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## **Davis-Bacon Suspension and Its Legislative Aftermath**

**November 14, 2005**

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## Summary

The Davis-Bacon Act of 1931 (as amended) requires that *not less than* the locally prevailing wage be paid to workers engaged in *federal contract construction*. A higher rate may be required, depending upon market conditions, in order to secure a qualified workforce. Davis-Bacon, however, represents a wage floor.

Under Davis-Bacon, the President is allowed to suspend the Act during a time of *national emergency* — though a national emergency is not defined in the Act. On four occasions, Presidents have suspended the statute — most recently in the wake of Hurricane Katrina.

During the last week of August 2005, Hurricane Katrina gathered strength in the Atlantic and moved against the Gulf states. On September 8, 2005, amid the chaos left in Katrina's wake, President George W. Bush suspended Davis-Bacon — focusing upon the massive effort that would be required for reconstruction.

In the wake of Hurricane Katrina, the legislative response has been diverse. H.R. 3684 (Flake) proposed to render a suspension mandatory during any *major disaster* proclaimed by the President under the Stafford Act. A companion bill was introduced in the Senate: S. 1817 (DeMint). Other measures, introduced after the President had acted, would have reversed his proclamation and would have restored Davis-Bacon to full force: H.R. 3763 (George Miller), H.R. 3834 (Pallone), and S. 1749 (Kennedy). Yet another bill, S. 1763 (Boxer), would have given employment preference to persons impacted by Hurricane Katrina — and would have, in effect, restored Davis-Bacon.

Proceeding in a different manner were H.Res. 467 (Miller) and H.Res. 488 (LaTourette). Though somewhat differently worded, the President was requested in each to provide to the House of Representatives information in his possession that relates to wages and benefits to be paid to workers in the several hurricane-impacted areas. In late October, Labor Secretary Chao announced that Davis-Bacon would be reinstated by November 8, 2005.

In other legislation, H.R. 3907 (Blackburn) proposed a redefinition of the concept of *helper* for Davis-Bacon purposes. Although of general application, the new definition could have a significant impact in the storm ravished regions.

This report analyzes the legislative aftermath of the decision to suspend the Davis-Bacon Act. It will be updated as conditions warrant.

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# Davis-Bacon Suspension and Its Legislative Aftermath

## The Davis-Bacon Act: An Introduction

During the years following World War I, various efforts were made to enhance the level of professionalism within the construction industry. Where federal contracts were concerned (with their low-bidder specifications), some contractors would bid above their level of expertise and, having won a particular contract, then attempt to hire a workforce. Some were successful in this enterprise; others were not. Some bidders engaged in *bid-brokering*: i.e., a systematic acquisition of contracts, followed by a leasing-out of the work or its transfer to another contractor whose workforce was paid at an extremely low rate — with the government as consumer indirectly supporting such abusive practices. There was, some suggested, a persistent lowering of standards and construction quality — with little concern for the workers actually engaged in construction nor with the ultimate consumer of the work.<sup>1</sup> In the process, some firms may have been less-than-competent. To such firms, the opprobrious title *fly-by-night operators* was given.

As the Nation moved into the Great Depression of the 1930s, when government was investing substantial amounts in public construction, such itinerant jobbers and firms, basing their operations on low wages, were seen as subverting the recovery process. The economic impact of publically subsidized work, intended to spur the economy of an especially depressed area, was defused: the effort to provide work (and contracts) for distressed communities was frustrated.

In 1931, Representative Robert Bacon (R-NY) and Senator James Davis (R-PA), the latter having served as Labor Secretary in the cabinets of Presidents Harding, Coolidge and Hoover, proposed what would become known as the Davis-Bacon Act.<sup>2</sup> The initial enactment seems to have satisfied very few; but, given an Executive Order (No. 5778) by President Hoover in 1932 and a restructuring of the statute by Congress in 1935 (P.L. 74-324), the Davis-Bacon Act was modified and quickly became a *generally* accepted part of federal labor-management policy. Gradually, the provisions of Davis-Bacon came to be added to a diverse number of statutes involving public works and related construction.

