“TIME AND A HALF’S
THE AMERICAN WAY”

A HISTORY OF THE EXCLUSION OF
WHITE-COLLAR WORKERS
FROM
OVERTIME REGULATION,
1868-2004

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“You’re Turning Blue…”

Marc Linder
“Time and a Half’s the American Way”
Also by MARC LINDER

Void Where Prohibited Revisited
The Autocratically Flexible Workplace
"Moments Are the Elements of Profit"
Wars of Attrition
Of Cabbages and Kings County
Void Where Prohibited
The Dilemmas of Laissez-Faire Population Policy in Capitalist Societies
Labor Statistics and Class Struggle
Projecting Capitalism
Migrant Workers and Minimum Wages
Farewell to the Self-Employed
The Employment Relationship in Anglo-American Law
The Supreme Labor Court in Nazi Germany
European Labor Aristocracies
Anti-Samuelson
Reification and the Consciousness of the Critics of Political Economy
Der Anti-Samuelson

Translations

Mogens Klitgaard, God Tempers the Wind to the Shorn Lamb
Mogens Klitgaard, There's a Man Sitting on a Trolley
Hans Kirk, The New Times
Hans Kirk, The Day Laborers
Hans Kirk, The Slave
Hans Kirk, The Fishermen
Fred Wander, The Seventh Well
Johannes Bobrowski, I Taste Bitterness
“Time and a Half’s the American Way”

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Marc Linder

Fānpihuà Press
Iowa City
2004
Cover illustration: Bernard Seaman, “You’re Turning Blue...”


Suggested Library of Congress Cataloging
Linder, Marc, 1946—

“Time and a half’s the American way”:

xlvi, 1342 p.; 23 cm.
Includes bibliographical references and index.


HD5111.U5 L56 2004
331.2572—dc21
Library of Congress Control Number: 2004097418
Overtime pay for overtime work
Hey, Mr. Congressman, hey!
We’ll never quit and we’ll never shirk
Hey, Mr. Congressman, raise our pay!

Pay, pay, overtime pay
We’ll work all night and we’ll work all day!
We’ll work ’till we chase all the fascists away
Hey, Mr. Congressman, raise our pay.

Overtime pay for overtime work
Hey, Mr. Congressman, hey!
Don’t stuff reaction inside your shirt
Hey, Mr. Congressman, raise our pay!

Overtime pay for overtime work
Hey, Mr. Congressman, hey!
We wanna work the American way
Time and a half’s the American way!

Overtime pay for overtime work
Hey, Mr. Congressman, hey!
We’ll work like horses but we can’t eat hay
Hey, Mr. Congressman, raise our pay!

I looked over Jordan and what did I see
Hey, Mr. Congressman, hey!
Twenty-nine creditors a-chasin’ after me
Hey, Mr. Congressman, raise our pay!

Overtime pay for overtime work
Hey, Mr. Congressman, hey!
The cost of living’s risin’ like the temperature in May
It’s gettin’ awful hot!
It’s gettin awful hot Mr. Congressman - ain’t it!

Overtime pay for overtime work
Hey, Mr. Congressman, hey!
You can ration our rubber, you can ration our sugar,
You can ration our gas, you can ration our girdles,
But you can’t ration morale in the O.P.A.!

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Preface

I urge consideration of the view that the appropriate and feasible next step is to assure—through further amendment of the Fair Labor Standards Act—that every person who works in this country receives at least enough for his labor to maintain himself and his family decently.

This would mean...the amendment of the Act in these respects:

1. Its coverage should be extended to every job within the reach of Federal Authority, and provision should be made for encouraging full supplementary coverage, at the same level, through State legislation. Nobody who works should be left out.

3. Provision for overtime payment after 8 hours in a day and 40 in a week should apply to all industries and all workers.

I recommend complete coverage of all workers—with no exceptions of any kind.2

A few days before the end of the Johnson administration and its War on Poverty in January 1969, the outgoing Secretary of Labor, Willard Wirtz, submitted his final statutorily required annual report to Congress with his “evaluation and appraisal...of the minimum wages and overtime coverage...together with his recommendations....”3 His plea for universal overtime coverage was ignored then and is arguably even farther from realization today. If his judgment that there was “no basis for treating farmworkers differently from nonfarmworkers under the Act”4 has been disregarded, if not dismissed, during the past 35 years,5 the discriminatory exclusion of tens of millions of white-collar workers from overtime regulation has become so deep-seated since the Fair Labor Standards Act’s enactment in 1938 that its existence has long been take for granted as a quasi-natural

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given of the order of things.\textsuperscript{6}

The two major antagonists in the struggle over state regulation of overtime, organized capital and labor, have, for two very different reasons, joined in stifling public debate of the issue. Banking, as it were, on the countless billions of hours of uncompensated labor that they have extracted during 66 years of virtually uncontested exclusion of scores of millions of white-collar workers from overtime regulation, employers know that they have a good thing going. Indeed, the exclusion has by now become such a permanent background institution that they themselves may have long since ceased to reflect on the need to defend it. In this sense, they are in an even better position than judges who, by taking refuge in a precedent, do not need to justify their decisions with reasons.\textsuperscript{7} Whereas judges still have to decide cases and write opinions, employers do not need to say or do anything—in fact, the less said about this automatically functioning privilege, the better.\textsuperscript{8}

If employers' vow of silence is easily understandable, why has the AFL-CIO not disrupted it? Ever since the first congressional debates in 1939 and 1940 and the first administrative hearings in 1940, when unions largely supported the status quo against employers' demands for even broader exclusions, these aggressor-

\textsuperscript{6}To be sure, Wirtz's actual proposals for amending the overtime provision during his tenure as Labor Secretary fell far short of the aspirations he mentioned in his valedictory. See Marc Linder, \textit{The Autocratically Flexible Workplace: A History of Overtime Regulation in the United States} 337, 340, 344, 348 (2002).

\textsuperscript{7}Robert Jackson, \textit{The Struggle for Judicial Supremacy: A Study of a Crisis in American Power Politics} 295 (1941).

\textsuperscript{8}Emblematic of employers' oblivious or evasive attitude was the response given by a corporate lawyer specializing in wage and hour law the day after the DOL issued its revised final white-collar overtime regulations in 2004. Asked "a very basic question, which is if somebody is working overtime, why shouldn't they get paid for it?" William Schurgin, a partner in one of the country's largest labor and employment law firms (Seyfarth, Shaw), instead of answering the "why shouldn't they" question, merely (but incorrectly) rehearsed the law: "Well, we have to understand there are two groups of employees when we think about federal wage and hour laws. There are hourly nonexempt employees who are entitled to overtime.... The classifications that we are talking about today...are really your supervisors, your high-level administrative employees, your professionals.... And most of those people have always been exempt." The Flipside, CNN, Apr. 21, 2004, 11:00 am EST, Transcript # 042101cb.132 (Lexis). As with employers in general, it remains unclear whether Schurgin was being intentionally evasive or whether he himself took the exclusion so much for granted that he was unaware of the need for a justification beyond the brute text of the law. The same question must be posed with regard to his erroneous statement of the law as excluding only "high-level" administrative employees.
defender, active-passive roles have been fixed. Labor has—with rare and isolated exceptions—never advocated narrowing the scope of the white-collar exclusions, let alone questioned the fundamental justification of their existence. Its role has always been reduced to protesting expansions. In 2004, for example, AFL-CIO President John Sweeney charged that the “Bush Administration...pressed forward with eliminating overtime pay for a huge swath of middle-class workers—many who make as little as $23,600 a year. The Bush overtime changes will take money directly out of the pockets of workers and put it into the hands of the President’s corporate campaign contributors. This has to be one of the biggest pay cuts in American history—special delivery to American workers straight from the White House. It is a huge windfall for large corporations.”9 Conveniently (or perhaps merely ignorantly) overlooking the actions of Presidents Franklin Roosevelt and Harry Truman (and the inaction of Jimmy Carter and Bill Clinton) that extended the exclusions de jure or de facto,10 the AFL-CIO inaccurately declared: “George W. Bush is now the first president in U.S. history to rewrite the overtime eligibility rules to take away workers’ overtime pay.”11 And going labor one better, Representative David Obey, who was leading House Democrats’ efforts to block the Republicans’ new regulations, introduced a mythical pre-FLSA era by charging that the Bush administration “for the first time in 80 years scale[d] back workers’ entitlement to overtime pay.”12

Yet despite these clangorous polemics, when it came to criticizing the revisions, the AFL-CIO, losing not a word on the issue of why any white-collar workers were excluded, engaged in precisely the same kind of quasi-theological casuistry—totally divorced from any actual or possible purposes of the FLSA’s overtime regulation and its unexplained exclusions of some white-collar workers—as the Labor Department itself in discussing whether an assistant manager in a fast-food restaurant (being paid $456 a week) should be permitted to devote x or only y percent of his time to “burger flipping or ringing up customers” before losing his entitlement to overtime pay.13

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10See below chs. 9-13.
13http://www.aflcio.org/yourjobeconomy/overtimepay/mythsfactsheet.cfm (visited Apr. 30, 2004). Karen Smith, a former DOL Wage and Hour investigator who testified, in effect, as the representative of the AFL-CIO at the House committee hearing on the new regulations immediately after their promulgation, engaged in the same abstract casuistry. Assessing the Impact of the Labor Department’s Final Overtime Regulations on Workers
Preface

The AFL-CIO’s defensive strategy is presumably driven by its non-publicly expressed fear of opening a Pandora’s box: since only Congress has the power to abolish altogether or fundamentally narrow the white-collar exclusions—the Labor Department possesses considerable discretion to define their scope, but beyond a certain point it would, even before exceeding its statutory authority, presumably provoke congressional intervention—and since the AFL-CIO has repeatedly lacked the political influence to prevail upon Congress even to take the relatively innocuous step of increasing the minimum wage above its perennially sub-real-world labor-market level, the labor movement may well be justifiably apprehensive that opening the amendatory process in a politically uncontrollable and unpredictable legislature might ultimately lead to a revised statute that would be even worse than current law with regard to overtime and many other provisions as well. However, despite such possibly valid concerns, the debate over the regulation of overtime work and pay has, over the course of its entire history, been conducted by virtually all participants in such an uninformed and/or devious manner that it is difficult to fathom how the millions of workers who have been ill served by the outcome could be made worse off by a detailed account and analysis of this irrational process of enactment and administration.

The ironic title of this book, “Time and a Half’s the American Way,” points in opposite directions. On the one hand, it underscores that the privilege that Congress and the state legislatures have bestowed on employers to require massive numbers of white-collar workers to work longer than standard hours without additional compensation deviates from what is widely (albeit erroneously) regarded as a national norm and right.\(^{14}\) On the other hand, it suggests that such penal-
Preface

—or, from the worker’s perspective, premium—pay is also the only protection or benefit to which workers in the United States are statutorily entitled: unlike most of the rest of the world, the United States lacks generally applicable maximum hours laws, which prohibit employers from employing workers more than a fixed number of hours per day, week, month, quarter, or year. Making the financial deterrence to the employer the fulcrum of overtime regulation while at the same time subjecting white-collar workers’ coverage to means-testing renders the system dysfunctional: money—whether in the form of salary level or additional overtime compensation—and the statutory purpose of shielding free time from firms’ over-reaching are incommensurate and incommensurable. Transmogrifying the mere tool of the monetary penalty into the chief purpose of the statute in the form of overtime premiums enabling workers to maintain their standard of living by working long hours stands the whole rationale of mandatory hours regulation on its head. Consequently, policy analysis is confused by arguments based on denying protection to white-collar workers primarily because of their high salaries, which are completely irrelevant, so long as their recipients are also exposed to the manifold effects of overwork.

The introduction to the debates and conflicts over the regulation of white-collar workers’ overtime work in Part I is divided into two parts. Chapter 1 lays out the quantitative background—the enormous and relentless increase in the absolute number of white-collar employees and in their share of the total labor force as well as in those excluded from the FLSA. Chapter 2 explores the twofold irrationality of regulations that lack any demonstrable connection to the purposes of the exclusions, which themselves have never been explicated by Congress; this critique is concretized by an examination of the occupational group (“administrative employees”) whose exclusion makes least sense because their boundaries are indeterminate.

1For an extreme example of an autocratically flexible workplace in dire need of overtime penalty pay, see this account by an official of an office-worker union: “[E]very stenographer is familiar with the type of employer who tells stories for two or three hours in the afternoon and starts his dictation at 5 p.m. The overtime penalty...force [sic] a more humane and sensible work organization so that overtime work is not necessary.” Official Report of the Proceedings Before the Wage and Hour Division of the Department of Labor In the Matter of: Definition of “Executive, Administrative, Professional” Employees and “Outside Salesman” at 574 (Washington, D.C., April 15, 1940), in RG 155—Wage & Hour/Pub. Contracts Div. Location: 530, 47:9:3-4/Boxes 10-14 (statement of Geneva Marsh, secretary, American Federation of Office Employes International Council).

16Linder, The Autocratically Flexible Workplace.
Part II is designed to keep in view what is likely to be lost sight of in the course of a long book on the FLSA—that penalty/premium overtime-pay laws are not the only way of regulating working hours, which can also be subject to absolute limitation by maximum hours laws. Chapter 3 recreates the impressive referendum campaigns for such laws in the Pacific Coast states in 1914, while Chapter 4 focuses on the debate over the merits of the actual eight-hour day in connection with railroad workers’ struggle for the basic eight-hour day (with paid overtime) during World War I.

The various pre-existing models for exclusion of white-collar workers that were available to Congress when it was drafting and debating the FLSA in 1937-38 are surveyed in Part III. Though not overtime laws, the alien contract labor immigration laws—the subject of Chapter 5—which Congress began enacting in the 1880s and from whose ban it exempted those whom the Labor Department later called learned and artistic professionals, are instructive because they showed Congress, administrative agencies, and courts grappling for the first time with the scope of these white-collar groups and the purposes of treating them differently than manual production laborers. State and federal hours legislation from the early 1930s is treated in Chapter 6, which highlights the Black-Connery 30-hour bills of 1933, which, despite their radical reputation, are revealed not only as crucial sources of the tradition of excluding certain white-collar workers from protection, but as having been shaped behind the scenes by the highest echelons of automobile industry management. Because the claim has often been made that the missing legislative history of the white-collar exclusions from the FLSA is to be found in the codes of fair competition approved under the National Industrial Recovery Act between 1933 and 1935, a large number of them are, together with the unpublished hearings and code histories, scrutinized in Chapter 7. Finally, Chapter 8 looks at the exclusions from the three hours of work conventions adopted by the International Labor Organization between 1919 and 1935 with special emphasis on that of 1930 dealing with commerce and offices.

Part IV, by far the longest, is devoted to the Fair Labor Standards Act itself. The sketchy legislative history of its overtime provision and virtually nonexistent legislative history of its white-collar exclusions are presented in Chapter 9 together with an account of the first set of regulations from 1938 and of employers’ puzzling acquiescence in them. Chapter 10 analyzes the efforts of pro-employer congressional Republicans and southern Democrats to amend the FLSA during 1939-40 to exclude all (blue- and) white-collar workers paid more than a $150 or $200 monthly wage or salary, which failed, despite support from the Roosevelt administration, but which nevertheless may have prompted the Wage and Hour Administrator to revise the regulations more in line with employers’ conceptions lest a future, even more conservative Congress return to the issue. Chapter 11 both explains how, in the wake of that legislative defeat, employers effected their counter-
Preface

intuitive strategy shift from lobbying an anti-labor Congress to persuading an ostensibly labor-friendly Wage and Hour Division to expand the white-collar exclusion, and offers important insight into the career of the most important decision-maker, Assistant Director of the Hearings Branch, Harold Stein. Chapter 12, based on the first use ever made of the recently discovered verbatim transcripts in the National Archives, offers a deep look into the arguments and mindsets of employers, unions, and the Wage and Hour Division at the crucially formative regulatory hearings in 1940, which were called in response to petitions by employers dissatisfied with the regulations of 1938. Chapter 13 analyzes the Stein Report issued in the wake of the hearings; its expansive exclusionary recommendations were adopted as the revised regulations and remain in large part in effect into the twenty-first century and its reasoning still dominates public discussion of the regulations. Chapter 14 narrates the finishing touches that were applied to the regulations in the aftermath of World War II and embodied in the Weiss Report of 1949, while their evolution during the second half of the twentieth century and in particular the obsolescence of the salary-level test as a result of the DOL's failure to update it from 1975 until 2004 are discussed in Chapter 15. Chapters 16 and 17 are devoted to the partially successful efforts by the George W. Bush administration to revamp the white-collar overtime regulations so as to relieve employers of as much liability as politically possible and to the partially successful efforts of the AFL-CIO to blunt those pro-employer revisions: the first chapter focuses on the proposed regulations of 2003 and the second on the final regulations of 2004.

Part V reveals that although Congress has excluded tens of millions of private-sector and state and local government white-collar workers from the protection that the FLSA offers against unilateral employer imposition of overtime work, it has also created a parallel system of protection for federal government employees going back to the nineteenth century. Chapter 18 deals, on the one hand, with how Congress and executive departments tried to identify those who were not encompassed by the "laborers, workmen, and mechanics employed by or on behalf of the government of the United States" who were covered by the federal eight-hours law of 1868, and, on the other hand, with the 1888 overtime law for city letter carriers, who, postal authorities had argued, were excluded from the earlier statute because they were more like clerks than manual laborers. Chapter 19 accounts for the expansion of the federal white-collar overtime regime as a technique for dealing with real salary stagnation during the inflationary conditions of World War II; it then shows how, divorced from those historically transient circumstances, Congress converted that regime into a permanent system at the conclusion of the war. Chapter 20 details the complicated evolution during the postwar era of the 1945 statute, which became especially convoluted after Congress created a dual overtime system by incorporating federal employees into the FLSA in 1974.

Finally, an international-comparative and historical overview of the treatment
Preface

of white-collar workers in the overtime and maximum hours laws of numerous other countries is presented in chapter 21 of Part VI, which reveals that although exclusions are widespread, no country rivals the United States with respect to their breadth and pervasiveness.

A Postscript, added while the book was being printed, reproduces two documents, unearthed from her father’s papers at the very last minute by Harold Stein’s daughter, that shed considerable light on the Wage and Hour Division’s mind-set in 1940 concerning the exclusion of white-collar workers and the viability of overtime regulation in general during World War II.
Terminological Prolegomena

The over-all trend seems to be toward the formation of a single pool from which new employees flow into the great mass of jobs in the lower and middle levels of the manual and white-collar fields.1

Two terms that appear countless times in this book (the one often modifying the other) may give rise to misunderstandings and therefore need to be clarified. One is "exempt(ion)" and the other, used in the subtitle itself, is "white-collar workers."

"Exempt(ion)"

The latest ruling frees non-factory employees from the limitations of the 40-hour week if they are paid $200 a month or more.2

From the time of its enactment in 1938, the Fair Labor Standards Act has contained a section, "Exemptions," the first subsection of which states that the law’s minimum wage and overtime provisions3 "shall not apply with respect to...any employee employed in a bona fide executive, administrative, professional...capacity...."4 The choice of the term "Exemptions" as the title of the exclusions

3Deborah Malamud, "Engineering the Middle Classes: Class Line-Drawing in the New Deal Hours Legislation," Michigan LR 96(8):2212-2321, at 2220 n.29 (Aug. 1998), mistakenly stated that the "FLSA also contains minimum-wage provisions, but there are no upper-level exemptions to the minimum wage." Although the exclusion of white-collar workers from the minimum wage requirement was of distinctly subordinate importance so long as the DOL kept their salary-level tests current, after it ceased doing so in 1975, employers could require white-collar employees to work overtime for less than the minimum wage for all hours without incurring any liability as far as the DOL was concerned. See below ch. 15.
section of the FLSA was curious: after all, an exemption is “[f]reedom from a
general duty or service; immunity from a general burden, tax, or charge,”5 whereas
an exclusion is a denial of a benefit or barring from the enjoyment of some des­
sirable good.6 It is therefore the employer who is exempt—from the burden of
paying the minimum wage or mandatory overtime, while, conversely, the employee
is excluded from these same protections. To be exempt, as the thesaurus reveals,
is to be privileged; the claim that it is an “inestimable privilege” for workers to be
required to work unlimited hours without additional compensation “is rare for the
seller of labor to” make, it being “generally the object of the buyer’s disinterested
solicitude.”7

Linguistic and thought habits sit so deep that a federal appeals court in a case
involving newspaper reporters wrote that the lower court had found that they were
“not entitled to the professional exemption of the Act’s overtime requirements and
awarded back wages and liquidated damages” to them8—as if the workers had
insisted that they had a right to be excluded from the law’s protection and the
monetary award represented a defeat. The DOL, too, even in the context of dis­
cussing litigation by white-collar workers against employers who sought to deprive
them of overtime protection, remarked that the requirement that an employee
exercise discretion and independent judgment in order to be exempt “has been
interpreted to deny the exemption to an employee who uses a procedures manu­
(italics added). That the locution was not a quirk was shown later on the same page when the DOL boasted that a new regulation “would ensure
that the administrative exemption is not denied to a highly trained and skilled employee
who performs administrative functions.”

Although Congress may have lost sight of the distinction between an exemption and
an exclusion, in 2003 at least the Congressional Research Service finally adopted the
insight that: “Exemptions, under the FLSA are, for the most part employer exemptions, not
worker exemptions. Although they are stated often in terms of whether an employee
qualifies for an exemption (implying a benefit for the worker), it is the employer who

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5Black's Law Dictionary 681 (4th ed. 1968 [1891]).
6Webster's Third New International Dictionary of the English Language Unabridged
9FR 68:15566 (Mar. 31, 2003) (italics added). That the locution was not a quirk was shown later on the same page when the DOL boasted that a new regulation “would ensure
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qualifies for an exemption (implying a benefit for the worker), it is the employer who
ployees—as if employees considered it a benefit that, in the Department’s exquisite circumlocution for the extraction of unpaid overtime work, “their pay will not be tightly tied to hours worked.”

On the other hand, however, the George W. Bush administration’s Wage and Hour Administrator, Tammy McCutchen, did obliquely (and inadvertently) admit the distinction in 2004 in defending a new regulation that would make it easier for an estimated 107,000 white-collar employees with salaries over $100,000 to “qualify for exemption.” In explaining to a Senate subcommittee that the DOL “believes even this result is unlikely given the incentives for employers to retain high-skilled workers and minimize turnover costs,” she was effectively acknowledging that even relatively highly paid employees regard the loss of overtime pay not as a benefit, but as a sufficiently harsh detriment that their employers would probably have to refrain from imposing it lest the affected workers leave their employ.

Use of the same word to designate both a much sought-after excusal from conscription into the military and a much-resented refusal of state protection from benefits from the exemption. The exemption allows the employer to avoid the costs of paying minimum wages or overtime pay to the worker.” William Whittaker, “The Fair Labor Standards Act: Exemption of ‘Executive, Administrative and Professional Employees’ Under Section 13(a)(1)” at 6-7 (CRS RL 31995, July 17, 2003).

Even the locution “qualify for exemption” is misleading in the sense that it would be odd to state that a person “qualifies for exclusion” from some desirable good. Wage and Hour Administrator McCutchen had used an even more counterintuitive phrase at a hearing several months earlier when she testified that “the occasional lawyer without a law degree is still entitled to the exemption.” Department of Labor’s Proposed Rule on Overtime Pay: Hearing Before a Subcommittee of the Committee on Appropriations United States Senate: Special Hearing 7-8 (S. Hrg. 108-542, 108th Cong., 2d Sess., May 4, 2004) (statement of Wage and Hour Administrator Tammy McCutchen). Even the location “qualify for exemption” is misleading in the sense that it would be odd to state that a person “qualifies for exclusion” from some desirable good. Wage and Hour Administrator McCutchen had used an even more counterintuitive phrase at a hearing several months earlier when she testified that “the occasional lawyer without a law degree is still entitled to the exemption.” Department of Labor’s Proposed Rule on Overtime Pay: Hearing Before a Subcommittee of the Committee on Appropriations United States Senate 10 (S. Hrg. 108-394, 108th Cong., 1st Sess. Jan. 20, 2004).
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employer overreaching may be a vestige of nineteenth-century American judicial contractarianism, which struck down, in the name of freedom of and to contract, labor-protective statutes as unconstitutional interferences with employees' "liberty to compete for employment upon unfavorable terms...."[14] Ironically, the source of the terminological conflation may have been mere sloppiness in legislative drafting. The original FLSA bill as introduced by Senator Black provided in its definitions section that "'[e]mployee'...shall not include any person employed in an executive, administrative, supervisory, or professional capacity...."[15] These workers (together with agricultural laborers) constituted all of the bill's categorical exclusions. The measure also contained a provision titled, "Exemptions from Labor Standards with Respect to Wages and Hours," which required the proposed Labor Standards Board to issue a regulation providing that "any employer employing less than [blank] employees"shall not be deemed to be violating the law by paying "an oppressive or substandard wage...."[16] In other words, the bill exempted small employers from the obligations imposed on larger employers. The radically revised bill that Black introduced two months later and that much more closely resembled the final enactment removed the named categories of workers from the definition of "employee" and transferred them to a section now titled simply, "Exemptions," which declares that the minimum wage and overtime provisions "shall not apply with respect to" the various named categories.[17] Unlike its predecessor, however, this new provision refers only to employees and not at all to their employers.[18]

This ideological distortion introduced by the inverted meaning of "exemption" has been exacerbated by the fact that the regulations, administrators, employers, and commentators commonly speak of "nonexempt" and "exempt" employees.[19]


[16]Id. § 6(a).


[18]S. 2475, 75th Cong., 1st Sess. §§ 3(e) and 11(a) (July 6, 1937).

However, despite massive exclusions of vulnerable workers such as migrant farmworkers, most employees in the United States are nevertheless protected by the FLSA—in 1999 71.5 percent and 66.8 percent of wage and salary workers were “subject to and not exempt from” the minimum wage and overtime provision, respectively. And since exclusions from coverage are to be construed narrowly in favor of inclusion, use of the paired categories nonexempt-exempt to designate the universe of affected workers inverts the purpose and spirit of the FLSA. To characterize covered, protected workers negatively as “nonexempt” suggests a statutory baseline of exclusion—as if workers had the burden of rebutting a presumption that employers are exempt from complying with the Act unless and until proven subject to its requirements. In fact, “an employer must prove that any exemption to the overtime provision applies. Proving the exemption is an affirmative defense; the statute assumes that an employee is covered.” And as even a former DOL Solicitor representing big business employers the told Congress in 1995, the FLSA “is written now so that there is a presumption that all employees are non-exempt....”

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21US DOL, WHD, Minimum Wage and Overtime Hours Under the Fair Labor Standards Act tab. 1 at 25 and tab. 3 at 27 (Jan. 2001) The DOL had previously estimated that in 1996 64.9 percent and 60.5 percent of all employed wage and salary workers in the civilian labor force were subject to the minimum wage and overtime provision, respectively, of the FLSA. U.S. ESA, Minimum Wage and Overtime Hours Under the Fair Labor Standards Act: 1998 Report, tab. 1 at 13, tab. 2 at 14. The 2001 report, using a different methodology, increased those figures to 72.9 percent and 67.6 percent, respectively. US DOL, WHD, Minimum Wage and Overtime Hours Under the Fair Labor Standards Act tab. 1 at 25 and tab. 3 at 27 (Jan. 2001).


23The universe is, strictly speaking, not exhausted by these two categories because in addition to “exemptions,” the FLSA contains a definitions provision, which excludes other groups of workers from the statutory category of “employees.” 29 USC § 203(e)(4) (2000).

24Richard Edwards, Contested Terrain: The Transformation of the Workplace in the Twentieth Century 133 (1979), reported the linguistic usage but mistakenly attributed it to managerial practices rather than to the law itself.


26Hearings on the Fair Labor Standards Act: Hearings Before the Subcommittee on Workforce Protections of the House Committee on Economic and Educational Opportuni-
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In order to avoid reproducing the ideological subversion of mandatory labor standards legislation connoted by the erroneous use of “exempt” and “exemption,” wherever appropriate the text below uses the terms “exclude” and “exclusion.” At times, however, especially in an effort to capture the spirit of a paraphrased statement, “exempt” and “exemption” are retained.

“White-Collar Workers”

[O]ffice work really is work. It has its own type of monotony, which often equals the intensity the various monotonous operations performed by workers in large factories.

During the past two decades large business offices have become mechanized. Today many office workers are machine operators. They operate such power-driven machines as the electric bookkeeping and posting machines, billing machines, addressograph machines, calculating machines, adding machines, mimeograph machines, mailing machines, card punching and sorting machines, in addition to numerous hand-powered machines, such as the typewriter and comptometer. Many office workers are held to rigid production schedules, and in some offices employers have even devised piecework and incentive systems of wage payments! ...

Until recently...office workers...have been permitted to toil in clothes like those worn by the boss and encouraged to believe that they were on the way up the management ladder to eventual “bosshood.”

In return for these “advantages” the white collar worker has until recently labored at rates of pay far below those...for plant workers of equivalent skill. He has until recently worked overtime not for time and one-half, but for nothing.27

The term “white-collar” is, without doubt, a superficial, misleading, and ideologically freighted label that “presupposes an essential difference between the structure of labor in the factory and the office” and evokes “the image of a system of social stratification that regards office work as a higher-status occupation than factory work, administration as more prestigious than manual labor....”28 What is

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28Stanley Aronowitz, False Promises: The Shaping of American Working Class Consciousness 292 (1974 [1973]). C. Wright Mills, White Collar: The American Middle Classes 291 (1967 [1951]), observed of this “occupational salad” that there was “no one accepted word for them; white collar, salaried employee, new middle class are used
in part misguided about this image is that much of whatever validity it may ever have possessed disappeared long ago—in part, even before the FLSA was enacted.  

In what could almost pass as self-mockery, the Labor Department’s own *Monthly Labor Review*, attempting to inject suitably concise and objective qualitative commentary into a statistical article, observed in 1961 that: “The white-collar work force encompasses a wide range of occupations, including typists, corporation executives, department store salesclerks, and nuclear scientists.” The best that the Bureau of Labor Statistics author could come up with to identify the “common traits” in this bewildering occupational “diversity” was that: “Originally, a white-collar occupation was one that did not require special work clothes. Through usage the term came to denote work which was performed in an office rather than a factory, work which was primarily mental rather than physical, and work which stressed formal education.”  

Long before this time, however, and even more so since then, the office was itself turned into a factory, with the result that the stereotyped differences in mental demands and formal education began to fade as well. It is for this very reason that employers’ recent demands that a depression-era FLSA must be modernized to interchangeably.”

As Harry Braverman, *Labor and Monopoly Capital: The Degradation of Work in the Twentieth Century* 315-16 (1974), pointed out: “In the beginning, the office was the site of mental labor and the shop the site of manual labor. This was even true...after Taylor and in part because of Taylor: scientific management gave the office a monopoly over conception, planning, judgment, and appraisal of results, while in the shop nothing was to take place other than the physical execution of all that was thought up in the office. Insofar as this was true, the identification of office work with thinking and educated labor, and of the production process proper with unthinking and uneducated labor, retained some validity. But once the office was itself subjected to the rationalization process, this contrast lost its force. The functions of thought and planning became concentrated in an ever smaller group within the office, and for the mass of those employed there the office became just as much a site of manual labor as the factory floor.”

The author’s definition was not idiosyncratic: “The Labor Economics Staff of the Bureau of Labor Statistics (‘White-Collar Workers: The Problem of Definition,’ unpublished) uses, along with ‘fixed payment by the day, week or month,’ two other criteria which I found helpful: ‘A well-groomed appearance’ and ‘the wearing of street clothes at work.’” C. Wright Mills, *White Collar: The American Middle Classes* 359 (1967 [1951]).

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deal with today's workplace realities\textsuperscript{32} compels a conclusion diametrically opposite to theirs: as more white-collar employees work in factory-like offices, more rather than fewer of them need the same protections that even employers have not yet dared assert that blue-collar workers no longer need even in non-depression periods.\textsuperscript{33}

Scientific Management entered offices by the beginning of the twentieth century, breaking down tasks, conducting time and motion studies, speeding up work, and imposing specialization.\textsuperscript{34} As early as 1917, William Leffingwell published \textit{Scientific Office Management}, in which he declared:

\begin{quote}
Time and motion study reveal just as startling results in the ordinary details of clerical work as they do in the factory. And after all, since every motion of the hand or body, every thought, no matter how simple, involves the consumption of physical energy, why should not the study and analysis of these motions result in the discovery of a mass of useless effort in clerical work just as it does in the factory? ... In time standardization will be carried into every branch of office and executive work....\textsuperscript{35}
\end{quote}

By the time of World War I, some typewriter manufacturers were already equipping their machines with a “mechanical contrivance which automatically counts the strokes made on the typewriter and records them on a dial.”\textsuperscript{36} And Leffingwell knew of “a machine on the market giving a graphic record of the production on the machine, showing by line just what was done each minute of the day.”\textsuperscript{37} A few years later \textit{The New York Times} could report that a late Victorian era proprietor of an “office help supplied” establishment...would wonder what the

\textsuperscript{32}The duties tests, according to the DOL, “are viewed in the regulated community as too...outdated for the modern workplace.” \textit{FR} 69:22239 (Apr. 23, 2004).

\textsuperscript{33}As long ago as 1912, the economist Emil Lederer pointed out that salaried office workers’ demand for shorter hours did not differ in principle from that of factory workers: both groups consisted of dependent employees seeking to impose limits on employers’ control over their labor power. Emil Lederer, \textit{Die Privatangestellten in der modernen Wirtschaftsentwicklung} 240 (1975 [1912]).

\textsuperscript{34}Margery Davies, \textit{Woman’s Place Is at the Typewriter: Office Work and Office Workers 1870-1930}, at 97-128 (1982).

\textsuperscript{35}W. Leffingwell, \textit{Scientific Office Management} (n.p. [Foreword]) (1917). See also William Leffingwell, \textit{A Textbook of Office Management} vii (1932): “The principles outlined in this work...are, in essence, but the principles of scientific management formulated by...Frederick Winslow Taylor...here applied to the conduct of the clerical office....”

\textsuperscript{36}Lee Galloway, \textit{Office Management: Its Principles and Practice} 222 (text ed. 1919 [1918]). See also Eugene Benge, \textit{Office Economies} 36 (rev. printing 1943 [1937]).

\textsuperscript{37}Leffingwell, \textit{Scientific Office Management} at 149.
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following nomenclature was all about: Addressograph operator, bookkeeping machine operator, dictaphone operator, Elliott-Fisher operator, multigraph operator, switchboard operator, comptometer operator, ediphone operator, graphotype operator, block clerk, calculating machine operator, rack clerk, inserter, key punch operator, Moon-Hopkins operator."38 As with blue-collar workers, some employers, doubting the possibility of obtaining an accurate measure of office workers’ output, began paying employees such as billing-machine operators, stenographers, and order-transcribers according to output.39 Time and motion studies using a stop watch were also conducted in offices.40 White-collar workers’ reactions were also reminiscent of those of similarly situated blue-collar workers. One employer reported that setting what should constitute a fair hour’s work was accomplished with the help of a billing-machine maker, who had one of its expert operators do a test run; the employer could have done this with its own operators, “but there was a certain amount of lack of cooperation on the part of our people, who were fearful of a cut in pay, which made a time study of our own inadvisable at the time.”41

The processes of factory-like rationalization that vastly intensified the division of office labor in Europe42 and the United States in the 1920s, creating “the

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40Benge, Office Economies at 73-76.

41Tobey, “This Wage-Making Plan Has Cut Our Office Costs for Three Years” at 405. Operators on the new system “would be expected to correct their own mistakes on their own time.” Id. at 406. An electric utility company devised the following production-based bonus system: “[S]ix operators...produce 230,000 accurate complete [electric] bills per month. These operators average about 1,600 a day, which is equivalent to 200 bills per hour or 3 1/3 bills per minute. Each bill necessitates about 35 key and motor bar strokes which means that in addition to striking 116 keys per minute, the operator must insert and remove the bill, insert and remove proof sheets, turn meter records, obtain and return stacks of bills as well as take personal time. The best operator averages 4 ½ bills per minute, about one bill every 13 seconds, 8 hours a day, 5 ½ days per week.” L.F. Seybold, “Measuring and Compensating Office Performance,” in AMA, Office Management Series O.M. 54, at 1-16 at 10 (1930). More generally for office work, industrial engineers “recommended the broader application of such methods as the introduction of piece work and production standards often mechanically controlled, as well as of practises leading to the virtual elimination of individual initiative.” Amy Hewes, “Clerical Occupations,” in ESS 3:550-54 at 552-53 (1934).

42Ludwig Preller, Sozialpolitik in der Weimarer Republik 133 (1978 [1949]).
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monster office in which vast numbers of clerks are herded together for their daily work, just as the concentration of capital in industry herded former craftsmen or cottage workers in the factory,"43 prompted the American Management Association in 1930 to evoke the image of the industrialized office:

The same cardinal elements of production so important in the operation of the plant, are present in the work of the "office." As in the plant, we find in the modern office both kinds of manageable energy—human and machine. These forces must be directed to some useful and productive end, with the aim of having the work of the office performed efficiently so as to be an element in the earning of a return on the company's investment in the same sense that increasing sales and reducing the cost of manufacturing are also elements.

Management assigns administrative, accounting and clerical services to its office forces; these services efficiently rendered are the "results" required. The problem of directing the office force in manual or machine operations, either mental or physical, or both, so that these results are achieved, is one of the hardest to solve because much office work is variable, intangible and dependent upon too many indeterminable factors. In spite of these obstacles, comparisons of modern office management with office methods of the past show that considerable progress has steadily been made in standardizing office operations and that the principles of efficiency have been quite successfully applied.44

By the time of the Great Depression, the "majority of clerical workers" were "concentrated in large units, attached to vast industrial commercial enterprises, in which mechanization has taken place in all branches of work from that of the file clerk to the more highly skilled bookkeeping and stenographic branches. The subsequent specialization and subdivision, involving physical segregation and excluding the possibility of advancement from one task to the other, have transformed most of these occupations into blind alley jobs."45 In connection with this intensifying process of rationalization, mechanization, and automation,46 social scientists in the United States and Europe began emphasizing that with the majority of the subordinate employees in large offices performing specialized duties "schematized down to the minutest details," the rise of unskilled and semi-skilled salaried workers indicated "the assimilation of the processes of work in the office to that in the factory. In the case of the salaried workers who serve as subordinates

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44Seybold, "Measuring and Compensating Office Performance" at 2. The author was a research engineer at the Milwaukee Electric Railway and Light Co.
45Hewes, "Clerical Occupations" at 552-53.
46E.g., Eugene Benge, *Cutting Clerical Costs* 157-79 (1931) (on labor-saving equipment such as dictation, calculation, tabulating, and addressing machines).

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on one of the many modern office machines...the difference in the nature of the duties between such workers and manual workers is completely wiped out....”

By the end of the 1920s it was also becoming clear that white-collar workers needed limits on their working hours as much as blue-collar workers. The noted German economist Emil Lederer argued that office work had become even more alienating than factory work, which, no matter how mechanized it was, still remained a production process. In contrast, for the masses of salaried employees work in offices had become “inescapably abstract,” emptied of all content, “a soulless function,” without any connection to an object of work. In addition to the rapid diminution in the number of white-collar workers who were able to experience their activity as individual accomplishment, Lederer stressed the unsurpassed monotony, exemplified by “those stenographers who cannot pick up a book or a newspaper in the evening because for them every word that they read immediately decomposes into its letters.”

The International Labour Office, in an analysis of the phenomenon of “mechanised mental work,” argued in 1937 that with the intensified trend toward mechanization since World War I: “Staffs are more and more clearly divided into ‘executives’ on the one hand—persons who make the decisions and organise and supervise the work—and a mass of subordinates on the other hand, whose functions less and less justify their classification as brain workers.” Consequently, the body of subordinate employees were often less highly skilled than good manual workers.

Under the title, “Robots in the Office,” the New Republic, noting that firms had invested a half-billion dollars in office machinery between 1929 and 1935, pointed

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49“The Use of Office Machinery and Its Influence on Conditions of Work for Staff,” ILR 36(4): 486-516, at 487, 492, 508 (Oct. 1937). To be sure, this view was not universally shared by sociologists, even later. One of the most influential sociological studies of class in Britain concluded that “it would appear from recent research that the rationalisation of white-collar work does not in fact produce factory conditions in the office nor alienated employees to the extent that has sometimes been supposed. In other words, it is important that the thesis of the white-collar worker becoming ‘proletarian’ should be regarded as critically as that of the manual worker becoming middle-class.” John Goldthorpe, David Lockwood, Frank Bechhofer, Jennifer Platt, The Affluent Worker in the Class Structure 84 (1969). This conclusion derived in part from the finding that “much clerical work is specific, non-repetitive, requiring a modicum of skill and responsibility and individual judgement.” David Lockwood, The Blackcoated Worker: A Study in Class Consciousness 78 (2d ed. 1989 [1958]).
out in 1938 that the dictaphone displaced one of every two stenographers, a bookkeeping machine two of three bookkeepers, checkwriting and billing machines three of four checkwriters, a statistical machine four of five statistical workers, and a tabulator, sorter and punch machine displaced 11 of 12 tabulating clerks. The magazine went on to illustrate the massive collapse of the collar-color line:

Today's mechanized offices constitute, in fact, a mass production industry. Insurance premiums, light bills, checks, letters, reports pour out in thousands of units daily. The working conditions of office employees approximate those of industrial workers. Today their jobs are less secure than the jobs of auto workers in a Ford factory.

As in the factory, division of labor and the installation of machines have brought assembly-line methods of production into the business office. On the office assembly line Tillie must attain a prescribed rate of output under threat of fines or dismissal. She must perform her function in that manner and within that period of time which will make the office product on which she is working—card, letter, account—ready for the machine and machine-hand next in line.

A ruthless consumer of physical and nervous energy, the office assembly line demands prompt reactions and unfailing attentiveness.

In 1940, shortly before the Wage and Hour Division of the Labor Department opened the crucial hearings that produced the definitions of excluded white-collar workers that have basically persisted to the present, The New York Times quoted an observer who judged that the introduction of highly specialized office machinery and, in some cases, of piecework wages had "served to bring this class of work more nearly on a level with factory work than ever before.... This development...has reduced many essential differences that once existed between the two fields of work...." At those 1940 hearings themselves, an AFL office workers union official testified that, for example, in the wholesale industry, "the work of the office employee is reduced as nearly to routine and to factory operation as it is possible to reduce such work." Where bookkeeping machines were not used, "the bookkeeping functions are so divided and simplified that they seldom require even a knowledge of bookkeeping, but they are parceled out to various clerks...." The result was that the worker who sat at an office machine or doing clerical work all day, by 4 p.m. suffered from fatigue with the strain originating across the back and

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51 Stuart, "Robots in the Office" at 70.
52 Anne Petersen, “Machinery Seen Curbing Appeal of Office Work,” NYT, Jan. 28, 1940 (sect. 2, 6:1) (quoting Mrs. Sherwood Anderson, director of the industrial section of the National YMCA).
shoulder muscles.53

In the postwar years, too, the view persisted that “the office [was] becoming progressively more a paperwork factory....”54 In 1948 Business Week saw unionization as being promoted by office work’s “getting to be more and more a machine operation, akin in effort and tempo to factory labor.”55 Whatever control over time that office workers ever possessed was vanishing just as it had in factories. At mid-century C. Wright Mills was acutely aware of this transformation: “The modern office with its tens of thousands of square feet and its factory-like flow of work is not an informal, friendly place. The drag and beat of work, the ‘production unit’ tempo, require that time consumed by anything but business at hand be explained and apologized for.”56 If “the most factory-like operatives in the white-collar worlds...the “interchangeable clerks” who operated office machines were not even “allowed to talk during working hours,” for managerial and professional employees, too, the proliferation of rationalizing bureaucracies made office work “like factory production.” There were, in Mills’s view, “few, if any, features of wage-work (except heavy toil—which is decreasingly a factor in wage-work) that do not also characterize at least some white-collar work.” Consequently, in offices as well as in factories, the whole spectrum of individual human traits, physical and psychic, had “become units in the functionally rational calculation of managers.”57

By the early 1960s, the AFL-CIO noted that: “Some insurance companies have designed new office buildings much like factories with a minimum of partitions, and housing a large number of clerical workers performing routine tasks under impersonal supervision. Some companies employing large numbers of clerical workers engaged in a multiplicity of procedures have installed conveyor belts that carry papers and documents from desk to desk, in a manner strikingly similar to an


54Ida Hoos, Automation in the Office 82 (1961).

55“A Union Target: The White-Collar Worker,” BW, Feb. 7, 1948, at 88-94, at 88. But see “1 in 8 Clerks in Unions,” NYT, Feb. 7, 1948 (28:5), which reported that an American Management Association survey of union contracts involving office workers as opposed to sales, editorial, and professional personnel stated that, contrary to general belief, the great majority of white-collar workers remained unorganized with unions still “encountering resistance from this highly individualistic groups.”

56C. Wright Mills, White Collar: The American Middle Classes 204 (1967 [1951]).

57Mills, White Collar at 206, 227.
assembly line in a mass production plant." So much progress had been achieved by the 1970s that a participant-observer was able to report that "the clerk-typist in the back room of an insurance company works at a superindustrial pace. Business machines control the operator’s mind and motions more completely than in almost any factory situation."

Differences galore abound between a pig-iron loader and Albert Einstein, but the question is whether they are relevant to identifying who should be protected against overwork. The British courts had a long tradition of interpreting various labor statutes, coverage under which hinged on whether workers, as the Employers and Workmen Act, 1875, put it, "engaged in manual labour." Consequently, the problem was very much present to British judges that "it is difficult to imagine any work done by man so purely intellectual as to require no kind of work with the hands; and the converse is equally true, that there can hardly be work with the hands that requires no intellectual effort." By 1935, when the Depression had made relatively highly paid white-collar workers vulnerable to unemployment, the Unemployment Insurance Statutory Committee on Remuneration Limit for Non-Manual Workers, charged with scrutinizing the exclusion from the unemployment insurance system of non-manual workers with annual salaries in excess of £250, observed that the "distinction between the 'manual' work of using a hand guided by the brain, and the 'non-manual' work of using a hand as the instrument of the brain, is by now unreal."

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59Barbara Garson, All the Livelong Day: The Meaning and Demeaning of Routine Work 151 (1981 [1975]).
61Bound v. Lawrence, [1892] 1 Q.B. 226, 229 (per Fry, L.J.).
62Unemployment Insurance Act, 1935: Report of the Unemployment Insurance Statutory Committee on Remuneration Limit for Insurance of Non-manual Workers 7 (1936). See also "The Problem of Defining a 'Salaried Employee,'" ILR, 37(6):764-87, at 768 (June 1938). Yet even at this late date, dogmatic approaches had still not died out. For example, in its instructions to inspectors, the Ministry of Health included the principle that "if...display of taste and imagination, or the exercise of any special mental or artistic faculty or the application of scientific knowledge (as distinguished from manual dexterity) is the primary quality of the employment, the employment is not deemed to be by way of manual labour, although a certain amount of manual work may be involved."

