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LEGAL AND PRACTICAL ASPECTS OF THE FEDERAL FAIR LABOR STANDARDS ACT

By
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The economic importance of federal wage and hour controls in modern business and industry is now universally recognized. The application of these controls on a daily basis to almost every aspect of the employment relationship of persons who are either engaged "in interstate or foreign commerce" or "production of goods for interstate or foreign commerce" clearly demonstrates the extent to which such controls affect the affairs of employers in business and industry as well as the millions of persons who are employed by them. Hence, just as wage and hour controls have exerted considerable influence in the economic planning of other enlightened countries, so the Fair Labor Standards Act of 1938 is an important factor in our business and industry planning.

But a law such as this one which so basically affects the daily affairs of both employer and employee, and which is so comprehensive in its scope, is naturally very complicated, difficult to understand and still more difficult to apply. It will probably be some time before this law will have developed a status and meaning necessary to satisfy the thinking and requirements of all those persons who are subject to its provisions.

I doubt if many persons realize the intricate problems with which the courts have been and are yet confronted in fixing the legal status of persons involved in these relationships, and the determination of rights and liabilities between litigants subject to this law and the administrative regulations under it designed to control wages and hours of employed persons within the ambit of the act, but thousands of decisions upon many phases of that subject are sufficient proof of these facts.

The Fair Labor Standards Act of 19381 (hereinafter called "FLSA") with some amendments2 has been in operation for nearly thirteen years. The

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1 Shortly after the FLSA became operative, it was estimated that the act was applicable to 15,500,000 persons employed by more than 360,000 employers in 48 states, the District of Columbia, Alaska, Hawaii, Puerto Rico and the Virgin Islands. See dissenting opinion of Mr. Justice Douglas in Cudahy Packing Co., of La., v. Holland, 315 U. S. 785.


For a comprehensive list of amendments to the act, see WAGE-HOUR LAW by Wecht, volume on "Coverage" note 39 on page 21 and note 41 on page 22.
case law upon the subject is very much unsettled, abounding in conflicting interpretations concerning its application to an inestimable number of involved fact situations. Governing as it does, so great a section of our people over an extensive geographical area, the rules imposed are very complicated. There are problems within problems, exceptions to most of the rules, and exceptions to some of the exceptions. Those who have had the responsibility of solving one of these complex problems will readily comprehend the accuracy of this statement. One will also recognize the tremendous task of regulating wages, hours, child labor and employment practices on so broad and sweeping a scale and the difficulty of promulgating a law and regulations which are applicable on a country-wide basis without interfering with long established business and industry methods and procedures. Ergo, the Supreme Court of the United States has said that these controls are difficult to apply since the amount of wages and the nature of employment practices vary according to geographical location as well as from industry to industry and from factory to factory.\(^8\)

In addition to these complexities, further confusion arises from the difference between the "commerce power" generally exercised by Congress and the extent to which the same power has been exercised by it in the FLSA. It is important to recognize and understand this distinction.

**Exercise of Commerce Power by Congress in other Legislation**

The line of demarcation in the ruling cases of the Supreme Court of the United States construing the exercise and validity of the use of the federal commerce power applied to activities related to intrastate production or manufacturing is the case of *NLRB v. Jones & Laughlin Steel Corp.*, 301 U. S. 1, 81 L. Ed. 563, 57 S. Ct. 615.

Upon other problems related to the facts in that case the Supreme Court had ruled (1) the validity of an exercise of the commerce power by Congress required a showing of activities which were a constant and recurring burden and obstruction upon interstate or foreign commerce;\(^4\) (2) the use of the federal commerce power was not limited to transactions which were in and of themselves interstate commerce;\(^5\) (3) a regulation designed to control intrastate transactions deemed

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\(^5\) *Stafford v. Wallace*, n. 4, sustaining the *Packers and Stockyards Act* (42 Stat. 159) holding that the stockyards were the throat through which the current of commerce flowed and transactions which occurred there were part of the flow of commerce subject to the federal power. *Chicago Board of Trade v. Olson*, *supra*, in which the court sustained the use of the commerce power in the *Grain Futures Act of 1922* (42 Stat. 998) with respect to transactions on the Chicago board of trade which were not in and of themselves interstate commerce.
to be an essential part of a "flow" of interstate or foreign commerce, constituted a valid exercise of the congressional commerce power, and such transactions are not rendered immune because they grow out of labor disputes. But upon the premise that manufacturing in itself was not commerce (there being no immediacy or directness of such intrastate activities to interstate commerce or foreign commerce), it had been held that the effect of such activities were so remote as to be beyond federal control.

Though the commerce power employed in the Sherman Anti-Trust Act was sustained when applied to the conduct of employees engaged in intrastate production which had the effect of restraining or controlling the supply of an article entering and moving in interstate commerce, or the price of it in interstate commerce

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6 The Shreveport Case, 234 U.S. 342 and Houston etc. Dy. Co., v. United States, 234 U.S. 342, sustaining the use of the federal commerce power regulating intrastate rates of interstate carriers where the effect of the rates is to burden interstate commerce; Southern Ry. Co., v. United States, 222 U.S. 20, permitting regulations by Congress to compel the adoption of safety appliances on rolling stock moving intrastate because of the relation to and effect of such appliances upon interstate traffic moving over the same railroad; Balt. & Ohio R. R. Co., v. Interstate Commerce Commission, 221 U.S. 612, sustaining the power of Congress to prescribe maximum hours for employees engaged in intrastate activity connected with the movement of any train, i.e., activities of train dispatchers and telegraphers.