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<sup>1</sup> Inter alia, see Lloyd Smith, “To Eliminate Irresponsible Bidders,” *The Constructor*, Jan. 1925, pp. 23 and 64; “When Low Bids Are Too Expensive,” *The Constructor*, Feb. 1930, pp. 40-41 and 58; C. W. Butts, “The Necessity for Prequalification: Over Optimism on the Part of Contractors Requires a Check,” *The Constructor*, Mar. 1930, pp. 40-41; E. A. St. John, “Cooperation Eliminating Irresponsibility,” *The Constructor*, Apr. 1930, pp. 35-36; and Hard Facts About Contractors,” *The Constructor*, Sept. 1930, pp. 28-30.

<sup>2</sup> P.L. 72-798, signed into law by President Hoover on Mar. 3, 1931.

By the late 1970s, President Carter commenced a further restructuring of the Act — a process carried on by President Reagan in the 1980s. During subsequent years, criticism of the Act has tended to reflect ideological perspectives: some, conservative, often in opposition; some, mostly trade unionist and contractors operating with union crews, in support.<sup>3</sup>

Among labor laws, Davis-Bacon is *widely* known but it may not be *well* known. The Act provides a wage floor and is geared to specific types of construction: i.e., residential, building, highway, and heavy construction. It is implemented on a locality basis, generally on a county level. Although often mislabeled, the Davis-Bacon wage is not necessarily the union wage — though, in cases where the union wage prevails, it may be that the Davis-Bacon rate is indeed the union rate. Conversely, the wages paid on Davis-Bacon projects may be somewhat higher than prescribed by the Act because of demand for labor and for other market considerations. Finally, Davis-Bacon applies only to federally contracted construction — though its impact may spill over into the non-federal sector, depending upon the market and general conditions of employment.

Perhaps the most frequently asked question concerning the Davis-Bacon Act is: Would the federal government (and the taxpayers) save money if the Davis-Bacon Act were repealed or modified to narrow its scope? The short answer is: No one really knows. Conversely, might Davis-Bacon result in savings to the federal government in its purchases of construction. That, too, would seem to be an open question. One might like to say, forthrightly, that a change in the statute could have a positive or a negative impact. However, the state of current research would probably be insufficient to justify just an assertion.<sup>4</sup>

## Suspension of Davis-Bacon

Under Davis-Bacon, the President is allowed to suspend the Act in times of *national emergency*. However, the concept of *national emergency* is not defined in the statute.

As the implications of Hurricane Katrina became known, there were increasing pressures upon the Bush Administration for a suspension of Davis-Bacon. Some suggested that advocates of suspension were simply using the disaster as a means of advancing an agenda which they were not, under normal circumstances, able to move

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<sup>3</sup> See testimony of Labor Secretary William N. Doak in U.S. Cong., Senate Committee on Manufactures, *Wages of Laborers and Mechanics on Public Buildings*, Hearings on S. 5904, 71<sup>st</sup> Cong., 3<sup>rd</sup> Sess., Feb. 1931, pp. 2-3. See also: Proclamations and Executive Orders, Herbert Hoover, Mar. 4, 1929, to Mar. 4, 1933. Washington, Govt. Print. Off., 1974, vol. II, pp. 1066-1067; editorial, “Reinterpreting the Davis-Bacon Law,” *The Constructor*, Jan. 1932, pp. 15-16; and *Federal Register*, May 28, 1982, p. 23644. For a summary history of the Act, see CRS Report 94-408, *The Davis-Bacon Act: Institutional Evolution and Public Policy*, by William G. Whitaker.

<sup>4</sup> There is an extensive literature on the Davis-Bacon Act, pro and con. See CRS Report 94-908 E, *Davis-Bacon: The Act and the Literature*, by William G. Whitaker.

in Congress.<sup>5</sup> Others affirmed that a “[t]emporary suspension of Davis-Bacon will help avoid costly delays that impede clean-up and reconstruction efforts along the Gulf Coast.”<sup>6</sup> In addition, it was affirmed that “...we need to be as flexible as possible in helping the Gulf Coast region and ease the burden on state and local officials as we begin one of the largest reconstruction projects in modern history.”<sup>7</sup> Others, citing the “massive rebuilding challenges ahead,” urged the President to issue “a presidential proclamation to suspend Davis-Bacon until our country is once again whole.”<sup>8</sup>

