because they do not know about it, because they do not understand its requirements, or because the profitability of their operations is so low that the expenses avoided by noncompliance are more important to them than the corresponding potential penalties and liabilities. If they cheat or abuse the farmworkers they employ, the protections FLCRA affords the victims are illusory. The crewleader in most cases is judgment proof, generally owning little more than his truck, and his equity in that will rarely even cover his legal fees. So the prevailing plaintiffs walk away with a worthless judgment, or the Department of Labor compliance officers assess an uncollectable fine, and the crewleader, *sans* truck, goes back to being just another farmworker.

135. For an example of this arrangement, see Marshall v. Coastal Growers Ass'n, 598 F.2d 521, 523-24 (9th Cir. 1979).

136. 7 U.S.C. § 2042(b) (1976), *reproduced at* note 78 *supra*.

137. "Generally the Act will not exclude any farmers' cooperative performing any of the farm labor contracting activities in behalf of its members . . . ." Interpretations of Farm Labor Contractor Registration Act of 1963, 29 C.F.R. § 41.17(a) (1980).

138. *See* Marshall v. Coastal Growers Ass'n, 598 F.2d 521 (9th Cir. 1979); Jenkins v. S & A Chaissan & Sons, Inc., 449 F. Supp. 216 (S.D.N.Y. 1978); Marshall v. MUPU Citrus Ass'n, 84 Lab. Cas. ¶ 33,707 (C.D. Cal. 1978); Usery v. Point Sal Growers and Packers, 80 Lab. Cas.

consider them to be contractors. Organized agribusiness argues that, because nonprofit agricultural cooperatives do not exploit their workers, they are not the kind of labor contractors Congress meant FLCRA to cover.[139] To "clarify" the congressional intent, the Boren Amendments would exempt nonprofit cooperatives operated solely for the benefit of their members.[140]

The congressional intent the Amendments would "clarify," however, does not need clarification. FLCRA's coverage definition, as noted above, clearly encompasses these cooperatives. Senator Williams, moments before the Senate passed the 1963 Act, made it clear that Congress intended FLCRA to apply to these organizations.[141] Senator Tower, writing the minority view accompanying the 1963 Senate report, even protested that "this legislation covers any association which hires workers for employment by [the association's] own members, a common practice of growers' associations."[142]

There is nothing inherently benign about nonprofit agricultural cooperatives. They are "nonprofit" only with respect to their members. Not reaping a profit does not prevent them from exploiting the workers they recruit or recruiting workers for employers that will exploit them.[143] The cooperative, like any other form of business organization, is subject to abuse. If Congress exempts nonprofit agricultural cooperatives, farm labor contractors or producers could avoid FLCRA alto-

¶ 33,483 (C.D. Cal. 1977), *aff'd mem.*, 87 Lab. Cas. ¶ 33,835 (9th Cir. 1979) (opinion withheld from publication).

139. *See 1976 FLCRA Amendment Hearings*, *supra* note 6, at 117, 120 (statement of Leon Gordon).

140. Boren Amendments, *supra* note 77, at S9791. This exemption for nonprofit agricultural cooperatives would fill the hole the Boren Amendments would otherwise leave in § 2042(b)(2). Although those Amendments would exempt nearly all § 2042(b)(2) employers and their employees, nonprofit cooperatives still might fail the "for such person's own operation" test.

For example, in Marshall v. Coastal Growers Ass'n, 598 F.2d 521 (9th Cir. 1979), the court found nonprofit grower cooperatives to be farm labor contractors. The court denied the cooperatives the § 2042(b)(2) exemption because they did not contract farm labor solely for their own operations. That exemption, the court reasoned, refers to "farmers who recruit labor solely for their own farms," and therefore bears "no reasonable application to appellants." *Id.* at 524. The Boren Amendments would exempt the cooperatives in this situation.

141. 109 CONG. REC. 10625 (1963) (remarks of Sen. Williams).

142. S. REP. NO. 202, 88th Cong., 2d Sess. 15, *reprinted in* [1964] U.S. CODE CONG. & AD. NEWS 3690, 3705. Eighteen years later Senator Tower evidently changed his mind about what the 88th Congress had intended FLCRA to cover. In 1980, when he backed the Boren amendments as "necessary and rather simple *clarifications*" to FLCRA, he argued that Congress intended FLCRA to protect "migrants from abuses by *irresponsible crew leaders*." 126 CONG. REC. S9800-01 (daily ed. July 24, 1980) (remarks of Sen. Tower) (emphasis added). *See* text accompanying note 148 *infra*.

143. *See 1976 FLCRA Amendment Hearings*, *supra* note 6, at 98 (statement of John F. Ebbott, Milwaukee Legal Services) (description of two incidents of FLCRA violations by nonprofit cooperatives).

gether by utilizing the cooperative form.[144] Congress chose to foreclose that possibility. The courts have refused to permit it. But amendments like those proposed by Senator Boren would enact it into law.