7 Texas & N. O. R. Co., v. Brotherhood of Railway & Steamship Clerks, 281 U.S. 548, holding a statute protecting the rights of collective bargaining by railway employees was within the competence of Congress under the commerce clause and that its provisions extended to clerks who had no direct contact with the actual facilities of railroad transportation. See also, The Virginia Railway Co., v. System Federation No. 40, 301 U.S. 515 and United States v. Ry. Employees etc., 290 Fed. 978. Attention of the reader is also directed to wage and hour provisions of the Adamson Act, 39 Stat. 721, 45 U.S.C. Sections 61-66, sustained by the Supreme Court of the United States in Wilson v. New, 243 U.S. 332. For other illustrations of the exercise of the federal commerce power see Wage-Hour Law by Wecht under "Federal Controls" there discussed.

markets,\(^9\) nevertheless, upon the authority of *Schechter v. United States*, 295 U. S. 495, and *Carter Coal Co., v. Carter*, 298 U. S. 238, a number of federal inferior courts held the National Labor Relations Act to be an invalid exercise of the federal commerce power when applied to relations between employers and employees engaged in intrastate or local production of goods subsequently shipped in interstate commerce.

In the *NLRB v. Jones & Laughlin Steel Corp.*, case, *supra*, reversing the Fifth Circuit Court of Appeals and thereby sustaining the validity of the NLRA, the Supreme Court pointed to its former rulings on the subject of the use of the federal commerce power and then held:

"the congressional authority to protect interstate commerce from burdens and obstructions is not limited to transactions which can be deemed to be an essential part of a "flow" of interstate or foreign commerce. Burdens and obstructions may be due to injurious actions springing from other sources. (emphasis supplied) The fundamental principle is that the power to regulate commerce is the power to enact 'all appropriate legislation' for 'its protection and advancement' . . . to adopt measures 'to promote its growth and insure its safety' . . . 'to foster, protect, control and restrain'. . . 'That power is plenary and may be exerted to protect interstate commerce' no matter what the source of the dangers which threaten it' . . . Although activities may be intrastate in character when separately considered, if they have such a close and substantial relation to interstate commerce that their control is essential or appropriate to protect that commerce from burdens and obstructions, Congress cannot be denied the power to exercise that control."

This, the court indicated, was the reasoning in the cases under the Sherman Anti-Trust Act sustaining the use of the federal commerce power where the close and intimate effect which brought them within the reach of the federal power was due to activities related to manufacturing although such manufacturing when separately considered was local.\(^{10}\)

Refusing to apply the rulings of the *Schechter* and *Carter* cases, *supra*, the Supreme Court held they were not controlling since in the former, the decision was based on the fact that the effect of the activities on interstate commerce was so *remote* as to be beyond the federal power, and in the latter, the decision turned on the fact that there was an improper delegation of legislative power, and the requirements not only went beyond any sustainable measure of protection of interstate commerce but were also inconsistent with due process.\(^{11}\)

\(^9\) Loewe v. Lawler, 208 U. S. 274; Coronado Coal Co., v. United Mine Workers, n. 8; Bedford Stone Cutters Ass'n v. Bedford Stone Co., *supra*; where, though, the reduction in the supply of an article to be shipped in interstate commerce by the illegal or tortious prevent of its manufacture or production is ordinarily an indirect and remote obstruction to that commerce, yet where the intent, inferred from the proof of direct and substantial effect produced by employees conduct, is shown to be to restrain or control the supply entering and moving in interstate commerce, or the price in interstate markets, their action is a direct violation of the *Anti-Trust Act*.

\(^{10}\) Standard Oil and *American Tobacco Co.* cases, 221 U. S. 1, 106.

\(^{11}\) But Mr. Justice Jackson in his book (written before his appointment to the Supreme Court) on *The Struggle for Judicial Supremacy* indicates other reasons impelled this distinction.
Prior Discussion Relates to Activities "Affecting" Commerce

In all of the congressional legislation cited to this article thus far, it is clear that it was the "effect" upon commerce not the source of the injury which was the criterion. The intent of Congress expressed in the findings and policy of this legislation was to bring within the scope thereof any transactions which "affected" interstate or foreign commerce, regardless of the origin of the goods, the place of sale or the percentage of interstate sales. The question was simply one of degree as to whether the facts presented were within the regulated area. This is the principle which distinguishes the use of the federal commerce power in the aforementioned legislation from the use of the same power in the FLSA.

Extent of Commerce Power Exercised by Congress in FLSA

It would not be possible, in the space allotted for this discussion, to present a detailed account of the reasons of Congress where lines are drawn and limitations are imposed under a federal enactment as between those controls which are to be exercised by the federal government and those which are left to the states. It is generally considered that such legislation is, in a large measure, a matter of give and take as between assertions of new power by the central government and the historic functions of the individual states. In view of the fabulous growth of our manufacturing and business economy on a national scale, it was inevitable that the central government assert its authority over economic enterprise by assuming powers previously exercised or which might have been exercised by the states. Hence, laws of this character cannot be construed without reference to and regard for the implications of our dual form of government.

An illustration of the extent of this give and take by Congress between federal and state governments which generally varies with the subject matter, the history, the specific terms and the procedures involved in the legislations, is to be found in the remarks of Mr. Justice Frankfurter, speaking on the subject in Kirschbaum v. Walling, 316 U. S. 517, he said:

"Thus while a phase of industrial enterprise may be subject to control under the National Labor Relations Act, a different phase of the same enterprise may not come within the 'commerce' protected by the Sher-

12 Santa Cruz Packing Co, v. NLRB, 303 U. S. 453; NLRB v. Fainblatt 306 U. S. 601. However, it has been held by the National Labor Relations Board that where the "effect" on interstate commerce is insubstantial, it will decline jurisdiction because assuming jurisdiction would not effectuate the policies of the N. L. R. A. See In re: Nickerson, 78 N. L. R. B. 623; In Re: Tampa Sand and Material Co., 78 N. L. R. B. 629; In Re: Sta-Kleen Bakery, Inc., 78 N. L. R. B. 798.
13 Consolidated Edison Co., v. NLRB, (U. S. Sup. Ct.) 1 Labor Cases 117, 120.
14 NLRB v. Jones & Laughlin Steel Corp., 301 U. S. 81, where in discussing the validity of the National Labor Relations Act, referring to our dual form of government, Mr. Chief Justice Hughes said: "Undoubtedly the scope of this power must be considered in the light of our dual form of government and may not be extended so as to embrace effects upon interstate commerce so indirect and remote that to embrace them, in view of our complex society, would effectually obliterate the distinction between what is national and what is local and create a completely centralized government."