On September 8, 2005, President George W. Bush, citing potential inflationary wage pressures, suspended the Davis-Bacon Act *as it relates to specific segments of the country* (i.e., to portions of Florida, Alabama, Mississippi, and Louisiana).<sup>9</sup> The proclamation of suspension specified that both the Act and “provisions of all other acts providing for the payment of wages, which provisions are dependent upon determinations by the Secretary of Labor” would be suspended.<sup>10</sup>

## Post-Suspension Legislation

Following the September 2005 suspension of the Davis-Bacon Act, a number of pieces of legislation was introduced that would deal in various ways with that action. Some, it would appear, would have broadened the suspension or made it mandatory. Others would have overturned that suspension.

### The Flake Bill: H.R. 3684

Representative Jeff Flake was first to emerge with a Davis-Bacon proposal — a day before the President suspended the Act.<sup>11</sup> The bill, cited as the “Cleanup and Reconstruction Enhancement Act (CARE Act),” would amend Section 3147 of Title 40 (the provision that allows the President to suspend Davis-Bacon) by adding at the end the following:

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<sup>5</sup> Rep. George Miller, Statement to the Press, Sept. 8, 2005. See also Jonathan Weisman and Amy Goldstein, “In the Floods, Parties’ Agendas Surface,” *Washington Post*, Sept. 10, 2005, p. A4.

<sup>6</sup> Rep. Tom Feeney, Statement to the Press, Sept. 7, 2005.

<sup>7</sup> Letter from Reps. Charlie Norwood and Charles W. Boustany to George W. Bush, Sept. 8, 2005.

<sup>8</sup> Rep. Jeff Flake, Statement to the Press, Sept. 7, 2005.

<sup>9</sup> Concerning the procedure for suspension of such acts as the Davis-Bacon Act, see CRS Report 98-505, *National Emergency Powers*, by Harold C. Relyea.

<sup>10</sup> White House press releases, Sept. 8, 2005. Davis-Bacon has been incorporated within a series of other statutes, specifically or by inference, to which “determinations by the Secretary of Labor” refers.

<sup>11</sup> The Flake bill had 29 original Republican co-sponsors: now raised to 33. No Democrats signed onto the bill. There appears to have been no explanatory documents or introductory statement.

In any area that the President determines to be a major disaster under section 102(2) of the Robert T. Stafford Disaster Relief and Emergency Assistance Act (42 U.S.C. 5122(2)), the provisions of this subchapter shall not apply for a period of 1 year from the date on which the President makes such determination.

The bill is short and direct. Whenever the President, in the national interest, finds it necessary to declare a “major disaster” under the Stafford Act (thus, opening eligibility for various subsidies and/or federal programs), the Davis-Bacon Act will automatically be suspended for one year (in the area of concern) from the date on which the determination is made.

The bill would remove from the President what has been a discretionary policy and render it automatic — if a “major disaster” is declared. Under 42 U.S.C. 5122(2) of the Stafford Act, a *major disaster* is defined as “including any hurricane, tornado, storm, high water, winddriven water, tidal wave, tsunami, earthquake, volcanic eruption, landslide, mudslide, snowstorm, or drought” or “regardless of cause, any fire, flood, or explosion” for which the President determines there is a need for “major disaster assistance.” In a statement subsequently applauding the President’s action, Representative Flake affirmed that compliance with Davis-Bacon “can add weeks to federally financed construction projects ... often driving up costs.”<sup>12</sup>

H.R. 3684 was introduced on September 7, 2005, and referred to the House Committee on Education and the Workforce.<sup>13</sup>

### **The Miller Bill: H.R. 3763**

Introduced on September 14, 2005, the proposal by Representative George Miller, H.R. 3763, would basically overturn the President’s authority with respect to *the particular case* of Hurricane Katrina.<sup>14</sup>

The bill states that, the proclamation of the President, dated September 8, 2005, or any other provision of law notwithstanding:

... the provisions of subchapter IV of chapter 31 of title 40, United States Code (and the provisions of all other related Acts to the extent they depend upon a determination by the Secretary of Labor under section 3142 of such title, whether or not the President has the authority to suspend the operation of such provisions) shall apply to all contracts to which such provisions would otherwise apply that are entered into on or after the date of enactment of this Act, to be performed in the counties affected by Hurricane Katrina and described in such proclamation.