IV. Specific Defenses: Farmworkers Protected

A. The Redefinition of "Agricultural Employment"

The 1963 Act limited itself to activities performed on a farm, or in the employ of a farm operator, by a farmworker transported across state lines.[145] The 1974 FLCRA Amendments eliminated the interstate requirement and expanded the definition of "agricultural employment" to include all activity prior to delivery for storage of any agricultural or horticultural product whether or not the activity took place on a farm.[146] The Boren Amendments would again restrict the definition of "agricultural employment" to operations performed "on a farm or ranch."[147] Its supporters' claim that this change "clarifies" congressional intent[148] conflicts with Congress' own statement of what it was trying to do: "[The 1974 FLCRA amendments' redefinition of 'agricultural employment'] amends section [2042](d) of the Act *providing coverage to all aspects of commerce in agriculture*, including that defined in either the Fair Labor Standards Act or the Internal Revenue Code, *and other processing of agricultural or horticultural commodities in an unmanufactured state.*"[149]

The Boren Amendments' redefinition, furthermore, ignores one-hundred years of agricultural history. Before the late nineteenth century, labor stopped being "agricultural" and became "commercial" when the commodities left the farm or ranch. In those days agricultural products generally reached consumers unadulterated and unprocessed. Upon leaving the farm or ranch they entered directly the transportation-storage-distribution-sale chain of commerce, within which they were treated like any other commodity.

144. In the simplest such arrangement, two farmers could set up a nonprofit cooperative to hire a crewleader, who then receives a "salary" inversely proportionate to the expense of harvesting the farmers' produce. The motive and potential for abuse of farmworkers are present, but the FLCRA protections are gone. *See 1976 FLCRA Amendment Hearings*, *supra* note 6, at 98 (statement of John F. Ebbott, Milwaukee Legal Services).

145. Farm Labor Contractor Registration Act of 1963, Pub. L. No. 88-582, § 3, 78 Stat. 920 (current version at 7 U.S.C. § 2042(d) (1976)), *reproduced at* note 78 *supra*.

146. Farm Labor Contractor Registration Act Amendments of 1974, Pub. L. No. 93-518, § 3, 88 Stat. 1652, 1653 (codified at 7 U.S.C. § 2042(d) (1976)). This includes "the handling, planting, drying, packing, packaging, processing, freezing, or grading" of the product. *Id.*

147. Boren Amendments, *supra* note 77, at S9791.

148. Boren Letter, *supra* note 73.

149. 1974 SENATE REPORT, *supra* note 40, at 8, [1974] U.S. CODE CONG. & AD. NEWS at 6448 (emphasis added) (citations omitted).

This distinction between agricultural and commercial employment no longer exists. Today most agricultural products are processed before they are marketed. The processor may be the farmer or grower, or may be an entity separated both organizationally and physically from the farm or ranch where the crops are produced. In either case the processor frequently requires unskilled seasonal labor to perform grading, packaging, freezing and canning activities. The people recruited to perform these tasks are usually farmworkers, often the same people who harvested the crops. The potential for exploitation of these workers continues when they switch from harvesting to processing activities. Indeed, the farmworkers remain subject to, and continue to suffer, the abuses and exploitations common in the seasonal labor market.[150]

Congress in 1974 chose to extend FLCRA's protections to farmworkers in this situation.[151] A redefinition of "agricultural employment" like that proposed in the Boren Amendments would leave FLCRA covering farmworkers employed in processing only if they work in facilities fortuitously located on farms or ranches. Not only do these facilities constitute but a small percentage of all labor-intensive food processing operations, they usually fall within the section 2042(b)(2) "solely for his own operation" exemption because normally they process only produce from the farm or ranch on which they are located.

B. The Redefinition of "Migrant Worker"

Under FLCRA,[152] a "migrant worker" includes any temporary or seasonal worker whose primary employment is in "agriculture" as defined in the Fair Labor Standards Act[153] or who performs "agricultural labor" as defined in the Internal Revenue Code.[154] Combining these two definitions, virtually anyone who performs agricultural labor on a seasonal or temporary basis is a "migrant worker."

"Migrant worker" therefore no longer refers only to workers who migrate. Fifty years ago most seasonal workers actually did migrate around the country harvesting various crops. But today more than eighty percent of seasonal agricultural workers do not migrate.[155] The law, however, has not developed a new term for nonmigrating seasonal

150. *See, e.g.,* Abraham v. Beatrice Foods Co., 418 F. Supp. 1384, 1386 (E.D. Wis. 1976).
151. *See* 7 U.S.C. § 2042(d), *reproduced at* note 78 *supra*; text accompanying note 149 *supra*.
152. 7 U.S.C. § 2042(g) (1976).
153. 29 U.S.C. § 203(f) (1976).
154. 26 U.S.C. § 3121(g) (Supp. III 1979).
155. *See* note 16 *supra*.

farmworkers, and refers to all seasonal farmworkers as "migrant workers," whether they migrate or not. Both Congress[156] and courts[157] consider all seasonal farmworkers to be "migrant workers."