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That very same year, anticipating congressional enactment of the Social Security Act creating the basis for a cooperative federal-state Unemployment Insurance system, the New York State legislature, almost alone among the states, initially aligned itself with the British approach by excepting “any person employed at other than manual labor at a rate of wages of more than” $50 a week or $2,500 the first year and $2,600 the second year.63 The absurdities wrought by the discrimination were not long in coming. By the end of 1935: “Whether boxers or wrestlers are manual or non-manual workers is a question that is engaging the attention of the best brains of the State Department of Labor.” Merely one of several hundred questions raised by the statutory provision, it was called “‘a real nut cracker’” by the director of the Division of Unemployment Insurance because: “It has been argued that a good boxer or...wrestler is almost always one who uses his head for thinking, and therefore to the extent that he uses his head he is a non-manual worker.” Presumably lodging his tongue firmly in cheek, Glenn Bowers proceeded to recite the argument that “Gene Tunney was a non-manual worker in that he used his intelligence to perfect a limited physical equipment and boxing ability to the point where he disposed of Jack Dempsey.... Certainly the non-manual trait was indicated in his decision to retire from the ring with his ears intact.” Edging his way ever so slightly toward the underlying public policy considerations, Bowers posed what he apparently regarded as a ridiculous outcome: If boxers were manual laborers, then even Joe Louis (if he were someone’s
employee) would be entitled to $15 a week in benefits for up to 16 weeks of unemployment. If Bowers failed to make clear whether his skepticism was directed toward the possibility that a very highly paid manual worker would be entitled to unemployment compensation while a less highly paid nonmanual worker would not or that any highly paid worker would receive benefits, the editors of *The New York Times* were neither amused nor confused by the implication of Bowers’ “strange logic” that a manual worker was “not one who uses his hands, but one who does *not* use his head.” They knew that: “If the word ‘manual’ means anything, a boxer is a manual worker if there ever was one.” By the same token so were typists and bookkeepers, and jugglers and pianists because it was “almost impossible to imagine work that does not require the use of the hands.” The newspaper conceded that the legislature had created a problem that defied a consistent solution, but, unlike the state labor bureaucracy, the editors were free to challenge the statute:

It is impossible to think of a sound economic ground for the discrimination against “non-

64 “State to Decide If Boxing Is Labor,” *NYT*, Dec. 17, 1935 (48:3). Another classificatory dispute was triggered in March 1936 by an inquiry by the Baldwin Piano Company as to whether a piano tuner performed manual labor. Bowers replied that manual labor was “based on physical strength, on physical effort, on skill or dexterity, or on perception by the senses, distinguished from intellectual or artistic expression.” Concert piano tuners, no matter how highly trained, were manual employees because their performance was based on sense perception. After sending this reply, Bowers used this general definition in a draft of a question and answer booklet; apparently having second thoughts, however, he wrote the state attorney general that he had “a fear that any definition of manual or nonmanual labor will lead us into controversy and possible suits.” Including the proposed definition, he asked the attorney general for his advice on “the safest course...in distinguishing manual from nonmanual labor....” Attorney General John Bennett, Jr. advised Bowers not to make the distinction too specific, but at the same time opined that it was also not comprehensive enough. Nevertheless, Bennett’s concrete advice was confined to appending to Bowers’ list of physical factors the caveat: “No general definition further than the foregoing can be given and classification will have to depend on duties or tasks performed. The use of physical force or strength or force is contrasted with mental or intellectual effort, or artistic expression as the dominant characteristic of nonmanual labor.” Since Bennett’s definition omitted Bowers’ reference to sense perception, it would have failed to generate an unambiguous outcome regarding piano tuners, in whose work “physical strength or effort” was hardly “[t]he essential factor....” New York State Department of Labor, *Annual Report of the Industrial Commissioner For the Twelve Months Ended December 31, 1936*, at 95-96 (1937).

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manual" and in favor of "manual" workers in the present law. A non-manual worker earning $55 a week, who is not covered, has just as much need for unemployment insurance as a manual worker earning $60 a week, who is covered. The legal discrimination can be explained only on political or sentimental grounds. "Manual" workers are more largely organized than "non-manual" workers. In addition, there has been in Marxist literature a sentimental glorification of brawn workers as compared with brain workers, and this has entered even popular thought in the tacit assumption that only labor that handles a sledgehammer is Labor with a capital L.66

To be sure, the editors’ attempt to blame Marxism for the New York State legislature’s discriminatory treatment of higher-paid nonmanual workers (rather than their employers, who directly benefited from not having to pay payroll taxes on their salaries)67 made no sense in light of the fact that communist unions were at that very moment undertaking furious efforts to organize many of them.68 The more interesting and significant point, however, is that later neither the Times nor anyone else accused Marxists of discriminatorily seeking to deprive white-collar workers of protection against overtime work under the FLSA. The reason was not hard to discern: it was newspaper publishers themselves and other employers that were in the vanguard of that struggle to insure that white-collar workers earning more than $30 a week were excluded. That the Times was willing to admit that higher-paid nonmanual employees needed to be protected from the economic insecurity of unemployment as much as manual workers,69 but denied that they needed protection against overwork may have been rooted in its preference (which soon became law) that coverage of both manual and nonmanual workers’ wages


68See below ch. 14.

69Two years later, when the state legislature was debating elimination of the discrimination (which it then passed), the Times again editorially supported equal treatment on the grounds that no “justice could be found for drawing” a “satisfactory line of demarcation” between manual and nonmanual workers: “Under the present law a ‘non-manual’ worker earning $55 a week is not covered by insurance, but a ‘manual’ worker earning $75 is. Yet the needs of the former are likely to be just as great as those of the latter, and he has probably had an opportunity to save less to meet them. It is only by a curiously perverted form of sentimentalism that such a definition could originally have got into the law.” “A Desirable Change,” NYT, Mar. 5, 1937 (20:3) (editorial).
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be capped at the same relatively low level ($3,000 a year). In the late 1930s and early 1940s, the Times and other employers did not frame their campaign against overtime regulation by reference to the discrimination that entitled blue-collar workers to premium time-and-a-half wages no matter how high their wages, whereas many white-collar workers were excluded once their salaries exceeded $30 a week. Instead, they conducted it as a more fundamental attack on overtime regulation altogether, proposing the limitation of penalty overtime pay to the minimum wage. Nevertheless, in spite of somewhat similar strategies in the two areas, it remains significant that employers in principle were constrained to concede in the context of unemployment insurance that even nonmanual workers whose salaries would have exceeded the exclusion thresholds under the FLSA overtime regime faced the same economic distress as their manual counterparts.

As a European sociological discussion, which focused on the preferred European term, “salaried employee”—which is no more precise than “white-collar worker”—pointed out in the 1950s:

What...are salaried employees and how are they to be defined? ... [M]ost people...have answered that salaried employment has a special intellectual character, whereas wage earners are concerned with manual work. Obviously this explanation is fundamentally mistaken and provides the starting point for a vicious circle. A young typist who spends her time on routine copy work is quite definitely a salaried employee, whereas a compositor whose specialty is setting up type for books in foreign languages is quite definitely a wage earner. Need we discuss which of the two is doing the more “intellectual” work?

Indeed, as the following account suggests, perhaps no job that exposes its incumbents to repetitive-stress injuries should qualify as white-collar. In recent years the state of Iowa has financed free dental treatment for poor and unemployed people, many of whom had not been treated by for decades. The hard physical work involved in cleaning the encrustations on the teeth of such a large number of patients prompted the dental hygienists at the University of Iowa to complain that they were at risk of developing carpal tunnel problems, which would make it impossible for them to continue in this career work, as they intended, until normal retirement age. The result was that they all voluntarily shifted to 24- or 32-hour workweeks.

70 Manual’ Workers.” On the $3,000 ceiling, see below ch. 6.


73 Interview with Linda Ridenour, dental hygienist, University of Iowa Hospitals and

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"'[W]hite-collar worker,'" as the president of the Office Employees International Union noted at mid-century, is the "misleading and elusive term...[that] refers to the person who is not considered as a part of the production and maintenance force—the so-called ‘non-manual’ worker who none the less must frequently rely on manual dexterity and neuro-muscular coordination in order to do his or her job." 74 There are also differences among skilled and unskilled blue collar workers 75: the aspect of mental labor does not predominantly characterize all white-collar jobs, the qualifications for many of which fall below that of many skilled

Clinics, Iowa City (Aug. 27, 2003). A coalition of the largest private employers in the United States recognized that dental hygienists (and dentists and other professional employees) perform considerable manual work, but instead of questioning whether they were white-collar employees, the organization proposed that the DOL eliminate the requirement that professional employees perform office or nonmanual work to be excluded from overtime regulation. "LPA’s Comments on Proposed Rule Defining and Delimiting the Exemptions for Executive, Administrative, Profession, Outside Sales and Computer Employees, 68 Federal Register 15560 (Mar. 31, 2003)" at 1 (June 30, 2003), on http://www.hrpolicy.org/memoranda/2003/03-66_White_Collar_Comments.pdf.

74 Paul Hutchings, “Today’s Labor Frontier: The ‘White Collar’ Field,” AF 59(4):14-16, 31, at 14 (Apr. 1952) (president, OEIU). Just five years later, another OEIU president opined that the office employee thought in terms of his education, background, classification, personnel practices, supervision, and (most importantly) promotion and job security. Consequently, white-collar workers simply could not be organized on the basis of wages and working conditions. Being “prestige conscious” and unwilling to be placed in the same category as manual workers: “White collar workers prefer to be called employes. ... Many unions which organize white collar people, including the Office Employees International Union, have been careful to use ‘Employes’ in their official names rather than ‘Workers.’ There is no question that all are workers and wage-earners. But to influence white collar employees it is best to direct a union’s appeal along prestige lines. ... While those of us who specialize in the field of white collar unionization recognize this attitude of clerical employes borders on snobbery, we nevertheless feel that it is imperative to take note of this feeling, understand it and direct our appeals accordingly.” Howard Coughlin, “White Collar Progress,” AF 64(11):10-12, at 10-11 (Nov. 1957).

75 Nevertheless, Lederer, Die Privatangestellten in der modernen Wirtschaftsentwicklung at 22, argued that vertical differentiation within the salaried labor force was greater than among wage earners: “Mag auch der materielle, soziale und kulturelle Abstand zwischen einem ungelernten, gelegentlichen Aushilfsarbeiter, der dem ‘Lumpen-Proletariat’ angehört, und einem gelernten, hochqualifizierten, organisierten, ständig beschäftigten Arbeiter ein sehr großer sein, so läßt er sich doch nicht vergleichen mit dem Niveau-Unterschied, der den Handlungsgehilfen einer kleinen Landkrämerei vom Prokuristen der großen Bank trennt...”
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workers.  

Much more systematic was the dissection to which Harry Braverman subjected this “common but absolutely meaningless term”:

In the clerical routine of offices, the use of the brain is never entirely done away with—any more than it is entirely done away with in any form of manual work. The mental processes are rendered repetitious and routine, or they are reduced to so small a factor in the work process that the speed and dexterity with which the manual portion of the operation can be performed dominates the labor process as a whole. More than this cannot be said of any manual labor process, and once it is true of clerical labor, labor in that form is placed on an equal footing with the simpler forms of so-called blue-collar manual labor. For this reason, the traditional distinctions between “manual” and “white-collar” labor, which are so thoughtlessly and widely used in the literature on this subject, represent echoes of a past situation which has virtually ceased to have meaning in the modern world of work. And with the rapid progress of mechanization in offices it becomes all the more important to grasp this.

Lumping together all office labor under the rubric of white collar or salaried employees was, in Braverman’s view, “nothing but a hangover from the days in which all office labor did share the characteristics of privilege in pay, tenure, and authority. It was not the color of the employee’s collar, still less the mode of payment on an annual or monthly basis as distinguished from the daily or hourly wage of the manual worker, that in themselves had a determinate meaning, but rather the whole complex of social position and position in the enterprise and the labor process that these terms symbolized.” For Braverman, the anachronistic use of the term “long after the realities behind it have disappeared is one of the greatest sources of confusion in the analysis of this subject. A term which lumps together

[76] Emil Lederer and Jakob Marschak, “Der neue Mittelstand,” in Grundriss der Sozialökonomik, IX Abteilung: Das soziale System des Kapitalismus, 1. Teil: Die gesellschaftliche Schichtung im Kapitalismus 120-41, at 123 (1926). The Census Bureau evaded the issue of comparative skill levels by defining them out of existence: “[N]one of the professional, proprietary, official, managerial, or clerical pursuits lends itself readily to a classification by skill; and it is doubtful whether any of them may be properly so classified, since in none of them is skill or manual dexterity the chief characteristic. In fact, it is believed that only those occupations in which the expenditure of muscular force is an important characteristic can be properly classified by skill.” U.S. Bureau of the Census, A Social-Economic Grouping of the Gainful Workers of the United States 1 (1938) (by Alba Edwards).

[77] Braverman, Labor and Monopoly Capital at 295.


[79] Braverman, Labor and Monopoly Capital at 349.
in a single class grouping the authoritative executive representing capital on the one hand, and the interchangeable parts of the office machine which serves him on the other, can no longer be considered useful.\textsuperscript{80} Braverman regarded its continued use as apologetic inasmuch as it “conveniently lumps into a single category the well-paid, authoritative, and desirable positions at the top of the hierarchy and the mass of proletarianized inferiors in a way that makes possible a rosier picture.... [T]he ‘white-collar’ category tends to get its occupational flavor from the engineers, managers, and professors at the top of the hierarchy, while its impressive numerical masses are supplied by the millions of clerks....”\textsuperscript{81}

In spite of all of these justified criticisms, however, “white-collar,” fuzzy as it may be, “has become a social fact that in turn affects perceptions of class realities, false though some of those perceptions may be. It cannot simply be wished away....”\textsuperscript{82} After all, the most common German words for “employer” (\textit{Arbeitgeber}) and “employee” (\textit{Arbeitnehmer}), as Friedrich Engels himself attested, are an even more profound ideological distortion;\textsuperscript{83} yet they have become culturally even more ineradicable than “white-collar”—despite the fact that, unlike the latter, \textit{Arbeitnehmer} has a perfectly acceptable, shorter, and non-ideological substitute (\textit{Arbeiter}).

\textsuperscript{80}Braverman, \textit{Labor and Monopoly Capital} at 349 n. Braverman shared this skeptical view with Herbert Northrup, who became a prolific anti-union author. In 1949 he called “white-collar” a “broad essentially meaningless term” because it encompassed federal government employees in Washington, D.C., Saks 5th Avenue, Hearn’s on 14th Street, a Wall Street law office, a Burlington, Iowa drug store, an Austin, Texas lunchroom, industrial chemists, teachers, social workers, and meteorologists. Herbert Northrup, “Democracy vs. All Inclusive Labor Movement,” \textit{LN} 5(3):23, 37, at 23 (May-June 1949).

\textsuperscript{81}Braverman, \textit{Labor and Monopoly Capital} at 349-50 n. Here Braverman agreed with Vance Packard, who 15 years earlier had observed that while the boundary between white-collar and blue-collar workers was blurring, the boundary between the lower and upper white-collar employees (managers and professionals) had “become the great dividing line in our society.” Vance Packard, \textit{The Status Seekers} 37 (1959). He included among the “supporting” classes the “limited-success” class (“the non-commissioned officers of our society’’); clerks, except routine machine attendants and secretaries; the lower ranks of the genuinely white-collar world and the higher ranks of the blue-collar world—the aristocrats of labor; and the working class (semiskilled factory operatives, office machines operators, supermarket clerks, deliverers). \textit{Id.} at 41-42.

\textsuperscript{82}Martin Oppenheimer, \textit{White Collar Politics} 11 (1985).

\textsuperscript{83}Friedrich Engels, “Zur dritten Auflage,” in Karl Marx, \textit{Das Kapital: Kritik der politischen Ökonomie}, v. 1: \textit{Der Produktionsprozeß des Kapitals}, in Karl Marx [and] Friedrich Engels, \textit{Werke} 23:34 (1962 [1883]). To be sure, “employer” and “employee” are as ideologically inverted as the German words that Engels called “gibberish.”
Acknowledgments

The following people, libraries, and agencies provided archival or otherwise inaccessible materials: Tab Lewis, National Archives; John Butsch and Vita Loyevsky, U.S. Department of Labor Wirtz Labor Library; Bernard Crystal, Columbia University Rare Books; Bentley Historical Library, University of Michigan; Minnesota Historical Society; Kheel Center for Documentation, Cornell University; Lucia Stein Hatch; Lucy Barber, California State Archives; California State Library History Room; California State Law Library; Lupita Lopez, Washington State Archives; Barbara Pearson, Washington State Library; Dennis Hyatt, University of Oregon Law Library; Oregon State Archives; Mark Savolis, Holy Cross College, Archives/Special Collections; Bob Heim, Workforce Statistics, Office of Workforce Information, Office of Personnel Management; David Ware, Capitol Historian, State of Arkansas; U.S. Department of Labor Wage and Hour Division; Barbara Somson, UAW, Washington, D.C.; Colin Gordon, University of Iowa; Joe Goldberg, Office of General Counsel, American Federation of Government Employees; Edmund Brehl, Labor Relations Counsel, California Department of Public Administration, Legal Division.

Helen Seaman enthusiastically granted permission to use the cartoons drawn by her husband Bernard Seaman, who died in 1998. Adam Stein, John Stein, and Lucia Stein Hatch provided valuable information about their father, Harold Stein. Dorothy Haywood filled in the background details of her lawsuit against North American Van Lines. Bob Hendler, OPM, repeatedly and generously took the time to discuss numerous aspects of the applicability of the FLSA to federal employees. Hilary Stern, Department of Justice, and Robert Van Kirk discussed Doe v. United States of America. Barbara Somson (UAW), Kelly Ross (AFL-CIO), and Ross Eisenbrey (EPI) all took out time from making history to share their insiders' knowledge of labor’s campaign against the revised regulations of 2003-2004. Dave Dyson, Executive Director, Manitoba Employment Standards, explained in detail his agency’s enforcement policy regarding white-collar workers.

Bob Ramsey and Kati Jumper of the State University of Iowa helped scan in illustrations and generate charts, while C. D. Coyle made typographical suggestions for the front matter.
Abbreviations

AAPSS  Annals of the American Academy of Political and Social Science
ABA  American Bankers Association
ACA  American Communications Association
ACW  Amalgamated Clothing Workers of America
AF  American Federationist
AFGE  American Federation of Government Employees
AFL  American Federation of Labor
AGCA  Associated General Contractors of America
ALLR  American Labor Legislation Review
AMA  American Management Association
ANG  American Newspaper Guild
ANPA  American Newspaper Publishers Association
ARF  American Retail Federation
AS  American Socialist
AULR  American University Law Review
BASU  Bookkeepers, Accountants, and Stenographers Union
BFAECT  Bulletin of the Federation of Architects, Engineers, Chemists and Technicians
BGB  Bundesgesetzblatt
BHL  Bentley Historical Library
BHR  Business History Review
BILO  Bulletin of the International Labour Office
BLS  Bureau of Labor Statistics
BNA  Bureau of National Affairs
BW  Business Week
CAF  Clerical, Administrative, and Fiscal
CASE  Chain Age Store Executive
CBI  Confederation of British Industry
CC  Cahiers du communisme
CCSM  Continuing Consolidation of the Statutes of Manitoba
CFC  Commercial and Financial Chronicle
CFC-CGC  Confédération Française de l'Encadrement-Confédération Générale des Cadres
CFR  Code of Federal Regulations
CG  Congressional Globe
CIO  Committee for Industrial Organization/Congress of Industrial Organizations
CMA  Clothing Manufacturers Association
CNWA  Council of National Wholesale Associations
CPI  Consumer Price Index
CPS  Current Population Survey
### Abbreviations

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<td>CR</td>
<td>Congressional Record</td>
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<td>CRA</td>
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<td>Civil Service Commission</td>
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<td>Coast Seamen's Journal</td>
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<td>Department of Justice</td>
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<td>Department of Trade and Industry</td>
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<td>DW</td>
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<td>General Schedule</td>
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### Abbreviations

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<td>NAA</td>
<td>Newspaper Association of America</td>
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### Abbreviations

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<td>New York Herald Tribune</td>
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<td>Official Opinions of the Attorneys-General</td>
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<td>Publications of the University of California at Los Angeles in Social Science</td>
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### Abbreviations

<table>
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<tr>
<th>Abbreviation</th>
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<tr>
<td>RA</td>
<td>Recht der Arbeit</td>
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<td>Record Group</td>
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<td>RWDSU</td>
<td>Retail, Wholesale and Department Store Union</td>
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<td>SCC</td>
<td>Special Conference Committee</td>
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<td>UE</td>
<td>United Electrical, Radio and Machine Workers of America</td>
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<td>United Food and Commercial Workers</td>
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<td>United Office and Professional Workers of America</td>
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<td>U.S. News and World Report</td>
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<td>Verhandlungen des Reichstages: Stenographische Berichte</td>
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<td>WHA</td>
<td>Wage and Hour Administrator</td>
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Part I

Why No Overtime Dollars for White Collars?

Overtime payments at time and one-half add up to real money if much overtime is worked, and most hourly paid employees work plenty of overtime. The salaried workers receive very little of this money.\(^1\)

Elmer F. Andrews, Administrator of the Wage and Hours Act, during a visit here yesterday, told the Trade Association Executives Forum this definition of the term “executive.” “If a man has an office with a desk on which there is a buzzer, and if he can press that buzzer and have someone come dashing in response—then he’s an executive.”\(^2\)

The term “executive,” while used in the FLSA and implementing regulations, is somewhat of a misnomer for this exemption. A more realistic title would be full supervisory employee.\(^3\)

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\(^2\) “Andrews Defines ‘Executive,’” *NYT*, Dec. 10, 1938 (15:2). In his World War I-era novel on office work, Sinclair Lewis spoke of the “chiefs” as “the castes above the buzzer line,” whereas their private secretary was “not above the buzzer. She had to leap to the rattle-snake tattoo, when Mr. Ross summoned her....” Sinclair Lewis, *The Job* 232 (1994 [1917]).

"Good to the last drop!"

The office worker
The impression is widespread that there is an inherent difference between the kind of work performed by the white-collar worker and that of the wage earner. I think it is fair to say that as between the work turned out in insurance companies, banks and other business offices, on the one hand, and in the big shipyards and munitions plants on the other, there is no essential difference. The situation in a large room or office building, or temporary building in which from 200 to 1,200 typists, calculators, and stenographers are assembled, involves the same kind of machine effort that is put in by the average industrial worker.1

In a thoroughly pedestrian move for the most unabashedly pro-employer Republican administration since before Herbert Hoover’s,2 the proposed and final regulations published by the U.S. Department of Labor in 2003 and 2004, respectively, revising the rules pertaining to white-collar workers’ overtime work, sought to make it easier for companies to avoid paying premium-penalty wages.3


2Joel Brinkley, “Out of Spotlight, Bush Overhauls U.S. Regulations,” NYT, Aug. 14, 2004 (A1:6, A10:1-6). The Bush administration’s regulatory changes with “A Pro-Business Tilt” had been so numerous and varied that this lengthy account failed even to mention the white-collar overtime regulations.

3See below chs. 16-17. Since changes in the white-collar regulations have been on the DOL’s agenda for more than two decades and on employers’ political agenda for even longer, the following rhetorical accusation by the president of the Communications Workers of America was preposterous: “Many predicted that a Bush presidential victory coupled with Republican control of the Congress would lead to assaults on workers’ rights and benefits. But even so, the Department of Labor’s sneak attack on the 40-hour workweek is stunning in its audacity and magnitude. ... The DOL is reworking the rules in a way that stands the FLSA on its head, denying overtime to millions of workers.... What’s particularly outrageous is that the administration is over-stepping its authority, changing policy established by Congress—actually reversing that policy to hand its corporate political supporters a bonanza—while condemning millions of workers to lower pay and sweatshop-like hours. Morton Bahr, “In My Opinion: DOL’s Scheme: Longer
This action took place against the background of what the Los Angeles Times called a “tidal wave of class-action lawsuits” brought by “[l]ow-level managers whose long hours on straight pay helped fuel the economic boom” and then prompted them to accuse employers of “robbing them of overtime.” These and many other white-collar workers “see themselves as slaves to jobs they blame for leaving them stressed, worn out and rarely available for spouses, children and other pursuits.”

The partisanship of a Senator Hillary Clinton or Edward Kennedy was hardly required to draw the conclusion that the Bush administration was doing “the bidding of its corporate donors” in proposing “an unfair scheme to prop up business profits.” Labor unions quickly pointed out how the proposals would expand by millions the groups of workers already deprived of the right to extra pay for long workweeks. (The guesstimate of eight million additional excluded workers presented by the Economic Policy Institute became a mantra for unions and their congressional supporters.) But what not even the labor movement questioned was the justification for the original exclusions going back to the Fair Labor Standards Act’s enactment in 1938. And while the AFL-CIO may have had plausible tactical reasons for concentrating on warding off further incursions rather than on rolling back 65-year-old encrustations, in fact, the union movement, like

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4Lisa Giron, “Infuriated Managers Suing for Overtime—and Winning,” LAT, June 8, 2001 (A1:1) (Lexis) (discussing settlement of two suits against Rite Aide Corp. and U-Haul Co. for $25 and $7 million, respectively). As Deborah Greenfield, associate general counsel of the AFL-CIO and former DOL official, pointed out regarding employers’ complaints about the increase in FLSA litigation: “Let’s remember that this is a worker protection scheme, so that an increase in private litigation in which employees enforce their rights doesn’t mean that the protections should be relaxed. For us, it means that for some reason employers are emboldened to classify their employees in a way that allows them not to pay overtime.” Federalist Society, National Lawyers Convention 2002: “The Fair Labor Standards Act: Keeping Time with the 21st Century?” at 28 (Nov. 14, 2002).


6CR 149:S11066 (Sept. 4, 2003).


8In spite of the AFL-CIO’s tactical decision to ignore the fact that the existing regulations already excluded millions of white-collar workers from overtime protection, as late as 1993, the AFL-CIO did express concern about the growing number of excluded workers. Appearing before the House Subcommittee on Labor Standards, John Zalusky,
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all other participants in the public debate, has come to take the exclusions themselves for granted.9 Moreover, the AFL-CIO’s political strategy has, perversely, entailed passing over in silence, and thus in effect withholding from public debate, the fact that a statute enacted by the New Deal Congress and regulations issued by the New Deal Wage and Hour Division have, according to the Labor Department itself, wound up excluding as many as 32 million white-collar workers.10 Typical of this distortion is the claim made by Democratic Representative Robert Andrews on the House floor that: “Seventy-six [sic] years ago, the Congress passed and the President signed a law which says that if you

head of the organization’s Office of Wages and Industrial Progress, observed that the DOL’s reports to Congress showed that in 1990 14 million or 15 percent of the private-sector workforce was exempt as administrative, executive, or professional employees—up from 9.3 million and 14.1 percent, respectively, in 1975. To him the evidence was “clear” that these “exemptions have been slowly eroding coverage.” Hearing on the Fair Labor Standards Act: Hearing Before the Subcommittee on Labor Standards, Occupational Health and Safety of the Committee on Education and Labor 60 (Serial No. 103-25; 103d Cong., 1st Sess., July 1, 1993).

9For example, testifying at a congressional hearing against the proposed exemption of inside sales workers, the deputy director of public policy at the AFL-CIO conceded that the original exemption of outside sales workers in 1938 had been “a fair and reasonable accommodation to a practical reality created by the nature of the job” because Congress justifiably “believed it was both unreasonable and unfair to expect employers to satisfy minimum wage and overtime requirements...when employers had no practical way to know how many hours these employees worked, and no real power to control their hours.” The Sales Incentive Compensation Act: Hearing Before the Subcommittee on Workforce Protections of the Committee on Education and the Workforce House of Representatives 62 (Serial No. 107-17; 107th Cong., 1st Sess., June 7, 2001) (written statement of Christine Owens). In fact, there was union testimony at the 1940 WHD regulatory hearings arguing that some outside salesmen were subject to control by employers, which did, from custom and practice, know rather definitely how many hours outside salesmen put in. See below ch. 2.

10In the course of exploratory negotiations over whether the AFL-CIO would help place for publication the author’s op-ed piece on the DOL’s proposed regulations, the AFL-CIO’s spokesperson suggested that the article “tease out more explicitly...that the DOL proposal moves in the exactly wrong direction, moving away from a narrow exception that would exclude few workers to a much broader excemption [sic] that would exclude more and more workers every year.” When the author countered that “it just ain’t so—there are 25-30 million white collar workers excluded now,” the spokesperson replied: “We think it’s less important to start out identifying how bad the FLSA is now to tighten [sic] up that the real problem is that the new proposals are going to make things worse.” Email between Kathy Roeder and Marc Linder (May 23, 2003).
work more than 40 hours a week,...you get time and a half for that additional time. With some carefully reasoned and well-thought-out exceptions since then, it has been the law for every American worker under every circumstance.”

Why So Much More Is at Stake: The Inexorable Increase in the Number and Proportion of White-Collar Workers

[W]e have been seeing a revolutionary blurring of the boundary line between white- and blue-collared people. The recent upheaval of our economic system has brought about this blurring. ... Just about every basis on which white-collared clerical people have claimed superior status to blue-collared workers...has been undermined in recent years.12

The reason that controversy over the exclusion of white-collar workers from overtime regulation has become increasingly intense is that, with their steady increase in absolute numbers and as a proportion of the labor force, the volume of working hours that employers can potentially extract without additional pay has grown dramatically.13 As the Wage and Hour Administrator admitted to the House Subcommittee on Workforce Protections toward the end of the Clinton administration: the white-collar exemptions cover “an estimated 32 million workers, more than one-quarter of the total workforce, and this number has been increasing with the continuing growth of the service sector. [T]his group is increasing, and the assignment of overtime to this group of employees is increasing.”14 Thus with regard to the DOL’s regulatory exclusions, much more has come to be at stake for more workers.

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13Big business was well aware of the stakes: as the EPF pointed out, of new full-time-private sector jobs between 1970 and 2002, 22.7 percent were executive, administrative, or managerial and 17.9 percent professional specialty. Employment Policy Foundation, “An Economic Primer to White Collar Reform,” in Backgrounder 4 (May 21, 2003), on http://www.epf.org.
This fundamental structural point is blurred when, for example, the *Detroit News* (misled by its erroneous supposition that Congress enacted the FLSA “to protect unskilled workers from exploitation”) editorialized that the “job distinctions” from 1938 “worked as intended as long as the American economy relied on manual labor,” but that the regulations had to be revised once “technological changes...radically reshaped the workplace, making it difficult to distinguish protected blue-collar laborers from unprotected white-collar workers.”15 It was not that identifying the two groups had become more difficult—after all, neither Congress nor the DOL had ever explained why either group should or should not be protected or even what they should be protected from—but, rather, that, with so many more millions of workers performing what passes for white-collar work and thus potentially excludible, labor and capital were struggling more intensively over how many of those millions would wind up outside of government regulation of overtime work and pay and subject exclusively to the forces of an anarchic labor market and employer fiat.

The extent of clerical employment—understood broadly as encompassing occupations bordering on business management and others primarily concerned with manual routine—was numerically insignificant until after the Civil War. But with the tripling of manufacturing output during the three decades preceding the Great Depression16:

To create a demand for new goods and to keep manufacturing plants busy, a greatly expanded sales and clerical force became essential. The lack of opportunities in productive industries swelled the ranks of new workers seeking clerical employment and by the pressure of their numbers made available a quantity of comparatively cheap labor at just the time when the business structure could make use of great numbers of additional clerical workers.

The greatly augmented production of agricultural and manufactured goods required a market. Modern advertising, promotion, and salesmanship emerged to meet the needs. Where sufficient purchasing power did not exist to make cash sales possible, the financial


16H. Dewey Anderson and Percy Davidson, *Occupational Trends in the United States* 584-86 (1940). The authors perceived as common to the category, which included bookkeepers and accountants as well as office clerks and typists, being “directly related to the management of industry and trade without having final responsibility for its operations. *Id.* at 585. This definition was remarkably similar to that of “bona fide administrative” employee published by the Wage and Hour Division later in 1940 to mark off those excluded from overtime protection. See below chs. 2 and 13.
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structure was modified to allow part-payment sales.\textsuperscript{17}

In 1930, at the last pre-FLSA census, the 14,319,793 white-collar workers accounted for 29.4 percent of the economically active civilian population\textsuperscript{18}—this nonmanual share of all workers being the highest in the world at the time.\textsuperscript{19} In 1940, at the first post-FLSA census, the 16,081,569 white-collar workers accounted for 31.1 percent of the total; and in 1950, at the first postwar census, their numbers and share had risen to 21,600,921 and 36.6 percent, respectively. The Bureau of the Census defined the category of white-collar workers as consisting of four subcategories: professional, technical, and kindred workers; (nonfarm) managers, officials, and proprietors; clerical and kindred workers; and sales workers. Even if it is assumed that only the first two subgroups encompassed workers who could be plausibly excluded from FLSA protection, these professional and managerial employees increased from 6,924,385 and 14.2 percent in 1930, to 7,649,052 and 14.8 percent in 1940, to 10,235,929 and 17.3 percent by 1950.\textsuperscript{20} In part, this

\begin{itemize}
  \item \textsuperscript{17} Anderson and Davidson, \textit{Occupational Trends in the United States} at 587.
  \item \textsuperscript{18} David Kaplan and M. Claire Casey, \textit{Occupational Trends in the United States 1900 to 1950}, tab. 1 at 6, tab. 2 at 7 (Bureau of the Census, Working Paper No. 5, 1958). This average obscured significant differences between men (25.2 percent) and women (44.2 percent). Women's overrepresentation in 1930 was especially prominent among clerical workers (20.9 percent versus 5.5 percent among men) and professional and technical workers (13.8 percent versus 4.8 percent among men). \textit{Id.} Women thus accounted for 33.2 percent of all white-collar workers, 51.8 percent of all clerical workers, and 44.8 percent of all professional and technical workers. \textit{Id.} tab. 4 at 9. Women's overrepresentation among professional employees was a function of their concentration in two professions—teaching and nursing—which accounted for 77.1 percent of all female professionals. In contrast, the six largest male professional groups—(in descending order) engineers, teachers, accountants and auditors, lawyers and judges, physicians, and clergymen—accounted for only 56.6 percent of all male professionals. \textit{Id.} tab. 6b at 22, tab. 6a at 16.
  \item \textsuperscript{19} "The Use of Office Machinery and Its Influence on Conditions of Work for Staff," \textit{ILR} 36(4):486-516, at 514 (Oct. 1937). In 1929, according to one international comparison, salaried employee density (""Angestelltendichtigkeit"") was internationally highest in the United States at 15.9 salaried employees per 100 industrial workers, followed by Germany (15.4), Great Britain (10.8), and France (10.7). In Germany from 1907 to 1925 the number of industrial workers rose by 12 percent, while that of salaried workers (Angestellten) rose by 111 percent; in Great Britain the corresponding rates of increase between 1907 and 1924 were 7 percent and 56 percent. Emil Lederer, "Die Umschichtung des Proletariats," \textit{Die neue Rundschau} 40(II):145-61 at 150 (Aug. 1929).
  \item \textsuperscript{20} Kaplan and Casey, \textit{Occupational Trends in the United States 1900 to 1950}, tab. 1 at 6, tab. 2 at 7. This Census Bureau publication reworked and adjusted census data and
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expansion was fueled by the vast increase in the number of administrative employees in industry. In manufacturing alone, their numbers rose absolutely from 457,000 in 1899 to 1,562,000 in 1929 to 2,672,000 in 1947 and relative to production workers, from 9.9 percent to 18.5 percent to 22.2 percent, respectively.21

From 1900 to 1950,22 the total number of white-collar workers grew 322 percent compared with 103 percent for the economically active civilian population as a whole, resulting in a doubling of white-collar workers’ share from 17.6 to 36.6 percent. The explosion in the number of clerical workers accounted for a disproportionate share of this increase: during the first half of the twentieth century, they increased by 725 percent, more than quadrupling their share of total employment from 3.0 to 12.3 percent.23 This spectacular growth,24 which was filled in gaps. The absolute numbers are overstated because proprietors were not employees, but presumably, over time, managers increased more rapidly than proprietors.


23Kaplan and Casey, Occupational Trends in the United States 1900 to 1950, tab. 2 at 7, tab. 3 at 8. Again, the aggregate averages conceal different trends among men and women. From 1900 to 1950, as female white-collar workers increased by 809 percent, their share among all female workers tripled from 17.8 to 52.5 percent, and female white-collar workers as a proportion of all white-collar workers rose from 18.5 to 39.9 percent. The disproportionate increase in women’s share of white-collar workers and white-collar workers’ share of female workers was in large part a function of the 2,022-percent increase in the number of female clerical workers; consequently, from 1900 to 1950, clerical workers as a share of all female workers rose from 4.0 to 27.4 percent, while female clerical workers as a share of all clerical workers rose from 24.2 to 62.3 percent. Id. tab. 2 at 7, tab. 3 at 8, tab. 4 at 9.

24From the vantage point of the 1860s, Marx offered this account: “From the outset this office is always infinitesimally small compared to the industrial workshop. ... As the scale of production is extended, the commercial operations multiply which are constantly to be carried out for the circulation of industrial capital, both in order to sell the product existing in the shape of commodity-capital, and to transform the money that was made back into means of production and to keep account of the whole process. Calculation of prices, bookkeeping, cash bookkeeping, correspondence all belong here. The more developed the scale of production, the greater, though not at all proportionately greater,
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restrained by office mechanization, resulted in part from the new functions, such as various aspects of payroll accounting and compliance with government regulation, that white-collar workers performed.\(^{25}\) Indeed, it is a great irony that employers' compliance with the FLSA itself contributed to the increase in white-collar employment.\(^{26}\) In large part, however, it was a function of Taylorist scientific management, which sought both to coordinate and separate various aspects of management that had previously been handled by foremen and bookkeepers—purchasing, production control, inventory records, payroll, and pricing—by creating a series of administrative units and departments that had barely existed before 1890: “Management’s overall purpose was to separate mental and manual work by extracting as much decision making as possible from production workers and transforming it into standardized tasks performed by clerks and managers.”\(^{27}\)

At the decennial censuses during the second half of the twentieth century, the number and proportion of white-collar workers continued to rise.\(^{28}\) In 1960, white-collar workers comprised 27.0 million or 39.8 percent of the civilian labor force, while in 1970 the figures rose to 37.9 million and 47.4 percent, respectively. For the professional and managerial subcategories, the corresponding figures were 12.8
millions and 18.8 percent in 1960 and 18.0 million and 22.6 percent in 1970.29

Little wonder that by 1970, when Fortune saw “platoons” of clerks, accountants, bookkeepers, and secretaries, who were once “a privileged few” and “the elite at every plant,” the magazine concluded that “the clerk rather than the man on the production line is the typical American worker.” Their proletarianization was signaled by the fact that “[w]orkers in this stratum cannot but notice that the federally defined poverty standard is climbing toward their level from below....”30

Although the data from 1980 on are not completely comparable because of classificatory and methodological changes, by 1980 white-collar workers formed a majority of employed workers: the 51,882,000 accounted for 52.2 percent of all employed workers. The two subcategories of professional and technical workers and managers and administrators numbered 27,106,000 and comprised 27.3 percent of all employed workers.31 In 1990, the 30,657,000 managerial and professional specialty workers made up 26.0 percent of all employed civilians, while the 3,842,000 technicians accounted for another 3.3 percent. Although most of the 18,641,000 workers classified as “Administrative support, including clerical,” were clerical and presumably not excludible from overtime, 771,000 were supervisors and several hundred thousand were insurance adjusters and employed in related occupations, which the DOL now treats as generally exempt. Finally, 3,812,000 persons were classified as sales supervisors and proprietors, of whom at least hundreds of thousands and perhaps several million might have been treated as exempt executives. Overall, white-collar workers (consisting of the five occupational categories of managerial, professional, technical, sales, and administrative support employees) made up 57.1 percent of all employed civilians.32 By 2000, the 40,887,000 managerial and professional specialty workers accounted for 30.2 percent of all employed persons; the 4,385,000 technicians, 710,000 administrative support supervisors, and 4,937,000 sales supervisors and proprietors added several millions more to the pool of excludibles. All told, the 80,329,000 white-collar workers (consisting of managerial, professional, technical, sales, and administrative support employees) accounted for 59.4 percent of all employed

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32EE 38(1):tab. 21 at 184, tab. 22 at 185-87 (Jan. 2001). On the DOL’s treatment of insurance adjusters, see below ch. 2.
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Emblematically, more people worked in physicians' offices than in automobile plants. After yet another revision based on somewhat different methods and categories, the data for 2003, the last year for which annual data are available, reveal that the 19,934,000 management and 27,995,000 professional workers together (totaling 47,929,000) accounted for 34.8 percent of all 137,736,000 employed persons, the former contributing 14.5 percent and the latter 20.3 percent. To the category of FLSA-excludible management employees must be added the many subcategories of "first-line supervisors/managers" listed within various white- and blue-collar occupations and industries: food preparation and service (667,000), housekeeping and janitorial service (166,000), landscaping, lawn service, and groundskeeping (223,000), gaming (131,000), personal service (162,000), retail sales (3,389,000), non-retail sales (1,388,000), office and administrative support (1,623,000), construction (897,000), installation, maintenance, and repair (340,000), production (939,000), and transportation and material moving (216,000). These various supervisors and managers numbered 10,141,000, bringing the total number of management employees to 30,075,000 and the total number of potentially FLSA-excludible employees to 58,070,000 or 42.1 percent of all employed persons. This proportion was about three times greater than at the time the FLSA went into effect in 1938. If to this number are added the 35,496,000 sales and office workers (minus the 6,400,000 first-line sales and office supervisors/managers already included), the total number of white-collar workers numbered 87,166,000 or 63.3 percent of all employed persons.

It is this colossal sea-change in the number and proportion of potentially excludible white-collar workers—which employers characterize as "technological and organizational advances...hav[ing]...blurred the definitional lines of many job responsibilities, qualifications and duties"—that has animated employers to push for broader exemptions.

In order to get a sense of the inflated use of the term "executive" in the occupational data and the DOL's white-collar regulations and the latter's vastly

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understated salary thresholds, it is crucial to note that the Bureau of Labor Statistics also reported that in 2000 "top executives," who "are among the highest paid workers," numbered only about three million, 2.4 million of whom worked in the private sector. The median annual earnings in 2000 of general and operations managers were $61,160, with the middle 50 percent earning between $40,880 and $93,610; the median annual earnings of chief executives were $136,760.37

How Many White-Collar Workers Are Excluded?

Since passage of the Fair Labor Standards Act in 1938, overtime rights and the 40-hour work week have been sacrosanct, respected by Presidents of both parties.38

The estimated number of "white collar" workers excluded from the FLSA is also huge. The DOL's estimates for the year 1996 revealed that of 122,359,000 wage and salary workers, 48,315,000 or 39.5 percent were "exempt from or not subject to" the Act's overtime provision. 31,729,000 or almost two-thirds of all these excluded workers were "exempt under the executive, administrative, professional exemption" and accounted for 26 percent of all wage and salary employees.39 By far the largest contingent—almost two-fifths—of excluded white

39US ESA, Minimum Wage and Overtime Hours Under the Fair Labor Standards Act: 1998 Report 14 (1998). The report reworked data going back to 1990, for which year it estimated 28,868,000 excluded executive, administrative, and professional workers. Id. tab. C1d90. This total exceeded by 8.5 million the previous estimate for the private sector and was 1.5 million lower than that for the public sector. Id. n.p. (136). One of the authors who developed the data stated that the DOL data from 1990 were a "black box," behind which the new authors did not go, and might not be correct. Telephone interview with Daniel Hodge, Employment Research Corp., Ann Arbor (Nov. 12, 1999). The methodology of the 1998 Report was a black box in its own right. It was based on using the difference between total and non-supervisory employees "to reconcile with estimates of the exemption for executive, administrative, and professional employees...." The BLS Occupational Employment Survey matrix was used to "determine the level of executive, administrative, and professional employees, applying exempt probabilities to each potential exempt occupation. ... This matrix helped calculate how many employees were in typically exempt occupations for each industry." US ESA, Minimum Wage and
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collar employees worked in the service industries, followed by state and local government, manufacturing, and retail trade. At 36 percent, the service industry displayed the third highest proportion of excluded white collar employees behind the federal government and finance, insurance, and real estate. Table 1 breaks these data down by industry.40

To be sure, these data must be viewed with caution because the DOL’s methodology underlying the estimates identifying excluded white-collar employees and distinguishing them from their covered counterparts was opaque and highly questionable: the “refining estimates of the percentage of employment exempt in occupations generally exempt for executive, administrative, or professional...workers...were provided by knowledgeable Department of Labor staff and were primarily used to estimate professional exemptions, since a measure was already obtained of supervisory workers from” establishment-based data.41 This methodology constituted a black box because it failed to explain how anyone or even any group at the DOL could possibly know what proportion of workers in any, let alone, hundreds of occupations, met the regulatory duties tests that are the prerequisite for lawfully depriving white-collar workers of overtime protection under the FLSA.42 The methodology is even murkier because it suggests that the DOL


40Tables 1-3 are found at the end of ch 1.
42Ronald Bird, chief economist at the pro-employer Employment Policy Foundation, indirectly corroborated this point at a House hearing on the new white-collar regulations by criticizing pro-labor estimates of the number of workers who would be exempted by various changes on the grounds that there was insufficient hard information on job descriptions to jump to such conclusions. Assessing the Impact of the Labor Department’s Final Overtime Regulations on Workers and Employers: Hearing Before the Committee on Education and the Workforce House of Representatives (108th Cong., 2d Sess., Apr. 28, 2004), on http://edworkforce.house.gov/hearings/hrarchive.htm. During the 1950s, 1960s, and 1970s, DOL investigators, in connection with periodic increases in the salary-test levels, generated estimates of the number of excluded workers as a by-product of their
was at a loss to estimate the number of excluded administrative employees, who are neither professionals nor supervisors.\textsuperscript{43}

The methodological difficulty inherent even in real (as opposed to speculative armchair) surveys is, as the Minimum Wage Study Commission—which itself lacked the money to conduct a similar survey—recognized, that: “The FLSA definitions of executives, administrators [sic], and professionals require an analysis of the duties performed on a particular job, do not correspond precisely to standard occupational classifications, and are not used in most, if any, government statistics.”\textsuperscript{44}

Using the same methodology based on second-hand speculation by DOL officials on the likelihood of exemption for 905 occupations,\textsuperscript{45} the General

investigations in thousands of establishments; since the DOL stopped adjusting the salary levels, it also stopped conducting such surveys. See below ch. 15. Thus, the WHD’s estimation methodology shifted from generating data from investigations of employers’ actual classificatory practices to surveying its investigators’ speculations about those practices regardless of whether they had had actual investigatory experience with every occupation. In 1975 the DOL conducted a survey of 10,300 establishments in which it identified excluded white-collar workers by comparing their duties and job descriptions (although the data may have been skewed by neglect of salaried employees paid less than the regulatory thresholds). The survey found a total of 8,396,000 white-collar workers in the private sector who were exempt from the FLSA and “lower-paid” with salaries below $350 a week. Of this total, 5,585,000 (66.5%) were executives, 1,198,000 (14.3%) administrative employees, and 1,613,000 (19.2%) professionals. US ESA, \textit{Executive, Administrative and Professional Employees: A Study of Salaries and Hours of Work} 10, A-ii (1977) (written by Robert L. Turner).