In short, the Davis-Bacon Act (and related federal statutes) would be made to apply, after enactment, to the counties specified in the President’s September 8, 2005,

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<sup>12</sup> Rep. Flake, Statement to the Press, Sept. 8, 2005.

<sup>13</sup> S. 1817, a companion bill, was introduced on Oct. 4, 2005, by Senator Jim DeMint and was referred to the Committee on Health, Education, Labor and Pensions.

<sup>14</sup> The Miller bill had 161 original Democratic co-sponsors including one independent; one Republican was an initial co-sponsor, but withdrew his name.

message. Of course, the Act would continue to be applicable to other U.S. jurisdictions.

In an introductory statement, Representative Miller explained that the Davis-Bacon Act “requires that Federal contractors pay their workers at least the prevailing wage — simply the wage that is typical for their kind of job in their community.” He continued: “Many of the workers subjected to these wage cuts [under the President’s Proclamation] have lost everything — their homes, their property, their jobs, and even family members.” We owe it to these “American workers” to pay them “a wage that will allow them and their families to get back on their feet.”<sup>15</sup>

The Miller bill, cited as the “Fair Wages for Hurricane Victims Act,” was referred to the Committee on Education and the Workforce.

### **The Pallone Bill: H.R. 3834**

Introduced on September 20, 2005, by Representative Frank Pallone, H.R. 3834 essentially duplicates the Miller bill except that one phrase, “...whether or not the President has the authority to suspend the operations of such provisions,” has been omitted. The measure was referred to the Committee on Education and the Workforce.<sup>16</sup>

### **The Kennedy Bill: S. 1749**

Introduced on September 21, 2005, by Senator Kennedy, S. 1749 is a companion to the Miller bill. The measure was referred to the Committee on Health, Education, Labor, and Pensions.<sup>17</sup>

In an introductory statement, Senator Kennedy observed that, in rebuilding the Gulf Coast, “...we are rebuilding communities and neighborhoods. And the foundation of such communities is good jobs with fair wages.” Senator Kennedy estimated that from “400,000 to 1 million workers may become unemployed as a result of the hurricane, with the unemployment rate reaching 25 percent or higher in the gulf region. Many affected workers will be unemployed for 9 months or longer.” The rebuilding of the Gulf Coast communities “...will be a major source of new employment, and we need to be sure that they pay decent wages. This is all that Davis-Bacon does: it simply ensures that workers on Federal Government projects earn a typical wage.”<sup>18</sup>

### **The Boxer Bill: S. 1763**

On September 22, 2005, Senator Barbara Boxer introduced S. 1763, a bill cited as the “Hurricane Katrina Reconstruction and Displaced Worker Assistance Act of

<sup>15</sup> *Congressional Record*, Sept. 14, 2005, p. E1845.

<sup>16</sup> There were no other original co-sponsors.

<sup>17</sup> The Kennedy bill had 25 original co-sponsors (now raised to 28), all of them Democratic.

<sup>18</sup> *Congressional Record*, Sept. 21, 2005, pp. S10302-S10303.



2005.” The bill, essentially, has two parts. *First*: It would have the “head of an executive agency” “give a preference” in hiring for hurricane “reconstruction efforts” to workers who have been displaced by the storm: “not less than 25 percent of the workforce that will perform such services” are to be such displaced workers. *Second*. Notwithstanding the President’s proclamation of September 8, 2005, “...all laborers and mechanics employed by contractors or subcontractors in the performance of Federal contracts for the procurement of services in connection with Hurricane Katrina reconstruction efforts shall be paid wages at rates not less than those prevailing for similar work in the locality involved...” The bill was referred to the Committee on Health, Education, Labor, and Pensions.