A declaration of new dominance by the central government does not necessarily mean that Congress in enacting such new legislation intended to embrace all the situations which may conceivably be encompassed within the evils giving rise to such legislation. Any and all situations involved may be reached where the objective concerns only a single unitary government, but this is not the case where the underlying assumptions of our dual form of government cut across what might otherwise be the implied range of the legislation. It is a long-settled principle that Congress may choose to regulate only a part of what it can constitutionally control leaving local matters for the states.

In determining the incidence of the FLSA it is requisite in the first instance to evaluate the relationship between the facts in each case and the extent of the commerce power exercised by Congress in enacting the FLSA, for unlike the many other congressional statutes earlier discussed, the legislative history of the original FLSA and its 1949 Amendments conclusively proves that Congress did not see fit to exhaust its constitutional power over commerce. Hence, "this requires that the courts assume the sole duty of applying ad hoc the provisions of the FLSA to an unlimited variety of involved industrial and business situations without the aid of constitutional criteria or preliminary administrative process for ascertaining whether the particular situation is within the regulated area." There is no mathematical formula which can be devised for at once determining whether or not a given situation falls within the ambit of the act, for like all other questions which involve the commerce power by Congress they do not permit of the formulation of a mechanical method for determining the incidence of the power. Each case must be resolved on its own facts with due consideration given to the law established in other cases on the same question where the facts are similar. Every new situation calls for a rational judgment as the facts vary, for each new problem becomes one of degree to be resolved

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15 NLRB v. Jones & Laughlin Steel Corp., 301 U. S. 81. This fact is revealed by the history of the FLSA, the congressional regulation over the rates of interstate carriers which affect commerce, and the amendment of August 11, 1939 to the Federal Employers Liability Act which extended the scope of the act to employees "who shall in any way directly or closely and substantially affect interstate commerce. (53 Stat. 1404).

16 NLRB v. Jones & Laughlin Steel Corp., n. 15; and see extended discussion of this subject in WAGE-HOUR LAW by WECHT, pages 261 et seq.

17 Kirschbaum v. Walling, 316 U. S. 517.

18 Santa Cruz Fruit Packing Co., v. NLRB, 303 U. S. 453.

19 Walling v. Twyeffort, 158 F.2d 944 (CCA2), cert den. 331 U. S. 851.
by a process of drawing lines. But such lines are not susceptible of mathematical calculation according to fixed points. In fixing the points according to which the lines are drawn, all of the facts and inferences must be carefully weighed and placed in the proper perspective to determine whether or not the subject at hand falls within the regulated sphere.

What Constitutes Commerce

Since its departure from the limited definition of commerce in the *Schechter* and *Carter Coal Co.* cases, *supra*, the Supreme Court of the United States as late as *Armour & Co.* v. *Wantock*, 323 U. S. 126, defines "commerce" used in the *FLSA* as having a much broader significance than the mere manufacture or physical production of goods. The intent of the act is held to include those transactions, conditions and relationships which were known and acknowledged as constituting commerce prior thereto, which includes not only the manufacturing of the goods and the shipment thereof, but the carriers and instrumentalities by which such commerce is carried on. By including the terms "transportation" and "transmission" in the clause defining "commerce" Congress considerably broadened and extended its comprehension so as to include the instrumentalities which are employed and the common understanding of the term, even if at variance with the statutory definition, cannot be substituted for it.

Services Which Merely Affect Commerce

But though the foregoing statement would seem to indicate that the range of the *FLSA* is all inclusive, and notwithstanding that its application has been held to extend to the farthest reaches of the channels of interstate commerce, yet, Congress did not extend the power to the limit of its authority. Hence it does not have the same scope as those statutes hereinbefore discussed so as to reach activities of employees which only "affect" commerce. For example, a contention

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22 Section 3 (b) of *FLSA* as amended.
24 Umthum v. Day & Zimmerman, 235 Iowa 293, 16 N. W. 2d 258.
26 Congress may legislate upon a part of the subject leaving other evils to be remedied by the states. NLRB v. Jones & Laughlin Steel Corp., n. 15.
that the act has the same scope as the National Labor Relations Act so as to apply to any occupation which “affects” commerce was dismissed.  

**Purposes of FLSA**

The original FLSA was considered by Congress at a time when the country was recovering from the effects of a severe depression. The causes and effect of a badly managed economy were still fresh in the minds of the members of the Congress. Against such a background Congress could more aptly recognize those evils which contributed to the economic downfall and thus better evaluate its findings.

It found substandard labor conditions to exist in industries engaged in commerce and in production of goods for commerce, which, if permitted to continue by perpetuating themselves through the continued use of the instrumentalities of interstate and foreign commerce, would burden the free flow of goods, interfere with orderly fair marketing and give rise to unfair methods of competition.

In order to correct these conditions, since history and experience had already indicated that these conditions could not be controlled by state legislation on the subject, Congress enacted the instant statute controlling wage and hour standards of employment in private industry and business, including child labor.