\textsuperscript{43}A WHD official who participated in preparing the report agreed that this methodology suggested that the researchers did not understand the regulatory definitions. Telephone interview with Richard Brennan, Deputy Director, Office of Enforcement Policy, WHD (Washington, D.C., Mar. 29, 2004). As the GAO had already noted, the CPS also suffers from the “major limitation[ ]” that its “occupational classifications do not distinguish between supervisory and nonsupervisory employees.... Therefore, one job title, ‘managers and administrators,’ could include the President of General Motors, but it may also include an office assistant.” GAO, \textit{Fair Labor Standards Act: White-Collar Exemptions in the Modern Work Place} 42 (GAO/HEHS-99-164, 1999).


\textsuperscript{45}To identify which of 905 occupational classifications included in the Current Population Survey data “would likely include exempt white-collar workers,” the GAO “asked DOL officials to assess the likelihood of exemption for each occupation.” They determined that 257 “would likely include exempt workers.” For each of these 257 they
Accounting Office estimated in 1999 that in 1998 between 19 and 26 million full-time white-collar workers accounting for between 20 and 27 percent of all full-time wage and salary workers\textsuperscript{46} “would most likely be properly classified as exempt workers under the DOL exemptions.” The GAO did not even try to estimate how many more workers were actually treated by their employers as not subject to the overtime regulations regardless of whether such treatment was lawful or not.\textsuperscript{47} These numbers represented a significant increase over 1983, when, according to the GAO, between 12 and 17 million workers accounting for between 17 and 24 percent of all full-time workers had been estimated to be excluded white-collar employees.\textsuperscript{48}

In large part the GAO traced this increase back to above-average employment growth in the service sector, which employed an above-average proportion of excluded workers. The number of service industry employees almost doubled from 13 million in 1983 to 24 million in 1998, thus increasing their share of the total number of full-time wage and salary workers from 18 to 25 percent. During the same years, the increase in the number of excluded white-collar workers in the service sector rose by 3.6 million or 46 percent of the total increase of 8 million. Consequently, the service industries’ share of all such workers increased from 19 to 29 percent.\textsuperscript{49} Ironically, the GAO reported that “[c]ritics of the FLSA” claimed that it was precisely this shift from manufacturing to services that had “left the FLSA and its regulations outdated and in need of revision.”\textsuperscript{50} Other than that employers preferred to work these additional millions of run-of-the-mill service-sector workers long hours without extra pay it is unclear why the FLSA should have lost any of its efficacy on account of this transition from the secondary to the tertiary sector of the economy.

\textsuperscript{46}US GAO, \textit{Fair Labor Standards Act} tab. 2 at 8.
\textsuperscript{47}US GAO, \textit{Fair Labor Standards Act} at 2 n.1.
\textsuperscript{48}US GAO, \textit{Fair Labor Standards Act} tab. 2 at 8.
\textsuperscript{49}US GAO, \textit{Fair Labor Standards Act} at 8-10. GAO averaged its high and low estimates to arrive at these absolute numbers of excluded workers. The GAO included in the service industries business and repair, personal, entertainment, and recreation, and professional and related services. \textit{Id.} at 9.
\textsuperscript{50}US GAO, \textit{Fair Labor Standards Act} at 1.
Using a somewhat different methodology and database, the DOL in 2001 derived somewhat lower estimates for 1999, which are displayed in Table 2.\(^{51}\) Although the DOL did not re-estimate disaggregated data for 1996, it did calculate that both the number and proportion of workers exempt from or not subject to the FLSA overtime provision rose from 1996 to 1999,\(^{52}\) and predicted that, given the forecast of continued rapid growth of professional specialty occupations, “the proportion of workers exempt from the FLSA” was likely to continue to increase.\(^{53}\) About three-fifths of the almost 40 million workers to whom the FLSA overtime provision did not apply were executive, administrative, and professional employees.\(^{54}\)

For 1999 for the first time, the DOL published data from the Current Popu-

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\(^{51}\) The main difference was that for 1999 the DOL used the Current Population Survey, which counts people only once, whereas for 1996 it had used the establishment-based Current Employment Statistics, which counted jobs. US DOL, WHD, Minimum Wage and Overtime Hours Under the Fair Labor Standards Act 33 (Jan. 2001). When asked whether the first data set was “simply wrong and useless and should not be cited,” Malcolm Cohen, who was responsible for devising and implementing the methodology for both reports, replied: “I don’t think we should call the earlier reports wrong. If we use them to measure persons covered it would be an incorrect use of the data.” Email from Marc Linder to Malcolm Cohen (Mar. 26, 2004); email from Malcolm Cohen to Marc Linder (Apr. 28, 2004). In its 2001 report, the WHD failed to identify its methodology at all, merely asserting that it “developed estimates by occupation of the percent of wage and salary persons exempt due to their status as an executive, administrator, or professional.” US DOL, WHD, Minimum Wage and Overtime Hours Under the Fair Labor Standards Act at 74 (Jan. 2001). When asked to open this black box, the person who had actually worked up the data for the report replied: “You are right there is no way to figure out the duties test from the CPS. What I did instead was to survey investigators and officials in DOL and ask them about percent exempt by occupation and combined this data with CPS data on percent working hourly.” Email from Malcolm Cohen, Employment Research Corp., to Marc Linder (Apr. 28, 2004). In 2004 the DOL admitted that “the CPS does not contain a variable that can be used to determine whether workers are...exempt or nonexempt” because none of the data variables it collects “either individually or in combination permit a precise mapping of a worker’s exempt or nonexempt status...because there is no information on the actual duties performed by a worker.” FR 69:22198 (Apr. 23, 2004).


lation Survey disaggregating the occupational structure of the excluded executive, administrative, and professional employees, as shown in Table 3. To be sure, the impression given by the data in Table 3 that administrative employees account for only 5 percent of all excluded white-collar workers is false: the category "administrative support" is misleading because, as the DOL itself cautions, the CPS "classifies most 'administrative' jobs in a category labeled 'management related.'"55 In fact, the CPS labels the category "Business and financial occupations," which includes wholesale and retail buyer, purchasing agents, claims adjusters, appraisers, examiners, investigators, compliance officers, cost estimators, human resource specialists, compliance officers, management analysts, accountants and auditors, appraisers, loan officers, and tax examiners and preparers.56 The DOL later admitted that its underlying methodology was "not designed to estimate the number of exempt workers for each...exemption (executive, administrative, or professional)..."57

A DOL-sponsored study estimated that in 1999 25,534,000 workers were "exempt" white-collar employees or 34.8 percent of all such employees. Of this number the executives, management-related and professional specialty employees, and computer programmers accounted for 21,205,000, who in turn accounted for 60 percent of the incumbents of these occupations; exempt supervisors accounted for 1,949,000 or 27 percent of all supervisors; other technicians and administrative support, and clerical workers accounted for only 677,000 excluded employees, who in turn made up only 3 percent of this group; salesworkers contributed 1,703,000 excluded workers, who accounted for 17 percent of all salesworkers.58

The Preliminary Regulatory Impact Analysis done for the DOL in connection with the George W. Bush administration’s proposed regulations estimated, using a similar methodology, that the total number of exempt white-collar workers in 2001 ranged from a minimum of 18.2 to a maximum of 21.4 million.59 This figure,
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however, omitted an additional 8,064,298 employees (physicians, lawyers, and teachers) who are not subject to the salary test. If this group is added to the aforementioned ranges, the total becomes 26.3 million to 29.5 million. Finally, the DOL’s own Regulatory Impact Analysis the following year estimated, using the same methodology, that in 2002 19,439,391 white-collar workers earning $155 or more per week and subject to the salary tests were exempt; adding the 7,554,250 who were not subject to the salary test brings the total to 26,993,641.

To be sure, all these data were all derived from guesses by “a group of experienced WHD employees” assembled in 1998 (for the GAO) to estimate ranges of probability that workers in 499 different occupations were exempt. How this staff based on its “expert judgment” and “collective experience” arrived at these probability ranges remains a black box. Those who applied this methodology neither contended that the WHD employees had in fact conducted investigations involving all 499 occupations nor stated how many employees performing each type of work they had ever investigated. John Fraser, the Deputy Wage and Hour Administrator from 1990-2000, shared this skepticism. The economist in the DOL’s Office of the Assistant Secretary for Policy who was in charge of working up the background data for the 2003-2004 regulatory revisions, when asked about the accuracy of this method, evasively replied that they were the best available.

Although these official DOL data on the number of excluded are huge enough in their own right, an alternative set of data suggests an even larger group of potentially excluded white-collar workers. In 1991, when DOL establishment surveys estimated that 19.1 percent of private non-farm employees worked in


60Telephone interview with and email from Frederick Rueter, CONSAD, Pittsburgh (June 22, 2004).

61FR 69:22201 (tab. 3-3), 22209 (tab. 3-7) (Apr. 23, 2004).


63According to the Deputy Assistant Secretary of Labor for Employment Standards, who had not been there in 1998, a group of three to twelve investigators and former investigators was convened (none of whom he believed still worked at the DOL); they discussed the various occupations orally. In response to a series of questions concerning the informants’ knowledgeableability he insisted that the probability ranges (0-10%, 10-50%, 50-90%, 90-100%) were so broad that lack of detailed familiarity with individual occupations would not have been fatal. Telephone interview with Dixon Mark Wilson, Washington, D.C. (Sept. 15, 2004).

64Telephone interview with John Fraser, South Otseelic, NY (July 14, 2004).

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nonproduction or supervisory jobs and the household survey estimated that 18.7 percent of the same universe were categorized as employed in managerial or supervisory occupations, the nationally representative Class Structure Survey, which asked participants whether they supervised others, whether their position was considered managerial or supervisory, and what kinds of authority they exercised over co-employees, found roughly twice as many: 38.9 percent (or 35 million) reported that they supervised the work of other employees or told others what work to do, while 36.3 percent identified their position as managerial or supervisory. In addition, 27.7 percent responded that they had the authority directly to discipline subordinates for poor work or misconduct. The magnitude of these alternative data is reinforced by the fact that they do not even encompass professional occupations, although 29.1 percent of professionals reported that they also exercised managerial or supervisory responsibilities.66

These alternative data are merely suggestive. But because the DOL data do not represent counts based on DOL investigations of how employers actually classified and paid their employees in terms of the FLSA overtime provisions, and because employers may in fact use the aforementioned indicia of managerial/supervisory responsibility to deny overtime pay to an even broader swath of employees, the alternative data set may capture an aspect of prevalence not reflected in the official data.67

66David Gordon, Fat and Mean: The Corporate Squeeze of Working Americans and the Myth of Managerial “Downsizing” 38-40 (1996). Gordon tabulated these data from the survey organized by the Comparative Project on Class Structure and conducted by the Survey Research Center of the University of California at Berkeley. Id. at 260 n. 19. According to James Smith, “Supervisory Duties and the National Compensation Survey.” CWC 5(1):9-20 (Spr. 2000), in 1997, 21 percent of full-time workers were first-, second, or third-line supervisors or team leaders.

67Assessment of the DOL’s white-collar overtime data constructed during the George W. Bush administration must take into account the Department’s dogmatic markets-know-best basic assumption that labor’s claim that “employers..., in the absence of government protections, commonly exploit workers by requiring them to work many hours of overtime without adequate or any compensation” can be valid “only...in labor markets...dominated by a single employer who has substantial monopsony power: the prototypical company town.” CONSAD Research Corp., “Final Report: Tasks and Analyses Performed in Support of Development of the Regulatory Impact Analysis of the Revised Rules for the Fair Labor Standards (FLSA) Regulations at 29 CFR 541” at 31 (May 14, 2004).
Table 1: Executive, Administrative, and Professional Employees Excluded from the FLSA Overtime Provision as % of All Employees, by Industry, 1996

<table>
<thead>
<tr>
<th>Industry</th>
<th>All employees (in 000s)</th>
<th>Excluded white-collar employees (in 000s)</th>
<th>Excluded white-collar employees as % of all employees</th>
</tr>
</thead>
<tbody>
<tr>
<td>All</td>
<td>122,359</td>
<td>31,729</td>
<td>26</td>
</tr>
<tr>
<td><strong>Private sector</strong></td>
<td>102,912</td>
<td>25,495</td>
<td>25</td>
</tr>
<tr>
<td>Agriculture/forestry/fishing</td>
<td>1,907</td>
<td>252</td>
<td>13</td>
</tr>
<tr>
<td>Mining</td>
<td>574</td>
<td>95</td>
<td>17</td>
</tr>
<tr>
<td>Construction</td>
<td>5,400</td>
<td>736</td>
<td>14</td>
</tr>
<tr>
<td>Manufacturing</td>
<td>18,457</td>
<td>3,230</td>
<td>18</td>
</tr>
<tr>
<td>Transportation/public utilities</td>
<td>6,261</td>
<td>1,413</td>
<td>23</td>
</tr>
<tr>
<td>Wholesale trade</td>
<td>6,483</td>
<td>1,580</td>
<td>24</td>
</tr>
<tr>
<td>Retail trade</td>
<td>21,625</td>
<td>3,049</td>
<td>14</td>
</tr>
<tr>
<td>Finance/insurance/real estate</td>
<td>6,899</td>
<td>2,706</td>
<td>39</td>
</tr>
<tr>
<td>Services</td>
<td>34,377</td>
<td>12,434</td>
<td>36</td>
</tr>
<tr>
<td>Private households</td>
<td>929</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td><strong>Public sector</strong></td>
<td>19,447</td>
<td>6,234</td>
<td>36</td>
</tr>
<tr>
<td>Federal govt.</td>
<td>2,757</td>
<td>1,233</td>
<td>45</td>
</tr>
<tr>
<td>State/local govt.</td>
<td>16,690</td>
<td>5,002</td>
<td>30</td>
</tr>
</tbody>
</table>

### Table 2: Executive, Administrative, and Professional Employees Excluded from the FLSA Overtime Provision as % of All Employees, by Industry, 1999

<table>
<thead>
<tr>
<th>Industry</th>
<th>All employees (in 000s)</th>
<th>Excluded white-collar employees (in 000s)</th>
<th>Excluded white-collar employees as % of all employees</th>
</tr>
</thead>
<tbody>
<tr>
<td>All</td>
<td>118,963</td>
<td>23,830</td>
<td>20</td>
</tr>
<tr>
<td><strong>Private sector</strong></td>
<td>100,025</td>
<td>16,860</td>
<td>17</td>
</tr>
<tr>
<td>Agriculture/forestry/fishing</td>
<td>1,754</td>
<td>92</td>
<td>5</td>
</tr>
<tr>
<td>Mining</td>
<td>531</td>
<td>119</td>
<td>22</td>
</tr>
<tr>
<td>Construction</td>
<td>6,230</td>
<td>546</td>
<td>9</td>
</tr>
<tr>
<td>Manufacturing</td>
<td>19,323</td>
<td>3,515</td>
<td>18</td>
</tr>
<tr>
<td>Transportation/public utilities</td>
<td>7,317</td>
<td>1,208</td>
<td>17</td>
</tr>
<tr>
<td>Wholesale trade</td>
<td>4,573</td>
<td>813</td>
<td>18</td>
</tr>
<tr>
<td>Retail trade</td>
<td>20,098</td>
<td>1,533</td>
<td>8</td>
</tr>
<tr>
<td>Finance/insurance/real estate</td>
<td>7,588</td>
<td>2,118</td>
<td>28</td>
</tr>
<tr>
<td>Services</td>
<td>31,675</td>
<td>6,911</td>
<td>22</td>
</tr>
<tr>
<td>Private households</td>
<td>938</td>
<td>6</td>
<td>1</td>
</tr>
<tr>
<td><strong>Public sector</strong></td>
<td>18,938</td>
<td>6,969</td>
<td>37</td>
</tr>
<tr>
<td>Federal government</td>
<td>3,264</td>
<td>840</td>
<td>26</td>
</tr>
<tr>
<td>State/local government</td>
<td>15,674</td>
<td>6,129</td>
<td>39</td>
</tr>
</tbody>
</table>

*Source: U.S. DOL, WHD, Minimum Wage and Overtime Hours Under the Fair Labor Standards Act, tab. 4 at 28 (Jan. 2001).*
Tab. 3: Executive, Administrative, and Professional Employees Excluded from the FLSA Overtime Provision, by Occupation, 1999 (000s)

<table>
<thead>
<tr>
<th>Occupation</th>
<th>Total wage and salary employment</th>
<th>Total excluded EAP</th>
<th>Excluded as % of all EAP in occupation</th>
<th>% of all excluded EAP</th>
</tr>
</thead>
<tbody>
<tr>
<td>Total</td>
<td>118,963</td>
<td>23,830</td>
<td></td>
<td>100</td>
</tr>
<tr>
<td>Executive</td>
<td>11,624</td>
<td>7,293</td>
<td>63</td>
<td>31</td>
</tr>
<tr>
<td>Management related</td>
<td>4,376</td>
<td>2,023</td>
<td>46</td>
<td>8</td>
</tr>
<tr>
<td>Professional specialties</td>
<td>18,693</td>
<td>11,598</td>
<td>62</td>
<td>49</td>
</tr>
<tr>
<td>Technicians</td>
<td>4,187</td>
<td>403</td>
<td>10</td>
<td>2</td>
</tr>
<tr>
<td>Sales</td>
<td>13,451</td>
<td>1,361</td>
<td>10</td>
<td>6</td>
</tr>
<tr>
<td>Administrative support</td>
<td>17,875</td>
<td>883</td>
<td>5</td>
<td>4</td>
</tr>
<tr>
<td>Other</td>
<td>48,757</td>
<td>268</td>
<td>1</td>
<td>1</td>
</tr>
</tbody>
</table>

An Introductory Illustration:  
The Joker in the Trinitarian Formula—  
What Are “Administrative” Employees and  
Why Are They Excluded?

No law is a good law which gets itself involved in procedure and formulae divorced from its goal.¹

The legislative history for the FLSA contains no explanation for the exemption.²

Embedded and operating in a policy vacuum, the Labor Department has continued the unbroken 66-year-old tradition of evading discussion of possible justification for the massive exclusions of white-collar workers. In the three-columned 191 pages of proposed regulatory revisions and background material that it published in the Federal Register in 2003 and 2004 the DOL barely offered any explanation at all. Worse still, in its technocratic zeal to revise its regulations, the Department has totally lost sight of any possible legislative intent underlying the overtime penalty-premium and any possible relationship between the technical rules it is tinkering with and Congress’s social-economic purposes. Consequently, instead of shaping the regulations in reliance on the purposes of the statute’s time-and-a-half requirement, the DOL has permitted the regulations to take on a life of their own divorced from the law. Thus, although Congress undeniably mandated the exclusion of employees “employed in a bona fide executive, administrative, [or] professional...capacity,”³ the Department of Labor has failed to show its own bona fides in excluding 30 million white-collar workers.

Why Are White-Collar Workers Excluded?

Mr. [Leo] Bernstein [United Wholesale and Warehouse Employees]: And you say that it is the intent of Congress to exclude some people or to exclude as many people as possible in the Wage Hour Law?

Mr. [J.] Rosenbluth [New York Dry Goods Association]: I don’t know that I am qualified to answer as to what the intent of Congress was.

Presiding Officer [Harold] Stein: I am glad to hear one witness who is modest enough to claim not to know the intent of Congress.4

In opposition to the analysis here, one former Labor Department attorney has argued: “The white collar exemption, like all FLSA exemptions, is contrary to the purposes of the FLSA. Hence to argue that the exemption makes no sense and is inconsistent with the purposes of the FLSA does not...get us very far in trying to define the scope of the exemption.”5 If the point were merely to measure that scope rather than abolish the exclusion altogether, that argument might, under certain circumstances, be well taken, but it is, nevertheless, not possible to gauge the scope of the white-collar exclusions without identifying the purposes of the overtime provision as well as of the exclusions. Thus, for example, if the purpose of the law were to spread employment,6 excluding occupations that experienced no unemployment would both make sense and be consistent with that purpose; similarly, if the purpose were to enable workers to make ends7 meet by requiring


5Email from James Leonard to Marc Linder (May 26, 2003).

6See, e.g., the congressional testimony of Jacob Potofsky, president of the Amalgamated Clothing Workers: “We are not looking for the overtime here as a source of income. Unlike some other industries where it is an entirely different situation, it is not relevant to us. What we are looking for is the overtime as a penalty so we can have wider employment.” Fair Labor Standards Amendments of 1971: Hearings Before the Subcommittee on Labor of the Committee on Labor and Public Welfare United States Senate on S. 1861 and S. 2259, Part 1, at 143 (92d Cong., 1st Sess., May 26-June 22, 1971).

7Such an alleged purpose, which stands the real objectives of overtime regulation on its head, swamped all others in the AFL-CIO/Democratic Party campaign against the Bush administration’s regulations in 2003-2004. Emblematic of the approach was presidential
their employers to pay them overtime premiums, then it would both make sense and be consistent with that purpose to exclude occupations that were so highly compensated that the workers in question were not subject to normal financial stresses.\footnote{In contrast, the foremost expert on the early workers compensation statutes argued: "Executive officers of a corporation...are ordinarily highly paid, are exposed to little risk of injury in the performance of their duties and are presumptively able to insure themselves against accidental death or disability. Yet the additional cost of including even executive officers in the compensation system is practically nil and the ground on which they are excluded is the archaic distinction between masters who issue orders and servants who obey them. There is no sufficient reason in economics or equity for denying compensation to a railway president or a bank director who should chance to be injured in the discharge of his official duties." E. Downey, \textit{Workmen's Compensation} 24 (1924).} If, however, the excluded workers exhibited the same relevant characteristics as the protected workers and including them would thus serve the statutory purposes, then excluding them would be irrational.\footnote{The authors of a study commissioned by the outgoing Clinton administration DOL rehearsed this incoherent mantra without asking themselves how a guaranteed salary and greater security and promotability could possibly protect excluded white-collar workers from the individual, let alone collective, consequences of overtime work: "The overtime premium is intended to: limit excessive hours worked by those already employed in order to increase employment opportunities for the unemployed and underemployed; provide a greater reward for employees required to work in excess of the normal work week; and, discourage employers from requiring employees to work long hours that might adversely affect health and safety. ... For the most part, the FLSA recognized that certain jobs should be exempt from the overtime provision. These occupations include executive, administrative, professional (EAP), and outside sales workers. The EAP occupations were not subject to the monetary requirements of the FLSA because these employees had a guaranteed salary, more job security, and a greater potential for promotion than did production workers. It was thought that these job characteristics would effectively compensate for removal of minimum wage and overtime protections." Malcolm Cohen and Donald Grimes, \textit{The "New Economy" and Its Impact on Executive, Administrative and Professional Exemptions to the Fair Labor Standards Act (FLSA)} (DOL, Jan. 2001), on http://www.dol.gov/asp/programs/flsa/report-neweconomy/main.htm.} 

In the real world of labor-protective legislative policy articulation, Congress does not typically announce publicly that it has decided to exclude some group of workers despite the fact that inclusion would benefit them; rather, Congress either

\textit{Introductory Illustration}
Introductory Illustration

asserts that the group would not benefit from the protection or, evading the harm it is inflicting, instead focuses on the benefit being bestowed on the employers. For example, the real reason for the exclusion of farmworkers from the minimum wage (now partially lifted) and overtime provisions of the FLSA was and is the congressional desire to benefit certain agricultural employers regardless of its impact on this most impoverished working-class stratum. Yet Congress would never admit this political rationale, which, to boot, was originally racially motivated, and has, instead, fabricated some more neutral or benign reasons.  

In the case of the exclusion of white-collar workers from the overtime provision, however, Congress never articulated any reason at all and the Department of Labor, the regulatory agency charged with administering the exclusion, has never even asserted that it has divined that unexplicated reason. Indeed, in 2004, it admitted, perhaps for the first time, that “the statute contains no definitions, guidance or instructions as to the[ ] meaning” of the three white-collar terms. And shortly after leaving office, Tammy McCutchen, the Wage and Hour Administrator who had overseen the Bush administration’s revisions, was able to deny that the “dearth of legislative history” had left her groping in the dark solely on the grounds that senior career officials in the agency had informed her of a regulatory history focused on work (such as a lawyer’s) that could not be standardized in terms of time and therefore could not be spread to absorb the unemployed. But when asked whether the DOL had ever conducted investigations to evaluate white-collar occupations with reference to this criterion or had extended coverage to occupations because it had empirically determined that such work could be spread, she conceded that on the policy level on which she had operated “that was not something I thought about.”

Indeed, several months before she released her proposed revisions, McCutchen had insisted even more baldly on abstaining from seeking guidance for regulatory revision from the statute’s purposes. At a Federalist Society panel discussion on the FLSA in November 2002, an audience participant asked whether work-spreading, which had been one of the Act’s major purposes, was still relevant: “And if that’s one of the fundamental underpinnings of the Act, which really isn’t


See below ch. 9.


even a consideration anymore [sic], doesn’t that call into question the need for the Act at all?” McCutchen replied that as WHA she would not “touch that one with a 10-foot pole” because her “job is to...interpret the law as it is currently....” Her persistent abstentionism—which left the audience and, no doubt, the WHA herself, totally in the dark as to what “the law” was currently or ever had been in terms of its purposes—could not obscure the fact that the DOL’s regulatory revision agenda was then and had always been untethered to any congressional intentions, which the agency had long since ceased to be concerned with deciphering.

To be sure, non-office-holding employer advocates at the Federalist Society convention were considerably less reticent to discuss the fate of work-sharing as an underlying purpose of the overtime provision. Annie White, labor counsel for the Senate Committee on Health, Education, Labor, and Pensions, was eager to “argue that there is one big premise that’s gone now.” And although she was “not saying ditch the whole thing,” she did allow as there had been “a major shift in...the reason we enacted the law in the first place” without, however, disclosing what the new reason was.14 In contrast, the Clinton administration WHA, Maria Echaveste, while agreeing that “[o]ne key premise has disappeared,” insisted that “families depending on overtime” had taken its place. Echaveste, however, failed to explain how a national system of overtime regulation that was based on inducing workers systematically to work more than 40 hours a week was worthy of its name. More realistic (and cynical) was the observation of William Kilberg, a former Solicitor of Labor whose corporate law career included representing big business on amending the FLSA before Congress. While agreeing that work-sharing was “pretty much gone” as a purpose, he stressed that “the reason it’s not gone is not because we’re not in a depression but because the cost of benefits is so high today that it would take much more than one and a half times a regular rate for an employer to have a disincentive to work individual employee [sic] overtime rather than hire another employee.”15 Unsurprisingly, the employers‘ advocate did not seek to resolve this dysfunctionality by proposing an increase in the penalty rate to double or triple time.

The DOL’s regulations, thus, are not underwritten by any express (or even hidden) policy since the DOL has as little conception of why it is doing what it is doing as the current (or perhaps even the enacting Seventy-Fifth) Congress or outside observers. Consequently, it is literally impossible to “define the scope of the exemption” rationally, not because the exclusion “makes no sense” or “is

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Introducing the Illustration

inconsistent with the purposes of the FLSA,” but because neither the legislature nor the agency has ever revealed a rationale for it.16 Furthermore, the real reason—presumably the banal congressional desire to save employers money—cannot function as a useful marker for defining the scope of the exclusion, especially against the interpretive judicial canon that exclusions from protective statutes must be construed narrowly, because, logically, such a goal could just as well have been formulated on behalf of the employers of blue-collar workers.

To be sure, scenarios are imaginable (albeit politically implausible) in which it might be possible to implement an exclusion without knowing its purpose. For example, if Congress had excluded all employees who “wear a white collar during their entire workday” or “are employed in an office,”17 defined in such a way as to eliminate vagueness and ambiguity, such an exclusion could perhaps be operationalized even though Congress had never disclosed any rationale and the Labor Department confined itself to issuing regulations that merely described the individual statutory words “white,” “collar,” “entire,” “workday,” and “office” in purely functional terms without any socio-economic reference points. Bizarrely, such an improbably literalist, virtually physicalist, approach differs hardly at all from what Congress and the DOL have actually done—in spite of the fact that Congress’s use of the modifier “bona fide” inescapably cries out for a nuanced socio-economic regulatory interpretation.18 It is the failure to provide such an

16In a rare admission by the DOL that Congress had failed to express its intent, the ESA stated: “The reason for including the executive, administrative and professional employees’ exemption in the Fair Labor Standards Act was not explicitly stated either during the hearings or in related Congressional records or reports.” U.S. ESA, Executive, Administrative and Professional Employees: A Study of Salaries and Hours of Work 3 (May 1977) (prepared by Robert Turner).

17The hearing officer at the crucial 1940 WHD hearings on the white-collar overtime regulations sarcastically asked an employers’ representative whether, in enforcing their proposal that all office workers be excluded, a WHD inspector would simply check to see whether the employees in question “sat behind a desk or office machine....” “1940 WHD Hearings Transcript” at 28 (June 3) (Harold Stein).

18Interestingly, Congress did not attach “bona fide” to “the capacity of an outside salesman,” suggesting perhaps that physical rather than socioeconomic definitional criteria were appropriate. Significantly, the WHD has also never adopted a salary requirement for this excluded category. At the first regulatory hearings in 1940, one company witness testified that outside salesmen should be exempt because management did not and should not control their hours. When a union representative asserted that “[i]f I can make any sense or meaning out of the meaning of that exemption,” it was that off premises an outside salesman’s hours were not subject to control, but that where in fact they were subject to control, imposing a standard workweek was desirable, another company witness insisted

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interpretive infrastructure that is irrational and "makes no sense" and for that very reason renders the attempt to define the scope of the exclusions hopelessly irrational. Indeed, the DOL’s approach may be regarded as incoherent formalism inasmuch as it labors under the "handicap[ ]" not of "relative indeterminacy of aim," but of total ignorance and disregard of the statutory purpose(s).

Admitting that Congress, when it enacted the Fair Labor Standards Act in 1938, offered no guidance as to how to identify those employees “employed in a bona fide executive, administrative, [or] professional...capacity” who were to be excluded, the Department in 2003 merely asserted that these exclusions “were premised on the belief” that such workers “typically earned salaries well above the minimum wage, and they were presumed to enjoy other compensatory privileges such as above average fringe benefits, greater job security and better opportunity for advancement, setting them apart from the nonexempt workers entitled to overtime pay.” Here the DOL overlooked the inconvenient fact that the one thing for which money, tenure, and promotion could not compensate white-collar employees was also the main function of hours regulation: the prevention of overwork and its physical, emotional, intellectual, and interpersonal consequences.

that even if “every true outside salesman is subject to control...Congress has still said that an outside salesman is to be exempt. It is the function of this hearing to determine how to define an outside salesman and not to determine whether they should be exempt or not.” Official Report of the Proceedings Before the Wage and Hour Division of the Department of Labor In the Matter of: Definition of “Executive, Administrative, Professional” Employees and “Outside Salesman” at 486-87 (Washington, D.C., April 15, 1940), in RG 155—Wage & Hour/Pub. Contracts Div. Location: 530, 47:9:3-4/Boxes 10-14 (statement of Richard Keck, Kraft Cheese Co.); id. at 765 (Apr. 16) (Joseph Kovner, CIO); id. at 765-66 (Apr. 16) (A. Gilbert, Best Foods, Inc.). Later, under questioning by the hearing officer about employees who work away from the office, a union official testified that although an industrial insurance “agent’s time can’t be clocked just as regularly as though he were employed in a store, still the companies have a very definite idea that they get from custom and practice of just how much time [he] is actually putting in on his job.” Id. at 522 (July 29) (testimony of Sidney Cohn, American Communications Association). Furthermore, the Teamsters Union testified that for years it had deliberately omitted hours limitations from collective bargaining agreements at the unanimous desire of its salesmen-members; hours limitation would adversely affect members’ interests without leading to hiring more men or giving them more work, and in any event “we don’t want to endanger a wage scale that has taken us 15 to 20 years to build up....” Moreover, it would lead to hiring some additional employees, but for the ones who would be hired the resulting business would be unsatisfactory. Id. at 579-80, 589 (quote) (Apr. 15) (statement of Daniel Carmell, Joint Council No. 25, IBT, Chicago).

The only other reason offered was that "the type of work they performed was difficult to standardize to any time frame"; as a result, because the hours they worked beyond 40 "could not be easily spread to other workers," the "potential job expansion" that the time-and-a-half premium was supposed to exert would not come into play.\(^{21}\)

As scanty and unexplained as these references to underlying congressional beliefs were, they played absolutely no part in the DOL’s further deliberations and the Department never cited them again, let alone used them, to support its proposed revisions. In particular, in estimating the costs that employers might incur in complying with the proposed regulations, the DOL surveyed five possible responses, but the one reaction it failed even to mention was the only one that Congress had in mind—hiring an additional worker.\(^{22}\) To be sure, in this regard the Bush administration differed not at all from any of its predecessors.

The fundamental question here is: Why should white-collar workers be made

\(^{21}\)FR 68:15560-97 at 15561 (Mar. 31, 2003). In its comments on the proposed regulatory revisions of 2003, the National Employment Law Project completely misunderstood the logic of the DOL’s argument in asserting that the “DOL itself admits that the type of work exempt employees perform could not be easily spread to other workers after 40 hours in a week.” The DOL’s claim was in no way an admission—which would have entailed that it somehow impaired the argument that the DOL was really trying to make—but a non-empirical assertion without which it would have been unable to justify the exclusion of white-collar workers from overtime regulation. The NELP’s misunderstanding presumably flowed from its curious claim that: “The purpose behind the exemptions is to permit higher-level employees paid on a salary basis and with duties and responsibilities associated with managerial or professional work to be compensated on a basis other than hourly.” NELP, “Comments on Proposed Rulemaking Re Executive, Professional and Administrative Exemption to FLSA Overtime, Submitted to U.S. Wage and Hour Administrator” at 10 (June 30, 2003).

\(^{22}\)FR 68:15576 (Mar. 31, 2003). The DOL was reporting the methodology used in its Preliminary Regulatory Impact Analysis: CONSAD Research Corporation, “Final Report: Economic Analysis of the Proposed and Alternative Rules for the Fair Labor Standards Act (FLSA) Regulations at 29 CFR 541: Prepared for: US Department of Labor Employment Standards Administration” at 42-44 (Feb. 10, 2003). In its commentary on the final rule published in 2004, the DOL, in defending itself against possible accusations that it had failed to accommodate small businesses sufficiently, did mention that one aspect of “a measure of maximum flexibility” that the FLSA provides to employers in complying with the Act was the possibility of responding to the new final rules by adhering to a 40-hour week and “spreading available work to more employees....” FR 69:22122-274 at 22238 (Apr. 23, 2004). But the DOL never specified that such an outcome was actually the purpose of the overtime provision, let alone used that purpose to guide its revisions.
to work long hours without premium (or any additional) pay? Incredibly as it may seem from the perspective of the monolithic anti-FLSA employer rhetoric of the twenty-first century, in 1941 even the magazine of the Chamber of Commerce of the United States, which conceded that “office workers in the lower exempted positions...have been subject to much exploitation in some companies,” found it “natural, therefore, that many exempt employees question the fairness of putting in unlimited overtime without extra compensation...” Secondarily, it is necessary to ask by what logic some white-collar workers (such as claims adjusters) with lower annual incomes than some manual workers (such as automobile or construction workers) are excluded from overtime regulation.

Why did Congress exclude bona fide executive, administrative, and professional employees but not, for example, bona fide skilled craftsmen? If the purpose of the overtime law is work-sharing, the blue- versus white-collar dichotomy is irrelevant as is the duties test; the only question is whether there are unemployed workers and whether the job in question lends itself to sharing. If the purpose is to protect workers’ health and/or welfare from long hours, there is also no relevant categorical distinction between blue- and white-collar workers; there are, to be sure, some manual jobs that are killers, but there are also millions of white-collar jobs that are at least as strenuous and debilitating as many blue collar

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23 The only person interviewed at the DOL who agreed that economically there was no reason to treat blue- and white-collar workers differently was, ironically, an economist in the Office of the Assistant Secretary for Policy who had been chiefly responsible for working up the background data for the revised regulations of 2003-2004 and who believed that the government had no business regulating minimum wages or overtime altogether because the market and unions could take care of them. Asked about the 90 percent of private-sector workers who were not in unions, he insisted that they did not want to be in unions. Economists’ ahistorical consciousness was nicely captured by his assertion that the origins of the white-collar exemptions went back to “old England,” where clergy, doctors, lawyers, and teachers were exempt from some labor laws that he could not identify. Telephone interview with Mario Distasio, Washington, D.C. (Aug. 16, 2004).

24 Edward Cowdrick, “When the Boss Works Late,” NB 29(5):17-19, 114-15 at 115, 19 (May 1941). On Cowdrick, who had written similar pieces as secretary of the big business Special Conference Committee, see below this chapter.

25 It was not this kind of arbitrariness that a management attorney had in mind in asserting that the FLSA is “essentially counterintuitive legislation,” in that lots of practices that are violations are not apparent to employers.... ‘Some employers wrongly believe that if “I’m paying someone $50,000 per year, they have to be exempt!” But maybe they are, and maybe they aren’t....’” Victoria Roberts, “Attorneys Explore Reasons for Surge in Wage and Hour Lawsuits, Offer Strategies,” USLW 71(24):2403-2405 at 2403-2304 (Dec. 24, 2002).
 jobs. In fact, why should highly paid executives not be protected from overwork as well? 

If, however, the purpose is to compensate workers for the extra wear and tear of overtime hours, then, while the duties test is still irrelevant, the regulatory salary threshold might not be. Would Congress and the Labor Department have created separate rules for white-collar workers if their salaries had about the same range and distribution as blue collar wages? 

If, in fact, regulators were concerned about overinclusiveness, that is, about the propriety of siphoning off profits into the pockets of employees so highly paid that no one regarded them as deserving additional time and a half compensation, why has the DOL knowingly set and kept the salary thresholds far below the wage level of millions of protected blue-collar workers?

The purposes traditionally advanced for the FLSA overtime law are: (1) reducing unemployment by redistributing hours of work from the currently overworked to the currently un(der)employed; (2) increasing workers’ leisure; (3) protecting workers’ physical and mental health; and (4) in those instances in which the overtime penalty fails to prevent the imposition of overtime work, compensating workers for the additional wear and tear of longer than standard hours. Do these rationales apply to highly paid executive, administrative, and professional employees? (1) applies, provided that (a) there is unemployment in such occupations; (b) those currently employed in them are working overtime; (c) the overtime penalty is sufficiently great to make it cheaper for employers to hire additional workers than to pay the premium to existing employees; and (d) each employer could employ more than one person in each such position and could therefore hire an additional worker and share the hours.

There was considerable unemployment in the 1930s among such occupations. Indeed, in what appears to have been the very first reported judicial opinion in the

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26But see Wilcox v. Niagara of Wisconsin Paper Corp., 965 F.2d 355, 368 (7th Cir. 1992) (Easterbrook, J., dissenting): “How does it ‘gravely’ violate the ‘paramount’ requirements of the public interest to tell an employee to do sedentary work in a clean office? ... So far OSHA has not thought it necessary to prescribe rules for stress that may cause heart trouble for desk-bound managers.”

27If it was ever the case in Europe, as claimed by Fritz Croner, Soziologie der Angestellten 267 (1962), that income dispersion among salaried employees was not greater than among wage workers, it is not in the United States.

28During one of the Senate floor debates in 2004 on an amendment to block implementation of the DOL’s new regulations, it at least occurred to Republican Senator Michael Enzi that unlike the white-collar groups, blue-collar workers faced no effective $100,000 limit on the amount of wages on which they were entitled to overtime pay, even if he failed to ask why the DOL treated them differently. CR 150:S4796 (May 4, 2004).
United States using the term “white collar” in its sociological sense, Judge Augustus Hand of the U.S. Second Circuit Court of Appeals at the nadir of the Depression in 1932 dismissed a challenge to a New York State statute that made employment agencies’ charges to employees contingent on success in securing them a job, thus vindicating the state’s protection even for unemployed lesser executives:

[I]t is obvious, as well as amply demonstrated, that employees (even of the “white collar” class of the present case), have a bargaining power in general far weaker than that of employers. They are often, as in these very times, in a desperately poor condition, ready to pay almost anything possible in the hope of securing employment. ...

It has been suggested that “clerical and executive workers” do not need any legislative protection and therefore cannot properly be included in section 186. This obviously is not true of “clerical workers,” and we have no reason to suppose that the term “executive workers” related to officials of railroads and industrial corporations, but rather to the numberless lesser “executive workers” who naturally seek employment through commercial agencies.

The annual report for the same year of the Special Conference Committee, a “clearing house...for information on labor relations” among eleven of the largest corporations in the United States, went much further, asserting that:

In this depression, probably to a greater extent than ever before, unemployment has struck indiscriminately at manual laborers and salaried employees. In some respects the plight of the “white collar” worker has been even more hopeless than that of his fellow-sufferer from the shop and his opportunities for restoration have been less.

Five years later, in October 1937, just as the FLSA bills were making their way

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29The few earlier uses identified by a search of the Westlaw and Lexis computerized databases involved literal references to clothing.


Introductory Illustration

through Congress, a survey report was issued to the Special Conference Committee on overtime work and compensation of salaried workers. The increasing attention that firms were devoting to salaried employees’ working conditions was in part due to “a growing realization that the efficiency, loyalty and morale of salaried workers are of vital importance to the present success and future leadership of industrial organizations.” Of central relevance here is that firms at this very time, contrary to the DOL’s subsequent undocumented claims in justification of the white-collar exclusions from the FLSA, were concerned about the convergence of blue- and white-collar working conditions:

Employers are coming to realize that the traditional differentials in favor of the salaried man have been diminishing. Today many wage-earners participate in vacations, sick leave with pay, pay for holidays, and dismissal compensation. In many industrial organizations promotion comes at least as readily to the hourly man as to the salaried employee, especially if the former has some background of technical training. Wages probably have risen father above pre-war levels than have salaries in the lower brackets. ... Even social distinctions are disappearing with the increased number of high-school and college graduates who voluntarily or under necessity have gone into manual labor. With this decline in class distinctions there has begun to grow up a community of interest between wage-earners and salaried employees. In some companies salaried workers have shown a desire for collective bargaining with employers, either through their own organizations or by use of the same agencies that serve the wage-earners.

With few exceptions, work-sharing was also possible, although perhaps not quite so easily as among mass-production workers. The work-sharing mechanism would, given the depression conditions, also have made more sense if the overtime

33E. S. Cowdrick, “Report to Clients, 1937” at 8 (Jan. 25, 1938), in Willis Harrington Papers, Accession 1813, Box, 28, Hagley Museum and Library. Cowdrick was the SCC’s secretary. Although Hagley archivists were unable to locate the separate survey report itself, Prof. Colin Gordon at the University of Iowa generously cut through the bureaucracy there to obtain a copy of the SCC annual report for 1937, which discussed the survey report. The excerpt quoted above appeared verbatim in an unsigned article in a management magazine that provided a few figures from what was presumably the survey. See below ch. 9.


35Deborah Malamud, “Engineering the Middle Classes: Class Line-Draw in the New Deal Hours Legislation,” Michigan LR 96(8):2212-2321, at 2315 (Aug. 1998), criticized the WHD for having failed in its early years to collect data on whether unemployment was a problem among executive, administrative, and professional employees. In fact, the widespread unemployment among them was a well-known fact and socioeconomic problem. See below ch. 12.
Moreover, unemployment among white-collar workers did not begin and end with the Great Depression. The post-World War II period has witnessed repeated large-scale corporate dismissals and a trend toward greater insecurity. For example, between 1947 and 1959 in the electrical manufacturing industry, which employed many professional employees, large military orders fluctuated and were often cancelled; consequently, many research and design employees working on prototypes lost their jobs, while large corporations began stockpiling engineers in anticipation of government contracts and then dismissing them when the contracts failed to materialize. Thus “lay-offs, which had previously been uncommon for salaried electrical workers, began to occur with alarming frequency after the war.” Furthermore, these post-World War II reductions in force were “often accompanied by speed-up efforts.”

As early as 1961, Chrysler Corporation made headlines by dismissing 7,000 white-collar workers, including engineers, clerical workers, and administrative and public relations employees as a cost-cutting measure—together with factory shutdowns—in response to overproduction of automobiles. This mass firing of 7,000 of the firm’s 36,000 white-collar employees from secretaries to high-ranking

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36 At a congressional hearing, the chief economist of the employer-funded Employment Policy Foundation, in addition to pointing out that in 1938, when the FLSA was enacted, the unemployment rate had been 19.1 percent, whereas in March 2004 it was only 5.7 percent, noted that the act had been envisioned as a way to encourage work-sharing. However, instead of concluding that work-sharing had therefore outlived its statutory purpose, he used his own personal situation to extol the lower rate of unemployment as giving “me power to make demands about...hours...that my grandfather in 1938 would have never attempted.” Assessing the Impact of the Labor Department’s Final Overtime Regulations on Workers and Employers: Hearing Before the Committee on Education and the Workforce House of Representatives (108th Cong., 2d Sess., Apr. 28, 2004) (prepared statement of Ronald Bird), on http://edworkforce.house.gov/hearings/108th/fc/overtime042804/bird.htm. Even in the implausible case that unemployment were eliminated (for highly paid white-collar workers), the other reasons for opposing overtime work would remain unaffected.

37 Referring to engineers and chemists, Herbert Northrup vastly understated the case: “It is possible that in times of economic stress companies may reduce or liquidate technical staffs....” Herbert Northrup, “Collective Bargaining by Professional Societies,” in Insights into Labor Issues 134-62, at 160-61 (Richard Lester and Joseph Shister eds. 1948).


executives helped lower its break-even point from 1,000,000 to 725,000 vehicles annually. Since the company's president claimed that the action did not impair efficiency, presumably the surviving employees had to work more.

That employers in general were operating on the basis of a convergence of white- and blue-collar work and workers was reflected two years later in a front-page article in the *Wall Street Journal*. Cutbacks reflected top management's growing conviction that white-collar payrolls had ballooned: since 1947, white-collar manufacturing employment had grown by 65 percent, while the production workforce had shrunk by 7 percent; consequently, the proportion of white-collar workers had risen from 25 to 35 percent. Although some analysts believed that the relentless growth of corporate bureaucracies had put more pressure on profit margins than the widely discussed increase in production costs, most firms focused on their assembly lines, in part, because they allegedly tended to regard all white-collar employees as part of management and thus immune from workforce reductions. A further impediment to mass discharges was lagging automation in administrative and technical areas. On the demand side, the proliferation of fringe benefits increased the need for personnel administration, while other white-collar functions that had sprung up or greatly expanded included market research, product planning, sales promotion, quality control, and operations research. Although by 1963 personnel cutbacks had not reversed the long-term growth in white-collar employment, the *Journal* speculated that if the trend continued, it could mean eventually that "a large body of jobless office workers will join the army of production workers idled by technological advances."41

Professional employees were subject to the same disemployment mechanisms. For example, *The New York Times* reported in 1972 that many engineers and other well-paid professionals "buffeted by massive layoffs in the aerospace industry...have swallowed their pride" and sought affiliation with labor unions. In particular, engineers, who only 10 years earlier had been "often a small elite group within a company..., now sometimes outnumber production workers in companies working on complex government projects. The engineers, jammed in huge rooms before long rows of drawing boards, are often laid off without benefits. Now it is becoming harder and harder for them to be convinced that they are closer to management than to the workers in the shops."42 This shakeout of engineers and

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41 Karr, "Firms Try to Reverse Trend to Ever-Larger Office, Technical Staffs."
42 Agis Salpukas, "Engineers Eying Help from Unions," *NYT*, May 1, 1972 (36:1). To be sure, the engineers "do not want to be assimilated with rank-and-file production workers." For example, as a condition of affiliating with the UAW, the National Engineers
other science-degree holders in military, space, and government financed research projects, according to a union official, made "these people suddenly feel very naked."43

Later, especially in the 1990s, mass firings of middle managers at large corporations became widespread.44 Referring in 1993 even to corporation counsel and senior executives, *U.S. News & World Report* noted: "So it goes for the men and women who were once the mandarins of American commerce. Their influential positions, their princely paychecks, their corner offices and their job security all crumpled under the weight of the 1990-91 recession. For the first time on record, white-collar workers have surpassed blue-collar workers in the nation's unemployment lines...."45 If, despite "down-sizing," the number of middle managers did not decline as a proportion of the workforce, the *Wall Street Journal* speculated that one reason might have been that often even more nonsupervisors were fired. In addition, white-collar employees, a growing proportion of the workforce, had historically been supervised by far more managers than their blue-collar counterparts.46

A sense of the growing relative employment insecurity for white-collar workers can be gleaned from BLS data on "displaced workers," that is, those who permanently lost jobs that they had held for three or more years because their plant or company closed down or moved, their positions or shifts were abolished, or there was insufficient work. Displacement rates for all workers 20 years and older declined from 3.9 percent in 1981-82 to 2.5 percent in 1997-98 and 1999-2000; in

and Professional Association wanted almost complete autonomy from the UAW executive board.