The Boren Amendments would change this by redefining "migrant worker" to encompass only those persons who cannot regularly return to their domiciles after working hours, or who are transported from and to their domiciles each workday by a farm labor contractor.[158] The proponents of this change do not call it a "clarification." Rather, they reason that "[t]his definition reflects the underlying purpose of the Act: the protection of the *true* migrant agricultural worker. An agricultural worker whose domicile is on or near a farm, and who never comes into contact with a *true* labor contractor, does not need the Act's protections."[159]

Redefining "migrant worker" to exclude eighty percent of all seasonal workers from FLCRA protection, standing alone or in conjunction with the other proposed amendments, would further weaken FLCRA. First, a farmworker, to show he is covered by the Act, would have to prove his domicile.[160] A farmworker plaintiff unable to prove his domicile would lose his FLCRA action on an issue unrelated to his substantive claim. Second, farm labor contractors in areas with a large farmworker population could avoid FLCRA simply by hiring local people who have their own transportation.

A farmworker's domicile in an agricultural area does not shield him from exploitation. Although he may avoid abuses associated with

156. "[T]he word 'migrant' has become associated with a whole complex of economic and social deprivations, and tends to mean a group of people whose condition is exemplified by the migrant—whether they have settled out into stationary misery, or continue to take it along the Interstate with them." *Seminar on Farm Labor Problems: Hearings on H.R. 5010 and Related Bills Before the Subcomm. on Agricultural Labor of the House Comm. on Education and Labor*, 92d Cong., 1st Sess. 153 (1971) (staff memorandum).

157. This definition [that of "migrant worker" in § 2042(g)] is obviously a term of art, having no reference to workers with migratory tendencies. Originally defined in the Fair Labor Standards Act, it referred to a class exempted from that Act's coverage, and its broad definition was supported by the agricultural industry. . . .

We affirm the district court's definition of "migrant workers" as including . . . both those "whose primary employment is in agriculture" and those who perform agricultural labor "on a seasonal or other temporary basis."

Marshall v. Coastal Growers Ass'n, 598 F.2d 521, 524 (9th Cir. 1979). *Accord*, Marshall v. Buntings' Nurseries, Inc., 459 F. Supp. 92, 95 (D. Md. 1978); Usery v. Golden Gem Growers, Inc., 417 F. Supp. 857, 860 (M.D. Fla. 1976).

158. Boren Amendments, *supra* note 77, at S9791-92. The proposed definition is reproduced at note 78 *supra*.

159. Boren Letter, *supra* note 73 (emphasis added). *See also 1978 FLCRA Amendment Hearings*, *supra* note 6, at 119 (statement of C. H. Fields, American Farm Bureau Federation).

160. Questions of domicile often involve difficult questions of fact and problems of proof. Many farmworkers, for example, do not have a single domicile, but rather a series of residences that they occupy at different times of the year.

housing, he can still be cheated out of his wages.[161] The Boren Amendments' redefinition of "migrant worker" would artificially distinguish farmworkers who migrate from those who do not and deprive the latter group of FLCRA's protections.

V. Conclusion

FLCRA creates a comprehensive prophylactic scheme designed to prevent and remedy abuses of farmworkers. Congress wrote into the Act a series of provisions aimed at exempting the small producer and some of his permanent employees from the burdens the Act imposes. As the foundation of American agriculture changes from the small family operator to the large vertically-integrated corporation, the function that was once performed by an independent farm labor contractor is increasingly being taken over by large-scale agricultural concerns and their employees. Now organized agribusiness, calling for the "clarification" of FLCRA, is trying effectively to repeal the Act by broadening the exemptions to the Act's coverage so that all corporate agricultural producers and processors, and all of their employees, will be free to subject farmworkers to the mistreatment and exploitation that has been their lot for decades.

The people who pick the crops continue to be the most mistreated and least rewarded workers in America. The Farm Labor Contractor Registration Act affords farmworkers some protection against the many abuses they historically have endured at the hands of their employers. In its attempt to regulate a varied and flexible set of economic relationships by imposing a burden on those who contract for farm labor, the Act has made powerful enemies. Its opponents repeatedly have attempted to amend it in a manner that would effectively eliminate most of the protection it provides. Their efforts should be resisted, for if they are successful the victims will be a class of people who already have suffered for too long.

Richard S. Fischer

161. *Cf.* Hodgson v. Griffin and Brand, Inc., 451 F.2d 235 (5th Cir. 1973) (minimum wage violations against both migrants and local residents).