Various purposes ascribed to the FLSA by the courts have been (1) to secure for those unorganized workers who lack sufficient bargaining power a minimum subsistence wage; (2) to extend the frontiers of social progress by insuring to all able-bodied working men and women a fair days’ pay for a fair days’ work; (3) by a reduction in hours to spread employment; (4) to place a floor under

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28 Keen v. Mid-Cont. Pet. Co., 157 F.2d 310, affirming 63 F. Supp. 120 (D. C. Iowa). Early drafts of the act embodied provisions which would have applied the act where goods were sold and shipped in commerce to a substantial extent, or to “employers engaged in commerce in any industry affecting commerce.” In connection with the last proposal the Secretary of Labor would have been given authority to issue an order declaring an industry to be one “affecting commerce” and thus covered by the act where he found that the industry was dependent for its existence upon “substantial purchases or sales in commerce and upon transportation in commerce.” These earlier drafts were rejected in favor of the coverage provisions contained in the present law. See H. R. Rep. 7200, 75th Cong., 1st Sess., introduced May 14, 1937; Amendment to S. 2475, 75th Cong., 1st Sess., and Committee prints 4/15/38, S. 2475, 75th Cong., 3rd Sess. Such reject-confirms the congressional intent to distinguish the commerce power used in the FLSA from the previous use of that power.

29 See statement of conclusions of Congress committee conducting hearings H. R. Rep. No. 2182, 75th Cong., page 6 of Joint Hearings on H. R. No. 7200 and S. 2475. For a further detailed discussion see *WEIGHT ON WAGE-HOUR LAW*, page 18 et seq.

30 H. R. Rep. 2182 etc., note 16.


wages and a ceiling over hours; to promote economic stability through increased purchasing power; to regulate wages industrywide, and under conditions which would not give one section of it a competitive advantage over another; without substantially curtailing employment or earning power,

Aside from the purposes already discussed, the fundamental aim of the FLSA is to proscribe the shipment into interstate or foreign commerce of goods, which at the time of manufacture are made under substandard labor conditions, and thus to make effective the congressional conception of "public policy" that interstate commerce should not be used for competition which is injurious to the commerce and to the states from and to which it flows.  

Constitutionality and Construction

It is highly significant that the entire field of enlightened federal labor relations legislation was made possible as a result of the interpretation by the Supreme Court of the United States of legislation dealing with the subject of wages.  

Hammer v. Dagenhart, 247 U. S. 251 in which the Supreme Court of the United States ruled that Congress was without power to exclude the products of child labor from interstate commerce was viewed as an effective bar to wage legislation covering employment in private industry. On the authority of that case the same court had several times struck down minimum wage legislation by the states designed for the protection of women and minors employed in private industry, although it had upheld state legislation providing maximum work hours limitations for women and minors in the same employment. In West Coast Hotel Co., v. Parish, the Court was called upon to consider the validity of legislation of the State of Washington, which was identical with the other state legislation previously invalidated in the cases cited to this text. Contrary to the popular belief and quite by surprise, the Supreme Court re-examined

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84 Id. And see also the Message of President Roosevelt to Congress in May, 1937, urging enactment of a law to establish fair labor standards, at page 17 of WECHT on WAGE-HOUR LAW; Culket v. Martin Neb. Co., (D. C. Neb.) 10 WH Cases 225.  
88 United States v. Darby Lumber Co., 312 U. S. 1, 2 WH Cases 47.  
90 West Coast Hotel Co., v. Parrish, 300 U. S. 379.  
93 300 U. S. 379.  
95 See cases cited in note 41.
the whole question of wage laws applicable to private industry and reviewed its ruling in the *Hammer v. Dagenhart* case, *supra*. After reviewing the cases, both before and after the decision of that case, the Court abandoned its former position holding that case

"was a departure from the principles which have prevailed in the interpretation of the commerce clause both before and since the decision and that such vitality as it there had, has long been exhausted. It should be, and now is, overruled."

That ruling eliminated any further necessity to proceed with a long standing plan to amend the Constitution, then being considered for ratification by the states, on the issue of child labor. It likewise was the impelling force which caused President Roosevelt to ask Congress for the enactment of a law to establish fair labor standards, resulting in the enactment of the FLSA. This ruling by the Supreme Court of the United States marks the beginning of a long line of cases construing the validity of "new deal" legislation in which it would appear that the majority of the court adopted a conception of the extent of the federal commerce power which was much broader than its range as previously construed.46

The fundamental basis for the exercise of the federal commerce power is that "the power to regulate commerce is the power to prescribe the rule by which such power is governed."47 Such power being full and complete in itself, it may be used to suppress competition which it has condemned as unfair, to the end of protecting such commerce against dislocation through the use of facilities of such interstate commerce for competition by goods produced under substandard labor conditions with those produced under the prescribed or better labor conditions. Upon these premises the use of the federal commerce power in the FLSA was held to be a valid exercise of the right to control intrastate activities related to interstate or foreign commerce including the production of goods for interstate or foreign commerce.48 This power of Congress to regulate wages and hours has been upheld by the courts when applied to many phases of industry and business, and its constitutionality is now an accepted fact.49

In construing this type of legislation, born of economic and social pressure, attempting to harmonize discordant socio-economic forces, courts have expressed themselves as bound to view such legislation in the framework of the conditions

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46 Mr. Justice Jackson in his book *The Struggle for Judicial Supremacy* (written prior to his appointment to the Supreme Court of the United States), characterizes this new position by the court as a retreat in the existing dispute between the court and the other departments of the government in "the battle for judicial supremacy."

47 Gibbons v. Ogden, 9 Wheat. 1, 196; see the same and similar rules expressed in NLRB v. Jones & Laughlin Steel Corp., n. 15, and the other cases on the commerce power cited to this article.


aimed to be remedied thereby. Consequently, it is vital that the congressional findings and policy of such statutes as this one be carefully examined to determine the intent of the lawmakers.

The guiding principles underlying the rules construing the provisions of the FLSA are to be found in the objectives of that statute as expressed in its findings and declaration of policy. These objectives clearly demonstrate that the act, salutary and comprehensive in its aims and highly remedial in character, is entitled to be construed liberally. This does not require an interpretation which is opposed to the obvious meaning and purpose of the act, but it does require that the act as a whole must be given a liberal interpretation in accordance with the legislative aims expressed therein.