45David Hage, Linda Grant, and Jim Impoco, "White Collar Wasteland," *USNWR*, June 28, 1993, at 42. The number of white-collar unemployed did not exceed that of blue-collar unemployed, but the ratio of the former to the latter and of the unemployment rate of the former to that of the latter did increase sharply beginning with the Reagan depression of the early 1980s. *Economic Report of the President* 107-109 (1994).

manufacturing, the rates fell from 8.2 to 4.2 percent and then rose in 1999-2000 to 4.7 percent; for blue-collar workers the rates fell from 7.3 to 3.1 percent and then rose in 1999-2000 to 3.3 percent. The trend in displacement rates for white-collar workers is shown here in greater detail: 2.6 percent in 1981-82; 2.1 percent in 1983-84; 2.6 percent in 1985-86; 2.1 percent in 1987-88; 2.7 percent in 1989-90; 3.7 percent in 1991-92; 3.3 percent in 1993-94; 2.9 percent in 1995-96; and 2.4 percent in 1997-98 and 1999-2000. Administrative support and clerical workers' displacement rates rose from 2.5 percent in 1981-82 to 2.6 percent in 1999-2000, after having peaked at 3.9 percent in 1993-94. Among executive, administrative, and managerial employees, displacement rates rose from 2.5 percent in 1981-82 to a peak of 4.8 percent in 1991-92, before falling to 2.7 percent in 1999-2000. In the professional specialty occupations, in contrast, there was little variation, with the rate declining slightly from 1.7 percent in 1981-82 to 1.6 in 1999-2000, after having peaked at 2.4 percent in 1991-92. Overall, then, although white-collar workers continued to be less likely to lose their jobs, the gap in displacement rates "has narrowed considerably since the early 1980s."\(^{47}\)

The leisure and health rationales of (2) and (3) manifestly apply to all workers. With regard to (4), while it is unclear precisely how additional income is supposed to compensate even low-paid workers for excessive working hours (perhaps by enabling them to buy more intense leisure and means of recuperation), unless executive, administrative, and professional employees are already so highly paid that they could not possibly spend any more money to engage in such compensatory rehabilitation, this rationale should also apply to them, though perhaps to a lesser degree.\(^{48}\) However, even if their salaries did exceed this level, the overtime premium would still have to be examined from its mirror-image perspective as a penalty imposed on the employer—otherwise, the work-sharing mechanism embodied in (1) would not function appropriately. Thus even if white-collar employees with salaries in excess of some fixed level were deemed incapable of


\(^{48}\)The hypnotic disorientation that salary level exerts on judges was vividly on display in a case involving a pilot of a company airplane, in which even the dissenting judge who did not agree that the employer had proved that the employee was engaged in a learned profession, did agree with the majority that the pilot, whose monthly salary ranged from $1,700 to $2,081 and who cleaned and stocked the plane in addition to flying it, did "not need the protection of overtime wage rates" because commercial pilots "command such income as to make overtime rates virtually irrelevant apart from matters of ill will and spite...." Paul v. Petroleum Equipment Tools, Co., 708 F.2d 168, 169, 171, 174 (quote), 175 (5th Cir. 1983).
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using the overtime premium to make up for the fatigue linked to the overtime work, it would still have to be imposed on the employer and could be taxed away to fund the re-employment of the unemployed.49

If, then, all four purposes apply to high-salary white-collar employees, why did Congress choose to exclude them from overtime pay? Because they had so much control over their work that their employers could never be certain that their overtime hours were really necessary? Because their incomes and working conditions and status and privileges were so remote from those of covered workers that Congress simply deemed them as belonging to a different category or class for whom labor-protective regulation was not designed and was superfluous? If Congress assumed that they possessed enough bargaining power to prevent employers from forcing them to work long hours (without additional pay), would the fact itself that they did work long hours with no additional pay constitute sufficient proof that Congress’s assumption was incorrect and that not even these workers could be trusted to take care of their own long-run interests, let alone the interests of their unemployed co-occupationists whose re-employment they were thwarting by working excessively long hours? If legislators believed that managers and professionals had more flexibility when scheduling their hours and were therefore able to take more time off when business was slow, would they still have left them unprotected had they known that in reality employers expect such workers to work until the job is done, no matter how long it takes?50 If Congress, taking an undifferentiated view of management and professionals as a monolithic mass, simply could not conceive that these people who controlled the (and their own) workplace needed protection from their own actions or that, given their higher earnings and bargaining capacity, there was room for serious exploitation of them,51 what kind of empirical evidence would be required to refute the legislature’s implicit premises? And can the exclusion of administrative employees who fail to fit this idealized image of the autonomous self-managed employee be understood as anything but an add-on resulting from objections by these managers concerning their assistants?

Employers may defend separate rules on the basis that white-collar workers do not produce definable, countable output and supervisors cannot stand behind them and supervise or monitor their work.52 Consequently, so the defense goes, firms


50Email from Lee Ann Campbell, Labor Standards Officer, Whitehorse, Yukon Territory, to Marc Linder (May 9, 2003).

51Email from Larry Norton (May 30, 2003).

52A boss, as one reporter speculated, walking through a drafting department “has no
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pay them a handsome salary (to discourage them from shirking), they work as long as it takes to get the work done, and some days they may get done early and they can leave. But to make employers pay them overtime would be inappropriate because, since firms do not know how long it should take them to do the work, they could start loafing so that they could get paid for longer hours even though those additional hours are unnecessary. If, finally, government makes firms pay overtime premiums, then they may simply lower the base salaries so that it will all come out in the wash and the workers will wind up with the same amount per week.

Such an account exaggerates and distorts the work that the vast majority of white-collar workers perform: it might be true of a research physicist doing cutting-edge experiments or complex and creative pioneering thinking that his employer cannot monitor his work effort or measure his daily or weekly output, but he is very atypical. Most white-collar workers perform tasks that management has observed countless times before; consequently, if it does not prescribe how much time is to be spent on them, it has acquired a sense of how long the completion of

way of knowing whether a draftsman gazing out the window is thinking or merely day-dreaming. Sometimes white collar workers may look busy when they’re really accomplishing little of value.” Albert Karr, “Firms Try to Reverse Trend to Ever-Larger Office, Technical Staffs,” WSJ, Jan. 3, 1963 (1:6).

Employers of blue-collar workers have often made related complaints. For example, William Dunn, the executive director of the Associated General Contractors of America, testified at a 1971 Senate FLSA hearing that construction workers would not work and unions would not supply workers unless there was scheduled and guaranteed overtime: “[T]he good reasons the Congress had in mind back in 1938 for limiting overtime...because of the fatigue factors, were completely thrown out the window...when this overtime became an attraction; it became a reward; it became a benefit; and it certainly became inflationary. [I]f you really want to stamp out overtime, we should stamp out the premium in cases of labor shortages, and there would not be any overtime work. It is rather shocking, but what...what has been in the past considered a penalty...to spread the work, in times of labor shortages becomes just the opposite: It is a reward; it is more pay....” In responding, Senator Harrison Williams failed to understand that the fact that “more and more...people have two and three jobs” subverted Congress’s intent in imposing the overtime penalty in order to spread jobs. Fair Labor Standards Amendments of 1971: Hearings Before the Subcommittee on Labor of the Committee on Labor and Public Welfare United States Senate on S. 1861 and S. 2259, Part 1, at 215 (92d Cong., 1st Sess., May 26-June 22, 1971). Anthony Obadal, the manager of labor relations at the U.S. Chamber of Commerce testified that “workers...go on strike in order to get overtime.” When pressed by Williams, Obadal conceded: “I think you can finally get to the point where the penalty is so great you will eliminate overtime. Now, the question is...is that worthwhile in order to create more jobs?” Id. at 266, 268.
such discrete activities takes.54 Moreover, there is no obvious reason that most white-collar workers cannot stop work at 5 p.m. and start again the next morning—unless, the employer, by custom or command, has structured the work flow so that it really does take more than eight hours a day. As one bank executive, intent on avoiding liability for time-and-a-half pay, discovered shortly after the FLSA had gone into effect: "I find, that very often in order to save my secretary from having to stay as late in the afternoon as I am having to stay,...I will hold over some correspondence until the next morning to give her."55 If more than one person performs this work, the firm can relatively easily cut their hours and hire an extra worker. If only one person does and she works 50 hours a week, and it is not feasible to hire someone to work the other 10 hours, then, by the logic of work-sharing, the work presumably should be divided into two 25-hour jobs.

If the regulations are to be modified to bring them current with today’s workforce, then these exclusions must be narrowed to keep under protection the large group of white-collar workers who need their employers to be restrained, in frequency and volume, from requiring them to work more than forty hours. The question, in other words, is identifying which workers lack market-based protection from employers’ simply paying them a salary and working them as much as the labor market will bear.

Although Congress itself made this situation possible by requiring the exclusion of “bona fide” executive, administrative, and professional employees, going back to the pro-labor Roosevelt and Truman administrations, the DOL—which Congress directed to issue regulations defining these terms—has

54 As the Wage and Hour Administrator remarked in 1947 in response to employers’ demand to exclude from the FLSA all employees working away from supervision: “[A]n employer is not without resources for the protection of his interest.... Any experienced supervisor or employer who knows the business has a pretty good idea of how much work can be done in a given time, how many calls can be made, how many assignments can be completed.” “Supplemental Statement of the Administrator, Wage and Hour and Public Contracts Division, United States Department of Labor, on Proposed Amendments to the Fair Labor Standards Act,” in Minimum Wage Standards and Other Parts of the Fair Labor Standards Act of 1938: Hearings Before Subcommittee No. 4 of the Committee on Education and Labor House of Representatives, vol. 4:2594, 2628 (80th Cong., 1st Sess., Nov. 17-Dec. 17, 1947).

furnished the broad definitions excluding far more white collar workers than social-economic logic can justify.  

The first matter to resolve is the basis for the exclusion of the three categories in the statute. It might be easier to argue that the regulations initially made sense in accomplishing the purposes of the exclusions, but no longer do, but in fact Congress’s failure to furnish any guidance whatsoever as to the general purpose of the overtime provision, let alone of the white-collar exclusions, created a tenuous foundation for the Labor Department’s regulatory mission. Consequently, the DOL not only was compelled to grope in the dark, but also, unsurprisingly, wound up replicating the legislature’s failure to explain why it did what it did. Because neither Congress nor the Labor Department ever explained why any workers should be paid overtime premiums, let alone why some white-collar workers should not, both have made it impossible to create a rational basis for distinguishing the “bona fide” professional, executive, and administrative employees from the non-bona fide, who are then automatically protected. Articulation of a principled regulatory scheme has been further thwarted by the bizarre situation that in its 66-year stewardship of the regulations, the DOL has never even recognized, let alone acknowledged, this epistemological void in which it has been operating.

\[56\] See below chs. 13-14.

\[57\] The assertion by an attorney for the Communications Workers of America that the DOL’s proposed revised regulations constitute “an illegal seizure of legislative power,” “[b]ut the agency doesn’t explain why office workers are less deserving of a 40-hour workweek,” overlooks the fact that Congress itself failed to explain. Mark Wilson, “Overtime Rules: A Boon for Business, a Bust for Workers” (unpub. MS, n.d. [2003]).

\[58\] In response to this analysis, John Fraser, Acting Assistant Secretary for Employment Standards and Deputy Wage and Hour Administrator in the Clinton administration, remarked that the WHD was not acting blindly precisely because it had decades of regulations and interpretations on which it relied. This view may offer an accurate self-description of the subjective attitude of WHD officials caught up in their day-to-day regulatory activities, but it neither refutes nor is inconsistent with the argument that objectively the WHD is nevertheless formulating and interpreting regulations that have no demonstrable or rational relationship to any policy that Congress ever articulated. He also stated that it would be unprecedented for the executive branch to inform Congress that it did not understand what the legislature intended and request statutory guidance in lieu of continuing to exercise its own regulatory powers. Telephone interview (July 11, 2004).
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What Are “Administrative” Employees?

Misconception No. 1 is the office worker’s false sense of his individual importance to his employer. It is indeed remarkable what a job employers have been able to do in holding office workers at pitifully low rates and paying them through building up in their minds a false sense of importance. Title promotions have been used most effectively to lead the office worker to believe that he is advancing up the job ladder toward a rosy future.59

To illustrate the responsibility that the Department bears for this outcome, consider the thoroughly typical case of a so-called administrative employee, whom the Wage and Hour Administrator in 1949 vacuously characterized as a “‘white collar’” worker who exercises discretion and independent judgment in his work.60 Unlike the situation with the two other constituents of the trinitarian formula—executive and professional excludees—identifying what an administrative employee is and does has to confront a lexicographic confusion.61 A layperson might be excused for imagining an executive excluded from overtime payment as the big boss62 with a colossal million-dollar income who comes and goes as he pleases, and a professional as a research physicist whose first thought upon awakening and last thought on going to sleep each day is some puzzle thrown up by his current project, and who, after years, still cannot believe that he actually gets paid (and well) for doing what he loves to do seven days a week without ever looking at the clock—limiting his hours would torture him and paying him extra for hours beyond 40 would no more serve a purpose than paying a child to play.63

61One court found the meaning even of the underlying term “administration” to be “elusive.” Bothell v. Phase Metrics, Inc., 299 F.3d 1120, 1126 (9th Cir. 2002).
62William Whyte, The Organization Man 143 (1956), arbitrarily defined executives as corporation men who were either presidents, vice presidents, or those in middle management who had so demonstrably gone ahead of their contemporaries as to indicate that they were likely to keep going.
63An example that purportedly fit this model was certain engineers in the aircraft industry, in which many managers believed that overtime pay had adversely affected engineers’ attitude toward work and company, one consequence of which was a reduced inclination to work so-called casual or volunteered, i.e., unpaid overtime. This
Although the DOL’s definitions are vastly more sweeping, these layperson’s associations nevertheless form the most plausible and fundamental core of these two categories.

Significantly, this strict model did not sit well with unionized professional employees in the mid-1950s, when the National Industrial Conference Board, a big business organization, published a report on unionization among engineers at a time when the federal government’s guided-missile and atomic programs and aircraft production “demand[ed] a fantastic number of professional engineers” far in excess of their annual production and supply, thus making overtime work and pay issues of intense interest to labor and capital. In his contribution on the causes of unionization, the president of the American Federation of Technical Engineers, AFL-CIO, Russell Stephens explained that engineers were no Einstein disinclination apparently applied less to the “more creative groups, such as the preliminary design and advanced electronics sections” in aircraft firms: “Here the engineer (often a scientist) has his own project with which he becomes identified; he sees immediately the consequences of not continuing to work overtime on his particular problem or project when it becomes necessary.” Richard Walton, *The Impact of the Professional Engineering Union: A Study of Collective Bargaining Among Engineers and Scientists and Its Significance for Management* 79 and 79 n.2 (1961). That such engineers’ drive to keep working may be more commercially than intellectually determined is suggested by an engineering manager’s admission that “it is sometimes an advantage to provide adequate incentives to work overtime. ... ‘If a guy finally gets a fix on a solution on Friday, it definitely is in the company’s interest for him to work straight through Saturday and Sunday if he likes. It’s certainly worth more to the company than the premium incurred. And if there were no premium involved, he might wait until Monday.’” Id. at 76-77. In sharp contrast, there is no ambiguity whatever in dismissing the model’s applicability to commercial radio station program directors, whom the National Association of Broadcasters tried to exclude from coverage on the grounds that they might spend all their waking hours thinking and “[e]ven if the station could afford to pay him overtime, there would be no way to calculate his working time. ... They are idea men. And creative endeavor just cannot be turned on at nine and off at five.” Official Report of the Proceedings Before the Wage and Hour Division of the Department of Labor In the Matter of a Hearing on Proposed Amendments to Part 541 of Regulations with respect to the Definition of the Terms “Executive, Administrative, Professional...Outside Salesman” as They Affect Employees in the Publication, Communication, Public Utility, Transportation, and Miscellaneous Industries at 102 (Washington, D.C., July 25, 1940), in RG 155--Wage & Hour/Pub. Contracts Div. Location: 530, 47:9:3-4/Boxes 10-14 (Joseph Miller, labor relations director, National Association of Broadcasters).

Some will argue that the work day or work week of the engineer and other professionals should not be fixed. Others will argue that the engineer’s interest in his work is such that he takes pleasure in remaining at his desk or laboratory long after the normal work day has been completed, as his interest is such that he just cannot tear himself away from an interesting problem. He is expected to serve longer than the standard eight-hour day without additional compensation. The wage and hour law reflects the attitude of the business interests in its exclusion of professionals from the coverage of the act in the exemption clauses. These exemptions were the result of big business lobbying in a successful attempt to exploit the professional by driving him to do as much work as possible with the minimum possible compensation. Engineering today is far different than it was in our fathers’ and grandfathers’ time. In the days when there were one or two engineers employed in a large plant, the engineer was in fact a bona fide part of management. His individual decisions were respected and carried out. He had freedom to come and go as he pleased. He was truly a professional consultant on engineering problems. Today, the scene has changed. The advent of mass production has made the engineering and design unit of a plant a cog in the production facilities of that plant. The engineer is part of the work force, the same as the machinist, sheet metal worker, or other highly skilled craftsman. In most instances, he punches a time clock on arrival at his office and when leaving. Why then should he not receive compensation for extra hours as do his fellow employees working in the skilled trades? In all our bargaining we are very emphatic about premium pay provisions for overtime and, in many instances, have provided our members with this form of security, which they never had before.65

Attentive to one purpose of the FLSA overtime provision, Stephens added that “I have known of many instances in which employees have been laid off while others have worked overtime. In such instances, our union committees sit with management committees and establish a shorter work week for all in order to prevent the unfair feast and famine.”66 Most engineers’ collective bargaining agreements did provide that when employers “directed” FLSA-exempt engineers to work overtime, they were required to pay time and a half up to a certain salary level; beyond that point firms had to pay on a sliding scale. However, such contracts also usually specified that FLSA-exempt engineers “will not receive overtime payment for work they do of their own volition after hours.” For example, one such agreement provided: “Exempt employees are expected to work

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additional time over and above the regular workday or workweek at their own discretion and of their own choice, without their being directed to do so by the employer. Such work shall be termed 'nondirected overtime' and the employee shall not be compensated therefor, nor receive credit toward the forty hours which must be worked before an employee becomes eligible for overtime payments."

So inveterate was this contrivance that even where contracts provided for overtime pay for "directed" overtime: "In practice management would require overtime on a regular basis for as much as six weeks without paying extra compensation before they determined that an extended work week should be "scheduled."" 

Regardless of the reality content of the aforementioned idealized models of the executive and professional employees who might have no need for overtime protection, a bona fide or genuine "administrative employee" fails to conjure up any concrete image at all of a class of workers, regulation of whose working time would be manifestly unnecessary if not inappropriate. (The lack of a rationale for this exclusion should trigger its narrowest possible reading, because, absent any evidence that Congress meant it to be read any way at all, there can, a fortiori, be no evidence that Congress meant it to be read more broadly). Little wonder, then, that the DOL itself concedes that the "duties test for administrative employees is the most difficult to apply" and the "administrative exemption is the most challenging...to define...." An organization of the senior human resources officers of the largest private employers in the United States has tried to explain this "difficulty [as] deriv[ing] from the fact that the exemption is designed to cover employees who do not manage people or belong to a profession." What it failed

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67 Bambrick, Blum, and Zagat, *Unionization Among American Engineers* at 21-22. A typical contract from 1958 provided for time and a half pay on salaries up to $570 a month, sliding-scale payments down to straight time on salaries between $570 and $1,106 a month, additional compensation on a diminishing scale on salaries between $1,106 and $1,400 a month, and no overtime pay on higher salaries. Walton, *The Impact of the Professional Engineering Union* at 75. This system was similar to that adopted for federal employees. See below chs. 19-20. The refusal to pay for overtime work that was "expected" of engineers but that was not "directed" was identical to the defense mounted by the U.S. Department of Justice for failing to pay its attorneys for overtime work in the 1990s. See below ch. 20.

68 Walton, *The Impact of the Professional Engineering Union* at 75.

69 Similarly, when the DOL stated that an "employee's job duties must primarily involve managerial, administrative or professional skills," unlike the first and last, the notion of "administrative...skills" is fuzzy at best. *FR* 68:15560.

70 *FR* 68:15566.

71 *FR* 68:15567.

72 "LPA's [HR Policy Association's] Comments on Proposed Rule Defining and
to explain in its 63 pages of comments on the DOL's proposed revised rules is why its members should be legally empowered to require non-professional non-bosses to work unlimited overtime without additional compensation. A FLSA treatise for employers was presumably expressing the same frustration in making the vast understatement that the administrative exemption is "the least definitive." 73

In 1940, when investigators of the U.S. Women's Bureau, in the course of doing a study of office work in various cities, 74 asked officials in various firms in Los Angeles to define executive and administrative employees in their organizations: "Very few made a clear distinction between the terms administrative and executive; department heads, superintendents, auditors, controllers, are considered either or both." 75 In Houston, firms listed general manager, office manager, department head, production manager, other supervisor, executive secretary, chief clerk, administrative officer, cashier, and comptroller as administrative and executive. 76

More than four decades later, two sociologists conducting empirical research in Britain also concluded that "the boundary between 'clerical' and 'administrative' work was in practice very difficult to define—even though all three of the organisations we studied had formal grade structures in which the distinction between 'clerical' and 'administrative' grades was explicit." At one workplace the chief personnel officer said: "'If you sit and process bills then you're a clerk; if you write letters, or service a small committee, that's administration.'" The researchers found that the general category of administration and management included effective controllers and decision takers as well as relatively subordinate employees and that many in the administrative and managerial grades performed much the same work as their subordinates. 77

The beclouded judicial mind-set is well-represented by the confusion of a

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74 US Women's Bureau, Office Work and Office Workers in 1940 (Bull. No. 188, 1942).
75 US Women's Bureau, Office Work in Los Angeles: 1940, at 14 (Bull. No. 188-2, 1942). Wilbert Moore, Industrial Relations and the Social Order 101, 135-36 (rev. ed. 1957 [1946]), equated executives with top management, but used "junior executive" and "junior administrator" (which belonged to middle management) interchangeably.
76 US Women's Bureau, Office Work in Houston: 1940, at 10 (Bull. No. 188-1, 1942).
federal district court judge in 1947 who, after opining that the executive and administrative categories “are somewhat synonymous and of necessity do overlap,”78 had no qualms about characterizing as having met the “requirements as an administrative officer” and thus not entitled to overtime wages one Lewine, who had “an exceptional talent of being able to judge meat products independent of grades and to pick out for the most finicky customers of Armour and Company....” Because Lewine had a “rather intimate and close acquaintance with, and knowledge of, the tastes and desires of the various customers...the practice...evolved...that [sic] Lewine himself goes into the cooler and applies his general background of knowledge and skill....” Based on this view, the judge jumped to the conclusion that Lewine was performing “responsible, non-manual work directly related to management policies or general business operation along specialized and technical lines requiring special training, experience and knowledge,” and was therefore an exempt administrative employee.79 To ask why a worker whose job it was to walk into and out of a meat cooler hauling slabs of beef all day long should be required to work more than 40 hours without even being paid time and a half did not occur to the judge, who merely “regret[ted]” that he could not “take the time out from the press of general running business to...write a comprehensive opinion....”80

The same underlying vagueness prompted a UAW representative at a 1957 AFL-CIO conference on white-collar workers to “point[ ] out that administrative rulings...under...the Fair Labor Standards Act have plagued [sic] the white-collar worker. The Wage and Hour Administrator...has the authority to exempt employers from paying overtime to white-collar workers who earn from $75 to $100 weekly on the grounds that these are ‘administrative’ employees.” He “urged that legislative action be taken to close this loophole in the law because ‘we in the white-collar field have found this to be a very serious problem, especially in the organized plants where employees are put on the administrative payrolls to avoid payment of overtime.’” 81 (Oddly, almost a half-century later, the AFL-CIO website on overtime pay rights fails even to mention the exclusion of administrative—as distinguished from executive and professional—employees, which is

80Walling v. Armour and Co. at 71,399.
presumably the exclusion of greatest significance to union members or potential union members.)82

Indeed, the very notion of a bona fide administrative employee is odd: while it is easy to understand why an employer would like to convince the DOL that a non-executive or non-professional qualifies as an executive—mislabeling workers "executives" not entitled to overtime is particularly widespread in retail and service establishments such as grocery and convenience stores and fast-food restaurants83—or professional, an administrative employee, in common parlance, embraces such a huge universe of run-of-the mill clerical employees that it challenges the imagination to name any white-collar occupation so lowly that it would not even rise to the level of genuine administrative employment.84 (Little wonder that,

82"The federal Fair Labor Standards Act requires that employees, unless specifically exempted—such as managers, certain sales employees and professionals—must be paid overtime if they work more than 40 hours in a week." AFL-CIO, "Denied Paid Overtime," on http://www.aflcio.org/youijobeconomy/rights/rightsatwork/overtime.cfm; visited Sept. 8, 2003.


84At the key 1940 hearings, Dr. Lazare Teper of the ILGWU asked the representative of the Southern States Industrial Council, J. H. Ballew, how a file clerk could be a bona fide administrative employee:

Mr. Ballew: Our idea with reference to that is by the use of the term administrative
according to a former Wage and Hour Division district office director, "[m]any small- and medium-sized employers still erroneously believe that the 'administrative' exemption automatically applies to their payroll clerk, accounts payable/receivable employee, customer service representative, and many other traditional office positions.")85 And yet the DOL has insisted that "'bona fide administrative' employees...are frequently on a higher economic level than...even 'bona fide executives'...."86

Under the rubric "Office and administrative support occupations," the Labor Department's own Occupational Outlook Handbook groups numerous occupations, such as date entry and information processing workers, bill and account collectors, billing clerks, bookkeeping, accounting and auditing clerks, payroll clerks, tellers, customer service representatives, file clerks, hotel clerks, library assistants, receptionists, reservation and transportation ticket agents, freight agents, couriers and messengers, dispatchers, meter readers, shipping, receiving and stock clerks, office clerks, postal service workers, secretaries, and administrative assistants87 that seem as deserving of regulation and protection as any blue-collar occupations. To be sure, the Occupational Outlook Handbook also includes an entry for "Administrative services managers" classed under "management and business and financial operations managers,"88 but these employees might just as appropriately be assigned to the category of executive employees. The only hint of administrative loftiness that the Occupational Outlook Handbook offers is an

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Congress clearly meant that the employees engaged in the administration of the business, not manual employees but employees - in other words, the so-called white collar workers. ... And upon that theory I say that file clerk is well within that scope.

Dr. Teper: Why do you think Congress inserted the term "bona fide" in there?

Mr. Ballew: Well, I don't know unless they thought probably some of the employers might list a person as a stenographer when as a matter of fact he was operating the spindle or something of that kind. And they didn't want them to get away with that.

“1940 WHD Hearings Transcript” at 94-96 (Apr. 10).


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entry in the index referring readers for “Administrators” to “Top executives.”

This usage appears to be a distorted terminological remnant of the classification plan for the federal civil service proposed in 1920 by the Congressional Joint Commission on Reclassification of Salaries, which embraced 14 services of clerical, office, or commercial work, of which the first was “the administrative and supervisory clerical service.” The commission used “administrative” not in the broad sense of encompassing all those employed in administration, but in the much narrower sense including only those who were “administrators”: “This service includes classes of positions, the duties of which are to supervise or to administer classes of positions which fall in two or more independent clerical services, or which fall in both clerical and other services, but which do not, for their supervision or administration, require specialized, professional, or scientific knowledge.” Thus, for example, the classes of junior clerical administrator, principal clerical administrator, head clerical administrator, and chief clerical administrator had as part of their duties “administrative supervision” of clerical employees.

Similarly, the same usage was prominently on display in 1921 when President Harding issued an executive order on uniform efficiency ratings. He directed the Bureau of Efficiency to prescribe a system for rating the efficiency of employees in the classified service of the federal government in the District of Columbia: standard ratings first had to be established for “employees engaged in clerical or routine work, such as clerks, stenographers, bookkeepers, messengers, and skilled laborers”; then special ratings had to be installed for “employees engaged in professional, scientific, technical, administrative, or executive work, or any other work involving for the most part original or constructive effort.”

Further contemporaneous light is cast on the meaning that Congress attached to “administrative” by the legislature’s deliberations in 1925 to stop, for reasons of cost, publication of the Official Register of the United States, which since early in the nineteenth century had listed all federal employees in what over time became

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91Report of the Congressional Joint Commission on Reclassification of Salaries, Part II at 5.
93Executive Order No. 3567, §§ 4 and 6 (October 24, 1921).
a huge tome. When some members of Congress complained, a compromise was reached: Representative Albert Johnson suggested that all that the members needed was a much smaller publication showing "the principal Federal officials. ... It will be a catalogue of Federal appointive officers in the United States, while as it is now it is a general directory of Federal employees." The language that he proposed was then included in a statute: "a full and complete list of all persons occupying administrative and supervisory positions in each administrative and judicial department..." Congress used virtually identical language in 1935 when it amended the statute, and until the publication was discontinued in 1959, even its subtitle tracked the statutory language: *Persons Occupying Administrative and Supervisory Positions in the Legislative, Executive, and Judicial Branches of the Federal Government, and in the District of Columbia Government.* In 1938, the year in which Congress enacted the FLSA, the *Official Register* listed, for example, 130 employees of the DOL (including Labor Secretary Frances Perkins). The two lowest-paid employees, with salaries of $3,200, were the legal editor and chief of the labor law information division of the Bureau of Labor Statistics and an industrial supervisor in the Women's Bureau. These positions reveal, as do many others (such as the Solicitor of Labor) that "administrative" encompassed employees in the Professional and Scientific Service as well, but did not in any event include clerical workers.

Even more revelatory of the federal civil service's synonymous use in the 1930s of "administrative" and "executive" was the encyclopedic survey of job descriptions issued by the Personnel Classification Board. Thus an executive chief attorney was the "responsible administrative and professional head of a large group

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95 *CR* 66:5022 (Feb. 28, 1925).
98 *Official Register of the United States, 1938: Persons Occupying Administrative and Supervisory Positions in the Legislative, Executive, and Judicial Branches of the Federal Government, and in the District of Columbia Government* 145-47 (1938). In 1959, the *Official Register*'s last year of publication, when the size of the DOL staff had increased enormously, the employees with the lowest salary ($7,030) included the chief of the division of office services in the Office of the Administrative Assistant Secretary within the Office of the Secretary of Labor. *Official Register of the United States, 1959: Persons Occupying Administrative and Supervisory Positions in the Legislative, Executive, and Judicial Branches of the Federal Government, and in the District of Columbia Government as of May 1, 1959,* at 525-38 (1959).
of attorneys...."99 An executive officer served as Governor of Alaska "with full responsibility for the success or failure of his administration...."100 A senior executive officer with sole responsibility for the success or failure of his administration served as chief executive of the Territory of Hawaii or of the Panama Canal; as Governor of the Panama Canal he was "to exercise complete executive and administrative authority...over the Panama Canal and the Canal Zone."101 A senior administrative officer as the chief clerk of the executive department of the Panama Canal supervised the operation of the executive office of the Panama Canal or had "general supervision of the office personnel, assuming responsibility for the coordination of the work, the activities and efficiency of employees, and the maintenance of proper discipline...."102 Finally, a senior administrative assistant exercised "general supervision of the clerical personnel in a district headquarters office," had "full responsible charge for all matters pertaining to personnel," or supervised and directed the general business operation of a moderately large and important field office with difficult problems of administration, laying out and planning the work of subordinates.103

By a semantic quirk, whereas generally and straightforwardly executive employees are called executives and professional employees are called professionals, only relatively few administrative employees are administrators.104 Taking advantage of—or, perhaps, misled by—this semantic overlap in the higher reaches

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100PCB, Field Survey Division, Preliminary Class Specifications of Positions in the Field Service at 598.
101PCB, Field Survey Division, Preliminary Class Specifications of Positions in the Field Service at 599.
102PCB, Field Survey Division, Preliminary Class Specifications of Positions in the Field Service at 581-83.
103PCB, Field Survey Division, Preliminary Class Specifications of Positions in the Field Service at 560-61. To be sure, in the alternative, a senior administrative assistant could individually "perform highly difficult and responsible general clerical work or specialized clerical work not otherwise specifically classified...." Id. at 561.
104 Unencumbered by any sense of the vast difference between these two terms, a pro-employer policy organization used them interchangeably. Employment Policy Foundation, "An Economic Primer to White Collar Reform," at 2-3, in Backgrounder (May 21, 2003), on http://www.wpf.org. Surprisingly, Deborah Malamud, “Engineering the Middle Classes: Class Line-Drawing in the New Deal Hours Legislation,” Michigan LR 96(8):2212-2321 at 2308, 2315 (Aug. 1998), even imputed the use of “administrator” to the author of the WHD’s seminal Stein Report, although he did not conflate them and she did. See below ch. 13.
between administrators and executives, the Communications Workers of America has posted on the World Wide Web an account purporting to be the real legal history of the exclusion of administrative employees, virtually every empirical claim of which is invented out of whole cloth:

Congress stated that top managers of a business could be excluded from overtime pay. This included the "administrator" of the business as well as "executives." An "administrator" was defined as a principal manager who doesn't necessarily supervise other workers, and an "executive" is a principal manager who does supervise workers. Low-level supervisors and others who perform paperwork or other office work functions were never considered for exemption. The regulations were written so that the vast majority of workers would have overtime pay rights. The FLSA also allowed "professionals" to be excluded from overtime pay. The "professions" included only doctors, lawyers, and ministers.

The dividing line between exempt managers/professionals and non-exempt regular workers was intended to be quite clear. The general presumption is that all workers should get overtime pay and have their 40-hour week protected. The salary test for exemption was supposed to ensure that only the most highly paid executives would be denied overtime protections. In 1940, 1949, and 1958, the salary tests were set so high that only the top 10 percent of salaried employees would meet the test. The lower 90 percent of workers would be guaranteed to receive overtime pay. Now, the DOL claims only the lowest 10 percent of workers should be protected.105

By the same token, Congress's use of the term "administrative" must be given some meaning. To be sure, it is possible that Congress used it instead of "administrator" simply because the syntax of the statutory provision required an adjective, in parallel to "executive" and "professional," and "administrative" had not then, and has still not today, been substantivized into a noun, as had the adjectives "executive" and "professional." In other words, perhaps "administrative" really did stand for the loftier "administrator" rather than the much more plebeian "administrative employee." This speculation is strengthened by its placement

105Mark Wilson, "Fair Labor Standards Act: History and Rights," on http://www.newsguild.org/overtimelfla.htm; undated ca. July 2003; visited 9-8-2003. For an uncommon judicial use of "administrator" instead of "administrative employee," see Dalheim v. KDFW-TV, 918 F.2d 1220, 1229-30 (5th Cir. 1990). Although the GAO in its important report on white-collar overtime regulation once used "administrator," in another passage it revealingly deprived the category of "administrative" employees of any independent significance at all by stating that white-collar tests include showing that salary indicates "managerial or professional status" and that "the employee's job duties and responsibilities must involves managerial or professional skills...." GAO, Fair Labor Standards Act: White-Collar Exemptions in the Modern Work Place at 5, 2.
Introductory Illustration

between the elevated categories of "executive" and "professional": if, for example, Congress had substituted "clerical" for "administrative," sandwiched between "executive" and "professional," it could have been perceived linguistically and socio-economically as out of its element.

A Case in Point: Customer Service Claims Adjuster

Industrial insurance agents are often told by their employers that they are "professional." They are from the point of view of income which often is $6,000 to $8,000 yearly. Yet large numbers of these agents have joined unions. What is the reason? These men work on a commission basis and are under constant management pressure to "produce." 106

Dorothy Haywood worked for 30 years for North American Van Lines at its headquarters in Fort Wayne, Indiana. 107 As a customer service claims adjuster in the mid-1990s she worked on average 45-50 hours a week and four Saturdays per year without any overtime pay for the princely annual salary of $28,000. 108 (It is indicative of judicial insensitivity to the human dimensions of compulsory overtime work that judges often write their decisions in such an abstract and mechanistic way that in the course of their forced march through the regulations they not only fail to reflect on the exclusion's underlying purpose, but do not even bother to mention how much overtime the plaintiffs worked.) 109 According to the Labor Department, claims adjusters' "most important role is acting as intermediaries with the public." In the insurance industry, many firms "are downsizing their claims staff in an effort to contain costs. Larger companies are relying more on customer service representatives in call centers to handle the recording of the necessary details of the claim, allowing adjusters to spend more of their time investigating claims." Median annual earnings in 2000 were $41,080. 110

107 Telephone interview with Dorothy Haywood, Kimmell, IN (Apr. 21, 2003).
110 US BLS, Occupational Outlook Handbook: 2002-03 Edition, at 32, 34. Amusingly, at the key 1940 hearings, bankers and stockbrokers sought to persuade the
nificantly, the DOL classifies claims adjusters as performing “miscellaneous clerical” work.\textsuperscript{111}

When Haywood sued for back pay, the judges, as always in such suits, failed to consider the underlying policy issue of whether Congress meant to deprive such employees of otherwise mandatory premium wages.\textsuperscript{112} The only instances in which judges have been prompted to examine policy issues have been the few cases in which defendant-employers, wishing to avoid liability for unpaid overtime pay, have challenged the validity of the regulations. In a few early decisions from the early 1940s, manifestly biased federal district judges ruled against alleged managerial-administrative plaintiff-employees by ignoring the salary level requirement on the grounds that the Administrator lacked authority to include it because it was not a “natural,” “reasonable,” or “real” part of the definition. For example, a federal court in Georgia held in 1941, in a case brought by a storage department foreman who had been paid only $16.15 per week (rather than the $30 required by the regulation for the employer to meet the exemption), that:

The power to define “employee employed in a bona fide executive *** capacity,” delegated in the Act to the Administrator,...is constitutionally exercised where the definition is within the limits laid down by Congress. These limits are marked out by the fair and natural meaning of the words “bona fide executive *** capacity.” The definition is within such limits if the Administrator restricts it within the bounds of such meaning and

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\textsuperscript{112}As the chief judge of the Seventh Circuit, Richard Posner, observed with regard to the FLSA white-collar regulations: “Judicial review of administrative action typically involves comparing the action with the criteria set forth by the legislature to guide the agency. If there are no criteria, about all the court can do is determine whether the agency’s action is rationally related to the objectives of the statute containing the delegation. That liberal test is easily passed here, at least with respect to the deduction for absences from work of less than a day. Remember that the issue is entitlement to overtime pay (at the statutory rate of 1.5 times regular pay). There is little purpose in paying overtime if the express or implied contract of employment does not fix specific hours of work, the employee being expected to do as much work (within reason) as necessary to carry out his responsibilities rather than to work exactly the same number of hours day after day.” Mueller v. Reich, 54 F.3d 438, 442 (7th Cir. 1995). Posner ignored (and may be ignorant of) the fact that the point is precisely that the law imposes no such reasonable limit.
does not add an element which has no reasonable connection with its connotation. To add such element is to legislate, not to define. The question here presented is whether or not the provision that the salary must be at least $30 a week, added by the Administrator to his definition of the term executive capacity, is a natural and admissible attribute of the term “bona fide executive and administrative capacity.”

Although the Administrator may legally define the term administrative employee with wide discretion within the meaning of such term, he can not go beyond that and add elements which form no part of such conception. In other words, he can not add an element which is not a real incident to executive work. He can not go outside of the meaning of such words and add an element not intended by Congress and virtually legislate to bring in a class of employees not intended. It is clear from the record in this case, and conceded by both sides, that plaintiff was an employee employed in a bona fide administrative capacity within the usual meaning of such word and also within the definitions of the Administrator, except with respect to the limitation of $30 a week salary. It might have been wiser for Congress to have classified employees to be covered by the Act upon the basis of their earnings, or to have added with respect to administrative officers the additional requirement of a minimum salary, but it did not do so, and in my opinion, the Administrator can not, by adding such requirement, which has no relation to the character of the work performed, bring within the scope of the Act a class of employees not intended. The fact that an executive may work for less than $30 per week or even $1 a year does not alter the fact that he is an executive.

A few weeks later a federal judge in Northern Texas, unencumbered by any citations to legal precedents, was not distracted by the fact that the plaintiff-florist shop manager, who had “cherished in his heart...the secret determination that it [the employer] was amenable to the wage and hour act, and that against that day of reckoning he would keep some sort of a record so he could assert what he claimed to be the overtime which he worked,” had been paid between $17.50 and $26.00 per week:

He was not a very big “boss,” but he was a “boss”; not of a very big business, but of a business. He was an executive. You cannot say that executives never sweep out, because if we study the history of America, we know that they do sweep out. ... I know one outstanding example of this town where the executive carried a pack on his back in which were the goods that he subsequently sold. American executives do anything they please, and that is why they get to be executives. The plaintiff’s duties were largely executive.

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114William H. Atwell (1869-1961) was appointed by Pres. Harding and was in active service from 1923 to 1955. He issued a number of openly racist decisions. E.g., Bell v. Rippy, 146 F. Supp. 485 (ND Tx 1956).
115Tune v. Roselawn Florists, 1 WH Cases 784, 785 (ND Tx 1941).
The administrator, in his first decision on "executive", under the Act, or of "administrative" officers, did not include the amount of the salary. Had he done so, I think it would have been the duty of the courts to have declared, as they did later, that the amount of salary cannot be considered in this land as an indication of an executive. Many executives forego any pay at all, in order that their employees may have their pay in full and things of that sort.\textsuperscript{116}

Even in later, more reasoned opinions, the courts, showing considerable deference to the agency, have refrained from plumbing the depths of the rationale; typically, indeed, the result has been an uninspired and unenlightening pro forma affirmation of the DOL’s regulations. For example, one judge rejected an employer’s contestation of the constitutionality of the administrative exemption and in particular of the salary basis test (where the plaintiff-employee efficiency experts had been paid in excess of the salary level test but on an hourly basis) by quoting Justice Holmes: "'Looked at by itself without regard to the necessity behind it the line or point seems arbitrary. ... But when it is seen that a line or point there must be, and that there is no mathematical or logical way of fixing it precisely, the decision of the (Administrator) must be accepted unless we can say it is very wide of any reasonable mark.'"\textsuperscript{117} Even less substantial was an opinion by the Ninth Circuit: "[U]pon examination of the history behind the promulgation of these regulations, it becomes clear that the rationale underlying them is sound and apparently the one practical method of 'defining and delimiting' the rather vague and ambiguous terms used in the statute."\textsuperscript{118} Indeed, by 1966, future U.S. Supreme Court Chief Justice Warren Burger had apparently grown so intolerant of obstructionist defenses that he deemed an injunction a superior tool of enlightenment for a newspaper publisher to further jurisprudential elucidation:

Appellees' final contentions are that the regulations in question are so vague as to offer no guidance to employers who attempt to comply with the Act and that the minimum salary requirement is not a justifiable regulation under Section 13(a)(1) of the Act because not rationally related to the determination of whether an employee is employed in a "bona fide executive...capacity." These contentions lack merit. The Secretary’s regulations are

\textsuperscript{116}Tune v. Roselawn Florists at 786. The judge’s assertion that the first set of regulations did not include a salary requirement for executive and administrative employees was incorrect. It was $30 per week. 29 CFR § 541.1, in FR 3:2518 (Oct. 19, 1938).


\textsuperscript{118}Craig v. Far West Engineering Co., 265 F.2d 251, 259 (9th Cir. 1959).
clear. They simply require in this context that, in order to qualify for the executive exemption, the employer must pay his district advisers at least $100 weekly over and above any employment-connected cost to them of the tools, i.e., automobiles, required for their work.

The Appellees’ attack, coming as it does so long after the passage of the Act and challenging the validity of the regulation tends to underscore the need for injunctive relief to bring home to the employer his duties and obligations under the law. The statute gives the Secretary broad latitude to “define and delimit” the meaning of the term “bona fide executive...capacity.” We cannot say that the minimum salary requirement is arbitrary or capricious.119

Perhaps the most detailed policy analysis was offered by the Tenth Circuit in a case involving a bookkeeper-office manager and a head miller, whose executive and professional exclusion the trial court had upheld, despite the employer’s failure to pay them the regulatorily required compensation, on the grounds that those salary requirements were arbitrary and unreasonable. Congress, according to the court, in exempting employees:

realized...that the phrases “bona fide executive capacity,” “bona fide administrative capacity,” and “bona fide professional capacity” would not fix absolute standards or a definite classification within or without which particular employees would fall, and that it was desirable that such phrases be defined and delimited. Congress did not undertake itself to define and delimit such phrases, but delegated that duty to the Administrator. It did not direct that criteria should be laid down as an aid in determining what employees fell within or without the exempted employments, but that the phrases should be made certain by specific definition and delimitation. ... Necessarily, if the classifications are limited by specific definition and delimitation, some employees who might fall within the general meaning of the phrases employed by Congress will be excluded. Exclusion usually results when we descend from the general to the particular, and Congress must have realized that specific definition and delimitation which would result in certainty of application would of necessity exclude some employees who might otherwise be regarded as within the general phrases used by Congress. Nevertheless, Congress did not see fit to leave embraced within the exempted employments every employee who might fall within the general meaning of the phrases employed, but directed the Administrator to specifically define and delimit such phrases. ... Congress, in effect, provided that employees should be exempt who fell within certain general classifications as rationally and reasonably defined and made certain by the Administrator. The general standard was laid down by Congress,—bona fide executive, administrative, or professional capacity. The policy was made manifest by Congress,—that of precise definition and delimitation by a reasonable and rational regulation defining and delimiting the general terms. The delegation of such

a power to define and delimit has been sustained by the decisions of the Supreme Court. Congress has laid down a general standard and manifest[ed] a policy and within the framework thereof has delegated to the Administrator the duty to supply the details. So to do is well within the principle of permissible delegation.

The question remaining is whether the standards or criteria laid down by the Administrator are ones which a rational person could have made or are unreasonable and arbitrary. ...

In Federal Security Administrator v. Quaker Oats Co.,...the court said: “It is enough that the Administrator has acted within the statutory bounds of his authority, and that his choice among possible alternative standards adapted to the statutory end is one which a rational person could have made.”