In an introductory statement, Senator Boxer suggested that “tens of thousands of people in the Gulf States have lost their jobs” and that “over 200,000 have filed for unemployment benefits.” Further, taking note of the President’s suspension of the Davis-Bacon Act, she stated: “The tragedy of Hurricane Katrina should not be used as an excuse to take advantage of working people.”<sup>19</sup>

### **The Miller Resolution: H.Res. 467**

On September 27, 2005, Representative George Miller introduced H.Res. 467, a measure “[r]equesting that the President transmit to the House of Representatives information in his possession relating to contracts for services or construction related to Hurricane Katrina recovery that relate to wages and benefits to be paid to workers.”<sup>20</sup>

Among the documents *requested* by the resolution (to be provided no later than 14 days after adoption of the resolution) were materials that deal with reconstruction in the Gulf region and with Davis-Bacon. This included:

...copies of any portions of any contracts in his possession for services or building or other construction (including pre-awarded contracts or contracts that were modified or extended) related to Hurricane Katrina recovery or rebuilding that address wages and benefits to be paid to workers pursuant to the Act commonly known as the Davis-Bacon Act..., the Service Contract Act of 1965..., or the Fair Labor Standards Act of 1938 ..., that were awarded by the Federal Emergency Management Agency (or at the request of such agency) or by the Departments of Labor, Education, Homeland Security, Health and Human Services, or Defense, or the Army Corps of Engineers; ...

The resolution requested presentation to the House by the President of “any communications in his possession made or received, on or after August 26, 2005,” by one or more of the several agencies, “related to compliance with or enforcement of” the Davis-Bacon Act, the Service Contract Act, or the Fair Labor Standards Act, and that

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<sup>19</sup> *Congressional Record*, Sept. 22, 2005, p. S10382. Senator Boxer also introduced S. 1644 (Sept. 8, 2005), which provides for a preference for workers displaced by the Hurricane. The bill was introduced almost simultaneously with the President’s proclamation.

<sup>20</sup> This language is taken from the title of the resolution. See *Congressional Record*, Sept. 27, 2005, p. H8388.

deal with the “geographic areas specified in the President’s Proclamation 7924 of September 8, 2005.”<sup>21</sup>

The resolution, a seldom used device, was referred to the Committee on Education and the Workforce. In mid-October 2005, the Committee voted to report the measure unfavorably.<sup>22</sup>

## The LaTourette Resolution: H.Res. 488

On October 7, 2005, Representative Steven LaTourette introduced H.Res. 488, similar to, but more abbreviated than, the Miller resolution discussed above. The LaTourette resolution was referred to the Committee on Transportation and Infrastructure where, reportedly, Committee Chairman Don Young had agreed to schedule a markup on the measure in early November.<sup>23</sup> (See discussion below.)

## Davis-Bacon Is Reinstated

On September 8, 2005, as noted above, President George W. Bush suspended the Davis-Bacon Act as it applied to certain Gulf Coast jurisdictions. The President’s suspension of the Act seemed to have produced a substantial backlash favorable to Davis-Bacon and toward reinstatement.

On September 13, Representative Miller had charged: “While the Administration is giving out no-bid contracts that fail to protect the taxpayer, it is also exploiting Hurricane Katrina to undermine the wages of the most desperate workers in our country.”<sup>24</sup> The next day, three trade union officials (Douglas McCarron, Terence O’Sullivan and Vincent Giblin) wrote to Congress decrying the logic of the Administration in suspending Davis-Bacon.<sup>25</sup> The people of the Gulf States “...have gone through so much and now the administration wants them to sacrifice decent pay,” it was suggested. “We don’t hear contractors being asked to work for a reduced profit.”<sup>26</sup>

Representative James Oberstar, ranking member of the House Committee on Transportation and Infrastructure, was similarly critical. “It is particularly unfair to ask workers to work at low wages to rebuild the devastated areas, when contractors are not

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<sup>21</sup> See CRS Report RL31909, *House Resolutions of Inquiry*, by Louis Fisher. This language is taken from the text of the resolution.

<sup>22</sup> Bureau of National Affairs, *Daily Labor Report*, Oct. 21, 2005, p. A1 ff. (Cited hereafter as *Daily Labor Report*.) The vote was 25 to 20, along party lines.

<sup>23</sup> *Daily Labor Report*, Oct. 27, 2005, p. AA1 ff.

<sup>24</sup> *Daily Labor Report*, Sept. 16, 2005, p. A8.