So as to make the act as complete in itself as possible, Congress defined many of its important terms, thus declaring in the body of the act (Section 3 has been called the "dictionary of the act") the construction to be placed thereon. Such statutory definitions have long been held to prevail over colloquial meanings. Hence, when they are complete in themselves as defined, they are controlling in construing the particular statute, so that there is no necessity for resorting to other statutes or to extraneous considerations in an effort to construe and give to such language used another and different meaning, especially those statutes and considerations on different subjects and having purposes which are different from the FLSA. This rule does not deny the right or necessity to define words used in the definition where Congress fails to define such words. However, in that situation such words must be taken to mean what they mean when used in the ordinary sense, controlled by the context and the legislative intent, and taking into consideration that the FLSA is highly remedial and humanitarian, therefore, the ordinary meanings which are supplied for undefined words should be the liberal interpretations or meanings thereof which best serve to carry out the purposes stated therein by Congress.

In construing any provision of the FLSA, in the first instance, one must not overlook the purposes and the intent of Congress in choosing the language

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60 Sections 2(a) and 2(b) of the FLSA.
61 McComb v. Farmers' Res. Co., 335 U. S. 809; Walling v. Rutherford Food Corp., 156 F.2d 513, aff'd 331 U. S. 722. For the same reasons, the exemption provisions of the act are to be strictly construed against the employer claiming them.
63 Musteen v. Johnson, 133 F.2d 106 (CCA3).
65 Creekmore v. Pubric Belt Comm., 134 F.2d 376, cert. den. 320 U. S. 742.
70 Western U. Tel. Co., v. Lenroot, note 52.
Where the language is not clear, resort may be had to its legislative history to construe it so as to effectuate the intent of Congress, in a manner consistent with the practical meaning and effect in a particular situation. Likewise, in such a situation, though the rule is otherwise where the meaning of the statute is plain, it is proper to refer to rulings construing other statutory definitions in regard to terms used in the FLSA, especially where they are statutes in pari materia. For example, judicial interpretations of interstate commerce are as pertinent to consideration of the commerce definition in the FLSA as they would be in any other statute where the question is whether employee or employer is engaged in interstate commerce. If the statutory meaning is clear, there is, of course, no occasion to resort to rules of construction.

Contemporaneous Construction of Act by Secretary of Labor

It has long been a settled policy of the judiciary that the contemporaneous interpretation by officers, administrative department heads, and others officially charged with the duty of administering and enforcing a statute is entitled to respect in ascertaining the meaning to be applied to the statute, and this policy has been extended to cases arising under the FLSA. Although the function of finally construing and interpreting the written laws belongs to the judiciary, the executive department, in the case of the FLSA represented by the Secretary of Labor, (formerly the Administrator of the Wage and Hour Division) may be required by necessity to place its own interpretations upon the laws in advance of their exposition by the courts.

It is common knowledge that the interpretative bulletins of the Wage and Hour Division of the Department of Labor are prepared by experienced lawyers who are specialists in the field, and while they are not controlling on the courts, they do constitute a body of experienced and informed judgment to

62. Jewell Ridge Coal Co., v. Local Union etc., 53 F. Supp. 935 (D. C. Va.) affirmed (CCA4) cert. den. 322 U. S. 756, but see the comments on this subject in the dissenting opinion of Mr. Justice Frankfurter in Powell v. U. S. Cartridge Co., 339 U. S. 497, in which he indicates that the court up to that time had misconceived the purpose and intent of Congress in the FLSA.
64. Republic Pictures Corp., v. Kappeler, 151 F.2d 543 (CCA7).
71. Reorganization Bill No. 6 adopted by Congress in 1950. The duties of the Administrator were transferred to the Sec'y of Labor who redelegated them back to the Administrator. A procedural change.
which the courts and litigants may properly resort for guidance. One very persuasive argument in favor of the use of such contemporaneous interpretative bulletins as aids to statutory construction is that uniformity of interpretation and operation throughout the country, which is in every way desirable, will be promoted thereby. However, by way of caution, the meaning of the act may not be sought in its purely legal interpretation by the legal staff of the Wage and Hour Division, for, if this were so, the Secretary of Labor would be both the litigant and the judge in his own case who has written the decision beforehand.

The weight to be accorded by the court to the interpretations of the Secretary of Labor is dependent upon the thoroughness evident in their consideration, validity of reasoning and consistency with earlier and later pronouncements, subject further, that interested persons will not be permitted to alter the plain meaning of the act, and though they are not binding on the court, they will be entitled to respect in construing the act.

Since the enactment of the Portal-to-Portal Act, the rulings and interpretative bulletins of the Administrator of the Wage and Hour Division and now the rulings and interpretative bulletins of the Secretary of Labor, play a very significant role in the determination of substantive rights and liabilities of both employees and employers under the FLSA where the employer satisfies the court that his action is in conformity with such ruling or interpretation, that he relied completely upon such ruling or interpretation and that his action was in good faith.