Obviously, the most pertinent test for determining whether one is a bona fide executive is the duties which he performs. Admittedly, a person might be a bona fide executive in the general acceptation of the phrase, regardless of the amount of salary which he receives. On the other hand, it is generally true that those in executive positions assume more responsibility and are generally higher paid than those who work under the supervision and direction of others. The same is true with respect to those employed in administrative and professional capacities. Therefore, in most cases, salary is a pertinent criterion and we cannot say that it is irrational or unreasonable to include it in the definition and delimitation.120

Yet, even this most specific account remained wholly formal and assumed precisely what should have been analyzed—namely, the basis of the congressional “general standard”; instead, the court merely characterized as the congressional “policy” the delegation to the Administrator of the power to define the terms.

Instead of scrutinizing the regulations’ socio-economic rationality, the federal district judge in Indiana121 and the federal Court of Appeals for the Seventh Circuit, assuming that whatever regulations the Labor Department has issued rationally define those terms in the sense Congress meant them, merely checked whether Haywood’s job fit within the regulatory criteria. In this instance, since the employer had claimed that Haywood was an administrative employee—the “exemption” for whom the Labor Department admits “is the most challenging...to define and delimit”122—those criteria were five in number. These requirements will be outlined here and then discussed seriatim in detail: (1) NAVL had to pay Haywood at least $250 per week; (2) NAVL had to compensate Haywood on a salary basis; (3) Haywood’s “primary duty” had to consist of “the performance of office or non-manual work”; (4) that work had to be “directly related to manage-

120Walling v. Yeakley, 140 F.2d 830, 831-32 (10th Cir. 1944).
122FR 68:15567.
ment policies or general business operations of the employer or the employer’s customers”; and (5) “the performance of such primary duty includes work requiring the exercise of discretion and independent judgment.”

Pursuant to the first requirement, Haywood had to be paid at least $250 weekly. Haywood’s salary placed her far beyond this means-tested level, which, despite the fact that the DOL had failed to update it since 1975, making it "outdated," nevertheless triggered the so-called short test, which was met by an employee who satisfied the aforementioned requirements (3), (4), and (5). Before examining these three so-called duties criteria, however, it will be helpful to scrutinize the second requirement—that Haywood be “compensated on a salary...basis...”

According to the pertinent DOL regulation: “An employee will be considered to be paid ‘on a salary basis’ within the meaning of the regulations if under his employment agreement he regularly receives each pay period on a weekly, or less frequent basis, a predetermined amount constituting all or part of his compensation, which amount is not subject to reduction because of variations in the quality or quantity of the work performed. ... Deductions may be made, however, when the employee absents himself from work for a day or more for personal reasons, other than sickness or accident. Thus, if an employee is absent for a day or longer to handle personal affairs, his salaried status will not be affected if deductions are made from his salary for such absences.”

Haywood alleged that she had not been paid on a salary basis because, if she missed work during the course of a workweek, she was required to make up the time, and NAVL admitted that when she was absent from work she was required to make up the time, and that if she was absent on a scheduled mandatory Saturday she might be subject to a non-monetary disciplinary action, such as a verbal or written warning. However, North American argued that “neither action impacts...

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124 29 CFR § 541.2(e)(2) (2003). The increase to $455 per week or $23,660 annually would be of no help to workers like Haywood, whose wages exceed that level. See below ch. 17.
125 In 1940, when the DOL first issued a separate definition of a “bona fide administrative employee,” it required a monthly salary of at least $200 to meet the test. 29 CFR § 541.2(a), in FR 5:4077 (Oct. 15, 1940). Adjusted by the consumer price index, that monthly salary was the equivalent of annual salary of $25,406 in 1994.
126 FR 68:15562.
127 29 CFR § 541.2(e)(2).
128 29 CFR §§ 541.118(a) and (a)(2). On the new regulation, see below ch. 17.
her status as a salaried employee. For in neither instance is Haywood’s salary subject to deduction.”130 The appeals court rejected Haywood’s contention on the grounds that: “Nothing in the regulations suggests that an employee loses his exempt status simply because his employer disciplines him in a non-monetary fashion for failing to work during his scheduled time. The regulations prohibit monetary discipline of exempt employees.... Indeed, if the regulations also were to prohibit non-monetary discipline for the quantity or quality of work an employee performs, employers would have no tool with which to combat chronic absenteeism, tardiness or poor performance. We do not believe that the Secretary intended to create such a result without so much as a word in the regulations.”131 Although the Seventh Circuit conceded that summary judgment against her might be precluded if Haywood could prove that she was threatened with a pay reduction for failing to make up the time she was going to take off, it concluded that she had not made such a showing.132 However, in the real world of employment, Haywood explained, NAVL did not need to threaten workers: if they refused to make up time, they were written up and the consequence was a bad evaluation and a lower or no salary increase the following year.133

Other federal appeals courts have issued similarly restrictive rulings.134 Thus in a recent case involving production planners at a shipyard, the Fifth Circuit wrote:

Cowart and Durbano contend that if they missed part of a day of work for personal

1:95CV325 at 10-11 (July 18, 1996).
131Haywood v. North American Van Lines at 1070. The same argument was accepted in McAllister v. Transamerica Occidental Life Ins. Co., 325 F.3d 997, 1000 (8th Cir. 2003).
133Telephone interview with Haywood.
134E.g., Renfro v. Indiana Michigan Power Co., 370 F.3d 512 (June 2, 2004); Schaefer v. Indiana Michigan Power Co., 2004 U.S. App. Lexis 2414 (6th Cir., Feb. 13, 2004). But see Oral v. Aydin Corp., 2001 U.S. Dist. Lexis 20625, at 18 n.6, 145 Lab. Cas. (CCH) ¶34,427 (ED Pa. Oct. 31, 2001): “For purposes of determining whether an employee is paid ‘on a salary basis,’ working extra hours to make up for a partial day absence is no different than having one’s pay docked for a partial day absence. Both involve counting the hours that an employee has worked and subjecting an employee to a reduction in compensation based on quantity of time worked. Both methods for dealing with partial day absences are inconsistent with 29 CFR § 541.118(a)’s definition of being paid ‘on a salary basis.’"
reasons, they were required to make up the missed time during that same week. In other words, if they took four hours off on Monday afternoon to run personal errands, and chose not to take vacation time, their salary was not reduced, though they were expected to make up for the missed time over the remaining four days of the week. We disagree with Cowart and Durbano that under this scenario they should have received compensation for a total of 44 hours of time, including four hours of overtime, even though they worked only forty hours. There is no support in the case law for the proposition that requiring salaried employees to make up time missed from work due to personal business is inappropriate. Although the salary basis regulation prohibits deductions from an employee's salary for personal absences of less than a day, the regulation does not prohibit an employer from requiring an employee to make up the time he misses. In the instant case, it is undisputed that there was never a deduction from Cowart or Durbano's weekly salary for any reason.

Cowart and Durbano contend that an Ingalls written procedure that permits salary deductions for absences of eight or more hours over two days violates the FLSA. Specifically, they challenge Ingalls's policy number 5050.18, which provides: "Deductions shall be made from the salary of a salaried employee for personal time off of a day or longer. For this purpose, a 'day' is defined as eight (8) consecutive hours in one or two days; i.e., an absence of the last four hours of one day and the first four hours of the following day will be considered as an absence of a day." Policy number 5050.18.

This Court finds no reason to rule that Ingalls's "eight consecutive hours" provision is impermissible under the FLSA. We will not support a compensation scheme that would permit an employee to work the first hour on Monday morning and the last hour on Tuesday afternoon, take off the fourteen hours in between, and still demand to be paid in full for both days on the ground that the fourteen-hour absence was less than a full day. There is no support for this illogical result, and we therefore reject it.135

The severe obstacles that the regulations and courts have erected to overtime pay recoveries by administrative employees,136 even where judges agree that an employer has unlawfully docked salary for a partial-day absence, are demonstrated by a recent Second Circuit case. After having been docked $60 for arriving two

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136Even during the Roosevelt administration, the WHD adopted a position affording employers great deference regarding their power to resist their white-collar employees' efforts to control their time: "[S]ince it is well recognized that bona fide executive, administrative, and professional employees are normally allowed some latitude with respect to the time spent at work, an employee will not be regarded as being paid on a salary basis if deductions are made for those types of absences ordinarily allowed such employees. For example, an employee is not being paid on a salary basis if the employer makes deductions from his salary for an afternoon when he goes home early or when he occasionlly takes a day off, unless, under the circumstances of a particular case, such absences must be considered unreasonable." WHD Release No. A-9, Issued, Aug. 24, 1944, published in BNA, Wage and Hour Manual 719 (1944-45 ed.).
and a half hours on the day after Labor Day, the clinical director of a counseling center sued the employer for unpaid back overtime wages, arguing that this pay docking had converted him into an hourly worker, depriving his employer of the administrative employee exemption. The trial court concluded that the worker’s wages had been “impermissibly docked, but held that Alliance could invoke a regulatory ‘corrective window’ and preserve Kendall’s exempt status under the FLSA by simply reimbursing to him the $60 in wages Alliance had withheld.” The court rejected the worker’s claim that “even if administrative employees at Alliance ordinarily fall under the FLSA exemption, Alliance’s impermissible docking of his wages for lateness eliminates that exemption as applied to him. This contention is meritless. The regulations provide that ‘where a deduction not permitted by these interpretations is inadvertent, or is made for reasons other than lack of work, the exemption will not be considered to have been lost if the employer reimburses the employee for such deductions and promises to comply in the future.’ 29 C.F.R. § 541.118(a)(6). We agree with the district court that ‘lack of work’ refers only to the unavailability of work for the employee to perform, and not to an employee’s failure to work.” The appeals court therefore found that the trial court had “correctly held that Alliance could invoke the ‘corrective window’ and preserve Kendall’s exempt status by reimbursing him for his $60 in lost wages. Kendall’s wage deduction was for reasons other than ‘lack of work’ as defined by the regulations. Although Alliance has not expressly promised to comply with the regulations in future, Kendall no longer works for Alliance, and therefore its failure to do so is not relevant in this case.”

Even the Bush administration could not bring itself to acquiesce in employer demands for elimination of the salary basis test because the test “reflected the understanding that such [bona fide executive, administrative, or professional] employees have discretion to manage their time and are not answerable for the number of hours worked or the number of tasks performed. Such employees are not paid by the hour or task, but for the general value of services performed.” The Labor Department’s position was rooted in its long-standing belief that the salary basis test best captures the “quid pro quo enjoyed by exempt employees, which distinguishes them from non-exempt workers. Exempt employees are not paid overtime for working over 40 hours in a week. In exchange, the employer must provide a guaranteed salary that cannot be reduced when an employee works less than 40 hours.” In 2003 the DOL decided against amending the test to permit pay docking for partial day absences because the quid pro quo would be violated: “An exempt manager...does not receive extra pay for working 16 hours on a Thursday

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to complete a project; thus, as a matter of fundamental fairness, an employer should not be allowed to dock the employee’s salary for leaving work early on Friday. Of course, an employer can terminate an employee who abuses this salary arrangement.”138 Apart from the question—which the DOL failed to raise, let alone answer—as to why employees who do in fact “have discretion to manage their time” should nevertheless not be entitled to overtime protection, the Labor Department impermissibly assumed that a weekly or monthly salary is not reducible, or has not been reduced by managers, to an expected amount of work or output per hour, day, or week.

As the DOL’s own illustration reveals, its “fundamental fairness” doctrine is merely qualitative and not quantitative; that is, it does not permit workers to take off precisely as many hours as employers make them work extra hours so that they wind up working only 40 hours. Such an outcome would defeat the whole purpose of the exemption and would doubtless entitle employers to fire such insubordinate employees.139 Firms, as C. Wright Mills already pointed out at mid-century, had been reducing salaried employees’ salaries for absences “for some time in many places....”140 This position that such time has to be made up was expressed with all imaginable clarity by the “typical” management statement uncovered by a Harvard Business School study of the engineering industry: “‘We assumed that time off for personal reasons and casual [i.e., ‘volunteered’ or unpaid] overtime would wash out.’”141

But if the upshot of the “quid pro quo” is that a worker has to make up time she takes off so that if she normally works 50 hours and, instead, some week works only 46 hours, but the following week will have to work 54 hours to make up the time, in what sense is she ‘off the clock’ and not paid by the hour? If all that her white-collar status amounts to is that she has the freedom to shift her hours around a little, but still has to put in the expected number of hours, why should that bit of

138FR 68:15572. See also below ch. 16.
139The U.S. Supreme Court interpreted the salary basis test as indicating that: “The Secretary is of the view that employees whose pay is adjusted for disciplinary reasons do not deserve exempt status because as a general matter true ‘executive, administrative, or professional’ employees are not ‘disciplined’ by piecemeal deductions from their pay, but are terminated, demoted, or given restricted assignments.” Auer v. Robbins, 519 US 452, 456 (1997). The National Association of Manufacturers objected to the resulting lack of flexibility in meting out punishment: “The general trend in the modern workplace is to impose progressive forms of discipline as an alternative to termination.” “NAM’s Comments on Proposed FLSA White-Collar Exemptions” at 8 (June 26, 2003), on http://www.nam.org.
140C. Wright Mills, White Collar: The American Middle Classes 299 (1967 [1951]).
141Walton, The Impact of the Professional Engineering Union at 80.
discretion deprive her of overtime protection and why should it be an indicium that her time is so discretionary that her employer is unable to hire an additional worker instead of requiring her to work overtime? An attorney in charge of labor relations at a corporation with more than 100,000 employees frankly put it this way:

It would be pretty rare that a low-paid administrative exempt worker such as you describe would try and take half a day (non-vacation-time) off to go fishing or otherwise loaf. Much more likely, s/he would have a personal or family concern that would make it urgent that the employee be allowed to leave early to attend to it.... In such a case, it is pretty unlikely that the exempt employee would be asked to make up the actual hours missed—but pretty much the rule that s/he would be expected to make up any work that had to get done to catch up, whether that involved extra hours worked or not. Let’s put it this way—there are certainly times when it does take real hours to make up work, but there are also plenty of times when it’s just a matter of working harder, more focused, to get caught up on work. I think it is not as much the quid-pro-quo of hours, but the very fact that many exemptees have at least some flexibility in figuring out how and when to get their work done. And keep in mind, many exemptees may come in a few minutes late, leave a few minutes early—they have more flexibility in doing this, they are not “on the clock”—and that has value in and of itself.142

In Haywood’s case, the regime was so strict that management would not even permit her to take off a day to see her dying mother in the hospital.143 The Labor Department has also impermissibly assumed that workers who retain some modicum of time discretion during the workday denied, for example, to assembly-line workers are also permitted to come and go as they please. However, in the wake of mechanical rationalization and automation, the white-collar worker “no longer has the possibility of a certain freedom of movement he used to enjoy. He cannot wander about from time to time, talking with fellow employees; he must be in at a set hour in the morning. He is almost like a blue-collar employee in that he is tending an important, costly machine.”144 And workers like Dorothy Haywood are a far cry from “the men in the higher range of income” whom some employers had in mind when they complained to the Wage and Hour Administrator shortly after the FLSA went into effect in 1938 that they saw no reason why men who “can go fishing when they like” should be paid time and a half.145 Nor, if courts took the

142Email to Marc Linder (Apr. 22, 2003) (identity withheld at writer’s request).
143Telephone interview with Haywood.
following guideline seriously, would Haywood or millions of other employees be banished from overtime protection: "Salary is a mark of executive status because the salaried employee must decide for himself the number of hours to devote to a particular task. In other words, the salaried employee decides for himself how much a particular task is worth, measured in the number of hours he devotes to it."  

Indeed, employers have become so aggressive in asserting their unfettered autonomous power to compel their employees to work uncompensated overtime that the National Retail Federation, representing employers of 23 million workers, was apparently not at all embarrassed to inform the Wage and Hour Administrator publicly that its comments on the 2003 proposed regulations "seek to underscore the fundamental reality that exempt employees in today's work environment do 'whatever it takes to get their jobs done.' The final regulations should reflect this fact and eliminate any suggestion that courts should second guess decisions of managers and other exempt employees regarding the manner in which they allocate their time to accomplish their primary goals."  

Remarkably, despite employers' claim that they should not have to pay white-collar workers overtime premiums because they are off the clock and are paid for the value of their services overall and not by the hour, they nevertheless told the General Accounting Office in 1999 that they objected to the salary basis test because the ban on pay docking for part-day personal absences "limits their ability to hold their exempt employees accountable for their time...." This self-contradiction was also glaringly on display in the comments on the 2003 DOL regulatory proposals by the National Retail Federation: "The regulations should confirm the ability to record and track hours without affecting an employee's exempt status. Maintaining records of hours worked and missed by exempt employees may be justified by many valid reasons that are unrelated to docking salaries and bear no attempt to control an employee's day-to-day activities. For example, this can occur...to record and bill hours to customers, clients, and the government, e.g., where lawyers, accountants, and government contractors bill for work on an hourly basis...." But as the Ninth Circuit Court of Appeals observed:

147Comments of the National Retail Federation on the Proposed Regulations Under 29 CFR Part 541” at 1-2 (June 30, 2003).
149Comments of the National Retail Federation on the Proposed Regulations Under 29 CFR Part 541” at 17 (June 30, 2003). David Fortney—who had been deputy and acting
Introductory Illustration

"Subjecting an employee's pay to deductions for absences of less than a day, including absences as short as an hour, is completely antithetical to the concept of a salaried employee. ... It is precisely because executives are thought not to punch a time clock that the salary test for 'bona fide executives' requires that an employee's predetermined pay not be 'subject to reduction because of variations in the...quantity of work performed'—especially when hourly increments are at issue." And as Judge Richard Posner added: "If the employer docks the employee's pay for an absence of a few hours on a particular day, the implication is that the employee really is expected to work the same number of hours every day, implying in turn that he really is an hourly rather than a salaried worker and that his salaried status is an evasion of the statute."

If almost all salaried workers—except the highest executives—are held accountable for their time by means of time sheets, records and personnel policies, then the vast majority of white-collar salaried workers fall outside the scope and rationale of the exclusions. Nevertheless, the upshot of the aforementioned case law is that employers can use their personnel policies to ensure that salaried employees work a minimum specified number of hours in a week by threatening either to dock them or to require them to make up the time and work them overtime without compensation. The employer faces liability problems for the overtime only if on many occasions it has actually docked salaried employees for absences of less than one day. If courts, by acquiescing in employers' practice of compensating employees for a minimum quantity of work measured by hours, are in effect

Solicitor of Labor during the first Bush administration—in testifying as an employer-side private lawyer at a House hearing in 2004 that keeping time records was inconsistent with an employee's being exempt rehearsed the legal rule without realizing that employers themselves had already conceded through words and acts that it had become hollowed out. Assessing the Impact of the Labor Department's Final Overtime Regulations on Workers and Employers: Hearing Before the Committee on Education and the Workforce House of Representatives (108th Cong., 2d Sess., Apr. 28, 2004), on http://edworkforce.house.gov/hearings/hrgarchive.htm.

150 Abshire v. County of Kern, 908 F.2d 483, 486 (9th Cir. 1990).
151 Mueller v. Reich, 54 F.3d at 442.
152 E.g., a union field representative who negotiated collective bargaining agreements and handled grievances for the union’s bargaining units and members was required to submit weekly time sheets showing his daily hours worked. The court held that deducting, in 15-minute increments, any deficiencies below 40 hours per week from his accrued sick leave and vacation time (as distinguished from his cash salary) did not mean that the employer had not paid him on a “salary basis”; consequently, he remained an exempt administrative employee in spite of the docking. Webster v. Public School Employees of Washington, Inc., 247 F.3d 910, 913, 917 (9th Cir., Apr. 18, 2001)
winking at the rule, one reason may be that judges have not been convinced that there is a rationale for paying overtime to plaintiffs in this situation or for the salary rule altogether. This judicial attitude may, in part, be a function of the overall historic failure of Congress and the DOL to explain the basis of overtime regulation and the white-collar exemptions from it.

With respect to the duties tests, the third regulatory requirement defining bona fide administrative employees involved the performance of office or nonmanual work. Of the relevant regulation, one federal court pithily observed, "DOL has cryptically interpreted the term nonmanual work in its regulations to mean 'white-collar' work."

Until August 2004 the regulation read:

(a) The requirement that the work performed by an exempt administrative employee must be office work or nonmanual work restricts the exemption to "white-collar" employees who meet the tests. If the work performed is "office" work it is immaterial whether it is manual or nonmanual in nature. This is consistent with the intent to include within the term "administrative" only employees who are basically white-collar employees since the accepted usage of the term "white-collar" includes all office workers. Persons employed in the routine operation of office machines are engaged in office work within the meaning of 541.2 (although they would not qualify as administrative employees since they do not meet the other requirements of 541.2).

(b) Section 541.2 does not completely prohibit the performance of manual work by an "administrative" employee. The performance by an otherwise exempt administrative employee of some manual work which is directly and closely related to the work requiring the exercise of discretion and independent judgment is not inconsistent with the principle that the exemption is limited to "white-collar" employees. However, if the employee performs so much manual work (other than office work) that he cannot be said to be basically a "white-collar" employee he does not qualify for exemption as a bona fide administrative employee, even if the manual work he performs is directly and closely related to the work requiring the exercise of discretion and independent judgment. Thus, it is obvious that employees who spend most of their time in using tools, instruments, machinery, or other equipment, or in performing repetitive operations with their hands, no matter how much skill is required, would not be bona fide administrative employees within the meaning of 541.2. An office employee, on the other hand, is a "white-collar" worker, and would not lose the exemption on the grounds that he is not primarily engaged in "nonmanual" work, although he would lose the exemption if he failed to meet any of the other requirements.

At least one federal judge thought that "manual work" was broader than "manual labor" and was therefore applicable to someone "doing the ordinary

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repetitious functional handling of some matter such as merely running an adding machine, comptometer or copying figures...." Consequently, even though a bookkeeper was not a manual laborer, "still you would hold that one doing nothing but balancing accounts and totaling figures is performing manual, as distinguished from work requiring the exercise of discretion and individual [sic] judgment."155 In light of this expansive definition, Haywood conceded that she performed office or nonmanual work.

The court then focused on the fourth criterion—that Haywood's work had to have been "directly related to management policies or general business operations."156 This element of the definition had been adopted by the Wage and Hour Administrator in 1940 verbatim from a proposal submitted by the National Association of Manufacturers,157 which had offered it as a component of "a moderate and practical definition," although the NAM "would [have] prefer[red] a regulation, or amendment to the law if necessary, which would exempt all so-called white collar employees earning a definite minimum regular salary."158 The organization prevailed with its view that there were a relatively small number of executives in any firm, but many "truly" administrative employees, because whereas an executive was concerned with the formulation of policies or the direction of their application, an administrative employee was concerned with the operating mechanism of the organization and carrying policies into practice.159 Because the NAM contended that the FLSA was not intended to regulate wages or salaries far above the minimum established as a standard of decency,160 it argued that its definition might be "too narrow," and that the term "administrative employee" "might be broad enough to include practically all clerical work con-

155Walling v. Armour and Co. at 71,400.
15629 CFR § 541.2(a)(1).
157As one part of a three-part alternative definition, the NAM proposed: "The execution of special assignments or tasks directly related to management policies or general business operations, involving the exercise of discretion or independent judgment, and whose work is performed under circumstances in which direct supervision and control over time or manner of performance or hours of work are impracticable." "Official Report of the Proceedings Before the Wage and Hour Division of the Department of Labor In the Matter of: Hearing on Redefinition of 'Executive', Etc. in Manufacturing and Extractive Industries" at 380 (Washington, D.C., June 5, 1940) (testimony of Noel Sargent, Secretary, NAM) (hereinafter "1940 WHD Hearings Transcripts"). See also below chs. 12-13.
158"1940 WHD Hearings Transcripts" at 351 (June 5) (testimony of Raymond Smethurst, Assoc. Counsel, NAM).
159"1940 WHD Hearings Transcripts" at 369 (June 5, 1940) (testimony of Sargent).
160"1940 WHD Hearings Transcripts" at 352-53 (June 5, 1940) (testimony of Smethurst).
nected with the management of a business.” Nevertheless, the NAM guessed that its definition would exempt about 20 percent of the office employees in a manufacturing plant.

The Department’s broad but vague interpretive gloss of NAM’s contribution “describes those types of activities related to the administrative operations of a business as distinguished from ‘production’...work. In addition to describing the types of activities, the phrase limits the exemption to persons who perform work of substantial importance to the management or operation of the business of his employer or his employer’s customers. The administrative operations of the business include the work performed by so-called white-collar employees engaged in ‘servicing’ a business as, for example, advising the management, planning, negotiating, representing the company, purchasing, promoting sales, and business research and control.” Employers have argued vociferously against this “administrative-production dichotomy” or “production versus staff dichotomy,” and some courts have awarded them more than they could plausibly have expected. (To be sure, in the 1980s, when some state and local governments erroneously believed that they had the authority to decide independently which of their workers were excluded from the FLSA as administrative employees, public employers triggered an epidemic of such classifications.) For example, LPA, the

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161“1940 WHD Hearings Transcripts” at 364 (June 5, 1940) (testimony of Smethurst).
162“1940 WHD Hearings Transcripts” at 392 (June 5, 1940) (testimony of Sargent).
16329 CFR § 541.205(a) and (b).
164Reich v. John Alden Life Insurance Co., 126 F.3d 1, 23 (1st Cir. 1997).
165FR 68:15566.
166For example, the same court that issued Haywood upheld a lower-court that had ruled that a publishing company production editor, who was “expected to put in whatever time was necessary to meet the production deadlines,” was an administrative employee despite the fact that her job “‘fell squarely on the production side of the line,’” because it met the “directly related to management policies or general business operations” part of the short test on the grounds that according to the DOL’s interpretive regulation the regulatory phrase embraced “persons who...carry out major assignments in conducting operations of the business...” Shaw v. Prentice-Hall Computer Publishing, Inc., 151 F.3d 640, 641, 644 (7th Cir. 1998) (quoting 29 CFR § 541.205(c)).
167Letter from Secretary of Labor Elizabeth Dole to governors of Georgia, Idaho, Iowa, Kansas, Maine, Maryland, Nebraska, Nevada, New Mexico, North Dakota, Texas, Wisconsin, and Washington (July 27, 1989) (unpublished; copy furnished by AFGE, July 28, 2003, and Richard Brennan, Div. of Policy and Analysis, WHD, DOL, Aug. 21, 2003). Dole informed the governors that in determining whether a public employee’s activities were directly related to management policies or general business operations, it was essential to consider the agency’s mission and functions; where employees were carrying
HR Policy Association, a peak organization of 200 of the largest private employers in the United States, has insisted that the “distinctions between work that is considered exempt and that considered nonexempt under the administrative-production dichotomy” are “illogical.” Yet nowhere in the numerous pages that it devoted to analyzing those distinctions in its comments to the DOL in 2003 did LPA ever try to explain why staff or administrative employees should be excluded from the entitlement to overtime pay or why the illogic that it believed it had uncovered could or should not lead to the conclusion that both groups of workers should be treated in exactly the same way. A former Solicitor of Labor testifying before Congress in 2000 on behalf of the U.S. Chamber of Commerce involved himself in the same predicament by admitting that “the line between blue-collar and white-collar workers” had “become blurred” since 1937 and then adding that there was little reason to believe that a “worker who brings experience, judgment, and discretion to bear in performing his duties should be treated differently depending upon whether the subject of that expertise is the product on which the agency’s ongoing mission and day-to-day functions, they were not exempt. Id., attached enclosure at 3. Recounting this episode in 2003, the DOL observed that beginning in 1985 “[m]any State and local governments classified nearly all of their non-supervisory ‘white collar’ workers as exempt administrative employees without regard to whether their primary duty relates directly to agency management policies or general business operations or meets the discretion and independent judgment test. In the late 1980s, several Governors and State and local government agencies urged the Department to exempt classifications such as social workers, detectives, probation officers, and others, to avoid disrupting the level of public services that would result from increasing costs or limiting the hours of service due to overtime requirements.” The limited responses to Dole’s letter “argued generally that government services are unique because of the impact on health, safety, welfare or liberty of citizens. This, they argued, should allow exemption of positions in law enforcement and criminal justice, human services, health care and rehabilitation services, and the unemployment compensation systems, regardless of whether any particular employee’s job duties include important decision-making on how the agency is operated or managed internally.” FR 68:15583 (Mar. 31, 2003). The DOL added, the next year, that the public employers’ responses “overlooked the focus on ‘management or general business operations’ that has always been an essential foundation to the administrative employee exemption, but without explaining why that result was consistent with the intent of the FLSA and the exemptions....” FR 69:22235 (Apr. 23, 2004). According to Richard Brennan, Deputy Director, Office of Enforcement Policy, WHD, between 1986 and 1992 state and local governments stopped trying to classify all non-supervisory employees as exempt administrative employees between. Telephone interview (Aug. 20, 2003).
employer’s economic success if built.”

The appeals court described a consumer service coordinator as “responsible for trying to resolve billing, damage to cargo and delay claims with...customers. The CSC’s primary role is to ensure quality service to North American’s customers and to prevent the customer’s dissatisfaction with some aspect of his move from escalating into litigation. The CSC is the sole contact person between North American and its customers with respect to these claims. CSCs spend a majority of their time adjusting claims and negotiating with customers to try to settle their claims.” The Seventh Circuit had no trouble concluding that Haywood’s activities settling billing, delay, and damages claims “are the types of classic administrative functions the regulation...contemplates.” The judges found their conclusion strengthened by the fact that Haywood “performed functions somewhat analogous to those performed by claims agents and adjusters, who are specifically mentioned by the regulations as meeting the ‘directly related’ test.”

Rejecting Haywood’s effort to depict herself as a production rather than an administrative employee on the grounds that “North American’s ‘product’ is moving goods from point A to point B. There is no evidence that Ms. Haywood is involved in producing this good in any way,” the court argued that Haywood’s tasks were “functions ancillary to North American’s business...moving household goods from one location to another.” In other words, NAVL’s “production process” is “actually moving the household goods.” This type of you-know-it-when-you-see-it guideline reached its high point when the Department commented that a “messenger boy who is entrusted with carrying large sums of money or securities cannot be said to be doing work of importance to the business even though serious consequences may flow from his neglect.” To be sure, the court noted that the DOL had warned that the term had been most frequently misapplied (by employers and employees) in cases in which it was confused with “the use of skill in applying techniques, procedures, or specific standards” and inappropriately applied to “employees making decisions relating to matters of little conse-

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171 Haywood at 1072 (citing 29 CFR § 541.205(c)(5)).

172 Haywood at 1072 n.6.

173 Haywood at 1072.
The DOL admitted that it was not possible to generate a general rule which will distinguish in each of the many thousands of possible factual situations between the making of real decisions in significant matters and the making of choices involving matters of little or no consequence. It should be clear, however, that the term "discretion and independent judgment," within the meaning of the regulations in subpart A of this part, does not apply to the kinds of decisions normally made by clerical and similar types of employees. The term does apply to the kinds of decisions normally made by persons who formulate or participate in the formulation of policy within their spheres of responsibility or who exercise authority within a wide range to commit their employer in substantial respects financially or otherwise. The regulations in subpart A of this part, however, do not require the exercise of discretion and independent judgment at so high a level. The regulations in subpart A of this part also contemplate the kind of discretion and independent judgment exercised by an administrative assistant to an executive, who without specific instructions or prescribed procedures, arranges interviews and meetings, and handles callers and meetings himself where the executive's personal attention is not required.

The DOL's choice of administrative assistant as the illustration is amusing in light of the trend in recent years to eliminate personal secretaries and to assign them to centralized typing pools. As a result, according to a study done in the 1980s, only a firm's top few executives still had their own secretaries, who, in addition to typing and filing, continued to perform the traditional diplomatic and personal services such as screening calls, scheduling appointments, sending anniversary cards, and sewing on buttons, but who were now called administrators, assistants, or administrative assistants.

Haywood had testified that she operated "'freelance'" with regard to billing and that "management deferred to her decisions." In Haywood's case, NAVL's "guidelines provide[d] an overview of what the CSCs should try to do when negotiating with customers." The employer not only cautioned that CSCs should "'[p]lease remember these are guidelines to try to stay within but there is always going to be a customer that is much more demanding and will require more attention and compensation,'" but also admonished them that "'in those cases'" they should "'[a]lways seek advice from your leader and assistant leader....'" Despite such systematically intrusive supervision, the Seventh Circuit did not find that the guidelines "adequately constrain a CSC's actions to prevent him from...

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174 29 CFR § 541.207(b).
175 29 CFR § 541.207(d)(2).
176 Garson, The Electronic Sweatshop at 202-203.
177 Haywood at 1073 n. 8.
exercising independent judgment."\footnote{178}{Haywood at 1073.}

Because the regulation itself stated that the phrase “directly related” limited the exclusion to “persons who perform work of substantial importance to the management or operation of the business,”\footnote{179}{29 CFR § 541.205(a).} the court also had to determine whether Haywood met this sub-criterion. As the Labor Department itself admitted: “It is not possible to lay down specific rules that will indicate the precise point at which work becomes of substantial importance to the management or operation of a business.” However, the examples that the regulation offered appeared to hinge on whether workers exercised discretion and independent judgment. For example, a bank cashier “performs work at a responsible level and may therefore be said to be performing work directly related to management policies or general business operations,” but neither a bank teller nor bookkeepers, secretaries nor clerks, who “hold the run-of-the-mine positions in any ordinary business”\footnote{180}{29 CFR § 541.205(c)(1) and (2).} do. The court was then content to assert that “[b]y any measuring stick” Haywood had “easily met” this test because, as she herself noted, “the corporation’s objective is a ‘happy move of clients’ household goods.’ If the move is not ‘happy,’ the corporation will experience not only increased litigation costs but a reduced customer base. Ms. Haywood’s job was to keep the move ‘happy.’”\footnote{181}{Haywood at 1072.}

Finally, the court examined the fifth requirement—that Haywood’s performance of her primary duty had to “include[ ] work requiring the exercise of discretion and independent judgment.” Here again the regulations were very broad: “[T]he exercise of discretion and independent judgment involves the comparison and the evaluation of possible courses of conduct and acting or making a decision after the various possibilities have been considered.”\footnote{182}{Haywood at 1072-73; 29 CFR § 541.207(a).} The court therefore dismissed Haywood’s attempt to fit her work within the group of employees, such as inspectors, examiners, and graders, “who do not exercise independent judgment” because they “must apply a well-established, specific and constraining standard in assessing the situations [t]hey face[ ] in [their] daily work.” The court rejected Haywood’s argument about lack of discretion because she had testified that the settlements that the consumer service coordinators reached with customers “could vary depending on...with whom the customer was negotiating. [N]o two CSC’s would reach the same settlement on the same case.” Finally, the fact that Haywood’s supervisors reviewed her work did “not defeat her

\footnote{178}{Haywood at 1073.} \footnote{179}{29 CFR § 541.205(a).} \footnote{180}{29 CFR § 541.205(c)(1) and (2).} \footnote{181}{Haywood at 1072.} \footnote{182}{Haywood at 1072-73; 29 CFR § 541.207(a).}
exempt status"183 because the regulations are quite lax in this regard.184

Thus, although the Department specified that the term “the exercise of discretion and independent judgment” “implies that the person has the authority or power to make an independent choice, free from immediate direction or supervision and with respect to matters of significance,”185 the regulations undercut much of the force of the term by adding that it “does not necessarily imply that the decisions made by the employee must have a finality that goes with unlimited authority and a complete absence of review. The decisions made as a result of the exercise of discretion and independent judgment may consist of recommendations for action rather than the actual taking of action. The fact that an employee’s decision may be subject to review and that upon occasion the decisions are revised or reversed after review does not mean that the employee is not exercising discretion and independent judgment....”186

Convergence of Blue- and White-Collar Work

“[I]f you ask what is a white collar worker, it is very hard to tell these days because there are many men who nominally classify themselves as manual workers but who actually are white collar workers. A man who works in a factory but does nothing but look at a lot of gauges and push switches, involving no great physical expenditure of labor, cannot very well be called a manual worker, but he may consider himself as such.”187

While it is possible to criticize the Seventh Circuit’s unanimous decision, both the letter and the spirit of the framework that the Labor Department has created for disentitling white-collar workers from overtime protection are extraordinarily capacious—capacious enough even to drive a North American Van Lines truck

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183Haywood at 1073.
184In the background materials to its regulatory revisions in 2004 the Bush DOL approvingly cited Haywood for the proposition that a worker was an exempt administrative employee “even though she followed established procedures because the guidelines gave employees latitude in negotiating a settlement, including advising employees to use ‘common sense’....” FR 69:22188.
18529 CFR § 541.207(a).
18629 CFR § 541.207(e)(1).
right through. Even if the judges decided Haywood’s case ‘correctly’ in some narrow legal sense, what possible rational relationship did the DOL’s regulations bear to the social-economic issue of whether employers should be legally free to be “‘squeezing as many hours out of salaried workers as they can,’”188 such as requiring Haywood to work 50-hour weeks without additional, let alone, premium pay.

Was Haywood’s $28,000 annual salary the kind that the Wage and Hour Administrator in 1940 characterized as so high that if its administrative-employee recipient were “paid time and a half for overtime, he would have serious doubts he earned it”?189 On the contrary, she is precisely the kind of worker of whom the Wage and Hour Division said as early as 1940: “There is little advantage in salaried employment if it serves merely as a cloak for long hours of work.”190

It is also unclear why the Labor Department believes that office work is hard to standardize in relation to time. After all, Taylorization “colonized” white-collar work191 decades ago. If it did not know already, best-selling popular sociologist Vance Packard informed the public at the end of the quiescent 1950s that:

Scientific management procedures and the introduction of office machinery have been creating working conditions very similar to those out in the plant, which simultaneously has been cleaned up and made to look more like an office. Many white-collar office workers—billing clerks, key-punch operators—are actually machine attendants, manual workers in any honest nomenclature. ...

Even the layout of the large office is coming more and more to resemble that of the factory, with straight-line flow of work and in some cases assembly belts for moving paper work from point to point. Each worker does a fragment of the complete operation. The repetitive task of a comptometer operator, for example, depends upon the repetitive tasks of file clerks, stenographers, accountants, and messengers before and after her task is performed.192

If the public was unaware, office employers, which had largely escaped unions,

189 Philip Fleming, Address before the NAM, New York City, Dec. 12, 1940, in CR 86:6693, 6694 (App.) (1940).
190 US DOL, WHD, “Executive, Administrative, Professional...Outside Salesman” Redefined: Report and Recommendations of the Presiding Officer at Hearings Preliminary to Redefinition 8 (1940) (Stein Report).
were increasingly concerned. The magazine *Office Management* told them in the same year that Packard’s book appeared that “with every move toward standardization of work in the office, every step toward increased mechanization, the worker’s basic resistance to unionization may be weakened.” And in fact the magazine explained that: “Work standardization, work measurement, tighter external controls on work methods will be the order of the day.... The growing emphasis on systems planning, forms control, elimination of unnecessary paperwork, will call for a much more rigidly planned clerical processing line. The faster tempo being demanded for all offices will lead to the same result.” These developments toward industrial convergence “will lead to a certain loss of the subtle distinctions that have always separated clerical workers from production workers....”

Indeed, “the pace of office automation, of improvement in office operating procedures is so swift that, potentially at least, far more office workers than production workers are threatened by improvements in operating efficiency.” In spite of the fact that it was only “a very naive worker who comes in as a typist or bookkeeper who believes that he or she will really move into senior executive ranks,” and in spite of the grim prognosis that these processes tended to “make more and more workers feel like automatons, like factory workers, going through prescribed motions under prescribed time and production standards,” *Office Management* urged management “to emphasize in every possible way the distinctions that do exist between office and factory working conditions.” Great irony attaches to the example of “psychological differentiation” that the magazine used as a way of fending off unionization: “If workers have privileges not ordinarily given in the factory—are allowed to smoke at their desks, for instance—again a subtle line has been drawn.”

Fifteen years later, the well-known *Work in America* special report to the Secretary of Health, Education, and Welfare declared: “The office today, where work is often segmented and authoritarian, is often a factory. For a growing number of jobs, there is little to distinguish them but the color of the worker’s collar: computer keypunch operations and typing pools share much in common with the automobile assembly-line.” With the increasing division of labor, office workers’ activities became just as controllable as factory workers’ and the affected workers just as fungible; consequently, it has been customary for decades,

if not in the United States, then at least in Germany, to pay additional compensation to salaried office workers for overtime and work during unsocial hours.\textsuperscript{196} As computerization has driven these processes much farther in recent years,\textsuperscript{197} insurance and other companies calculate and prescribe time for these types of activities such as the average number of minutes an accountant should take to complete a trade or enter a transaction\textsuperscript{198} or how long a claims adjuster should take to handle a customer complaint.\textsuperscript{199} White-collar workers’ once-vaunted independence is further undermined by computer devices such as Desktop Surveillance, which is “marketed as the ‘software equivalent of a video surveillance camera on the desktop.’” It permits third-party observers to view, in real time or in playback, exactly what tasks a user is performing and what keystrokes he or she is entering. Each program lets employers hide the fact that the software is running on an employee’s computer. Desktop Surveillance even allows a record of the employee’s activities to be E-mailed to a supervisor without an employee’s knowledge.” Producers “saw a demand from employers concerned about employees’ wasting time on their computers.”\textsuperscript{200} Even for professional employees of accounting, consulting, and law firms, it has long been the custom to track the number of billable hours, making it easy to identify those “who fail to work long enough and bring in whatever levels of revenue currently seem adequate.”\textsuperscript{201}

\begin{itemize}
  \item \textsuperscript{196}Wolfgang Hromadka, \textit{Das Recht der leitenden Angestellten im historisch-gesellschaftlichen Zusammenhang} 59, 81 (1979).
  \item \textsuperscript{197}\textit{Technology and the Transformation of White-Collar Work} (Robert Kraut ed. 1987).
  \item \textsuperscript{198}Email from Douglas Barkema (Apr. 7, 2003). Barkema, a former corporate credit analyst, added that there was not even a need to standardize these tasks per se: “If a company finds on average all of its credit analysts...are working 50 hours per week and there are 4 of them, why not hire a 5th to work 40 hours. Standardization of tasks seems irrelevant when it is easy to measure the total work product.”
  \item \textsuperscript{199}Cf. Robinson-Smith v. GEICO, 323 F.Supp.2d 12, 16, 31 (D DC 2004) (insurance adjusters’ software). Richard Edwards, \textit{Contested Terrain: The Transformation of the Workplace in the Twentieth Century} 88-89 (1979), noted that firms “quickly perceived the benefits of routinizing nonproduction work and...devoted considerable resources to doing so. Their efforts...succeeded...particularly with the lowest levels of clerical and sales work. Indeed, their very success has substantially eroded the usefulness of the blue-collar/white-collar distinction for today’s labor force.” Where routinization was not possible for nonproduction workers, employers found evaluation possible over a long period of time (months or years) during which the “particularities were...evened out....”
  \item \textsuperscript{200}Matt Richtel, “A Different Type of Computer Monitor,” \textit{NYT}, Aug. 27, 1998 (G3:3).
  \item \textsuperscript{201}Jill Fraser, \textit{White-Collar Sweatshop: The Deterioration of Work and Its Rewards in Corporate America} 24 (2001).
\end{itemize}
Grotesquely, in Haywood’s case, her “official ‘Position Description’ indicates that the job was, ‘Respond to both oral and written communication from non-service watch account customer, within time limits established by corporate guidelines.’” Moreover, NAVL management monitored by computer how many customers she and her colleagues—who were required to generate weekly production sheets—dealt with per unit of time, instructed them to complete each individual telephone session faster, and evaluated them for purposes of determining their salaries expressly on the basis of this output. The decision in Haywood’s case manifestly contradicts the overly optimistic judgment of the Pocket Guide to the Fair Labor Standards Act that “[c]ourt decisions indicate that employees cannot be classified as administrators simply because they are well educated white-collar workers who exercise discretion.” In fact, neither well-educatedness nor significant discretion is required.

The Department took its claims about lack of standardization from the 1981 Report of the Minimum Wage Study Commission, which stated that the “basic justification” for the exclusion of white-collar workers “resides in the nature of the work performed by the exempt employees. Unlike factory employment and clerical jobs, executives, administrators and professionals perform duties whose output is not clearly associated with hours of work per day.” The Commission opined that there was “no good rationale for eliminating this exemption.” The Report noted

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203 Telephone interview with Haywood.
204 Cathleen Williams and Edmund Brehl, Pocket Guide to the Fair Labor Standards Act 97 (2000). The authors’ use of “administrators,” is, as already noted, incorrect.
205 A November 19, 2002 DOL opinion letter revealed that the DOL’s interpretation remained firmly in place so that salaried insurance claims adjusters are not likely to qualify for overtime pay because the administrative exclusion applies when employees perform a number of specific duties including processing a claim “from the beginning to end, whether it is easily or quickly resolved....” “DOL Issues Guidance on FLSA Coverage of Insurance Company Claims Adjusters,” USLW, Nov. 26, 2002, at 2344. In 2004 the DOL incorporated this approach in the new final regulations by excluding insurance claims adjusters “if their duties include activities such as interviewing insureds, witnesses and physicians; inspecting property damage; reviewing factual information to prepare damage estimates; evaluating and making recommendations regarding coverage of claims; determining liability and total value of a claim; negotiating settlements; and making recommendations regarding litigation.” FR 69:22263.
that “compensatory privileges” were designed as “compensation for overtime hours associated with executive and managerial jobs.” It also observed that standardizing work “in relation to a specific period of time” was particularly difficult in the case of professional employees.\textsuperscript{207} The reason that the Report focused on professional workers was that the regulations themselves confined this defining characteristic exclusively to them, requiring “work...of such character that the output produced or the result accomplished cannot be standardized in relation to a given period of time.”\textsuperscript{208}

Yet, even many professional workers are subject to “hourly performance quotas.” For example, lawyers at a private law firm providing phone consultations under a pre-paid legal service plan are required to resolve 2.5 complaints per hour. Such constraints—“‘We end up being telemarketers’” said one lawyer—prompted one entire office of lawyers in Phoenix to vote to join the Teamsters Union.\textsuperscript{209} As early as 1954, the \textit{Harvard Business Review} observed that: “In a large engineering firm, the drafting engineers with college degrees became militant union members soon after the firm moved them from their individual cubicles to one large room and put their work on a production-line basis with each man responsible for a single detail. Formerly a draftsman handled one job from start to finish.”\textsuperscript{210} And more generally, as a Harvard Business School study found in 1961, for most engineers in industry, conditions had “changed drastically.” The huge expansion in the scale of engineering firms from dozens to hundreds to thousands of employees provided “new opportunities for rationalization of the engineering function. The work could be broken down and assigned in new ways.” The concomitant rationalization of management and supervision also led to the adoption of “formal control techniques, many of which had been developed in the shop and were not believed by engineers to be appropriate for engineers. Probably

\textsuperscript{207}Fritsch and Vandell, “Exemptions from the Fair Labor Standards Act” at 4:240.

\textsuperscript{208}29 CFR § 541.3(c) (2002). To be sure, prior to August 23, 2004, this element appeared only in the so-called long test, which was triggered by a weekly salary between $170 and $250; since it did not need to be met in the so-called short test, which was triggered by a weekly salary of more than $250, and lesser salaries had become implausible for professional employees, it was effectively eliminated as a required condition even for the only white-collar subgroup for which it has been required since 1938. 29 CFR § 541.3(e) (2003).