<sup>25</sup> The trade unionists were presidents of the Carpenters and Joiners of America (McCarron), the Laborers’ International Union (O’Sullivan), and the International Union of Operating Engineers (Giblin).

<sup>26</sup> *Daily Labor Report*, Sept. 15, 2005, p. A8.

being asked to make any comparable sacrifices.”<sup>27</sup> Meanwhile, the co-chairs of the House Labor and Working Families Caucus — Democratic Representatives Stephen Lynch, Michael Machaud, and Linda Sanchez — stated: “In an area so afflicted with poverty and with so many workers struggling to care for their families, waiving this basic worker protection is a big step in the wrong direction.”<sup>28</sup>

Gradually, a consensus began to build. Leaders of the state labor federations in Alabama, Louisiana, Mississippi and Texas, reportedly, called on President Bush to rescind his proclamation. “The union leaders also urged Republican governors of the three states in the region [to] add their presumed influence to the effort to restore wage protections.”<sup>29</sup>

In Congress, concern was growing. Representatives LaTourette and Frank LoBiondo organized a letter to President Bush “asking that the suspension of Davis-Bacon be lifted” — a letter “signed by 37 House Republicans.”<sup>30</sup> The dissidents had “met repeatedly with White House officials, including Andy Card and Karl Rove, and House Speaker J. Dennis Hastert.” In a statement to the press, LaTourette suggested: “There are thousand of skilled Gulf Coast workers who should be working to rebuild their communities...” and observed, further, “companies are passing them by and hiring cheap unskilled illegal workers to beef up their bottom line.”<sup>31</sup> Representative LoBiondo stated that it was “critical that the Congress have an accurate account of how all money is being spent.”<sup>32</sup>

On October 20, about 20 Republicans attended a meeting with White House Chief of Staff Andrew Card at the office of Speaker Dennis Hastert. Card was described as “more than receptive” to suggestions from defenders of Davis-Bacon, and, reportedly, he acknowledged that “they weren’t saving any money” through the suspension. According to LaTourette, “Card told the Republican lawmakers that “he has some bases to touch” and “that he’s going to take our message to the president, and hopefully he’ll let us know next week....” Meanwhile, the LaTourette resolution (H.Res. 488) remained with the Committee on Transportation and Infrastructure of whom Representative Young, one of the “signatories to the letter sent to Bush,” served as chairman<sup>33</sup> and Representative Oberstar served as Ranking Member.

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<sup>27</sup> Letter to President Bush from Representative James Obverstar, web-site of Representative Oberstar, Sept. 16, 2005.

<sup>28</sup> Statement from Representatives Stephen Lynch, Michael Machaud, and Linda Sanchez, Sept. 13, 2005, from a letter to President Bush, web-site of Representative Lynch.

<sup>29</sup> *Daily Labor Report*, Sept. 30, 2005, p. A9. Of the four states affected by the hurricanes, three have Republican Governors.

<sup>30</sup> Press release, Oct. 7, 2005, from the web-site of Representative Steven LaTourette.

<sup>31</sup> Press release, Oct. 26, 2005, from the website of Representative Steven LaTourette.

<sup>32</sup> Press release, Oct. 7, 2005, from the web-site of Representative Steven LaTourette.

<sup>33</sup> *Daily Labor Report*, Oct. 21, 2005, p. A1 ff. See also *Daily Labor Report*, Oct. 27, 2005, pp. AA1 ff.

A few days later, on October 25, Card called to issue an invitation for a meeting at the White House the following day. At the meeting, Card advised that a “reversal” would under way.<sup>34</sup> During the White House meeting, Card was quoted as having said, according to Representative LaTourette, that “there appeared to be no savings garnered from suspending the Davis-Bacon Act.” In a subsequent statement by Labor Secretary Elaine Chao, it was affirmed that “a review of current conditions in the declared areas” has resulted in the reinstatement of “Davis-Bacon Act provisions effective November 8.” The decision to reinstate the act renders “moot” the resolution of inquiry then pending before the Committee on Transportation and Infrastructure, LaTourette indicated.

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<sup>34</sup> Press release, Oct. 26, 2005, from the web-site of Representative Steven LaTourette.