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77 Fleming v. A. H. Belo Corp., note 70.
80 Roberg v. Phipps Estate, 156 F.2d 958 (CCA2) where the court refused to apply the literal interpretation of the act by the administrator, and adopted a more liberal construction of the FLSA.
81 Public law No. 49. 80th Cong., chapter 22, 1st Sess., 29 U. S. C. A.-, an act to relieve employers from certain liabilities under the FLSA, as amended, the Walsh-Healey Act and the Davis-Bacon Act. Though the Supreme Court has not yet dealt directly with the validity of the Act, it has refused to grant certiorari in a number of cases wherein the act was held constitutional by the lower courts. Seese v. Bethlehem Steel Co., 74 F. Supp. 412, affirmed 168 F.2d 58 (CCA4); Attalah v. Hubbert & Son, Inc., 168 F.2d 993 (CCA4), cert. den. 335 U. S. 868; Darr v. Mutual Life Ins. Co., 169 F.2d 262 (CCA2), cert. den. 355 U. S. 871; Battaglia v. General Motors Corp., 169 F.2d 254 (CCA2), cert. den. 335 U. S. 887.
82 Like almost all other problems under FLSA, the elements of conformity, reliance, and good faith, must be determined on the facts in each case as it arises. As an example of conflicting opinions see Addison v. Huron Stevedoring Corp., (D. C. N. Y. 1951) —— F. Supp. ——, 10 WH Cases 40, where employer who relied on ruling of War Shipping Administration was relieved of certain liability notwithstanding conflicting ruling of the Wage and Hour Division; see also Tripp v. May, (CCA7-1951) —— F.2d ——, 10 WH Cases 242, in which an employer who relied upon statements in correspondence made by the Regional attorney of the Wage and Hour Division was held not to be entitled to relief under the Portal-to-Portal Act. As to the exact nature of ruling or interpretation which may be relied on see Burke v. Mesta Machine Co., 79 F. Supp. 583 (D. C. Pa.) 8 WH Cases 175 and Moss v. Hawaiian SS. Co. 83 F. Supp. 528 (D. C. Calif.) 8 WH Cases 652.
Federal Rulings Controlling

In dealing with actions arising under the FLSA, state courts have expressed themselves as being bound to apply the rules of construction obtaining in the federal jurisdictions, following the implications of the decisions of the Supreme Court of the United States and the other federal courts construing the act and applying such implications to new situations. The decisions of the Supreme Court of the United States are binding on the Circuit Courts of Appeal of the United States, and the United States District Courts. It is now generally held that state law and policy which conflicts with the policy stated by Congress in the FLSA must yield to the federal law and policy established thereby.

Relationship of FLSA to Other Federal Laws

Without exception it has been held that the FLSA is not in conflict with other federal laws. The problems arising out of other federal legislation having different legislative backgrounds are generally held not conclusive in determining the legislative intent in enacting the instant statute. By way of illustration, it has been held (1) the "Eight Hour Law" as amended in 1940 to prohibit government contractors from employing certain persons in excess of eight hours per day without payment of overtime compensation, did not repeal the FLSA of 1938; (2) the FLSA and the Federal Highway Act of 1921 are not inconsistent; nor is the instant act irreconcilable with the Davis-Bacon Act, since the latter applies only to laborers and mechanics engaged on building projects financed with gov-

88 Section 16 of the FLSA provides, an action to recover back wages may be brought in any court of competent jurisdiction, which has been held to include state courts. Mizrahi v. Pandora Frocks, 86 F. Supp. 958 (D. C. N. Y. 1949).
84 Lyons v. Ferguson Co., 16 So.2d 586 (La. App.); Horton v. Wilson & Co., 223 N. C. 71, 25 S. E. 2d 437. But see Crowe v. Elmhurst Const. Co., 74 N. Y. Supp. 2d 445, 191 Misc. 585 holding, "The courts of the state (New York) are not bound to follow federal courts of the first instance on federal questions"; and see also Gilley v. Coca-Cola Bott. Works, (Tenn. Ch. Ct. 1950) 9 WH Cases 270 in which the court ruled: "Numerous federal district court decisions have been cited by counsel applying the doctrine of 'de minimis' in various fact situations. Some cannot be reconciled and some support each position here. This is natural where the test is relative and to an extent subjective. The result reached seems to be in accord with decisions in our own jurisdiction, which are given paramount consideration absent federal authority controlling. (italics supplied).
86 It is difficult for the writer to understand this ruling in the light of Mabee v. White Plains Pub. Co., 327 U. S. 178, Santa Cruz Packing Co., v. NLRB, 303 U. S. 453 and NLRB v. Fainblatt, 306 U. S. 601, all holding the doctrine of de minimis to be inapplicable in determining the incidence of statutes to activities related to interstate commerce. See also Remizewski v. Parodi Cigar Co., 64 A.2d 93 (N. J. Super. Ct. 1949); Hitchcock v. Union etc., Trust Co., 134 Conn. 246, 56 A.2d 655.
91 Walling v. Craig, 53 F. Supp. 479 (D. C. Minn.).
ernment funds,\textsuperscript{92} (3) the fact, that certain foremen at a plant manufacturing goods for the federal government have rights under the Walsh-Healey Public Contracts Act, does not preclude them from seeking redress under the FLSA for these statutes are not mutually exclusive;\textsuperscript{93} and (4) the provisions of the FLSA are applicable and govern the relationship between employees and cost-plus-a fixed-fee contractors for the war department under authority of the National Defense Act of 1940.\textsuperscript{94}

It is important to note, Section 18 of the FLSA provides that no provision therein shall justify non-compliance with any other federal law which fixes higher standards of employment. The language of this section discloses a congressional awareness that coverage of the FLSA overlaps that of other federal statutes affecting labor standards.\textsuperscript{95}

\textit{Conflict With State Laws}

Earlier in this discussion it was indicated that it was the several states which took the lead in enacting general wage and hour legislation in private industry. The FLSA in many respects is similar to and may have been modeled after this state legislation. It is understandable, therefore, why the FLSA is not in conflict with the many state laws upon the same subject. Congress by providing in section 18 of the FLSA that the act should in no wise justify non-compliance with state laws or municipal ordinances which establish higher minimum wages or shorter maximum workweeks or workdays clearly manifested its recognition of the existence of these state statutes upon the subject. Further evidence of this fact are the provisions of the FLSA indicating that no provision therein relating to the employment of child labor shall justify non-compliance with any state law or municipal ordinance which establishes a higher standard.\textsuperscript{96}

Although by the terms of the FLSA,\textsuperscript{97} an action to recover wages may be brought in any court of competent jurisdiction, which as earlier related includes state courts, nevertheless, this act is a law of the United States regulating inter-state commerce, therefore, the federal courts have jurisdiction regardless of citizenship of the parties or the amount of money in controversy.\textsuperscript{98} But, notwith-