\textsuperscript{209}Tresa Baidas, “Lawyers Unionize, Vote to Join the Teamsters,” \textit{NLJ}, Apr. 7, 2003, at A5, col. 1-4 at 2. Thousands of lawyers are also subject to billable-hours requirements.

the most ‘notorious’ of the techniques borrowed from the shop was the time clock; it was despised by professional engineers.”211

Hospitals, clinics, and health maintenance organizations (as well as insurance companies) have in recent years begun imposing similar constraints on employee-physicians.212 When Congress in 1983 put Medicare on a set fee per case basis according to 467 diagnosis-related groups, it created an assumption that cases within each group were homogeneous: “Patient care could be seen...in terms of standardized ‘products,’ reinforcing the image of the hospital as a factory. ‘Scientific management’ was finally to be achieved.”213 By logging on and off computers, physicians themselves are required to enable employers to capture the length of their interaction with clinical patients.214 Pharmacists in chain stores, too, are now evaluated on the basis of how many prescriptions they fill per day.215 These subordinating trends are inherent in the bureaucratization of professions and professionals, which promotes organizational control by employers.216

Computerized control was also adopted in the 1980s by Wall Street brokerage firms in the form of software programs that generate simultaneous multiple numerical ratings: “For managers and salesmen the grid of information hasn’t yet created the kind of physical constraint that it has produced for data entry clerks. A broker can still stand up, sit down or make a phone call. The computer isn’t timing his bathroom or coffee breaks. But as [a broker] pointed out, ‘With the computers the company can calculate not only how much business you’re doing, but exactly how much money they’ll make on each piece of business.... So now the pressure on the broker is not only to do more business but to do it exactly “our”

211Walton, The Impact of the Professional Engineering Union at 18-19.

212By the time of the Great Depression, “[e]ven physicians [we]re constantly becoming salaried dependents.” In 1929, 21,000 or one in seven physicians in the United States worked for salaries. Lewis Corey, The Crisis of the Middle Class 251-52 (1935). H. Dewey Anderson and Percy Davidson, Occupational Trends in the United States 536 (1940), while noting that 15 percent of all physicians were “employed full time by business firms or agencies,” also stated that 27 percent of all physicians and surgeons at the 1930 census were reported as “working for pay rather than in private practice....”


214Simon Head, The New Ruthless Economy at 126. For further description of control of physicians, see id. at 117-52.

215Telephone interview with University of Iowa pharmacy professor (May 2003); pharmacist, Osco Drug Store, Iowa City (Sept. 19, 2003).

way.’”

That so-called expert system software programs exist that automate much clerical decisionmaking is perhaps less surprising than the availability of computer programs that track managers’ performance. Proceeding from the assumption that “if there’s an output it can be measured,” some advocates of the Taylorized office tout other software as capable of measuring productivity for any kind of white-collar work at all. From their perspective, even for creative workers such as computer programmers, “programming is production work”; the work of human resources staffs filling positions, or designing salary or promotion plans as well as that of engineers is also production work. Tendentially the effect of such programs and organization regimes is to centralize decisionmaking and transform autonomous professional workers into clerks.

If even practicing lawyers and doctors, whose “traditional professions” the Labor Department has excepted from its salary-level requirement, can be subjected to such quota systems, the DOL’s principal excuse for excluding millions of white-collar workers from mandatory overtime premiums collapses. A principled basis for treating them differently than blue-collar workers is additionally undermined by the fact that, according to a recent influential typology of work systems, the highest category, “high-skill autonomous,” which is subject to little task supervision and only rare quantitative measurement of output, includes not only the highest-paid 25 percent of executive, administrative, and managerial occupations and all professional specialty occupations, but also all precision production, craft, and repair occupations. Why, under these circumstances, for example, high-skilled and autonomous electricians should be entitled to the same overtime protection as the most tightly constrained category of, inter alia, telephone operators and fast food workers, but millions of administrative and professional employees should be excluded neither Congress nor the DOL has ever bothered to

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217 Garson, *The Electronic Sweatshop* at 147. For further description of the control of brokers by brokerage firms, see id. at 128-54.


219 Garson, *The Electronic Sweatshop* at 163, 212

220 Garson, *The Electronic Workshop* at 164-65 (quoting a GTE human resources executive).

221 Garson, *The Electronic Sweatshop* at 110, 156, 166. For a detailed illustration of the phenomenon using the example of social workers, see id. at 73-114.

222 29 CFR § 541.314(a). The new regulations retain this exception. FR 69:22269 (to be codified at 29 CFR § 541.600(3)).

Despite having done nothing to expand overtime protection for white-collar workers during her tenure as WHA from 1993 to 1997, five years later Maria Echaveste pointed out the unrealistic nature of the DOL's dichotomous approach at a meeting of the right-wing Federalist Society:

I think if we’re going to make any real reforms, especially to the duties test, we need to have an honest conversation that just because of the level of education, people are using more of their brain, if you will, in their work, is that sufficient to say that they’re not entitled to overtime protection? The fact that your employer may very well still be looking at productivity in terms of how many...reports you file or how many things you get through during the hour—the industrial line doesn’t fit. Yet, you’re being measured on your productivity, and we get measured on our productivity, our billables, but we get compensated for it.224

Ironically, then, the rhetoric that employers and Republicans have deployed in their campaign to deregulate overtime and overtime pay—this “Depression-era law” must be modernized to deal with the new realities of today’s workplace225—compels a conclusion diametrically opposite to the one they favor: namely, that as more and more white-collar workers are subjected to Tayloristic rationalization in “the factory-like office,”226 more rather than fewer of them work under conditions requiring the same kind of protection afforded blue-collar workers.227 By the 1990s, even that bastion of corporate security, middle management—whom former Labor Secretary Robert Reich characterized as performing “routine supervisory jobs” analogous to the “repetitive tasks” of “traditional blue-collar jobs”—had begun to face mass terminations.228 If the evolution of “the white-


226Mills, White Collar at 205.

227Compare the assertion in a study by the pro-employer Employment Policy Foundation that legal regimes like the white-collar exemptions “create arbitrary distinctions between workers that do not fit the workplaces and work forces of the 1990s and the twenty-first century....” Edward Potter and Judith Youngman, Keeping America Competitive: Employment Policy for the Twenty-First Century 20 (1995).

collar ‘sweatshop’” in the 1980s and 1990s demonstrated that its incumbents “can be replaced easily.”\(^{229}\) That outcome has in no small part been driven by technological innovations that have left white-collar workers divided into three groups: those with reengineered jobs, those displaced entirely, and the small and contracting group with experience, creativity, or skills that have as yet been able to resist computerization.\(^{230}\)

Significantly, even the Labor Department indirectly conceded the proletarianization of this group in discussing the economic impact of its updating of the duties tests: because it will be “less difficult” for employers to determine whether an employee satisfies those tests, “employers will likely incur much lower costs associated with determining the exempt status of employees, including conducting expensive time-and-motion studies....”\(^{231}\)

The Labor Department has also undermined its own argument that the kinds of white-collar workers it has excluded from overtime pay protection perform overtime work that cannot be easily spread to other workers by admitting that “an employer’s volume of activities may make it necessary to employ a number of employees...performing identical work.”\(^{232}\) This admission raises the question as to why, for example, since NAVL employed 50-55 claims adjusters doing the same work as Haywood,\(^{233}\) it would not have been possible for the firm to reduce the workweek and employ additional adjusters to work a standard 40-hour workweek. After all, as the Wage and Hour Division observed in 1940: “It...does not appear why there should be a reluctance to make...overtime payments to salaried workers.... Either the penalty payments will discourage long hours of work, or the worker will receive a reasonable compensation for his additional efforts. [I]t is a serious misreading of the act to assume that Congress meant to discourage long hours of work only where the wages paid were close to the statutory minimum.

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**Introductory Illustration**

*in the Age of Corporate Restructuring* 3 (1995). Heckscher located middle managers, who hold a business together at the practical level, between the top managers (the general manager and his executive team), who deal with long-term questions, and supervisors, who deal with workers. *Id.* at 9-10. Barbara and John Ehrenreich, “The Professional-Managerial Class,” *Radical America* 11(2):7-31, at 13-14 (Mar.-Apr. 1977), included mid-level administrators and managers within the professional-managerial class defined as salaried mental workers who did not own the means of production and whose major function was the reproduction of capitalist culture and class relations.

\(^{229}\)Fraser, *White-Collar Sweatshop* at 20, 35.  
\(^{230}\)Fraser, *White-Collar Sweatshop* at 85.  
\(^{231}\)FR 68:15580.  
\(^{232}\)29 CFR § 541.205(c)(6).  
\(^{233}\)Telephone interview with Haywood.
Living conditions can be improved and work spread even where wages are comparatively high.\textsuperscript{234}

It is no coincidence at all that big business organizations such as the Labor Policy Association, which asserts that the FLSA ""was put in place to make sure workers at the low end of the pay scale are paid a fair day's wage for a fair day's pay, and it's gotten away from that,""\textsuperscript{235} also take the position that: ""We're no longer just a white-or blue-collar workforce.... We're a "gray-collar" workforce with a whole set of workers that just don't fall under the current system."" Unsupported by the prejudice that the FLSA's overtime provision was not designed to protect non-minimum wage workers, the LPA might be forced to justify its presumption that the convergence of blue-and white-collar workers should not bring about overtime protection for the hybrid group. To be sure, the LPA prevented any such insight by taking as an example the irrelevant case of ""an engineer with a two-year degree [who] is likely eligible for overtime pay, while a colleague doing the same job who has a four-year degree isn't.""\textsuperscript{236} In fact, the point is not whether two-year-degree engineers are white-collar workers—they are. Millions of white-collar employees are and have always been covered by the FLSA. The question is whether they are the kinds of white-collar workers whose workday should be subject to societal regulation, and neither the criteria developed by the DOL nor any employer proposals have ever contributed to answering it.

\textit{Introductory Illustration}

\textsuperscript{234}Stein Report at 7-8.


Part II

Maximum-Hours v. Overtime Laws: “The Difference Between Pity for the Weak and Overpay for the Organized”

Men do not want the liberty to be compelled to work all the time....

Senator EAGLETON. [W]hat if there was a law that prohibited anybody from working in excess of 40 hours a week for compensation?

Mr. [Nat] GOLDFINGER [research director, AFL-CIO]. I don’t know whether a Federal regulation of that sort, a prohibition, would make sense. I think that another way of doing it would be to apply a penalty—I mean a penalty which would discourage the scheduling of overtime. [W]e have found that the time-and-a-half penalty for overtime which was an effective penalty back in 1938, is hardly effective today because of the changes in fringe benefits.... We would rather apply a penalty for long hours than prohibit them. It may be at certain times and certain places in a given plant or a location that the employer may have to schedule overtime. But those circumstances...are rare. The general condition of overtime today...is that employers schedule overtime because it’s cheap to do so. In fact, there are cost savings, because you have an increased volume and as a result the fixed costs per unit are reduced.

1Secretary of State, Amendments to Constitution and Proposed Statutes with Arguments Respecting the Same To Be Submitted to the Electors of the State of California at the General Election on Tuesday, November 3, 1914, at 84 (1914) (State Senator William Kehoe presenting the argument in favor of an initiative requiring one day in seven as a day of rest).

Universal Eight-Hour Initiatives in California, Oregon, and Washington in 1914, and the Dispute Between the Socialists and the American Federation of Labor

What is a man to do who, with his household, breakfasts at 7, lunches at 12 and dines at 6? He must hire two cooks and two waiter girls where he now hires one, or overwork his wife, or go to jail.

Must...all of us who do not cook our own food and attend to our own toilettes go unfed, unshaved and unbathed on Sundays [?]...

All the laws that cranks and dreamers can devise will never give the race to the slow or the battle to the weak. Two and two make four, they do not make five, and no legislature can alter or repeal the multiplication table. The law of supply and demand will always dominate written statutes.

And at last there is the inborn ineradicable right of every American citizen to work...as few or as many hours as he pleases.¹

In order to appreciate the profoundly regressive character of the exclusion of millions of white-collar workers from even the very modest protection from excessively long workweeks that the FLSA began requiring in 1938, it is useful to focus attention on the existence of a serious political movement to enact much more stringent hours laws from which neither white-collar nor any other workers would have been excluded. Mobilized by the Socialist Party on the Pacific Coast in 1914, this campaign engulfed California, Oregon, and Washington² that year; although it failed to achieve legal embodiment in those states, within three years it did succeed in territorial Alaska, where, spurred on by the radical Western Federation of Miners and Socialist Party, the legislature enacted the most radical piece of hours legislation in the history of the United States. The history of this abortive statutory intervention—which was judicially declared unconstitutional by


²The Utah State Federation of Labor also adopted a resolution favoring "enactment of a universal eight-hour day law covering all classes of labor," but apparently no such initiative campaign took place in Utah. "Many Candidates Say They Favor Extension of the Eight-Hour Law," (Salt Lake City) Evening Telegram, Oct. 29, 1914 (14:5-6).
Universal Eight-Hour Initiatives

1918—has been told in depth elsewhere. Here an account of the historically similarly obscure developments on the West Coast is offered.

California

If I understand the aim and object behind every move toward the adoption of a shorter work day it is that we may be able to give the fagged brain and tired body of the worker who, through long hours of toil, is reduced in physical strength, an opportunity to study and develop mentally and physically.

Whereas leisure was the driving force behind the eight-hour movement under the special circumstances prevailing in climatically demanding Alaska, unemployment formed the impetus for hours regulation further south down the Pacific Coast. Thus the annual convention of the California State Federation of Labor passed a resolution in 1912 declaring: "Whereas, In view of the fact that the greatest problem affecting the whole people of the State of California is the unemployed problem; and ... Whereas, Under our modern industrial system this is largely due to employers compelling men to labor too many hours per day; therefore, be it Resolved, That the State Federation of Labor...do hereby pledge our full support to an eight-hour day in all industrial occupations." Three months later, the only Socialist Party member of the California state legislature, O. W. Kingsley of Los Angeles, introduced a bill in the Assembly

4David Roediger and Philip Foner, Our Own Time: A History of American Labor and the Working Day 179 (1989), briefly mention these eight-hour initiatives, but fail to recognize that they were not overtime, but maximum-hour regimes.
7California Legislature—Fortieth Session, 1913: Final Calendar Legislative Business 510.
limiting hours of labor: "No person shall be employed in any manufacturing, mechanical, mining or mercantile establishment, laundry, barber shop, hotel, restaurant, telegraph or telephone establishment or office, or employed by any express or transportation company, or any common carrier in this state more than eight hours during any one day or more than forty-eight hours in one week."\(^8\) The bill, which did not cover agricultural or domestic employment, imposed a fine of between $50 and $200 or imprisonment for 5 to 30 days, for violations.\(^9\) After the Committee on Labor and Capital recommended passage,\(^10\) it submitted several amendments during the second reading of the bill, which were adopted and altered the character of the proposal. First, in keeping with the venerable tradition of maximum-hours laws protecting miners in various western states,\(^11\) a proviso was inserted "that in cases of emergency involving injury to persons or property or both," the eight and 48-hour limits could be exceeded, provided, further, that time and a half be paid for any hours in excess of eight per day. In addition, the Assembly voted to extend the workday and workweek to 10 and 60 hours, respectively, in the transportation industry, subject, again, to the overtime premium. Finally, railway engineers, firemen, brakemen, and conductors were totally excluded from the bill.\(^12\) Despite the submission of a petition signed by 90,000 people,\(^13\) the Assembly narrowly refused passage of the watered-down bill by a vote of 37 to 30.\(^14\)

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\(^8\)Assembly Bill No. 31, § 1 (Jan. 13, 1913).

\(^9\)Assembly Bill No. 31, § 2.

\(^10\)Journal of the Assembly During the Fortieth Session of the Legislature of California: 1913 at 2210 (Apr. 26, 1913). The wording of the amendments that the committee included in its recommendation was not specified.

\(^11\)See, e.g., 1909 Cal. Stat. ch. 181 at 279; 1913 Cal. Stat. ch. 186 at 331; 1896 Utah Laws ch. 72 at 219. To be sure, these permitted emergency work after 8 hours but did not provide for premium overtime pay. See also Ariz. Rev. Stat., Civil Code, § 3099 at 1039 (1913) (electric light and power plants), and Idaho Rev. Code 1909, § 1464 at 661 (stamp mills); but see 1913 Missouri Laws at 399 revising Missouri Rev. Stat. § 7814a (eight-hour law for plate glass works without an emergency proviso).

\(^12\)Journal of the Assembly During the Fortieth Session of the Legislature of California: 1913 at 2276 (Apr. 29, 1913).

\(^13\)Journal of the Assembly During the Fortieth Session of the Legislature of California: 1913 at 2646 (May 6, 1913).

\(^14\)Journal of the Assembly During the Fortieth Session of the Legislature of California: 1913 at 2801 (May 9, 1913). The claim by Earl Crockett, "The History of California Labor Legislation, 1910-1930" at 22 (Ph.D. Diss. U. California 1931) that "[t]he measure did pass in the Assembly only to be voted down by the Senate," is erroneous.
In a post-mortem discussion of the bill at its annual convention in the fall of 1913, the California State Federation of Labor, revealing a tension with the Socialists, observed: “The Socialists of the State by their actions seem to have considered this bill the only important measure before the Legislature, as some of their publications had very little to say on other measures. In justice to Assemblyman Kingsley it should be said that he was not of a narrow partisan type, for he did valiant service on every labor measure that came before him. He also knows that if he had not introduced this bill it would have been introduced by others. The arguments in the committee...were made by trade-unionists, and we believe that the 31 votes that were cast for the measure were cast through the influence of trade-unionism. The petition of 90,000 signers was also circulated and signed to a large extent by trade-unionists.”

Indicating that the movement for the eight-hour day remained undaunted by the legislative setback, the convention at the same time passed a resolution requesting its affiliated central bodies, local unions, and members at large to help secure sufficient signatures for an initiative petition being circulated on behalf of a general eight-hour law, and recommending the appointment or election of agitation committees to bring about enactment of the law.

California had adopted the initiative and referendum in 1911 as part of the Progressive movement, which swept the governorship and legislature in 1910 and reshaped state labor law in 1911, but left labor advocates wanting more and pushing for the eight-hour law initiative. Endorsed in addition by the Socialist Party of California and the San Francisco Labor Council, an initiative petition was presented in early 1914 to be submitted to voters at the November election.

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15 Proceedings of the Fourteenth Annual Convention of the California State Federation of Labor Held at Old Armory Hall, Fresno, California October 6 to 11, 1913, at 101. Though only 30 names had been recorded as having voted for the bill, the Federation stated that “at the time all who watched the roll call are unanimous in saying that they heard 31 ayes.” Id. at 102.

16 Proceedings of the Fourteenth Annual Convention of the California State Federation of Labor Held at Old Armory Hall, Fresno, California October 6 to 11, 1913, at 17.


19 As amended in 1911, the Constitution of the State of California, Art. IV, § 1 provided for the initiative: “Upon the presentation to the secretary of state of a petition
Universal Eight-Hour Initiatives

adding the following section to the penal code:

Any employer who shall require or permit, or who shall suffer or permit any overseer, superintendent, foreman or other agent of such employer, to require or permit any person in his employ to work more than eight hours in one day, or more than forty-eight hours in one week, except in case of extraordinary emergency caused by fire, flood or danger to life or property, shall be guilty of a misdemeanor, and upon conviction thereof shall be fined not less than $50 nor more than $500, or imprisoned in the county jail not less than 10 nor more 90 days, or both so fined and imprisoned.20

This eight-hour day and 48-hour week proposal was radical in its universal applicability—neither adult men, nor farmworkers, nor domestic servants, nor managers nor professionals were excluded—and in the very narrow exception it allowed for “extraordinary emergency,” which employees would not be eager to work since no overtime premium was mandated.

Four months before the election, the seriousness of the campaign had become sufficiently prominent that, “[i]n view of the importance of the changes in industry that would follow adoption of such a law the Board of Governors of the Commonwealth Club of California arranged for a discussion” to inform both its members and the public at large.21 The debate at the Club in San Francisco on July 8, 1914, of which the press took note,22 featured the vice president of the San Francisco Labor Council and the editor of its organ, Labor Clarion, which the Club had requested to arrange for a presentation, despite the fact that the initiative certified as herein provided to have been signed by qualified electors, equal in number to eight per cent of all the votes cast for all candidates for governor at the last preceding general election, at which a governor was elected, proposing a law or amendment to the constitution, set forth in full in said petition, the secretary of state shall submit the proposed law...to the electors at the next succeeding general election occurring subsequent to ninety days after the presentation aforesaid of said petition.... Any act, law or amendment to the constitution submitted to the people by...initiative...petition and approved by a majority of the votes cast thereon...shall take effect five days after the date of the official declaration of the vote.... No act, law or amendment to the constitution, initiated or adopted by the people, shall be subject to the veto power of the governor, and no act, law or amendment to the constitution, adopted by the people at the polls under the initiative provisions...shall be amended or repealed except by a vote of the electors....”

20Secretary of State, Amendments to Constitution and Proposed Statutes with Arguments Respecting the Same To Be Submitted to the Electors of the State of California at the General Election on Tuesday, November 3, 1914, at 58 (1914).
measure had been drawn by "unofficial organizations of members of the Socialist party," because the Council had passed a resolution approving of it. Speaking against the measure were one representative each of farmers and of industrial employers. The Council's vice president, A. W. Brouillet, who was also its attorney, focusing almost exclusively on legal-constitutional issues, sought to make a virtue of a necessity by asserting that the proposal's very universality would immunize it against the kinds of judicial attacks that had struck down several hours laws. Conceding that the "this measure is more general in its scope than any measure regulating hours of employment in any American state, and it differs essentially from all other such measures brought to the attention of the courts," Brouillet stressed that it lacked certain defects that had triggered judges' displeasure in other cases: it was "flexible to some extent, and permit[ted] overtime employment in certain enumerated emergencies"; it contained no exempted classes and therefore could not be held to be special legislation discriminating against, for example, farm or domestic laborers; and, by not trying to fix overtime compensation, it did not deny employers' and employees' constitutional right to contract with regard to compensation. Though exuding an unfounded speculative optimism concerning the courts' hands-off attitude toward the measure ("courts will to a certainty refuse to interfere with the verdict of the people on a question involving a social evil and a remedy generally conceded capable of alleviating or removing it"), Brouillet was sufficiently circumspect to abandon safety or health considerations as the constitutional basis for the validity of the proposal. Instead, proponents were "frankly willing to place the statute on a decisive foundation of public policy, namely the economic and social welfare of the class of people for whose benefit the act is proposed," although he himself refrained from identifying that non-safety or health benefit.

In rebuttal, G. H. Hecke, a fruit grower from one of the most important producing communities, was introduced as discussing the impact on agriculture. Eventually he did depict what he viewed as the nightmarish consequences of the law for farming, but first he anticipated its effect on urban wage earners, whom he divided into skilled Americans and alien laborers. The former "enjoy already the

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23 "The Eight Hour Law" at 417, 420.
29 "The Eight Hour Law" at 429.
advantages of a short day of labor,” but “[t]heir income would be materially reduced by the fact that ‘overtime’ work is absolutely prohibited by the proposed bill.” Hecke failed to notice the self-contradiction in which he had trapped himself: if a material part of these workers’ wages consisted of overtime pay, then in fact they had not yet achieved the “short day” that the initiative measure sought to secure. Instead of lingering over this logical flaw, Hecke moved on to xenophobic labor market analysis, alleging that organized skilled workers’ strong position “would be much endangered by the powerful, alluring inducement to workers all over the civilized world, that California is to be the paradise of labor. Short hours and easy life promised by this law would cause an invasion of elements that might not be desirable as citizens....” Indeed, they would be a “menace” both to employers “by their disposition to limit hours and service to mere existence” and to the skilled workers “by their disposition to deprive efficient workers of their well-earned jobs.” The other group performed either “stoop-over farm work” or used a pick and shovel—“the monotonous hand work, performed under discouraging but unavoidable conditions, in cold wet weather or under the burning sun of an interior California summer....” A large proportion of them were “Oriental laborers, of which type too many have already become the owners of good California land,” but they were “not in such deplorable physical and financial condition that they need the arbitrary hand of state in an eight-hour law.” Without revealing which groups faced such deplorable conditions that they might actually need such state help, Hecke asserted that these “Oriental” laborers “would no doubt thrive better under any enactment that would further deplete the farm of its white help....”

Retaining the racist world-view as he turned his attention to agriculture, Hecke noted that “[t]he white man’s burden is carried more patiently by the farmers than by any other calling, but when the last straw is added something will break.” In this case the straw was the ban on overtime work, which, he admitted, would not apply to family members, but “[o]vertime work is imperative in the packing and shipping of perishable fruits to market.... There is no other way of getting the work done under the prevailing condition of the labor supply.” The parade of horribles reached its lowest point when Hecke contended that farm owners would be induced to lease to “alien ‘partnerships’ which could evade...the law” since the partners would be owners and not employees. But neither “American working men...nor...the allied types of German, English or Scandinavian” workers would

31Hecke, “The Standpoint of the Farmer” at 432.
32Hecke, “The Standpoint of the Farmer” at 433.
combine into partnerships, whereas “the Oriental” and southern European would.” In any event, “California agriculturalists...do not propose to submit to any arbitrary system that will necessitate an army of delegates to police the rural homes and parcel out the time,” and by defeating the initiative, the citizens would leave to them “the God-given right to use their time as may seem best to them for their own good.”

James Mullen, the editor of the Labor Clarion was then called on to discuss the proposed law’s economic and social aspects. He stressed that proponents of the initiative wished to discourage and penalize “systematic overtime” because of its injurious effects, whereas employers “generally favor the overtime privilege notwithstanding its higher cost or attendant lessening of efficiency.” Offering a more differentiated analysis than the other debaters—though, to be sure, at times he misleadingly conflated labor unions’ achievement of the “eight-hour system” with their abolition of overtime work—Mullen pointed out that since women and children were already covered by an eight-hour law and skilled men seldom favored legal enactments to obtain what they could achieve through their organizations, the focus had to be industries employing unskilled nonunion men such as farming, commerce, transportation, office work, personal services, the food and wine industry, and factories. In many of these industries it was impossible to assume that reduced hours would compensate employers by increasing output through increased efficiency; it would thus be necessary to employ more workers to produce the same output. Employers regarded this admission as fatal to the proposal, but in fact “on this admitted and uncontested fact, the best and strongest argument for the law is to be based. For our argument is, that modern conditions of society have developed to that stage of efficiency of production and saturation of economic activity that a general reduction in the normal workday seems to be the only social means of sustaining the general welfare of all its citizens....” It was the “evil of unemployment” that was driving the shorter hours movement, which, if it furnished the cure, would be “socially justified and the accompanying hardships or mal-adjustment that may result in individual cases, can have but little consideration in the eyes of those who recognize that heroic treatment is necessary....” Mullen’s overly optimistic prognosis was especially poignantly visible in his seemingly plausible claim, unfulfilled even 90 years later, that: “The time has gone by when farm operators may be exempted from all statutes for the social

33Hecke, “The Standpoint of the Farmer” at 436-37.
35Mullen, “The Standpoint of the Workman” at 440.
and economic advancement of labor. Work on the farm must become as remunerative and attractive as in the factory, if the farmers as a class are not to be placed outside the pale of modern progress."

Finally, Charles Bentley presented manufacturers' view, arguing that, since most vocations in California were already on a general eight-hour day, the real question for debate was stripped down to that of permitting overtime work with pay and the further question of creating an exception for peculiar conditions on farms. Bentley correctly observed that "[t]he object of the law is apparently to require employers to provide help enough to care for the work in the eight-hour period, and that if further work is necessary, it must be so arranged as to run two or three shifts...." The problem with this approach was rooted in a shortage of labor, which meant that since full day shifts could not be secured, night shifts were "out of the question." Moreover, apart from the impossibility of performing most farm work by artificial light, Bentley was able to impale proponents on their own logic by noting that: "as the motive of this proposed legislation is presumably for the physical, moral and social welfare of the employed, careful consideration and experience force one to the conclusion that night shifts do not conserve these desirable conditions." Not content to confine himself to raising this important unintended practical consequence, Bentley could not resist veering off into an ideological sermon on how "the evils of improvidence are even greater" than those of overwork: "To deprive our youth and manhood of the opportunity for extra reward by extra industry is very likely to give habits of idleness and unthriftiness, leading to the tragic despair of impoverished old age." While not denying the need "to secure for the laborer some leisure," he insisted that once wages rose above subsistence level, it was questionable whether a reduction in working hours was desirable. After all: "Men who get on in the world, whether they be laborers, merchants, manufacturers, doctors, journalists or lawyers, do not as a rule restrict themselves to eight hours of labor, even when their income may permit."

In reply, Mullen, while failing to address the issue of night-shift work as a consequence of a strict eight-hour day, sought to stress that wage workers did not desire overtime pay because they wanted the money. On the contrary: "There is no labor organization that I know of that does not penalize overtime for the sole purpose of preventing the employer from forcing the employee to work overtime."

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37 Mullen, "The Standpoint of the Workman" at 442.
39 Bentley, "The Standpoint of the Manufacturer" at 447.
40 Bentley, "The Standpoint of the Manufacturer" at 448.
41 Bentley, "The Standpoint of the Manufacturer" at 451.
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As an example, he adduced the International Typographical Union, which prohibited members from working more than six days per week where a substitute could be found; if a member worked more than six days because of inability to obtain a substitute or if his overtime work amounted to a day in hours, he was required to give the first available substitute such accumulated day or days.  

Two months later, with two months to go before the election, the state Attorney General Webb issued an opinion to the Progressive Governor Hiram Johnson on the constitutionality of the eight-hour law initiative measure. Before reaching that question, however, the attorney general presented a sociological perspective:

No one can contend that any one man or woman can work continuously twenty-four hours in a day without injury to his health and resultant harm to the state. No one would contend that the state may not prohibit the employment of man or woman for such period as would affect [sic] such injury to the state. That there must be a cessation for labor for some period less than twenty-four hours, both as to man and woman, must be admitted by all. For how long in any one day or in any week such cessation shall be, in other words how long in any one day or in one week one may labor without the resultant injury to the individual and to the state is the question in dispute. This question, however, it is submitted is a question of fact to be resolved from the experience of mankind, to be determined as an economic question and not as a judicial one. ... In view of the fact that many persons throughout this and other countries deem that eight hours is a sufficient time for labor in any one day by man or woman, in view of the fact that this opinion is held by many public writers and men of public affairs, and individuals the world over, it cannot be said that the requirement of eight hours labor only in one day is an unreasonable limitation upon the individual’s liberty. Neither is it a judicial question for the determination of a court.

However, the attorney general deemed it "idle" to discuss the economic viewpoint any further since the United States and California Supreme Courts "have been unwilling to sanction legislation which has for its object the limiting of the hours of individuals, unless that limitation is restricted to some class or occupation

42 "The Eight Hour Law" at 452.
44 It is unclear why a month passed before the Los Angeles Times published an account of together with extracts from the opinion. "Eight-Hour Law for Work Shown Invalid," LAT, Oct. 6, 1914 pt II (1:1).
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wherein the limitation has some bearing in the eyes of the Court upon the health or general welfare of the public, and that heretofore those Courts have not found that such limitation has such bearing when addressed generally to all individuals irrespective of sex or occupation.” Since the California initiative was unprecedented, it is unclear to what cases Webb was alluding, but he nevertheless concluded that the measure would be unconstitutional.46

If this opinion alleviated employers’ anxiety, it did not appear to diminish their vigorous agitation and propaganda against the initiative,47 which became especially intense about one month before the election on November 3 and was heavily supported by almost daily articles in the state’s two major newspapers, the Los Angeles Times (which under Harrison Gray Otis spearheaded the antiunion movement in Los Angeles)48 and the San Francisco Chronicle (a conservative Republican antiunion paper).49 Thomas W. Williams, the state secretary of the Socialist Party of California said of “the opposition to the eight hour bill, and articles in the capitalist papers” that the Merchants and Manufacturers Association (Otis’s ally in the open-shop movement)50 was

the inspiration back of the opposition. They are furnishing the sinews of war. ... They have organized a “Farmers and Fruitgrowers Association” and are centering their attack on the injury that the passage of this bill would inflict on the agriculturalists. Necessarily they are resorting to falsehood and misrepresentation. They are playing upon the prejudices of the farmers and frightening the workers.

The power of the Merchants and Manufacturers is so far-reaching that they have frightened the country newspapers into refusing any of our matter, and of course the big dailies are afraid to give us audience, the big merchants using their power of coercion.

Organized labor has helped us somewhat, altho it is difficult to get the leaders to appreciate the necessity of heroic action. The labor councils of Alameda County have invited [AFL President Samuel] Gompers to make a tour of the Pacific Coast states in


47Despite its unconstitutionality, the Los Angeles Times urged that “there is every need for added effort in behalf of the defeat of the law....” “What’s the Use? Could Never Enforce an Eight-Hour Law,” LAT Oct. 29, 1914 pt II (3:1) (editorial).


favor of the law. I do not know with what results.51

A member of the Socialist Party observed that the Merchants and Manufacturers Association of Los Angeles’s “stuff is now filling the columns of every daily and weekly publication outside of the socialist press, on the Pacific Coast; is simply a flood, a complete inundation of the public press with lies, sophistry, and hypocritical cant, and if that kind of a campaign can win, then the eight hour law is doomed. Our own and the labor press is totally inadequate to meet the situation.”52 The California State Federation of Labor agreed that agents of the Merchants, Manufacturers, and Employers Association’s and the newly organized Farmers’ Protective League were conducting a campaign of misrepresentation among the small farmers as to the amendment’s effect, which would “without doubt defeat the measure unless affected by logical argument” by supporters. Its annual convention therefore passed a resolution authorizing the incoming executive board to expend a reasonable amount of funds on literature contradicting the opponents’ false and malicious statements.53

The reporting in the Chronicle and the Times was so blatantly propagandistic that it merged with the numerous negative editorials on the initiative. For example, in early October, a Chronicle article celebrated that: “More than 50,000 farmers, members of the Farmers’ Protective League of California, are demanding the overwhelming defeat” of the measure and praised “the astonishing growth” of an organization that had been launched on June 4. The piece ended with the implausible allegation, misleadingly phrased as an indirect quotation, that Socialist Party state secretary Thomas Williams “rejoices that the proposed law will increase the cost of living and tend to abolish all profits.”54 Two weeks later the Chronicle falsely claimed that the proposed law “makes absolutely no exceptions. When a person has worked eight hours he must stop or his employer will go to jail. The law would mercifully excuse the really guilty party from any penalty.” In case any readers had failed to recognize to what horrors the actual eight-hour day was


53Proceedings of the Fifteenth Annual Convention of the California State Federation of Labor Held at Moose Hall, Stockton, California October 5 to 9, 1914, at 31.

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merely the prelude, the editorial added that some of these “would-be destroyers of society...are bold enough to say that this is only the beginning of what they intend to do to us.”55

Not to be outdone in the yellowness of its journalism, the Los Angeles Times, whose coverage focused on Southern California, trumpeted under the headline, “Women War on Eight-Hour Law,” that Los Angeles clubwomen were preparing to vote almost unanimously against the universal eight-hour day measure fathered by the Socialist Party: “Unrelenting in its opposition to the measure, the Farmers’ and Fruit Growers’ Association, representing more than 15,000 ranchers in Southern California alone, is now engaged in making a canvass among the women’s clubs south of the Tehachepi, the results of which, so far returned, indicate that the Socialist measure will have little or no measure from that quarter.” As one of the clubwomen succinctly put it: “Nature does not recognize the eight-hour law.”56

As part of the capitalist press’s mission of disorienting workers, the Times reported that the Commercial and Industrial League had issued a general warning to all the employees of its members against the probable effects of passage of the universal eight-hour law: “By passing this law you will be conspiring to overcrowd nearly every one of your trades and occupations...for coincident with announcement that an eight-hour day is compulsory in California will go forth the news that there is room for an army of workers one-third the size of that already here, and so will all the work your unions...have done to keen [sic] out superfluous labor be undone. Those of you who are buying your homes will soon find that you are being underbid on your wages by the members of the industrial army which will flock here from everywhere....’’ Moreover, if crowded out of their present job, workers would not be able to get work on farms “because the citrus industry cannot stand the imposition of this law without employing Japanese and Hindus and Mexicans, who can work on “a partnership basis,” and so evade compliance with this eight-hour law.”57

Without citing a single source or example, the Times, which called the proposal “utterly and inconceivably absurd,”58 claimed: “Strenuous opposition to the Socialist ‘universal eight-hour law’ has developed within the ranks of organized labor. Ostensibly planned for labor’s benefit, labor men are coming to realize that the law, as drawn,...is no less a menace to themselves than to their employers.”

Labor's chief objection to this proposed legislation was that it would end the overtime system, "a device of the unions themselves." Workers' "earnings capacities would be largely impaired by this Socialistic measure which denies to the labor the right to sell in [sic] open market his labor for the best price and under the best terms he can get for it...." The newspaper also took at face value the Farmers' and Fruit Growers' Federation report of growing opposition among field workers.\textsuperscript{59} Remarkably, when the FFGF was "coming into the metropolis to make a face to face appeal to its citizens for support in their fight against a measure, which, if adopted, they say will mean the virtual destruction of agricultural interests all over the State," it issued a statement conceding that, despite the destructive impact on farming, "'[t]here may be industrial lines in which such a law might serve a good purpose, but on the farm it would prove destructive....'\textsuperscript{60} Nevertheless, a few days later, this softer line had evaporated as the \textit{Times} quoted a state senator urging: "‘Don't, above all, allow persons to believe that the eight-hour law has even the seeds of humanitarianism in it.... It is a plain revolutionary, Socialistic measure....'\textsuperscript{61}

As election day neared, the press became more insistent and specific in its mission of instructing the public. The \textit{Chronicle}, in printing the position of the Chamber of Commerce, advised readers to vote against the eight-hour amendment on the grounds that it would reduce wages, prohibit overtime, and "place an absolute limit on man's earning capacity.... No country has so drastic a law on its statute books."\textsuperscript{62} The editorial the next day, the Sunday before the election, transcended all of its previous ideological exaggerations and non sequiturs:

A mistake has been made in basing the main opposition to this law on the injury to farmers. It will be comparatively easy for farmers to evade the law by leasing their land to co-operative associations of Asiatics.

And they will do it to the extent that Asiatics are available, and if there are not enough there is a danger that the farmers' vote will reverse the sentiment of the State on that

\textsuperscript{59}"Proposed Law Splits Unions," \textit{LAT}, Oct. 16, 1914 (pt. II, 6:4). The paper also reported that employees of 12 trades including cigar makers and printers had delegated committees to spend three hours each evening telephoning all industrial workers in their occupations to urge them to vote No. "Ask City Folks to Defeat Law," \textit{LAT}, Oct. 28, 1914 (pt. II, 2:5, 5:2).

\textsuperscript{60}"Here to Fight Ruinous Law," \textit{LAT}, Oct. 17, 1914 (pt II, 3:1). The FFGF's assertion that "'[a]n identical measure was overwhelmingly defeated when introduced in the Legislature at its last session,'" was incorrect since the bill had not covered farming and lacked emergency clause.


\textsuperscript{62}"For the Guidance of Electors on Tuesday," \textit{SFC}, Oct. 31, 1914 (10:2).
The greatest danger is to the householders and working men engaged in the industries. Affairs of the households employing help cannot be turned over to co-operative associations. Such a law, if its enactment were possible, would break up a multitude of families who would be driven into apartment life. Of course, all would leave the State who could.

The proposed eight-hour law is an emanation of the infernal spirit of hatred which permeates a considerable element of our population and which is bent on the destruction of confiscation of all property, the suppression of personal liberty and enterprise, and the institution of a government of loafers, by loafers and for loafers.63

The final editorial blast on the Sunday before the election in the Times, which delighted in calling the eight-hour initiative "this Socialistic freak,"64 was also suffused with rhetorical flights of fancy:

It is part of the punishment of a convict in a penitentiary that he cannot choose his own time for work and rest. By the proposed eight-hour law on the ballot...and the Sunday law..., it is designed to rank the working men and women of this State with thieves and assassins in that it prescribes the number of hours in which they will be permitted to work and fixes one day in the week in which they must absolutely abstain from work. ...

The proposed eight-hour and the proposed "Sunday rest law" are invasions of individual freedom and would establish a slavery as unendurable to free men as that which the nation abolished fifty years ago.65

In contrast, the report the same day about "a bevy of pretty costumed packing-house girls invad[ing] Los Angeles, campaigning for votes" noted that one of the main arguments of these citrus-belt "girls whirl[ing] through the city, tossing broadcast handbills pleading their cause" was that the elimination of overtime pay would "cost[ ] tens of thousands part of their incomes."66 Unlike the editors, who specialized in ideological hectoring, the citrus capitalists were articulating a most practical consideration that, by the beginning of the 21st century, when the question of absolute limits on working hours had long since been decided in employers' favor, constituted virtually the only argument that the labor movement could muster against congressional and federal regulatory proposals to restrict overtime—namely, that many workers' standard of living had come to depend on

65“Vote Against the Two Eight-Hour Propositions,” LAT, Nov. 1, 1914 (pt. II, 10:7-8).
premium overtime pay.67

Williams, signing as the Socialist Party's state secretary, also wrote the quasi-official argument in favor of the initiative that was published in the election booklet sent to the electorate. The *Chronicle*, which in a non-editorial article headlined "Progressive Fads Boost Election Costs," deemed much of the proposed direct legislation "vicious, fanatical and demagogic," thundered that the 1,800,000 amendment booklets, which cost $144,000 to print and distribute, contained "148,000 words of technical laws and arguments for and against" which the voter was supposed to digest and pass upon in the one or two weeks before the election.68

In an editorial published the same day, the *Chronicle* complained that, outside of newspaper offices, no voter had seen the 112-page election pamphlet and that "we doubt whether there are a thousand voters of the State who know a thing about any of" the 48 measures on the ballot except for two (not identified), being energetically discussed: "Never on earth before was there such a travesty on legislation."69

Williams focused on the measure's impact on unemployment and leisure:

An eight hour day means an increased demand for men. It relieves the unemployment pressure. Under a long hour day some men work while others are idle. Enforced idleness is not leisure. Idleness will impoverish, degrade and dwarf. Leisure will enrich and elevate character. It will give workers opportunity for study and organization. More idlers working, more workers thinking. ...

The eight hour day conserves the health of the worker, and extends the working period of his life.70

Williams also contended that the eight-hour day would not reduce wages because workers were not paid according to what they produced, but according to law of supply and demand, which would discourage the import of cheap labor and

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67For example, according to AFL-CIO President John Sweeney: "[T]he Republican leadership finally realized that not all of their members would blindly go along with unraveling the basic right to overtime pay, which could literally take billions out of the paychecks of working families." "Supporters Vow to Continue Fight to Pass Plan to Revise Comp Time," *LRR* 172:259 (June 16, 2002). See also below chs. 16-17.


70Secretary of State, *Amendments to Constitution and Proposed Statutes with Arguments Respecting the Same To Be Submitted to the Electors of the State of California at the General Election on Tuesday, November 3, 1914*, at 58 (1914).
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“prevent the employing class from manipulating the labor market when it shall have become flooded by immigration through the Panama canal. Employers of labor in this state are planning to abolish the eight hour day. It rests with the voters to decide whether the standard of living in California shall be reduced to the level of southern Europe.” In contrast: “All the arguments against this measure resolve themselves into this one—it will encroach on the profits of the exploiters of labor.”

Hecke presented the argument against the eight-hour law to the electors, which largely covered the same ground he had outlined in the debate at the Commonwealth Club. This time he pithily added that the measure “substitutes rigid rule of law for reasonable liberty of action. It prohibits ‘overtime’ by which employees and employers divide the burdens of emergency by co-operation.”

At the election the initiative measure (Proposition 3), which the FFGF on the eve of the vote accurately characterized as “the most sweeping and drastic measure of its kind ever submitted to vote anywhere in America,” was defeated by a vote of 282,692 (33.5 percent) to 560,881 (66.5 percent), losing in every county. In the three counties with approximately half of the state’s total registered voters, Alameda (Oakland), Los Angeles, and San Francisco, in which “the farmers maintain[ed] that they must get a big vote...against the measure if the agricultural interests...are to be preserved from the menace which confronts them,” the vote was 29,080 to 50,884, 74,583 to 133,704, and 49,629 to 70,909, respectively. Thus in the three largest cities, which accounted for 54.2 percent of all yes votes and 45.6 percent of all no votes, 37.5 percent of the voters supported the measure (the highest proportion, 41.2 percent, being attained in San Francisco). The closest
vote was counted in Contra Costa County (in the Bay Area), where 47.5 percent of the voters said Yes.76 The eight-hour measure received the largest total vote and by far the largest No vote of any proposition.77 Although the following day the Chronicle prematurely understated the breadth of the defeat in observing that the south and the big farmers’ vote opposed it,78 that a radical Socialist Party measure abolishing both mandatory and voluntary overtime work (except in extraordinary emergencies) secured one-third of the total vote in spite of a massive capitalist media campaign79 was no mean feat.80

Little wonder that by the time the election returns were posted at the end of 1914 the Commercial and Financial Chronicle opined of the initiative system: “This thing has been as a sort of new toy offered to children, but its attraction of novelty appears to have failed. The...indications are that the people are tired of it.”81

Undeterred by the two to one defeat of the eight-hour initiative two months earlier, in January 1915 one of the two Socialists in the California State Assembly introduced a no-overtime eight-hour bill similar to the one that the Assembly had voted down in 1913.82 However, despite the fact the bill sought to neutralize agricultural opposition by excepting the harvesting, curing, canning, or drying of any variety of perishable fruit or vegetables (as well as graduate nurses in

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76Secretary of State, Statement of Vote at General Election held on November 3, 1914 in the State of California at 42.
77Key and Crouch, The Initiative and Referendum in California, tab. 3 at 475. See also “Direct Legislation,” CSJ 28(15):6 (Dec. 23, 1914).
78Johnson Winner; Eight Hour Law and Drys Beaten,” SFC, Nov. 4, 1914 (1:5).
79To be sure, according to those very media, alone in one week in late October the Socialists had sent out one million pieces of literature on the measure. “Say Worst Is Yet to Come,” LT, Oct. 22, 1914, pt. II (1:3, 2:6).
80John Commons and John Andrews, Principles of Labor Legislation 253 n.l (2d ed. 1920 [1916]), incorrectly stated that the defeats of the eight-hour initiatives in California (as well as in Oregon and Washington) had largely been due to the farmer vote; they also failed to make clear that the measures were strict maximum-hours laws and not merely overtime laws.
81But see Cahill, Shorter Hours at 132-33, who opined that the fact that the initiatives in California and Washington had been rejected 2-1 was “apparent proof that public opinion either did not approve of the eight-hour principle, or did not approve of it by the legislative method.”
82Lewis Spengler, a merchant from Los Angeles, introduced the bill. California Legislature—Forty-First Session, 1915: Final Calendar Legislative Business 455.
hospitals), the Committee on Labor and Capital recommended against passage and the Assembly as a whole refused passage by a more decisive vote of 19 to 43. Although the Socialists remained unfazed, in the aftermath of this reverse, the State Federation of Labor ceased supporting such legislation.

**Oregon**

"[F]lexibility of hours"...seems to be a term that is generally current throughout these hearings. I should like to ask whether flexibility of hours just includes where an employer asks a man to throw in gratis any additional work required, or whether it also includes on a hot day like this, when a fellow would rather go fishing, whether he would be excused without being paid for it, or be paid for it. In other words, if there is such a thing as flexibility of hours it should work both ways.