\textsuperscript{92} Ortiz v. San Juan Dock Co., 5 WH Cases 662 (D. C. P. R.).
\textsuperscript{93} Brown v. Consolidated Vultee Air. Corp., 80 F. Supp. 257 (D. C. Ky.).
\textsuperscript{94} Powell v. U. S. Cartridge Co., 339 U. S. 497.
\textsuperscript{95} Id.
\textsuperscript{96} Sec. 18 of FLSA: H. R. Rep. No. 2182, 75th Cong., page 15.
\textsuperscript{97} Sec. 16(b) reads in part: the employee may bring an action in any court of competent jurisdiction. The 1949 amendments permits the administrator (now the Secretary of Labor) to sue for back wages under certain conditions. Only the federal courts have jurisdiction in injunction proceedings.
standing this plain statement, the question of jurisdiction is frequently raised where transfer actions are instituted between state and federal courts. There is considerable conflict of opinion on this problem which will continue to plague the courts and lawyers until the question is squarely raised and settled by the Supreme Court of the United States.

There is, however, unanimous agreement on the question of standards, for the courts, almost universally following the practice of adopting the policy and construction laid down by the federal courts, have sustained higher standards fixed by the state laws.\(^9\) Since the FLSA does not impose absolute limitations on hours, the many state laws which do enjoin against excessive hours of female workers supersede the instant law.\(^10\) But where the state law conflicts with the FLSA, the latter will supersede the state law.\(^10^1\)

**Geographical Application**

By virtue of Article I, Section 8 of the Constitution of the United States, Congress has the power to regulate commerce. The territorial extent to which it exercised the commerce power in the FLSA is implied in the language of Sections 3(b) and 3(c) thereof.\(^10^2\)

The application of the act to the area located within the boundaries of the 48 states and the District of Columbia is a simple problem. The use of the term "State" as defined in section 3(c) when read together with the definition of "Commerce", viz: "trade . . . among the several states or between any state and any place outside

\(^9\) See opinions of Louisiana Attorney General, September 13, 1938.


Section 3(b) as amended "‘Commerce’ means trade, commerce, transportation, transmission, communication, among the several states or (from) between any state (to) any place outside thereof.” (italics supplied). The words in parenthesis were included in the original act and deleted by the 1949 amendments. The changes were designed to eliminate inequalities in the act between employees engaged in foreign commerce based on whether the flow of such foreign commerce is out of the state rather than in to it. Hence, for example, the amended definition will serve to place employees of importers on an equal footing with employees of exporters. See "definitions", H. R. Report No. 1455, 81st Congress, 1st Sessions, October 17, 1949, page 1; Craig v. Heide & Co., 10 WH Cases 9; Addison v. Huron Stevedoring Corp., 10 WH Cases 40, (D. C. N. Y. 1951).

Section 3(c) reads "‘State’ means any State of the United States or the District of Columbia or any Territory or any Possession of the United States."
FAIR LABOR STANDARD'S ACT

thereof”, gives to the act a very wide geographical scope. It includes employees engaged in commerce or in production of goods for commerce, etc., in the manner provided in the act, in the territories of Alaska, Puerto Rico, Hawaii, the Canal Zone, Guam, Guiana Islands, Samoa, and the Virgin Islands, on much the same basis as the employees within the 48 states.108

FLSA Not Applicable to Foreign Employments

It is now well established that the geographical range of the act is confined to the territorial limits of the United States, its Territories and Possessions. It will not be applied to work performed in foreign countries,104 even though the contract under which such work is performed is made in the United States proper105 and the employees are citizens of the United States.106

Leased Areas as "Possessions of United States"

During World War II, the United States, for security purposes, leased a number of land bases from the British Commonwealth of Nations, and other sovereignties.107 Although there had been similar leases for land bases in existence prior to those mentioned,108 none of those arrangements were discussed in congressional reports or debates concerning the scope of the FLSA. Thus the question was open as to whether the term "possessions" used by Congress to bound the geographical coverage of the act fixed the limits of its scope so as to include these bases.

Early State and Federal Rulings

Several state courts had ruled, employees activities performed in the United States which were closely connected with the construction of military bases in foreign countries, were within the purview of the act entitling such employees to the benefits thereof.109

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107 Filardo v. Foley Bros., Inc., 45 N.Y.S.2d 262, 181 Misc. 136; Finnan v. Elmhurst Contracting Co., (N. Y. Sup. Ct. 1950) 9 WH Cases 686, however, such employees will be entitled to overtime compensation under the Eight Hour Law where work is performed on leased areas.
109 See Department of State Publication. No. 1726, Executive Agreement Series 204 (Greenland) and 205 (Liberia).
108 As to Cuban Base see International Acts, Protocols and Agreements (S. Doc. 357., 61st Cong. 2nd Sess.); as to Panama Canal Zone see Isthmanian Canal Convention, 35 Stat. 2234.
However, in the first case directly on the question to reach a federal court of the first instance, the court refused to extend the benefits of the act to employees of a contractor engaged by the United States to construct a defense base on certain areas in the Bermuda Islands leased to the United States by Great Britain, since the leased areas were not "possessions" of the United States, and that, being purely a political question, must be decided by the legislative and executive departments and not by the courts (relying upon *Jones v. United States*, 137 U. S. 202 and *Pearcy v. Stranahan*, 205 U. S. 257, 265). The Second Circuit Court of Appeals reversed, and the United States Supreme Court granted *certiorari* because of the importance of this question concerning the geographical extent of the act.

**Foreign Areas Leased by U. S. are "Possessions"

In affirming the view of the Second Circuit Court of Appeals in favor of coverage, the Supreme Court held the question is not a political one beyond the competence of the court to decide; that Congress has power in certain situations to regulate the actions of our citizens in criminal matters outside the territorial jurisdiction of the United States, hence, this being true as to crimes, *a fortiori* civil controls may apply to liabilities created by statutory regulation of labor contracts even if aliens may be involved where the incidents regulated occur on areas *under the control, though not within the territorial jurisdiction or sovereignty, of the nation enacting the legislation*. Congress derives its power from the Constitution and the lease provisions to regulate labor conditions on these bases, and whether or not its exercise of that power is effective beyond the boundaries of National Sovereignty is a matter of statutory construction for the courts. The Court adopted the view that where the aim was to regulate labor relations in an area vital to the national life of the United States, it seems reasonable to construe its provisions to have force where the nation has sole power, rather than to limit coverage to sovereignty, and the facts indicated an intention on the part of Congress in the use of the term "possession" to have the act apply to employer-employee relationships on foreign territory under lease to the United States for military bases.

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111 164 F.2d 924.
113 It is significant to note, the Supreme Court in its consideration of this case, accorded recognition to the fact that the Administrator of the Wage and Hour Division had issued a statement of general policy and a ruling which directed all his agencies to apply the act to a Canal Zone Base located on foreign leased areas, admittedly a territory over which the United States had no sovereignty. See C. F. R. 1947, Supp. Title 29, pp. 4392-93.
Foreign Military Installations in Areas not Under Lease to United States—Not "Possessions"  

Thus far, it would seem, the application of the act is limited to activities concerned with operations connected with military bases located on foreign leased areas, since one court has refused to extend the benefits of the FLSA to employees working at foreign military installations in areas not under lease to the United States.\textsuperscript{116}

Conclusion  

The foregoing discussion points up, in a general way, but a very few of the many complicated problems under the FLSA constantly engaging the attention of the courts. This writer conservatively estimates that there now exists, millions of dollars of contingent employer liabilities for back wages due employees, liquidated damages and attorney’s fees due thereon.\textsuperscript{115} If the courts have not, to a much greater extent, been flooded with litigation on this subject, it is only because the enforcement facilities of the Wage and Hour Division are not sufficiently adequate to cope with these violations of the act, and generally speaking, lawyers are not sufficiently cognizant of the potential of fees resulting from this type of litigation.

Some of the most involved problems arising under the act, i.e., the interpretation and application of the exemption provisions, the establishment of the "regular rate" for the purpose of calculating overtime compensation, the application of the child labor provisions, and many other intricate situations covered by the act, have not been touched upon here.

To be sure, the greater part of the confusion stems from the conflict of opinion existing among the courts having jurisdiction of issues arising under the act. There are many hundreds of federal and state courts throughout the United States and the Territories within whose jurisdiction these cases fall. These courts are not individual or corporate bodies for the promotion of particular objects, as much as they are personal. Each such tribunal is separate and independent of

\textsuperscript{116} Filardo v. Foley Bros., Inc., 45 N.Y.S.2d 262, 181 Misc. 136, in which the court refused to apply the act to a cook employed at a defense base in Iran by a company constructing a base for the United States Government.

Activities of employees connected with construction work being performed on "leased areas" may not be within the FLSA, however such employees may be entitled to overtime compensation under the provisions of the Eight Hour Law Finnan v. Elmhurst Contracting Co., (N. Y. Sup. Ct. 1950) 9 WH Cases 686.

\textsuperscript{115} See dissenting opinion of Mr. Justice Frankfurter in Powell v. United States Cartridge Co., 339 U. S. 756, wherein he estimates that the contingent liabilities to the United States arising from claims for overtime compensation, liquidated damages and attorney fees, in the cost-plus-affixed-fee contractors' cases, will run to as much as $250,000,000.00.

There would seem to be some justification for this estimate. Upon remand of the Powell case for further action by the lower court, these damages were fixed at approximately $248,000.00. The Powell case is only one of many such cases in which the same question is involved.
every other tribunal. State court judges are elected or appointed to serve for as long as ten years or more, and the judges of the federal courts are appointed for life. These judges, numbering perhaps in the thousands, differ considerably as to their experiences, party affiliations, and their political, economic and social views. It is, therefore, apparent how and why there has developed this confusion and conflict concerning the interpretation of a dynamic statute such as the FLSA with all of its social and economic implications affecting so many millions of citizens on a daily basis.

It is, perhaps, because of these conditions, that it would seem to be the position of the Wage and Hour Division, in its enforcements policies, to rely for its conclusions only upon the rulings of the Supreme Court of the United States, where they are available, otherwise to depend upon its thirteen years of experience, in preference to the conclusions of the lower courts. Surely, it is a matter of record that the lower courts are not obliged to, and few do, respect the opinions of the other lower courts. This is many times true of the ordinary conflicts which exist between inferior state courts. So far as federal courts are concerned, one need only refer to the long list of cases construing the validity of "New Deal" legislation over the past twenty years. During that period, commodity, price and labor laws enacted by Congress were valid in some states but invalid in other states because the federal district and circuit courts came to opposite conclusions upon the same question. Albeit, it is not necessary to go outside the FLSA to prove this point. For example, on the question of the application of the overtime compensation requirements of Section 7 of the FLSA to cost-plus-a fixed-fee contractors' employees, there was a general conflict of opinion over the whole country as to whether these employees were excluded from the acts' benefits. Very few problems have ever resulted in so many differences of opinion among the courts, involving also as many different approaches and legal logic as there were cases upon the subject.116 Here is con-


These are but a few of a very large number of cases decided both ways, some of which were divergent views emanating out of the same federal circuit by different judges of the districts.
vincing proof and a clear example of the type of conflict extant on many FLSA questions.

The writer suggests that there is much that lawyers can do to overcome the existing confusion by informing themselves concerning the fundamental principles which distinguish the interpretation and application of the FLSA from other congressional legislation dealing with employer-employee relationships. However, if this discussion serves no more useful purpose than to arouse the general interest of the legal profession to the possibilities inherent in the subject, this effort will have been justified.