Unlike California, Oregon adopted the initiative process in 1902 before the surge of the Progressive movement. Then in 1911 the Progressives gained control of both houses of the legislature and in 1913 were able to enact much important labor legislation governing working hours on government works and in manufacturing. During the intervening decade, however, the initiative process

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83 Assembly Bill No. 98, § 1. Jan. 11, 1915
84 Journal of the Assembly During the Forty-First Session of the Legislature of California: 1915, at 894 (Mar. 30), 1116 (Apr. 6).
87 Ellis, Democratic Delusions at 32, 186. See also Joseph LaPalombara, The Initiative and Referendum in Oregon: 1938-1948, at 1-11 (1950); Piott, Giving Voters a Voice at 32-50. The initiative and referendum were adopted as Art. IV, § 1 of the Oregon Constitution, the language of which strongly resembled that used in California, which was presumably borrowed from its neighbor.
88 Ellis, Democratic Delusions at 181. The hybrid maximum hours-overtime pay law
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had constituted an “unused right, which has been a disregarded privilege of the socialists of Oregon...” But by October 1913, initiative measures had become “the most important work of the socialist party of Oregon or any other state having the initiative right of legislation.” In this practical way, “the socialist party will be given a practical standing as a political party, seeking legislation rather than notoriety in nominations for office.”

The Universal Constitutional Eight Hour Day Amendment, initiated by authority of Mrs Jean Bennett on behalf of Universal Eight Hour League, which was filed on Oct. 30, 1913, would have added a section 9 to Art XV of the state constitution making it a criminal offense for any person, firm, corporation or his or its foreman, manager, or agent to employ any man, woman, boy or girl more than 8 hours in a calendar day or 48 hours in a calendar week, whereby the eight hours had to be confined to nine consecutive hours, allowing one hour for eating and rest, which nine hours had to be identical for each and every calendar day and week. The measure applied to every person employed for pay, remuneration, profit, or compensation of any kind in and around each and every farm, hospital, canning or packing plant, factory, lumber yard, logging camp, sawmill, railway, telephone and telegraph, engineering, mechanical, mercantile, mining, foundry, iron, and machine work, to laborers, domestics, artisans, mechanics and tradesmen in the building trades, office, store, barber shop, garage, workshop, wharf, cafe, club, restaurant, hotel, and laundry. Neither the professions, nor children, nor relatives of employers or their agents were exempt:

The only exemptions allowed...under this law...shall be in case of accident, breakdown, fire, flood, or storm; when in such cases, it shall be legal for any employer, his, or her agents, to employ their help for more than eight hours in one calendar day; provided, however, that, for each additional hour, or fraction thereof, such help shall receive twice their usual remuneration for each additional hour, or fraction thereof.

Enforcement was made even more stringent than the substance—which was more rigorous than the contemporaneous measures in California and Washington—inasmuch as failure by the Labor Commissioner to enforce without delay each and

limited work to 10 hours plus an additional three hours if paid at time and a half. 1913 Or. Laws ch. 102, § 3 at 169.


90Art. XV was entitled “Miscellaneous”; § 8 prohibited any “Chinaman” not resident in Oregon at the time of the adoption of the state Constitution from ever holding real estate or a mining claim.
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every provision of this law and to prosecute each and every violation without delay "shall make it mandatory for the Governor...to dismiss said Labor Commissioner." Violations were subject to punishment by a fine of between $100 and $1000 or imprisonment of between 30 days and one year in jail, or both.91

The state-provided election booklet included a brief negative argument by the Non-Partisan League, which was confined exclusively to criticizing the measure’s impact on agriculture. It contended that alone the fact that the bill covered farm hands and household servants showed it to be impracticable: farm work was impossible to limit to eight hours. Moreover: “The average farmer today is not amassing any fabulous fortunes and if he has to put in two shifts of men to harvest his crops it will put the farmer absolutely out of business. No matter what or how many laws we may pass, we cannot change the fact that crops ripen and have to be gathered in a very small portion of the entire year and unless everybody works early and late without much regard to hours, the crops will be damaged, if not lost.” The farmer had difficulty finding enough farm hands as it was for harvest; if he could get twice as many, “what would these extra hands do during the rest of the year. We don’t need any additional army to take care of during the winter.”92

On November 3, Measure No. 320-321, the Universal Constitutional Eight-Hour Day Amendment was defeated more decisively than in neighboring California by a vote of 49,360 (22.7 percent) to 167,888 (77.3 percent). The proposal lost in all 34 counties; even in Multnomah County (Portland) it was defeated 20,468 (30.5 percent) to 46,686 (69.5 percent).93

Washington

Some industrial nations absolutely have a prohibition on working beyond so many hours a week, and I think rightfully so, but this is too inflexible....94

91State of Oregon, Secretary of State, Proposed Constitutional Amendments and Measures with Arguments Respecting the Same to Be Submitted to the Electors of the State of Oregon at the General Election Tuesday, November 3, 1914, at 27-28 (n.d. [1914]).

92State of Oregon, Secretary of State, Proposed Constitutional Amendments and Measures with Arguments at 29.

93[Oregon] Secretary of State, Abstract of Votes: Cast in the Several Counties of the State of Oregon at the General Election held on the Third Day of November, A.D. 1914 (Dec. 3, 1914) [n.p. unpaginated 6x10 pamphlet].

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In early 1913, a bill was introduced in the Washington State Assembly making it "unlawful for any person, corporation, or joint stock association to cause, require or permit any employe to work more than eight hours during any day of twenty-four hours: Provided, however, That the provisions of this act shall not prohibit persons engaged in harvesting, packing, curing, canning or drying any perishable product from working employes ten hours during any day of twenty-four hours, if such employe is paid double time for such extra hours of labor." Violations constituted gross misdemeanors. Thus for the non-agricultural sector the bill would have permitted no deviations at all from the eight-hour day—not even for emergencies; and even in agriculture, the maximum workday was 10 hours for 11 hours of pay.

Remarkably, this radical proposal had not been introduced by a Socialist or leftist of any sort; on the contrary:

This bill was introduced into the legislature by Representative Grass, a stand-pat Republican from King County. Mr. Grass had no intention or desire of this bill becoming a law. He introduced it merely [crossed through by hand] purely as a retaliative measure. The State Grange had been very active in assisting the Federation of Labor in the passage of labor legislation, especially in securing the passage of a bill providing for an amendment to the constitution by the initiative of the people. This made some of the stand-patters very angry with the Grange and they wanted to get something with which to chastise the farmers, and they thought that a universal eight hour day would make the farmers squeal as quick as anything, so they drew up the bill, and had Representative Grange present it to the legislature. They soon found that the grange [sic] was in favor of an eight hour gate to gate law so they got busy and had the bill killed in the committee.

This account was written by in July 1913 W. H. Kingery, the first socialist elected to the Washington State legislature, in response to a request by the Party’s Information Department in Chicago for an “abstract of the Socialist’s work” in the legislature. Kingery declared that at the 1914 election he “will have the universal eight hour law that was before the legislature presented to the people for their approval or rejection under the new initiative and referendum law that we passed at the last session....” After Grass’s bill had been killed, Kingery “picked up the

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97Letter from Kingery to Thompson at 1-3. The voters approved the measure in 1912 and it was added to the state constitution amending Art. II, § 1. The initiative petition had
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cue" and circulated a petition for which he obtained 30,000 signatures. He took no action on the matter in the legislature, but planned to file the proposed eight-hour law with the secretary of state in January: "If the Socialist party will give me the proper support in the campaign for the passage of this law, we are sure to place the State of Washington on the eight hour law basis in the election of 1914." Kingery admitted that the proposed law was "a reform measure, but I sincerely hope and trust that the secretary and executive committee of the Washington Socialist Party, [sic] will at least surrender enough of their impossibilism to give me the support of the state office in the passage of this eight hour law." Although no one realized the futility of reform more than Kingery, he could not agree with his impossibilist comrades in their bitterness toward helping evolutionary social forces.98

More than four months before the election, The New York Times, which otherwise ignored the eight-hour campaigns on the West Coast, published an editorial, largely based on material in Pacific Coast newspapers, attacking both the initiative process and the substance of the proposal in Washington:

Some of the by-products of direct legislation are not altogether lovely. ...

One of the initiative bills now being circulated for signatures in Washington applies the penalties of the eight-hour law to all employers, including the farmer and the housekeeper.... Under it the farm hand or housemaid cannot relieve his or her employer from the penalty even if he or she wishes to do so. It may be said that this is not a fair example of the sort of legislation that is enacted under the initiative and referendum; but, as The Tacoma Ledger points out, if each voter does not scrutinize every one of the propositions submitted to him such an insane measure as this may slip through.99

The initiative, which was backed by the State Federation of Labor, provided:

It shall be unlawful for any person, persons, corporation, company or joint stock association to cause, require or permit any male or female employe in his, her or its employ to work more than eight hours during any day of twenty-four hours nor more than forty-eight hours during any week of seven days, except that in agricultural labor an additional two hours per day may be allowed for work which is unavoidably and necessarily incidental to farm management.

Provided, however: That in case of extraordinary emergency, such as danger to life

to be signed by 10 percent of or at most 50,000 voters. See generally, Piott, Giving Voters a Voice at 186-98.

98Letter from Kingery to Thompson at 3-5.
100Piott, Giving Voters a Voice at 195.
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or property, or where such eight-hour limit would unavoidably and necessarily prevent other workers in the same mine, mill, factory or other industrial unit from working the full eight-hour day the hours for work may be further extended, but in such cases the rate of pay for time employed in excess of eight hours of each calendar day shall be one and one-half the rate of pay allowed for the same amount of time during eight hours service.¹⁰¹

The measure thus permitted 10-hour days in agriculture (without overtime pay) and work beyond eight hours in industry in extraordinary emergencies at time and a half. Violations were subject to fines of 10 to 100 dollars.¹⁰²

The secretary of state printed two arguments against the initiative in its election Pamphlet. According to the Farmers’ Education and Cooperative Union of America for the Counties of Walla Walla, Colombia and Garfield, farming could not be conducted under the handicap of six eight-hour days: “[N]o matter what wages the farmer may offer to save threatened disaster to his crop or how willing the laborer may be to earn the extra money, this law prevents it....” More fancifully, the group complained that: “This provision might necessitate the presence in the field of a competent witness, provided with a stop-watch, to protect the farmer from the extortion or blackmail of a disgruntled crew.”¹⁰³ The United Metal Trades Association, Pacific Coast Loggers Association, and Washington State Fisheries were even more dramatic in their predictions of doom: “The compulsory 8-Hour Day Law will destroy our present manufacturing, commercial, domestic and social systems.” These organizations both posed rhetorical questions as to whether an employer could pay a “living salary” to workers whose “efforts are confined to 8 hours in any one day...or 48 hours in any one week....” On the contrary: “The certain result” of the initiative measure “would be that the employee’s earning power would by law be reduced by 20 per cent and his living expenses increased in a like ratio.” And just in case these arguments failed to make the desired impression, these employer groups brought the message literally home: “Mrs. Housewife, can you arrange your domestic affairs so as to permit your help to work only 8 hours...? Who will cook, take care of the house and children on the 7th day, or can you hire two girls where you are now using one and pay

¹⁰¹Secretary of State, State of Washington, A Pamphlet Containing a Copy of All Measures “Proposed by Initiative Petition,” Proposed to the People by the Legislature,” and “Amendment to the Constitution Proposed by the Legislature”: To Be Submitted to the Legal Voters of the State of Washington for Their Approval or Rejection at the General Election to be held on Tuesday, Nov. 3, 1914 , at 87-88 (n.d.)
¹⁰²Secretary of State, State of Washington, A Pamphlet Containing a Copy of All Measures “Proposed by Initiative Petition” at 88.
¹⁰³Secretary of State, State of Washington, A Pamphlet Containing a Copy of All Measures “Proposed by Initiative Petition” at 89.
them a living wage?"104

Support for the eight-hour measure in Washington was somewhat stronger than in California and Oregon: 35.8 percent or 118,881 of 331,816 voters said Yes and the proposal actually prevailed in two counties—Kitsap (across Puget Sound from Seattle), where it won 3,259 to 2,435, and Clallam (on the northwestern coast), where it won 1399 to 1338. Although the initiative lost in King County (Seattle), it nevertheless gained 33,724 votes or 42.5% of the total cast there.105 As had also been the case in California, however, the eight-hour proposed received more No votes than any other initiative.106

The Dispute Between the Socialists and the Gompers Leadership of the American Federation of Labor Over Eight-Hours Laws

Q. [Sen. Wilkinson Call, Dem. FL] Let me see if I understand your idea about this eight-hour law. I understand that...you propose a rule of action by which shall be prohibited the exaction of more than eight hours of labor daily of any one man. Now, suppose the man wants to work more than eight hours, would you favor a law prohibiting it?—A. [Samuel Gompers] No; I would not favor such a law. I believe that the regulation of that would easily evolve out of the organized efforts of labor and the means that would be taken to agitate the question and educate the workers to understand that it would be to their benefit, to their lasting benefit, to abstain from more than eight hours’ work.107

The national press failed to pay close attention to the eight-hour initiative movement on the Pacific Coast108 despite the fact that that campaign was tightly

104Secretary of State, State of Washington, A Pamphlet Containing a Copy of All Measures “Proposed by Initiative Petition” at 90.
105State of Washington, Department of State, First Biennial Report: Election Division 56 (1914).
106State of Washington, Department of State, First Biennial Report: Election Division at 65.
107Report of the Committee [on Education and Labor] of the Senate upon the Relations of Labor and Capital, and Testimony Taken by the Committee 1:300 (1885 [Aug. 16, 1883]).
108The Bulletin of the Public Affairs Information Service 114-15 (1915) at least reported the vote in the three states. Two years later, when The New York Times was attacking the eight-hour basic day imposed by the Adamson Act, the paper found it opportune to quote the socialist Milwaukee Leader on the defeat of the three initiatives in
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bound up with a sharp debate within the American Federation of Labor between Socialists and the Gompers leadership over the appropriateness of government regulation of the working hours of adult men in private employment. The immediate source of the controversy was created by a decision that the AFL made at its November 1913 convention at Seattle. A Painters union delegate proposed a resolution to push for the six-hour day in order to deal with unemployment caused by machinery. Although the secretary of the Committee on Shorter Hours, Paul Scharrenberg, who came from the California State Federation of Labor, expressed the committee's sympathy with the proposal, it believed that first the eight-hour day had to be universalized by inaugurating three eight-hour shifts in continuous industries and by limiting women's and children's to eight and 48 hours. The committee then added the sentence that launched the dispute: "Where women's eight-hour laws already exist an agitation should immediately begin for the enactment of general eight-hour laws." The convention adopted this recommendation.109

Before the AFL convened again, Gompers and the Socialists had an opportunity to debate the question of the achievement of the eight-hour day in a larger public forum. In May 1914 the U.S. Commission on Industrial Relations devoted several hearings to labor organizations at which representatives of the AFL, the Socialist Party, and the International Workers of the World testified and questioned one another. On May 22 a historically important mutual interrogation took place between Gompers and Morris Hillquit, one of the Socialist Party leaders.110 Expressing his suspicions of governmental activities, Gompers declared that the AFL "has some apprehensions as to the placing of additional powers in the hands of Government which may work to the detriment of working people, and
particularly when the things can be done by the workmen themselves."\textsuperscript{111} In response to Hillquit's question Gompers noted that the AFL had not opposed successful efforts by miners' unions in the West to limit the workday for underground miners by law, but also added "that some men unconsciously and with the best of intentions get to rivet chains on their wrists."\textsuperscript{112} When Hillquit asked Gompers directly whether the AFL would oppose a law imposing an eight-hour day on all employers in a state or the whole country, he stated that it would "because it has in large measure accomplished it and will accomplish it by the initiative of the association, the organization, and the grit and courage of the manhood and womanhood of the men and women in the American Federation of Labor." Yet when Hillquit observed that the unions may have proposed to enforce such rules, but had not yet done so, Gompers was constrained to admit: "Unfortunately, that is so."\textsuperscript{113} Gompers did not add, as he would six months later, that his patience was dictated by a very long view of history: "There are some men who fail to understand...that the labor movement of American is still in its infancy, and that in the cycle of time fifty or a hundred years count as but a minute."\textsuperscript{114}

By the time of the AFL's next convention in mid-November 1914 at Philadelphia, the outcomes of the eight-hour initiatives on the Pacific Coast were already known and invited an assignment of blame. On November 20, with AFL President Gompers in the chair, the Committee on Resolutions reported a resolution by Scharrenberg, delegate of the California State Federation of Labor:

WHEREAS, The Seattle convention of the American Federation of Labor urged upon all State branches to work for the enactment of laws limiting the working hours of women and children to eight per day, and (where such laws already exist) to begin an agitation for the enactment of a general eight-hour law; and

WHEREAS, During the year President Gompers publicly declared that the American Federation of Labor does not favor a legal limitation of the workday for the adult male workers; and

WHEREAS, Said statement of President Gompers was very effectively used by the

\textsuperscript{111} \textit{Industrial Relations: Final Report and Testimony Submitted to Congress by the Commission on Industrial Relations} 2:1500 (Sen. Doc. No. 415, 64th Cong., 1st Sess., 1916).

\textsuperscript{112} \textit{Industrial Relations: Final Report and Testimony Submitted to Congress by the Commission on Industrial Relations} at 2:1502.

\textsuperscript{113} \textit{Industrial Relations: Final Report and Testimony Submitted to Congress by the Commission on Industrial Relations} 2:1502.

opponents of the shorter workday in defeating the eight-hour initiative which was before the people of California, Oregon and Washington at the recent general election; therefore, be it

RESOLVED, By the Thirty-fourth Annual Convention of the American Federation of Labor, that we reaffirm the declaration of the Seattle convention upon the shorter work­day as enunciated in the report of the Committee on Shorter Workday.115

A somewhat less antagonistic resolution was proposed by a delegate from the International Association of Machinists, the International Union of Timber Work­ers, and the Washington State Federation of Labor urging that, since the “tremen­dous” efforts by the labor bodies in the three states to pass eight-hour laws had been “considerably handicapped” because the press had “misrepresented” the AFL as being opposed to such laws, the convention “does reaffirm its action favoring the direct-legislation method of shortening the workday in such States as the Federation of Labor...shall deem it desirable and expedient....” Instead, the com­mittee offered a substitute resolution stating that the AFL again declared that “the question of the regulation of wages and the hours of labor should be undertaken through trade union activity, and not to [sic] be made subjects of law through legislative enactment,” except with respect to women, children, health and morals, and government employees.116

In the ensuing debate, J. A. Taylor, the IAM delegate, related that after an eight-hour law for women had been passed in Washington, some employers fired women and hired instead Japanese and “Chinamen” and boys in order to work them 10 and 12 hours: “Therefore, the men in the State of Washington knew it was necessary to try to make the law universal....” Since the IAM had spent $800,000 unsuccessfully trying to reduce hours in the metal trades in the Northwest after 1910, it paid an organizer to get 35,000 signatures on the petition for the eight-hour initiative, but one of the main causes of its defeat was the circulation of a statement that the AFL president was opposed to it. As a result, according to Taylor, em­ployers in Washington had been able to use Gompers’ statement to the Resolutions Committee that the 1913 recommendation had meant only government em­ployees.117 A poster put up all over Washington by the Manufacturers Association and Metal Trades had read:

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“President Gompers, of the American Federation of Labor, denounces a compulsory eight-hour law Initiative.... Mr. Gompers ought to know, and he does know, and every intelligent laboring man knows, a compulsory eight-hour day will...hurt the laborer more than anything else. Mr. Laborer, do you want eight hours instead of ten, and maybe lose your job altogether? Do you want to quit having overtime. Your employer cannot give you overtime under this law. And there are thousands of unemployed men in the State of Washington and no one should be allowed to work one minute overtime. “Can you pay higher prices for all you eat and wear and still support your family on eight hours a day and no overtime?”

In order to undercut one of Gompers’ arguments, Taylor insisted that if laws were passed reducing working hours “so that all the men are employed...[i]t is a great deal easier to...organize people when they have jobs and their stomachs are full than it is...in...Washington at the present time where there are 30,000 men out of employment.” In any event, Taylor declared that “the people on the Pacific coast feel that the American Federation of Labor owes it to them to give them the right to go out two years from now and fight for this eight-hour law and pass it with the full consent of this body.... If you don’t, we will pass it anyway, and the American Federation of Labor goes on record that it does not believe in getting anything when we can go straight across and get it....”

Other delegates persisted in blaming Gompers for the defeat of the initiatives, although two from Washington and California conceded that when Gompers had heard what use employers had been making of his comments, he stated that he had given no opinion on the pending legislation. Scharrenberg declared (less than accurately) that in California: “We came so near carrying the eight-hour law that some of our dear friends on the other side had their hair standing up straight; and we did it notwithstanding the fact that the billboards were covered from one end of the State to the other with the warning of our distinguished president.”


121Report of Proceedings of the Thirty-Fourth Annual Convention of the American Federation of Labor at 429-30. Another delegate incorrectly asserted that the vote in California had been 341,000 for and 390,268 against. Id. at 434. A quarter-century later, in his capacity as the AFL’s national legislative representative, Scharrenberg testified before Congress praising the FLSA’s “flexible standards of hours of work with complete elasticity to adjust production to the needs of a particular situation.” To Expedite Naval

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Delegate Andrew Gallagher, a San Francisco labor union official, offered a substitute resolution that the AFL approved the efforts of the workers of western states to secure legal enactment of the eight-hour day and trusted that this effort would encourage workers in all other states to follow suit.122 Whereas Adolph Germer, a United Mine Workers delegate and Socialist party member, argued that organized labor had “become an adjunct to the capitalist political machines...[b]ut the capitalists do not say it is unsafe to leave the legislation to the legislative bodies,”123 AFL vice president James Duncan, when asked whether he distinguished between initiative legislation and legislative enactment and whether he would oppose a “nationalization of the workday for eight hours for all the people of the country, conveyed a sense of the gulf between the factions by replying directly: “I would oppose the Federal Government enacting a law governing private employment as being one of the greatest interferences with the liberties of the people.”124

Gompers himself, in order to undercut the significance of legislation, pointed out that less than a month earlier Congress had declared that the labor of a human being was not a commodity; it had required a third of a century to accomplish that declaration and yet the ink had scarcely dried when a judge enjoined men from quitting work.125 His essential point in resisting legislation was that: “If we can get an eight-hour law for the working people, then you will find that the working people themselves will fail to have any interest in your economic organization, which even the advocates declare is essential in order that such a law can be enforced.”126 At the close of Gompers’ remarks, Gallagher’s substitute resolution lost 64-115 and the vote on the committee report, repudiating the radicals’ position,

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Shipbuilding: Hearings Before the Committee on Naval Affairs United States Senate on H. R. 9822, at 108 (76th Cong., 3d Sess., May 31-June 7, 1940).


125Report of Proceedings of the Thirty-Fourth Annual Convention of the American Federation of Labor at 440. AFL unions praised the Clayton Act of 1914 for declaring that human labor was not a commodity, yet they were willing to sell it if the price was right, even though they charged that overtime work caused fatigue, injured workers, and deprived them of leisure.


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was 11,237 to 8,107.\textsuperscript{127}

Gompers’ victory did not mark the end of the controversy, although the initiative movement for a overtime-free maximum eight-hour day had, unknowst to its proponents, already passed its high point. As a leading student of industrial relations observed at the time, the fact that the AFL convention had voted down the resolution favoring the eight-hour day by legislation placed thousands of members in an anomalous position since they had recently begun a campaign for such laws.\textsuperscript{128} The National Executive Committee of the Socialist Party guaranteed the intensification of the dispute by issuing a pamphlet (Are the Workers of America Opposed to an Eight-Hour Law?) attacking Gompers and the AFL in the wake of the action at the Philadelphia convention, which the Socialists predicted was “bound to create an immense discussion in labor circles.” Boasting of the 30 state legislators and one Congressman whom the Party had elected in 1914 and who were pledged by its program to support an eight-hour law for all workers, its leaders conceded that it was “probable that for several years to come their efforts will be defeated” because Democrats, Republicans, and Progressives would oppose such legislation, “but now, after the action of the A. F. of L. Convention, we shall find Democrats, Republicans, Progressives, Manufacturers, Sweaters, Mine Owners and Mill Owners opposing an eight-hour law and claiming that THEY ARE CARRYING OUT THE WISHES OF THE A.F. OF L.”\textsuperscript{129}

Convinced of the centrality of the eight-hour campaign to the priorities of the working class, the Party declared that the AFL had “made a serious mistake,” which “if the mass of trade unionists have any say in the matter,” would be reversed at the next AFL convention. In the meantime: “If the Socialist party is the only labor group in America advocating a universal eight-hour law it will soon be discovered that it is the only party in America worthy of the support of all the workers. That will bring us millions of recruits.”\textsuperscript{130}

Gompers did not wait for the next AFL convention to respond to this broadside. In August 1915 he devoted almost 30 pages of American Federationist, whose editor he was, to a critique bearing the baroque subtitle: “A Reply to the Socialist Politician’s Pamphlet and Pronunciamento, in Which their Mask of Hypocrisy is Torn Away and the True Inwardness of their Antagonism is

\textsuperscript{127}Report of Proceedings of the Thirty-Fourth Annual Convention of the American Federation of Labor at 443-44. In addition, 607 were recorded as not voting.


\textsuperscript{129}Socialist Party, Are the Workers of America Opposed to an Eight-Hour Law? 1 (n.d. [1915]).

\textsuperscript{130}Socialist Party, Are the Workers of America Opposed to an Eight-Hour Law? at 2-3.
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Disclosed, and Labor’s Position for the Attainment of an Eight-Hour Workday—A Shorter Workday—is Set Forth.” In it Gompers laid out the traditional defense of voluntarism: “Where the workers are strong enough to protect themselves through their organized power, they are not left helpless before the forces of greed, but absolute faith in the legislative method has been shattered by the demonstration of its danger and its failure.” In contrast, he rebuked the Socialists who regarded the legislated eight-hour day as a “short cut.” Gompers sought to explain why legislation was a less straightforward approach than its advocates imagined: “Lawmakers have regard for those who have power—economic power is what gives John D. Rockefeller political power—organization secures for wage-earners economic power that makes them a political force. For placing labor laws on the statute books and for their enforcement economic organization is necessary.” Merely enacting a law secured no protection for anyone; laws were enforced by administrative agents on whom interested parties brought their power to bear: only through economic organization could workers obtain power and wield influence to appoint desirable administrative agents and compel enforcement. Since redress for violations was to be sought in the courts, workers would have to control legislators, administrative agents, and the judiciary: “The stipulation of industrial relations by law does not result in industrial freedom—it only restates all industrial problems in terms of political issues. It substitutes a political boss for an industrial employer. What would it profit the wage-earners working for the Rockefeller interests to exchange Rockefeller for Root or Taft?” In fact, industrial freedom could be achieved only when workers participated in determining their own working conditions because an industrial problem could be worked out only in the industrial field; it became a political problem only when government was connected with the industry or the industry was “especially hazardous.” Consequently, there was “no short cut to industrial freedom. Industrial freedom can not be bestowed on workers. They must achieve their own freedom and enjoy it as the reward of a good fight to establish their rights.”

The debate at the AFL convention at San Francisco in November 1915 echoed the preceding year’s, but the antagonists furnished a richer socio-economic and

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132 Gompers, “The Workers and the Eight-Hour Workday” at 583. Gompers adduced as examples one proposed bill in California outlawing union apprenticeship regulation and anti-democratic amendments to the Washington State initiative and referendum statute. Id.
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political context. A resolution was introduced that the AFL go on record favoring the direct legislation method of shortening the workday in such states as the state federations deemed. Instead, the Shorter Workday Committee recommended endorsement of the executive council’s report, which declared that the question of wages and hours should be regulated by trade-union activity and not by legislative enactment except with regard to women and minors, health and morals, and government employees: wage earners had to depend on their own economic organizations for shortening the workday and maintaining their independence.135

To the claim by a California State Federation delegate that the initiative law would have made it possible to establish an eight-hour law for men “had it not been for the fact that the enemies of labor availed themselves of the declaration of the American Federation of Labor that it is not in favor of the eight-hour day for men,”136 Andrew Furuseth, the long-time leader of the Seamen’s union who inveterately distrusted labor protective laws,137 objected that if California had enacted an eight-hour day for men by referendum, the U.S. Supreme Court would have invalidated it immediately: “You cannot get the eight-hour law for men within the United States except for a few and peculiar occupations, except by an amendment of the Constitution of the United States.”138 To subvert the claim that a legislated eight-hour day “will act as a preventative of organization,” an IAM delegate pointed out that, despite the statutory eight-hour day in arsenals and navy yards, the workers there “are just as responsive to the appeal of the labor movement as any men....”139 Another IAM delegate sought to refute another voluntarist shibboleth by observing that the labor movement had been pushing for the eight-hour day by organization for 35 years and yet not even two million (AFL) workers had secured it of a total of 30 million workers in the United States, at which rate it would take 125 years to gain the eight-hour day for all workers.140

140Report of Proceedings of the Thirty-Fifth Annual Convention of the American Federation of Labor at 494. The AFL’s membership fluctuated around two million from
President Gompers, as usual, had the last word. Granting that "we did not secure the eight-hour day nor the shorter work day as fast as we wanted it," he insisted that "the thing is of slow growth, slow success, natural development and natural achievement. The whole case was given away by one of the delegates who favors the eight-hour work day by law when he said, 'It is so much easier!' Somehow or other there are people who think they can find the easy way in the travail of the world; they fail to understand that there must be struggle and travail in the natural growth of human development. There are people who are afraid of the battle and the battle scars; they want to run away from them and think they can do it by dropping a ballot in the ballot box, forgetful of the fact that that power is gravitating from the ballot box in politics to the industrial field of human activity." Gompers' mistrust of government apparently transcended class boundaries since it was undifferentiated: "There never was a government in the history of the world and there is not one today that, when a critical moment came, did not exercise tyranny over the people." In light of how little the AFL had undertaken, let alone achieved, in organizing the vast majority of unskilled, semi-skilled, black, female, and immigrant industrial workers\(^1\) it was disingenuous of him to accuse those in favor of eight-hour legislation of imagining that "the working people are unorganizable and therefore the strong arm of the law should come in and 'protect' them. Now, there is nothing more unstable and untrue than that any working people are unorganizable. You may work for weeks and months and years upon some workers and apparently not move them,... but there comes a time, through the exercise of some special injustice by a great corporation or employer, when the spark that had remained untouched...is stimulated and they organize and fight...."\(^2\)

Finishing with a pathos-laden flourish, Gompers confided that what he primarily wanted from government was the "right to...exercise the normal human activities of self-development and associated effort...so that we may fight the battles, not by a piece of paper dropped in an urn or a beautifully carved ballot box, but by scars

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\(^1\)Lorwin, *American Federation of Labor* at 105-12. From 1910 to 1930, the number of organizable workers (that is, the total labor force excluding agricultural workers and professional, supervisory, and self-employed persons) rose from 20.7 to 30.2 million, while the proportion organized by AFL unions increased only from 7.7 to 9 percent. During the same period, organized workers in manufacturing (whose labor force rose from 7.1 to 10.1 million) actually fell from 6 to 3.8 percent. James Morris, *Conflict Within the AFL: A Study of Craft Versus Industrial Unionism, 1901-1938*, at 9-11 (1974 [1958]).

of battle, by the hunger of the stomach, of the weeping and the wailing of life...."\textsuperscript{143} Although this rhetoric failed to motivate the casting of 4,061 votes, of those who did vote, Gompers' voluntarism prevailed 8,500 to 6,396.\textsuperscript{144}

\textsuperscript{143} Report of Proceedings of the Thirty-Fifth Annual Convention of the American Federation of Labor at 503.

\textsuperscript{144} Report of Proceedings of the Thirty-Fifth Annual Convention of the American Federation of Labor at 503-504.
Many a worker compelled to work 48 hours or more on straight time would at the end of his 40 hours have some kind of ache or pain and go home, whereas that same worker receiving time and a half for overtime would work in spite of that ache or pain to obtain that overtime. I am not speaking of a fancied ailment, but I am speaking of a real ailment. It is just human nature that with the incentive of overtime payments a worker will work more hours than he would under straight time.1

The 1915 AFL convention may have marked the end of the rhetorical controversy over the statutory eight-hour day between the AFL leadership and the Socialists and their allies, and did in fact coincide with the movement’s failure to use the initiative process to bring about a universal maximum eight-hour day, but it did not at all bring to a conclusion the debate over the equally important question, which had been submerged at the conventions, as to whether the working class and society at large preferred the actual eight-hour day, extendable only by extraordinary emergencies, or merely the basic eight-hour day, to which overtime at time-and-a-half rates could be freely added. “The general public,” as The New York Times, noted, “learned what was meant by the ‘basic eight-hour day’ through discussions in connection with” railway workers’ dispute with the railroad corporations and congressional action to resolve it during 1916.2 Government intervention in the economy prompted by the demands of World War I then refamiliarized the country with the same issue in 1917 and 1918.

Railway Workers and the Adamson Act

The recent eight-hour movement began with the railroad brotherhoods in 1916-17. ... The

The railway dispute originated in 1915 over demands by the railroad operating workers unions for a basic eight-hour day plus time and a half for overtime. The railroad companies sought to undermine this demand by arguing that it was not a genuine move for a shorter workday, but merely a ruse to take advantage of the general popularity of the eight-hour day as leverage to pay time and a half to the highest-paid manual workers in the country, who knew that it was physically impossible to limit the average train run to an eight-hour schedule. Management charged that at $2,500 to $4,000 a year, some engineers were paid more than bank presidents in the smaller towns through which their trains ran—an accusation designed, no doubt, to produce a frisson of revulsion in the employing class. In response, the unions contended that the trainmen and engineers merely wanted the same time for leisure and to spend with their families that other workers enjoyed, and that the punitive overtime premium was simply designed to make it uneconomic for employers to impose long hours. As the parties failed to reach a settlement in 1916, President Woodrow Wilson sought to avert the nationwide strike that the unions had announced for Labor Day. Despite the fact that in early August his Secretary of Labor had informed him that a high-ranking official of one of the railway unions had told the Assistant Secretary of Labor that the members were not really interested in a shorter workday but in overtime pay, suggesting that a pay increase could resolve the dispute, two weeks later Wilson publicly announced that: “The eight-hour day now, undoubtedly, has the sanction of the judgment of society in its favor and should be adopted as a basis for wages even...”

3Secretary [of Labor], *Memorandum on the Eight-Hour Working Day: For the Members of the National War Labor Board* 7 (July 20, 1918).

4Selig Perlman and Philip Taft, *History of Labor in the United States, 1896-1932*, Vol. 4: *Labor Movements* 374-85 (1935). Even 30 years later, railway management still insisted that “[i]t would be a misunderstanding to suppose that what was intended by this demand was in any sense a limitation of the working day to eight hours. The objective was merely to use eight hours, rather than the existing period of ten hours, as the basis for computing wages.” *Railroad Wages and Labor Relations 1900-1946: An Historical Survey and Summary of Results* 46 (Harry Jones, Exec. Committee of the Bureau of Information of the Eastern Railways, ed. 1947).


7Foner, *On the Eve of America’s Entrance into World War I* at 165.
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where the actual work to be done cannot be completed within eight hours." Then on August 29, Wilson, in his address to a joint session of Congress requesting prompt action on a bill to resolve the wage and hour dispute, declared that the freight train employees were demanding an eight-hour working day "safeguarded by payment for an hour and a half of service for every hour beyond the eight." At the congressional hearings that took place in expedited fashion labor and management continued to trade charges over the real meaning of the demand for the eight-hour day. The president of the Brotherhood of Railroad Trainmen argued that shorter hours were "practically useless...unless the company is penalized in some way for working men after the expiration of eight hours...." If it "does not cost the companies one penny more for working the 10, 11, 12, or 15 hours than it costs them to work these men the first hour, there is really no incentive to stop them or so arrange their business that the eight-hour day will become effective." But if time and a half after 8 hours were attached to the bill, "I will promise you there will be very little overtime made, except in the case of a wreck or something of that kind which cannot be avoided." In contrast, the chairman of the executive committee of the Union Pacific Railroad countered: "I understand that if it were proposed by Congress to forbid these men from working more than eight hours a day, they would be up in arms against it. What they really want is an increase in pay. ... [I]f this country ever adopts the rule of time-and-a-half overtime, the train that gets into a terminal on schedule will become such a rare thing that community would turn out to see it. [Laughter.]"

Congressional debate over the eight-hour bill was marked by the same controversy concerning the term's meaning. Whereas some members of Congress insisted that the issue was not hours because the same number of hours would be worked regardless of whether the bill was enacted, Progressive Senator George Norris contended that if Congress provided that eight hours shall be the workday,

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11Threatened Strike of Railway Employees at 73, 78 (testimony of R. Lovett).
and then added that “you can work over eight hours as you and your employer may agree upon,” but that no excess would be paid for the time beyond eight hours, the legislature would have accomplished virtually nothing for the eight-hour day; consequently, it was necessary to penalize the overtime by increasing the pay so that it would not be profitable for companies to work men more than eight hours. That some in Congress were skeptical that the law would make the eight-hour day a reality became visible in the proposal made by the other leading Progressive, Senator Robert La Follette, that a provision be inserted insuring that the 1907 federal law requiring at least eight hours of rest after 16 hours of work on interstate railroads not be repealed. There was general senatorial agreement that under the Adamson bill employers could require any number of hours up to 16.

In the end, the Adamson Act (An Act to Establish an Eight-Hour Day for Employees of Carriers Engaged in Interstate and Foreign Commerce) provided that beginning on January 1, 1917, “eight hours shall, in contracts for labor and service, be deemed a day’s work and the measure or standard of a day’s work for the purpose of reckoning the compensation for services of all employees....” Pending the report of the commission established by the act, the law specified merely that “for all necessary time in excess of eight hours such employees shall be paid at a rate not less than the pro rata rate for such standard eight-hour day.” In a campaign speech three weeks after passage of the Adamson Act, Wilson reinforced the notion that the demand for overtime pay was merely a strategic method for securing the actual eight-hour day: the unions had “alleg[ed] that that was the only way in which they could obtain a genuine eight-hour day, by making the railroads pay more for the time beyond the eight hours....” He then went on to add the cryptic claim that: “The judgment of society, the vote of every legislature in America that has voted upon it, is a verdict in favor of the eight-hour day.” At the same time, Walter Lippmann opined that the Adamson Bill was an eight-hour law as truly as any hours legislation is: it offered the railroads the choice of paying

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14CR 53: 13634-35.
19Wilson, A Campaign Speech at Shadow Lawn at 216.
more for work done on the present schedule or speeding up the schedule to get the
same work done at the old wages but in less time; in other words, the law either
increased wages 20 percent or increased the speed of freight trains 20 percent, thus
giving the companies an incentive to achieve greater efficiency.20

Ironically, Wilson’s opponent, Charles Evans Hughes, who had resigned from
the U.S. Supreme Court to become the Republican presidential candidate, attacked
the law on the grounds that he was “not opposed to the principle of the eight-hour
day,” but that the Adamson Act was no eight-hour law, because if it “had been
intended to be an eight-hour bill there would have been attached a penalty against
employing men for longer than that time except in emergency.”21 Boasting that
“no one more than I desire to see every opportunity given to every workingman
to escape an undue severity of strain,” Hughes charged that the Adamson Act was
intentionally called an eight-hour measure to confuse the public. He then ac­
curately noted that instead of limiting hours, the law “leaves to railroad companies
the privilege to employ men for just as long a time as they were employed before.
What do we mean by an eight-hour day? It involves the principle of affording
opportunity for recreation, for refreshment, and for education by limiting the hours
of actual work, except in case of emergency.”22 (It is noteworthy that neither
opponents nor advocates of the FLSA ever objected to this same shortcoming in
it.) Ex-President Theodore Roosevelt, who was supporting Hughes, was somewhat
less disingenuous in his praise of the actual eight-hour day:

“Eight hours may be the outside limit of proper work time in Mr. Ford’s factory,
where the man is all the time working at just one thing intensively and without vacation:
but eight hours that include periods of doing nothing but sit around and also change of oc­
cupation, may not be long enough. Moreover, there are occupations of intermittent activity
where to limit the total hours would be an absurdity, and there are others where excessive
activity on one day is compensated for by complete leisure on the day [after?].”23

The same day that The New York Times reported Roosevelt’s views it sub
silentio adopted them editorially by asserting that workers who, like railway crews,
worked on watches with the opportunity to rest while not on watch, could work
long days “without hardship, since the pay runs all the time. More will be heard
of this if the attempt is ever made to make the ‘right’ day compulsory and prevent

20Letter from Walter Lippmann to Norman Hapgood (Sept. 22, 1916), in The Papers
of Woodrow Wilson, Vol. 38, at 274-76, at 274.
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the trainmen from getting more than ten hours' pay for a basic day. They are calculating now on getting overtime every day, and nobody has said that they would be satisfied without it.24

With regard to the subsidiary issue of the railway unions' and workers' subjective intent, the Eight-Hour Commission established by the Adamson Act concluded that an immediate increase in wages "was not the primary motive for the movement that resulted in the law's enactment. The men want first shorter hours, and then they want all the pay they can get afterwards."25 As to the strategic component, the commission observed that although complete elimination of overtime work was not practicable on railways, an extra overtime penalty would help reduce it.26 Whether the one and one-eighth time overtime premium/penalty that the Council for National Defense awarded the workers on March 19, 191727 would have sufficed to implement that strategy seems improbable.

The upshot of the railway workers' dispute was ambiguous. Incontestably the controversy did crystallize for public discussion the crucial difference between a maximum hours regime subject only to an exception for extraordinary emergencies and an overtime system, which enforced the eight-hour day by imposing an economic penalty on employers for violating it, regardless of whether the basis was a statute or a collective bargaining agreement. The fact, however, that President Wilson and others publicly certified the unions' overtime penalty strategy as effectively motivated by and likely to achieve an actual eight-hour day, served to blur the distinction. Nevertheless, despite this confusion, the controversy made clear that not the absorption of unemployment through work-sharing, but increased leisure was the goal and one that could be achieved only by inflicting a sufficiently painful penalty on employers to render overtime work unprofitable. Ironically, railway employers' accusations that the unions were merely pursuing "a counterfeit eight-hour day" for public consumption to camouflage their real goal of higher wages through overtime premiums28 retained the distinction, but cast doubt on the sincerity of any union or movement that advocated an overtime regime because it had concluded that capital's intense opposition to the alleged inflexibilities of the actual eight-hour day rendered that approach politically infeasible.

Remarkably, only a few years after the FLSA had gone into effect, what in

28Threatened Strike of Railway Employees at 167-68 (testimony of L. Loree, president, Delaware & Hudson Co.).
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1916 had been decried as a sham was transmogrified into the overtime provision's openly primary purpose. For example, by 1945, as the frenzied production of World War II was drawing to a close, fears were expressed that if overtime declined in the rush to a peace economy, "millions of workers will lose fat overtime pay returns which means the difference in their income from living in relative luxury, to just making both ends meet." Indeed, in struggling to ward off congressional efforts to cut back on or eliminate overtime entitlements, liberals and unions have more recently turned the legislative history on its head by asserting that the "FLSA sought to guarantee an adequate standard of living for working Americans by establishing a minimum wage and requiring overtime pay."30

World War I

"[O]vertime...imposes a very serious strain upon the management, the executive staff, and foremen, since they can not take days off, like the ordinary worker...."31

The principle of a maximum workday of eight hours has been endorsed by society and officially by the United States Government. The eight-hour workday represents a standard of productivity, of living, and of conservation. By protecting workers against over fatigue [sic] and enabling them to sustain their highest degree of productivity and skill, the eight-hour workday not only is an assurance that workers will make their most effective contribution to production, but that they will also be more useful and honorable members of society.32

The federal government instituted a maximum eight-hour regime, subject only to emergencies, in 1892, when Congress required that "the service and employment of all laborers and mechanics...employed by the Government of the United

33On the eight-hour law of 1868 and how it became a dead letter, see below ch. 18.
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States...or by any contractor or subcontractor upon any of the public works of the United States...is hereby limited and restricted to eight hours in any one calendar day, and it shall be unlawful for any officer of the United States Government...or any such contractor or subcontractor...to require or permit any such laborer or mechanic to work more than eight hours in any calendar day except in case of extraordinary emergency." Thirty-eight years later Congress enacted a second statute providing that “every contract...to which the United States...is a party...which may require or involve the employment of laborers or mechanics shall contain a proviso that no laborer or mechanic doing any part of the work contemplated by the contract, in the employ of the contractor or any subcontractor contracting for any part of said work...shall be required or permitted to work more than eight hours in any one calendar day upon such work.” In addition to authorizing the President to waive by executive order the provisions of the act during war or when war was imminent, the law prohibited the imposition of penalties for any violation “due to any extraordinary events or conditions of manufacture, or to any emergency caused by fire, famine, or flood, by danger to life or to property, or by other extraordinary event or conditions on account of which the President shall subsequently declare the violation to have been excusable.”

On the eve of U.S. entry into World War I, the naval appropriation act of March 4, 1917, authorized the president “in case of national emergency...to suspend provisions of law prohibiting more than eight hours of labor in any one day of persons engaged upon work covered by contracts with the United States” subject to the proviso that the wages of those persons “shall be computed upon a basic day rate of eight hours’ work, with overtime rates to be paid for at not less than time and one-half for all hours worked in excess of eight hours.” This transformation appears to have originated in a Wilson administration-backed initiative introduced by Tennessee Representative Lemuel Padgett, the chairman of the House Naval Affairs Committee, to amend the naval appropriations bill to authorize the president to commandeer shipyards and munitions establishments in time of war or national emergency. The amendment, as it was initially debated in the House on February 3 and 6, empowered the president to “waive all provisions of law restricting the hours of labor of persons in the employ of the United States and of persons in the employ of contractors therewith when employed on work in connection with such ships or war material....” It included other harsh anti-labor 

34 Act of Aug. 1, 1892, ch. 352, § 1, 27 Stat. 340; the law was amended in ways not pertinent to the present discussion by Act of Mar. 3, 1913, ch. 106, 37 Stat. 726.
37 “Move to Take Over Defense Industries,” NYT, Feb. 6, 1917 (4:2).
provisions including a prohibition on inducing anyone "employed in any factory and engaged on work for the United States to leave his employment or to cease such work." Padgett informed the House several times that all the representatives of the private shipbuilding firms who had appeared before his committee had testified that "they would be glad of the opportunity to get the extra time and to pay for it at the excess rate." Although he admitted that he had not heard it directly from the workers themselves, Padgett reported that the employers had stated that "their workmen individually would be glad of an opportunity to work more than eight hours. They say that it is almost unanimous on the part of the workmen. That is one of the limitations upon the capacity to build. The Government can get only enough men for one shift. These private yards can get only enough men for one shift, and they can work them only eight hours.

What one shipbuilding company president, S. Knox of the New York Shipbuilding Company, in fact had said at a Naval Affairs Committee hearing on the cost of preparedness programs in January 1917 was "that there ought to be something done to economize the labor that we have in this country—the labor that is willing to work. We can not work the same man, of course, a double shift...." When Padgett—who mistakenly believed that the government contractor worked "more than eight hours" on "the basic day"—asked what Knox had meant by "economize," the latter replied: "Let them work as many hours as they want to," and confirmed, in response to Padgett's question, that he meant "regardless of the eight hour day...." In response to another congressman's question as to whether on nongovernmental contracts not subject to the eight-hour law "the men will work for you and other corporations on commercial work 10 and 12 and 14 hours a day," Knox declared: "We have never yet had any trouble getting men to work overtime." Yet none of his interlocutors noticed when, in the course of registering his disapproval over the 1912 law, which "simply nullif[ied] 20 per cent of your labor," Knox let slip that: "Formerly, the day's labor was 10 hours, and we had no

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38 CR 54:2699 (Feb. 6, 1917). Padgett's amendment was introduced as a separate bill, H.R. 20779 (64th Cong., 2d Sess., Feb. 6, 1917).
39 CR 54:3149 (Feb. 12, 1917).
40 CR 54:2587 (Feb. 3, 1917).
41 CR 54:2586 (Feb. 3, 1917).
42 Hearings Before Committee on Naval Affairs of the House of Representatives on Estimates Submitted by the Secretary of the Navy: 1917, No. 20: Cost of Preparedness Programs, 64th Cong., 2d Sess. 1097 (Jan. 17, 1917).
43 Hearings Before Committee on Naval Affairs of the House of Representatives on Estimates Submitted by the Secretary of the Navy: 1917, No. 20: Cost of Preparedness Programs at 1098.
kicks from our men at that time,” implying that the workers wanted an eight-hour day and not overtime premiums. Interestingly, the only demand that Knox made for “help” was for a version of hours-averaging: “Forty-eight hours a week instead of eight hours a day. Under a 48-hour a week arrangement it would be all right. We can not get these men to work 48 hours a week under the 8-hour-a-day plan, because they want Saturday afternoons off. The result of that is that...you only get about 42 hours a week of work. ... We have not a man in the place who would not like to have 48 hours a week.”

Even armed with such employer intelligence from the industrial front, Padgett, as he confided to his colleagues on the House floor, despaired of achieving legislative success: “[Y]ou know, as well as I know, that when you come to tamper with the eight-hour law, there are many Members in this House who would not follow the chairman of the committee.” Those representatives were presumably acting in response to union demands, since Padgett, who had been informed that the labor organizations were opposed to working overtime, spoke of their “extreme sensitiveness...with reference to interference with the eight-hour law.” In order to subvert, as House Speaker Champ Clark put it, the “great deal of unwise talk in the United States in the last two or three years about who are the most patriotic,” the very next day AFL president Gompers wrote Clark a letter, which the Speaker read on the House floor, pointing out that there was no need for new legislation since the 1892 law expressly provided for waiver of the eight-hour day during an “extraordinary emergency” and the 1912 law expressly declared that nothing in it was to be construed to repeal or modify the 1892 law. In Gompers’ view, there was, therefore, already “under existing law...ample power...to waive the provisions of the eight-hour workday” with respect to government establishments and private contractors. Gompers appeared to fear outright repeal rather than mere suspension of the law, since he believed that a new eight-hour law would have to be enacted. In any event, boasting that he was “in a position to know as well as any other man in America the feeling and the spirit of America’s workers,” Gompers asserted that there was no need for apprehension “that the working people of the United States

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45CR 54:2586 (Feb. 3, 1917).
46CR 54:2588 (Feb. 3, 1917).
47CR 54:2591 (Feb. 3, 1917).
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will fail in the performance of duty....” He did, however, in light of the fact that in an emergency “the destiny of our Nation is dependent upon the creative labor power of men and women,” modestly urge Congress to “give consideration to the conservation of the human rather than to uneconomic utilization of that force....”

By the time the House voted on February 12, a proviso had been added: “That wages of Government employees shall be computed on a basic day rate of eight hours’ work, with overtime rates to be paid for at not less than time and one-half for all hours worked in excess of eight hours.” That Padgett’s move to do away with the actual eight-hour day was not motivated exclusively by conjunctural wartime considerations was revealed by his admission on the House floor that (despite the Clayton Act) labor was just a commodity like any other: “Personally I have always believed that an individual has as much right to sell any amount of his labor as he had to sell any amount of his corn or wheat.” Representative Thomas Butler, Republican of Pennsylvania, the ranking minority member of the Naval Affairs Committee, appeared to hold this view literally in contending that if the eight-hour law were suspended, “[t]he men may then work for 10 hours a day, or 12 hours a day, as the workmen may see fit.” Although the House approved Padgett’s amendment on commandeering, it deleted the language on hours and time and a half pay.

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48Letter from Samuel Gompers to Champ Clark (Feb. 4, 1917), printed in CR 54:2701 (Feb. 6, 1917).
49CR 54:3132 (Feb. 12, 1917). When other representatives pointed out the unfairness of waiving the eight-hour provision for private contractors without imposing time-and-a-half compensation, Padgett replied that the workers “do not have to work unless they want to” and that the shipbuilding companies would gladly pay time and a half; moreover, Padgett claimed that the government might lack the power to set wages for private contractors. Id. at 3150. Ultimately the issue was finessed by amending the language to prohibit the president from waiving the eight-hour provision as to government contractors unless they agreed to pay time and a half for all hours above eight. Id. at 3151.
50CR 54:2587.
51CR 54:2589 (Feb. 3, 1917).
52CR 54:3133-52 (Feb. 12, 1917); “Favors Commandeer Bill,” NYT, Feb. 13, 1917 (8:1). On the very same day a strike involving most of the 7,000 workers at the Brooklyn Navy Yard was averted, which “trouble was caused because the men demanded double pay for overtime while the Government paid them time and a half.” They had for some time been working “on an eight-hour a day basis” until the situation between the United States and Germany “became acute” and “orders were issued to work the men ten hours so that repairs...could be speeded up.” The workers decided to strike when they were told they would be paid only time and a half, but called it off when the Navy Department told them that “their demands would be satisfactorily met.” “Navy Yard Strike Averted,” NYT, Feb. 13, 1917 (8:1).
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This provision ultimately reentered the bill on the Senate floor, where it prompted no discussion, let alone debate.\textsuperscript{53} The House, which had first passed the bill without this provision, receded to the Senate amendment without debate.\textsuperscript{54} President Wilson inaugurated this wartime overtime regime\textsuperscript{55} three weeks later when he issued an executive order suspending the 1912 law "with respect to all contracts for ordnance and ordnance stores and other military supplies and material, contracts for building...at the arsenals...and for fortification working during the pending emergency...."\textsuperscript{56} One month later, after the United States had entered the war, Wilson issued a second executive order suspending the 1912 law with respect to contracts made by the war Department for construction of any military building or public work important for national defense. In addition, declaring that the war constituted an "extraordinary emergency" within the meaning of the statute of 1892, Wilson declared that laborers and mechanics performing work of the aforementioned character, whether employed by Government contractors or agents, "may be required to work in excess of eight hours per day" with wages to be computed in accordance with the proviso of the March 4 law.\textsuperscript{57} The result was that "[t]he actual eight-hour day has regularly been waived and overtime work required at increased compensation."\textsuperscript{58} As far as the AFL was concerned, congressional authorization of the president to suspend the eight-hour law for government contracts and providing for time and a half "maintains the eight-hour principle while at the same time it takes care of any emergency that may necessitate longer hours of work and penalizes overtime in an effective manner that will prevent occurrence without real necessity."\textsuperscript{59} Writing as adviser to the Secretary of War on labor

\textsuperscript{53}CR 54:4630 (Mar. 1, 1917). The provision appeared first in the Senate version of H.R. 20632 at 67 (Feb. 20, 1917), but was not discussed in the very brief S. Rep. 1101 on the bill. See also "Big Jump in Naval Bill," \textit{NYT}, Feb. 18, 1917 (16:2).

\textsuperscript{54}CR 54:4967 (Mar. 3, 1917).

\textsuperscript{55}See generally, Secretary [of Labor], \textit{Memorandum on the Eight-Hour Working Day: For the Members of the National War Labor Board} 13-29 (July 20, 1918).


\textsuperscript{57}EO No. 2605 (Apr. 28, 1917).

\textsuperscript{58}Secretary [of Labor], \textit{Memorandum on the Eight-Hour Working Day: For the Members of the National War Labor Board} 5 (July 20, 1918).

\textsuperscript{59}Report of Proceedings of the Thirty-Seventh Annual Convention of the American Federation of Labor: Held at Buffalo, New York, November 12 to 24, Inclusive 1917, at
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policies, Felix Frankfurter, who was intimately familiar with the difference between the two regimes from his participation in litigation defending various protective statutes, superficially distinguished them, but seemed to suggest that they differed not qualitatively, but merely quantitatively, whereas in fact one is designed to make possible what the other prohibits:

Under the naval act proviso the eight-hour law of June 19, 1912, has been changed in effect from a maximum hours' limitation to a provision necessitating a basic eight-hour-day rate, with time and one-half for overtime. In other words, the spirit of the law is still to encourage the establishment of an eight-hour day, but, due to the present exigency, this is not done as heretofore by an absolute limitation. Instead, work in excess of eight hours is permitted, but only on condition of payment to the workers of time and one-half for such overtime, the intent being thereby to discourage overtime except where required by war-production needs.60

A more improbable site of contention over the actual versus the basic eight-hour day during World War I was the “Federal Bureau of Engraving and Printing, where mostly women are employed, [and which] has always been an actual eight-hour establishment, but in periods of rush increased hours have regularly been worked. Only recently was the eight-hour day introduced with time and a half paid for overtime. This has affected approximately 6,600 employees in the bureau.”61 Less than three months after U.S. entry into the war, the press began reporting that 50 of those female employees who objected to working 10, 12, and 14 hours a day, “even for overtime pay,” on printing the billions of dollars worth of Liberty bonds and Federal Reserve notes to meet the need for advances to the war allies had complained to Representative Jeannette Rankin of Montana, who had recently become the first woman ever elected to Congress. Rankin, who visited the Bureau incognito, determined that the women could not stand the strain of standing at the presses or counting machines for such extended periods. Although Bureau Director Joseph Ralph announced the restoration of the eight-hour day, Rankin’s informants stated that the action would not affect a large proportion of the workers. Whereas Ralph claimed that 99 percent of the women were satisfied and that some want even more overtime work, Rankin said that many women had told her that they did not want overtime work, but were compelled to do it to keep their jobs.62

94 (1917).


61Secretary [of Labor], Memorandum on the Eight-Hour Working Day at 7.

62Miss Rankin Visits Bureau As a Sleuth,” NYT, July 2, 1917 (7:2).
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Within a week “a sharp and sudden end of the fight” came in the form of Treasury Secretary William McAdoo’s placing all the Bureau’s male and female workers on an eight-hour basis.63 The termination of all overtime work was apparently driven in part by the conclusion that it was no longer necessary and in part by the testimony of large numbers of women at a hearing about several consecutive months of 12-hour days; they informed a special Treasury committee that shorter hours and smaller compensation were “immeasurably preferable to” longer hours, increased compensation, and the danger of loss of health.64

No sooner had this denouement been announced than 900 Bureau employees attended a mass meeting to protest the order eliminating all overtime work. In the words of one female employee: “‘If we don’t object to the overtime, why do outsiders object? We object to be [sic] characterized as slaves.’” With nice irony another woman argued: “‘The overtime pay that is to be taken away from us...would help us pay for the thousands of dollars of liberty bonds we have obligated ourselves to buy.’” Although the protesters, the majority of whom were also women, claimed that they were more representative of overall employee sentiment than those who had complained to Rankin, their contention that as work had slackened in the previous few weeks none had found it necessary to work more than 12 hours a day was belied by records showing that more than a thousand women had been working 12 to 16 hours a day for several months. Disclaiming selfish motives, the protesters declared that, actuated by a spirit of patriotism, they wanted to help the government by working overtime at a time, as they informed McAdoo, when it was “‘apparently impossible to procure sufficient skilled help to meet the necessities of the present hour.’”65 To be sure, the Times reported that “some of the women said they desired overtime work because of the opportunity for making more money.”66

The immediate dispute at the Bureau of Engraving and Printing prompted the Washington Post to take a longer and broader view of the whole problem of government overwork. To be sure, the paper framed the controversy oddly as “whether in a time of an emergency employees who want to work overtime to earn additional pay shall be given that privilege.” It stressed that the question was hardly confined to the Bureau, but was of vital concern in many government departments “working overtime as never before to meet the demands of the public service.” Although it was true that work at the Bureau was physically probably more tiring than at some other government workplaces, it was not more so than at

63“Victory for Miss Rankin,” NYT, July 10, 1917 (7:2).
64“Orders an 8-Hour Day,” WP, July 10, 1917 (1:5, 4:2).
65“Ask Longer Hours,” WP, July 11, 1917 (1:6).
66“Helped Miss Rankin by Secret Inquiry,” NYT, July 16, 1917 (9:3).
the Government Printing Office or Navy Yard, where workers did receive overtime pay during rush seasons. At the Bureau employees also received extra pay for extra work, but their counterparts at the State, Treasury, War, and Navy departments did not. Even at the Bureau, however, where overtime pay had been a custom “almost from the day of its establishment,” only the regular rate was paid for overtime. This practice was contrary to the policy of the AFL, which was “not against overtime work,” but asked that “the additional pay for overtime shall be at a higher rate than the regular per diem.” The immediate consequence of McAdoo’s order, the Post speculated, was that the skilled plate printers, “who have held to their positions here because of the privilege of earning overtime pay,...may find it to their advantage to seek employment in private concerns” at a time when there was already a shortage of printers and the Bureau had been unable to find enough to establish three shifts. Finally, the newspaper reported, albeit in the anonymous passive voice, that “[i]t was thought yesterday that it may be necessary for Congress to take part in the controversy, and in that event it is not unlikely that government policy with respect to overtime work will be promulgated by law...for the entire public service.”

This prediction came true—but not for another quarter-century in the midst of the next world war.

With Schadenfreude The New York Times editorialized that if the Adamson law had familiarized the general public with the meaning of the basic eight-hour day, Representative Rankin was now learning of its complexities through the contradictory reactions to her victory in obtaining shorter hours for the Bureau employees. With an I-told-you-so sense of superiority, the Times doubtless looked back proudly at its editorial five years earlier criticizing the enactment of the actual eight-hour day for employees of government contractors, at which time it had warned that “[e]ight hours’ work and eight hours’ pay are not attractive under the present narrow margins of wages above the cost of living.” In 1917 it waxed more philosophical and sarcastic, basking in unabashed social Darwinism:

The trouble is that the shortening of the day for the weaker and the less important workers shortens the time of the stronger and better-paid printers. They want longer hours and higher pay, but they cannot work if their helpers’ hours are shortened.

The basic eight-hour day does not limit hours, but provides for payment for excess time, often on a punitive scale. This is the sort of eight-hour day which the postal...

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67“Long Hours in Government Work Becoming a Growing Problem Congress May Have to Solve,” WP, July 12, 1917 (4:2-3).

68See below ch. 20.


70“The Eight-Hour Day,” NYT, July 2, 1912 (10:3) (editorial).
employes are petitioning Representative Rankin to obtain for them. Secretary Flaherty of
the National Federation of Postal Employes asks her aid in procuring legislation...allowing
time and a half or double time when hours are longer than eight. The distinction between
the straight eight-hour day and the basic eight-hour day is the difference between pity for
the weak and overpay for the organized. The straight eight-hour day—no more work, no
more pay—is for the benefit of those substandard in strength at the common cost. The
basic eight-hour day is for excess pay for those whose organization enables them to
enforce the demand. They reject imposing upon them the stint of the weak, with limitation
of pay accordingly. They want superpay for supermen.

It is to be doubted that the country can afford to concede the wishes of either the
weaklings or those overstrong through combination. Hardly 5 or 6 per cent. of workers
have the straight eight-hour day. Much less than 10 per cent. of the workers are organized.
It would be better to pension those not able to work a full day for full pay than to cut down
the hours of those who prefer longer hours for larger pay. There is no demand for
overwork for anybody, but there is urgent need for the product of the strong. The basic
eight-hour day conceals a demand for more pay for the same work, not a plea for the weak
or the overworked. There is a false plea for humanity, as well as true benevolence in
sound utilitarianism.71

The most programmatic account of the distinction between the actual and basic
eight-hour day published during the World War I period stemmed from the
National Industrial Conference Board, which had been founded in 1916 by a group
of employers organizations and trade associations including the National
Association of Manufacturers.72 The foreword to the research report that it issued
in late 1918 observed that it was designed to compare the different senses in which
the term “8-hour day” was used; its particular aim of bringing out “the distinction
between the ‘straight’ 8-hour day as predicated on considerations of health or
public policy, and the ‘basic’ 8-hour day, which is largely a problem in wage
adjustment”73 revealed both its candor and ideological distortion. The NICB

72 H. Gitelman, “Management’s Crisis of Confidence and the Origin of the National
To be sure, Colin Gordon, New Deals: Business, Labor, and Politics in America, 1920-
1935, at 152 (1994), emphasized that even the “NICB’s nominal role as the business
community’s economic theorist and statistician was widely ignored even by its own
members, who saw little use for facts and figures that did not support their narrowly self-
interested objectives.” Nevertheless, it was the NICB (along with the AFL) that at the
request of Secretary of Labor William Wilson nominated members for the War Labor
Pt. 2 at 1766.
73 NICB, The Eight-Hour Day Defined (n.p.) (Research Rep. No. 11, Dec. 1918
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pointed out correctly—except for its odd neglect of the absorption of unemployment as one basis for shorter hours—that:

The 8-hour day in its rigid sense with prohibition of overtime is founded on the theory that such limitation of work-hours is demanded on grounds of health and social advantage. The contention is also often made that the straight 8-hour day is more productive than a longer workday. With these underlying premises for limitation of hours of work, overtime is inconsistent. Clearly, if the health of the worker or his social rights demand that he shall work not more than 8 hours per day, permission of overtime labor, except in extraordinary emergency, is illogical. If the straight 8-hour day is really more productive than a longer workday, overtime is absurd.74

The NICB tried to buttress its claim that the basic eight-hour day was “essentially a wage issue"75 with the following logic:

Increased rates for overtime are obviously designed to discourage employers from resorting to it. To this extent, the provision is related to the problem of health and social relaxation. In practice, however, these penal rates have proved an incentive to overtime work by the employee and thus tend to defeat any desire to promote his health or increase his leisure. Therefore, these rates, though ostensibly a penalty on the employer, are in reality a premium to the employee. So far as such an incentive induces the worker to work a longer day than is justified on the grounds of health, it is clearly warranted only by unusual emergency. In such cases overtime is physically undesirable, and overtime rates mean extra compensation for diminished productivity.76

Without any doubt the premium/penalty overtime system is self-contradictory.77 But it is disingenuous to impute this problematic structure to workers and unions when in fact it is employers that prefer the flexibility of an overtime arrangement to the rigidity of a maximum-hours regime and employers that irrationally prefer to require a fatigued and less productive worker to work additional hours (regardless of whether the pay is higher or not) to hiring an additional fresh worker. It is true that under certain circumstances, as for example during World War II, when the demand for war production was virtually unlimited and the supply of labor had been depleted, overtime compensation could not function to discourage overtime work or to share work; instead, under government cost-plus

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74NICB, The Eight-Hour Day Defined at 2.
75NICB, The Eight-Hour Day Defined at 4.
76NICB, The Eight-Hour Day Defined at 6.
77Linder, Autocratically Flexible Workplace at 41-55.
contracts, it did serve almost exclusively to reward workers for supra-normal hours of work. The NICB analysis did not even fit developments during World War I, when labor administration policies "undoubtedly caused considerable extension of the practice of paying overtime rates" and the "War and the Navy Departments... ordered the payment of an extra overtime rate on all their construction work." Nevertheless, General Order No. 13 of November 15, 1917, issued originally by the Chief of Ordnance and reiterated by the Quartermaster General, stated: "The theory under which we pay "time and a half" for overtime is a tacit recognition that it is usually unnecessary and always undesirable to have overtime. The excess payment is a penalty and intended to act as a deterrent. There is no industrial abuse which needs closer watching in time of war."

To clinch its argument the NICB added:

The basic 8-hour day with premium rates for overtime theoretically and practically violates the principle of the straight 8-hour day. The laborer who demands the 8-hour day on grounds of recreation, home life, and intellectual development, but who welcomes overtime, shows that to him the 8-hour day is in reality a question of earnings. [T]he social need for recreation and home life is made the basis for a provision which, instead of shortening hours, merely increases wages. The straight 8-hour day becomes an artificial means for demanding increased compensation.

The NICB believed that it was providing empirical support for its claim that unions "have repeatedly opposed legislative limitation of hours of work on the ground that such legislation would weaken their economic strength" by noting that the AFL at its 1914 and 1915 conventions had defeated resolutions favoring enforcement by law of the straight eight-hour day. In fact, as previously shown, a significant proportion of the AFL delegates had supported those resolutions and the state labor federations in the three West Coast states had supported the eight-hour initiatives. The NICB also overlooked that at its 1918 convention the AFL had unanimously concurred in the recommendation of the Report of the Committee on the Shorter Workday that when war production was no longer necessary, the AFL do all in its power to have all affiliated unions, through concerted action and mutual assistance, establish the eight-hour day without overtime "unless the necessity be extreme."

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80 NICB, *The Eight-Hour Day Defined* at 8.
81 See above ch. 3.
82 Report of Proceedings of the Thirty-Eighth Annual Convention of the American
The final illustration of the development of a widespread appreciation of the fundamental difference between maximum-hours and overtime laws during World War I was the system of awards issued by the National War Labor Board. The NWLB had been established as part of the government’s wartime program of achieving “the same purpose as that of the employing interests who clamored for the legal prohibition of strikes,” but “sought to accomplish this not through repressive legislation but through recognition of labor’s rights and redress of its grievances.”

President Wilson created the NWLB on April 8, 1918, to “settle by mediation and conciliation controversies arising between employers and workers in fields of production necessary for the effective conduct of the war, or in other fields of national activity, delays and obstructions in which might, in the opinion of the National Board, affect detrimentally such production....” And although Wilson urged on all employers and employees the necessity of using these methods for adjusting all industrial disputes and requested that there be no discontinuance of industrial operations resulting in curtailment of production of war necessities while such mediation or arbitration was pending, the Board had “no real power.”

It could arbitrate only if both parties agreed, and even when the Board or the umpire (chosen by the Board where it had failed to settle a controversy) had secured their initial agreement, they could refuse to accept an award. Consequently, the “NWLB’s only power...was the force of moral suasion, and this because the prospect of federal coercion was equally loathsome to businessmen and labor leaders alike.” Those who refused to adhere to this plan would suffer the obloquy, in the words of The New York Times, of being “looked upon as outlaws and obstructionists.”

Especially pertinent here is that among the principles and policies governing the Board and the umpire was that: “The basic eight hour day is recognized as applying in all cases in which existing law requires it. In all other cases the question of hours of labor shall be settled with due regard to governmental necessities and the welfare, health and proper comfort of workers.” While this

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Federation of Labor: Held at Saint Paul, Minn., June 10 to 20, Inclusive 1918, at 220 (1918).


84Proclamation at 1766-67.


86"Strikes Barred During the War," NYT, Mar. 31, 1918 (15:1).

87"Report of War Labor Conference Board to Secretary of Labor William B. Wilson"
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hours principle may have "meant almost anything one wanted it to mean," as far as the employers on the NWLB were concerned, labor's advocacy of the basic eight-hour day was merely an "ill-disguised grab for higher pay."88 The first eight-hours case to be decided by the Board (in July 1918, involving the Worthington Pump and Machinery Corporation works in East Cambridge, Massachusetts), which was viewed as setting a precedent for all manufacturers of war essentials, was curious in that the Machinists union was not even demanding the eight-hour basic day; instead, its demand was for a 48-hour averaged week consisting of five days of 8 hours and 45 minutes (7:30 a.m. to 12:00 noon and 12:45 p.m. to 5 p.m.) and four hours and 15 minutes on Saturday (7:30 a.m. to 11:45 p.m.). Only time worked in excess of these hours was to be paid at time and a half (with double time on Sundays and holidays).89 Nevertheless, whereas NWLB joint-chairman Frank Walsh and the labor-members argued that the workers' health and reasonable comfort demanded the basic eight-hour day, the employer-members dismissed that argument on the grounds that the workers were not seeking shorter hours "in order to gain time to spend with their families or to improve their minds. They only wanted higher wages for the same hours that they currently worked."90 Indeed, Walsh went so far as to support the actual eight-hour day, insisting that employees should be allowed to work longer only in emergencies.91 In the end, against the backdrop of a one-day strike at a plant that was virtually the only source of pumps for destroyers for the Navy, which pressed the Board to resolve the matter quickly,92 the NWLB awarded the basic-eight hour day.93

The most prominent and programmatic discussion of the difference between the actual and basic eight-hour day emerged from two cases involving the Wheeling Mold and Foundry Company in West Virginia, which, after the NWLB had deadlocked over them, were surrendered to two very high-profile umpires. The first case involved molders, who had demanded the actual eight-hour day.94 The

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88Conner, National War Labor Board at 89.
90Conner, National War Labor Board at 95 (citing NWLB Minutes, afternoon meeting of July 9, 1918, at 42-67).
91Conner, National War Labor Board at 97 (citing NWLB Minutes, afternoon meeting of July 9, 1918, at 53-54).
92Conner, National War Labor Board at 99-100.
94Conner, National War Labor Board at 105.
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umpire was a very unorthodox judge, who wrote an equally unorthodox decision, which was "by far the most comprehensive statement issued by the NWLB on behalf of hours limitation." Walter Clark (1846-1924), who at 17 had become a lieutenant colonel in the Confederate Army, was a North Carolina Supreme Court justice from 1889 to 1924 and Chief Justice from 1903 to 1924. A very outspoken judge who openly accused the judiciary of a pro-capitalist bias, Clark delivered an address at Cooper Union in New York City in 1914—published as a U.S. Senate document—espousing a world view more congenial to Karl Marx than to a high-ranking judge then or now:

All advance toward better conditions has been through a ceaseless combat between those who exploit and those who are exploited; between those who create the wealth of a country and those who take as large a share of it as they can grasp.

In this country, as in all countries, the control of the Government is in the hands of the few.

The following year, when he testified in a similar vein before the U.S. Commission on Industrial Relations (chaired by the future NWLB joint chairman Frank Walsh), the headline of the report in the next day's New York Times bluntly read: "Judge Says Courts Favor Capitalists."

The dispute before Clark had been submitted to the NWLB by the company—which was represented by Walter Drew, one of the founders of the NICB and perhaps the country's leading anti-union attorney—and Local 364 of the International Molders' Union with regard to a proposed agreement between the parties. The relevant paragraphs in that agreement provided: “First. That 8 hours constitute a day's work for all molders and coremakers. Second. That the wage rate be $6.50 for the basic 8-hour working day. Third. That all overtime shall be paid for at the rate of time and one-half.” The only controversy involved the

95 Conner, National War Labor Board at 106.
meaning of the first paragraph, of which Clark observed that it was clear that, standing alone, it "would mean the 8-hour working day beyond which employees cannot be required or permitted to work." According to the principle that the whole agreement should be construed together so that no part be invalidated, paragraph 2 could not be regarded as "substituting a basic 8-hour day for the actual 8-hour day provided by" paragraph 1:

It is not reasonable to suppose that the employees having agreed upon an 8-hour day, should by the next rule repeal it by substituting a 10 or 12 hour day for extra compensation.

The basic 8-hour rule is not an 8-hour day at all, but simply a wage agreement. If the 8-hour day is extended to 10 hours, then the 50 per cent added pay for the extra two hours in effect is an agreement to pay 11 hours' wages for 10 hours' work.... It was doubtless thought that the extra 50 per cent...would discourage requiring extra hours, but this has not been the result in all cases, for in some plants 10 hours from day to day, every day, has been exacted, and in others even 13 hours a day has been known to be required. The object of the 8-hour law is to protect the health and lengthen the lives of the employees, which would be seriously compromised by an excessive length of the day's work.101

Having turned employers' argument that the basic eight-hour regime is merely a wage agreement against the company, Clark then refuted the claim that the principles adopted by the NWLB's deprived it of jurisdiction to enforce the actual eight-hour day by pointing out that the hours principle specified that where existing law did not require the basic eight-hour day, "the question of hours of labor shall be settled with due regard to governmental necessities and the welfare, health and proper comfort of the workers."102 In order to implement this health and welfare standard, Clark observed that:

There is a vast body of experience that a 10-hour day shortens the lives of the employees, injures their health, and that in point of production there is an increase by the substitution of 8 hours for a longer period. Even if this were not true as to one day, the accumulated fatigue of working more than 8 hours for a series of days reduces the production below the quantity produced by strict adherence to that limit.

Especially is this so as to the molder's occupation, the life of whom, working 9 or 10 hours per day, subject to the heat and noxious fumes, is said to average not more than 14 years. In work of this kind there can be no doubt that greater production will be had by

102 Award in re Molders v. Wheeling Mold & Foundry Co. at 164.
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close the working of an 8-hour day than by working 9 or 10 hours.\textsuperscript{103}

Clark’s crucial legal move consisted in arguing that the congressional authorization for the president to substitute the basic for the straight eight-hour day meant that Wilson’s “suspension applies only to the prohibition of working more than 8 hours, and does not require it. It is still open to the employees to decline to work longer than 8 hours, and in [sic] event of a difference with their employers to submit the matter to the National War Labor Board.” Clark conceded that some industries might still need a longer day, “but it does not seem, in consideration of the conditions, that more than 8 hours should be exacted in the work that a molder has to perform.” Employers had received a great increase in profit, while workers who had given up the eight-hour day had contributed longer hours, and merely because whole country had not yet achieved the eight-hour day was no reason to require more than eight hours of molders “whose trade exacts greater fatigue and exposure to noxious and dangerous fumes.”\textsuperscript{104}

Perhaps even bolder and more unorthodox than Clark’s ruling in favor of the actual eight-hour day was his creation of a unique institution of economic democracy for identifying emergencies that would constitute exceptions to the maximum eight-hour regime. Conceding that, despite paragraph 1 of the agreement, emergencies were likely to occur permitting the eight-hour limit to be exceeded “for a brief period,” Clark nevertheless concluded that the protection of the 8-hour day will amount to nothing if it rests with the employer alone to declare the emergency. The 50 per cent allowed for overtime is too small a penalty in view of great profits that may arise. ... Such emergencies can ordinarily be met by the adoption of the three-shift system or an increase in machinery. It is better that the machinery should be worn out than the bodies of the employees. Man passes through this world but once, and he is entitled, in the words of the great Declaration, to some “enjoyment of life, liberty, and the pursuit of happiness.”\textsuperscript{105}

Rejecting suggestions that some protection against employer abuse of the emergency exception could be provided by limiting extra-hour days to three per week on the grounds that such overwork would affect workers all week long, Clark instead opted for a plan under which the employer and the employees each appointed two-member standing committees; since “the burden of establishing an emergency is upon those who assert it,” at least three of the four members would

\textsuperscript{103} Award in re Molders v. Wheeling Mold & Foundry Co. at 165.
\textsuperscript{104} Award in re Molders v. Wheeling Mold & Foundry Co. at 165.
\textsuperscript{105} Award in re Molders v. Wheeling Mold & Foundry Co. at 166.
have to agree on the existence of an emergency justifying overtime work. Having in effect conferred a veto power on the workers, Clark sought to evade any such accusation by asserting that the four-member plan avoided the objection that if there were only one member on each side, “factions opposition by the representative of labor might prevent operation even when there was an emergency requiring it.” Under his remarkable award, the committee determined not only whether an emergency existed, but also the length of time over which it might extend and the number of extra hours per day.

Aware of the significance of his decision, Clark, in order to enlighten the “reactionary” legal profession, asked the NWLB to mail 235 copies of the award to all U.S. Supreme Court justices, state and territorial chief justices and attorneys general, and 120 law school deans. NWLB joint chairman Walsh deeply appreciated Clark’s decision, in particular its contribution to industrial democracy. The president of the Plumbers union, John Alpine, who was the acting president of the AFL and editor of its magazine while Gompers was in Europe, published and praised Clark’s decision, adding strong support for the actual eight-hour day:

A great part of the industrial directorate appears to feel today that the demand for an eight-hour day has been met when the ‘basic’ eight hour day has been installed. That is not the case. .... Under a lessened demand for industrial output the overtime charge may serve as a sufficient deterrent for work beyond the eight-hour limit, but conditions are such today that emergencies are found readily for exacting ten and more hours of work.

In the second case, decided in October 1918, machinists working on a nine-hour basis to prepare tools for unskilled laborers who worked a eight-hour basic day, demanded the same terms. The umpire was none other than Henry Ford

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106 Award in re Molders v. Wheeling Mold & Foundry Co. at 166.
107 Award in re Molders v. Wheeling Mold & Foundry Co. at 167.
108 In rejecting Wheeling Mold & Foundry’s petition for rehearing, Clark mentioned that: “Soon after this opinion and decision of the board had been rendered, and possibly in consequence of it, the great United States Steel Corporation, with 300,000 employees, adopted the 8-hour law, and other companies are doing the same.” Ruling of Umpire on Petition to Rehear (Oct. 5, 1918), in National War Labor Board: A History of Its Formation and Activities at 167, 168
110 John Alpine, “For a Real Eight-Hour Day,” AF 25(11):999-1004, at 1004 (Nov. 1918) (editorial). This editorial casts doubt on the claim that by backing the actual eight-hour day, Walsh had “freed himself from the cause of organized labor....” Conner, National War Labor Board at 97.
111 Conner, National War Labor Board at 104-105.
himself, who rendered a one-word answer of Yes in response to the question as to whether the Board should render a decision granting the machinists’s demand for a basic eight-hour day. Although Ford did not deem it necessary to give his reasons unless the Board requested them, he broke with the vast majority of his fellow capitalists in offering his very deep conviction that the straight 8-hour day is much better practice than the so-called “8-hour basic day” where the latter is continually and almost uniformly being practically exceeded in the number of working hours.

My experience, and also my reason, teaches me that very few emergencies ever exist in a manufacturing business justifying the practice of exceeding 8 working hours per day. The strain of 8 hours is enough, and the hours should never be increased except under the most extraordinary circumstances. I can not dwell too much on this. For the good of the men, for the good of the employer, and for the general results, I would admonish those interested to adhere to the straight 8-hour day.\textsuperscript{112}

The personal experience to which Ford referred was presumably the eight-hour day that he had introduced at his Highland Park plant in January 1914, when he raised wages to $5.00 per day in connection with the increase in capacity utilization that he achieved from switching from two nine-hour shifts to three eight-hour shifts (and hiring an additional 4,000 workers).\textsuperscript{113} Although the eight-hour shift system, as the NICB pointed out, “is in accord with the motive of a straight 8-hour day...it is an arrangement for securing greater efficiency in production...by offsetting the burden of idle machinery and other overhead expense.”\textsuperscript{114}

Although it may not have been the case that “the whole world was startled” by Ford’s remarks accompanying his umpire decision as it had been by his five dollar a day announcement four years earlier,\textsuperscript{115} they were nevertheless far beyond the mainstream, especially since he did not condition the eight-hour maximum on use of the three-shift system. \textit{The New York Times} quoted a delighted NWLB co-chairman Walsh as commenting that “the straight eight-hour day was being generally recognized as more satisfactory than the basic eight-hour day, and...that Mr. Ford’s decision would give impetus to the tendency for its adoption.”\textsuperscript{116}


\textsuperscript{113}“Gives $10,000,000 to 26,000 Employees,” \textit{NYT}, Jan. 6, 1914 (1:6).

\textsuperscript{114}NICB, \textit{The Eight-Hour Day Defined} at 3.

\textsuperscript{115}“Henry Ford Explains Why He Gives Away $10,000,000,” \textit{NYT}, Jan. 11, 1914 (sect. 5, 1: 1).

\textsuperscript{116}“Ford for 8-Hour Day,” \textit{NYT}, Oct. 31, 1918 (12:8).
The Actual and the Basic Eight-Hour Day

the publicity about his decision did not give impetus to, however, was Ford's candidacy for U.S. Senator from Michigan: the very next week he lost the election.\textsuperscript{117}

The Clark and Ford awards represented the high points of NWLB adjudication in support of the superiority of the actual eight-hour day, but they were not the only ones to recognize it. In a post-armistice case involving New York harbor workers, the umpire, V. Everit Macy, a millionaire banker,\textsuperscript{118} acknowledged that the "Nation has come to realize that its security demands that its citizens have a reasonable opportunity for family life, a reasonable amount of leisure, and a proper standard of maintenance." Just as some industries exposing workers to unusual physical dangers should compensate them for this greater risk in the form of higher wage rates, "excessive hours are as dangerous to good citizenship as are noxious fumes to the health of workers. There may be certain occupations in which the basic straight 8-hour day is inherently impossible; if so, the basic 8-hour day should be the standard and the pay for overtime regarded as a legitimate expense and a just charge to be borne by the public."\textsuperscript{119} At the same time, Macy distinguished instances in which punitive overtime rates were not effective in deterring the imposition of overtime work, without explaining whether the compensation for such normal and predictable overtime work should be determined on other grounds: "There is nothing gained by limiting the working day without a punitive provision for overtime. On the other hand, in fixing the basic working day and scale, it is necessary to know approximately whether overtime will be the exception or the rule. If it is known beforehand that overtime will of necessity be the normal condition, then the punitive provision for overtime is merely another method of securing a higher wage scale in compensation for excessive hours and loses its punitive purpose. Such a condition requires special regulations for overtime work."\textsuperscript{120}

\textsuperscript{117}"Ford Defeated for Senate Seat," NYT, Nov. 6, 1918 (1:5).

\textsuperscript{118}On the complex circumstances of the case, see Conner, National War Labor Board at 167-72; "Decision Rendered in Harbor Dispute," NYT, Feb. 26, 1919 (6:1-2).

\textsuperscript{119}Award of the National War Labor Board in the Case of Marine Workers' Affiliation of the Port of New York v. The Railroad Administration, Shipping Board, Navy Department, War Department, and Red Star Towing & Transportation Co., [Docket No.] 10 and 1036 (Feb. 25, 1919), in National War Labor Board: A History of Its Formation and Activities at 126, 127.

\textsuperscript{120}Umpire Macy in the New York Harbor Case 10, Feb. 25, 1919, in US DOL, National War Labor Board, Report of the Secretary of the National War Labor Board to the Secretary of Labor for the Twelve Months Ending May 31, 1919, at 73 (1920). It is unclear why this language appears in this source, which published only extracts from the award, whereas it is lacking in National War Labor Board: A History of Its Formation and Activities, which appears to have published a complete text.
The analogy is not proper.... A butler is a laborer or workman. These are not laborers; these are actors and actresses. They develop entertainment for the American public and improve employment.¹

Our greatest primary task is to put people to work.²

We are making two rather definite efforts. The first is to spread employment over a very large number of people, as, for instance, in certain factories and certain industries where the work can be spread out over a larger number of people. The second principle is to prevent any one individual man, woman or child, from working too many hours at a time in any twenty-four hours.³


²Franklin D. Roosevelt, First Inaugural Address, in Franklin D. Roosevelt, Selected Speeches, Messages, Press Conferences, and Letters 90-95 at 92 (Basil Rauch ed. 1957 [Mar. 4, 1933]).

³Franklin D. Roosevelt, Press Conference #11 (Apr. 12, 1933), in Roosevelt, Selected Speeches at 103-106 at 104.
Prolog: "Brain Toilers" under the Alien Contract Labor Immigration Laws from the 1880s to the 1930s

Even late-nineteenth- and early-twentieth-century legislatures, courts, and administrative agencies in the United States had constructed a relatively consistent image of protection-worthy blue-collar workers and white-collar employees not in need of such protection. To be sure, that conception was not monolithic, and the latter were not always and everywhere deemed individually capable of looking after their own interests. That the two groups were not always regarded as rigidly dichotomous, even in the nineteenth century, is especially significant since the socio-economic gulf between them was considerable. The legal regimes under review here may have been substantively far removed from overtime regulation, but their stratum-specific differential conferral or denial of

1In re Carolina Cooperage Co., 96 F. 950, 952-53 (E.D. NC 1899).

2Even earlier the British Parliament had entrenched the distinction in truck acts prohibiting the payment of wages otherwise than in money. For example, the Truck Act of 1831 covered “Artificers, Workmen, Labourers” and deemed “all Workmen, Labourers, and other Persons in any Manner engaged in the Performance of any Work, Employment, or Operation” as “Artificers,” whereas “all Masters, Bailiffs, Foremen, Managers, Clerks, and other Persons engaged in the Hiring, Employment, or Superintendence of the Labour of any such Artificers, shall be and be deemed to be ‘Employers’....” 1 & 2 Will. 4, ch. 37, §§ 19, 25 (1831). See also Marc Linder, The Employment Relationship in Anglo-American Law: A Historical Perspective 103-10 (1989).
protection nevertheless sufficed to force government agents to reflect on the differences between blue- and white-collar workers and their relevance to the statutory purposes. The immigration-restriction statutes first enacted in the 1880s, which form the focus of this chapter, constitute a little-known but rich example of early governmental forging of blue-collar/white-collar discourse. Two appendixes devoted to the Dependent Pension Act of 1890 and lien, bankruptcy, corporate insolvency, and wage payment laws shed further light on the prehistory of what became dichotomous treatment.

A Brief Humanitarian Interlude

The structure of our civilization was growing more complicated. The worker was becoming less exclusively a producer. The “white-collar class” was increasing relatively as well as actually in numbers, though despite its high laundry bills it was still, in general and measured by economic terms, a section of “labor.”

One integrative judicial ruling was especially poignant. In the wake of the Triangle Waist Company fire in 1911 that killed 147 workers, the New York State legislature enacted a series of laws, including one in 1912 that amended the Labor Law to require building owners to install automatic sprinkler systems in factory buildings over seven stories or 90 feet in height in which wooden flooring or trim was used and more than 200 people were “regularly employed” above the seventh floor or more than 90 feet above ground level. Although 354 people were regularly employed above the seventh floor, the owner of the 16-story tenant factory and office building challenged the fire commissioner’s order to install the sprinklers on the grounds that only 140 of them were “employees” within the meaning of the Labor Law—namely, mechanics, workingmen, or laborers working for another for hire—whereas the other 214 comprised 52 office employees in.

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3 Robertson, Duffus, “We Begin Our Greatest Labor Experiment,” NYT, Aug. 6, 1933 (sect. 9, 1:1).
4 1912 NY Laws ch. 332, at 661 (Apr. 15).
5 The family was one of the large property owners in downtown district of Manhattan. “John Street History,” NYT, Dec. 17, 1917 (sect. 3, 45:4-5).
factories, 62 employees in non-factory offices, and 100 employers of labor. Arguing that the term “employed” in the sprinkler provision had to be understood within the meaning of the Labor Law’s definition of “employee,” the owner claimed that all the employers and “non-factory employees, such as accountants, clerks, stenographers and the like should be excluded in making the count....”

That the owner and her lawyers, even in the immediate aftermath of the historic Triangle Waist fire, were not embarrassed to indulge in such pettifoggery was hardly surprising given the real estate industry’s protests against the legislature’s fire safety measures to begin with.

The state intermediate appeals court agreed with the owner that if the sprinkler provision had used the statutory term “employees,” judicial precedent would have required exclusion of office employees and “persons employed in non-factory quarters.” However, the court pointed out, the sprinkler provision in fact did not use that term: “the Legislature has with evident intention omitted to make the number of ‘employees’ the measure of the requirement....” Although the numbers in this particular case made it unnecessary to decide whether to include employers, the court was even willing to concede that, given the law’s broad purpose of safeguarding human life and the omission of the “technical term ‘employees,’” the government’s contention might well be correct that “the expression ‘people * * * employed’ was used in the sense of ‘persons engaged,’ or occupants, and this notwithstanding the fact that in various sections of the Labor Law the term ‘occupants’ is more than once used in a technical sense as distinguished from ‘employers.’” Leaving that question undecided, the judges turned to the broader definitional issue and found it “reasonably clear that all persons who work for hire are properly included in the phrase ‘people * * * employed.’ Where the statute in so many sections carefully uses the word ‘employees’ when it is obviously intended to refer only to workingmen, mechanics and laborers and fails to in this case, I see no reason for departing from the natural and customary

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8 People ex rel. Cockcroft v. Miller, 187 A.D. at 712.

9 One of the owner’s lawyers, Harold R. Medina, 30 years later gained national notoriety as the federal judge presiding over the Smith Act convictions of 11 Communist Party officials.


meaning of the words and limiting it so as not to take into account all who are hired and regularly work for hire, simply because all persons who are hired are in a general sense employees and the term ‘employees’ as defined for specific purposes in certain sections refers only to workingmen, mechanics and laborers.”

That the judges were swayed by humanitarian considerations to throw white-collar workers onto the scales when lives were palpably at stake, even though they had to give a somewhat careless legislature an interpretive helping hand, emerged from an aside that made it clear that even the presence of the “technical term ‘employees’” would not deter the court from an expansive construction if the public health interests were significant enough:

[T]here is one section of the law in which the word “employees” is specifically used where the plain intent of the law is to include all persons engaged in work. Take section 85, referring to size of rooms. It reads: “No more employees shall be required or permitted to work in a room in a factory *** than will allow to each of such employees, not less than two hundred and fifty cubic feet of air space.” There the meaning of the word “employees” as first used obviously means “persons,” for the purpose of the provision is to provide a certain amount of cubic feet of air space for the workingmen, laborers and mechanics. Persons other than employees would use up the air space just as effectively as workingmen and it would be impossible to obtain the requisite air space for employees, technically referred to, if a large number of clerks, stenographers and accountants were permitted to crowd into the room. What we are required to do is to interpret this provision liberally and so as to carry out the plain intent of the statute. While it may be generally true that the act was passed in the interest of workingmen and many of the provisions specifically refer to them, the intent of this “sprinkler section” was to protect human life from fire perils. The number of persons working on a given floor of a building or working above the seventh floor obviously has a direct relation to such a fire peril as panic. It, therefore, seems reasonable to conclude that the Legislature meant to make the measure of this particular requirement for sprinklers the presence of more than 200 people who are regularly employed above the seventh floor, giving the usual and ordinary interpretation to the words “people *** employed.”

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12 People ex rel. Cockcroft v. Miller, 187 A.D. at 712-13. One dissenting judge would have ruled that “people...regularly employed” should have been construed broadly to include employers because the “panic risk increases with the number of people exposed, and is not limited by the question of whether they pay salaries and wages or are paid.” Id. at 715-16.

13 People ex rel. Cockcroft v. Miller, 187 A.D. at 713-14. In 1921, the legislature amended the provision, substituting “persons...employed” for “employees.” 1921 NY Laws ch. 50, § 300, at 132, 201. At the same time, it vastly expanded the scope of “employed” by defining it as including “permitted or suffered to work.” Id. § 2.5 at 133.
Where getting enough air to breathe or protecting "human life from fire perils" were obvious statutory purposes that, regardless of inept drafting, made it manifest that white-collar workers were human beings who could no more protect themselves than low-paid mechanics, workingmen, or laborers, judges—with the horrible deaths of the Triangle Waist workers presumably acutely present to mind—were quick to intervene on their behalf. In contrast, later in the twentieth century, without any articulated legislative purpose as a guide or any perception that years of overwork could be as lethal as a fire, judges never scrutinized the exclusion of white-collar workers from the FLSA with a view to affording protection to overworked executive, administrative, and professional employees.14

Alien Contract Labor Immigration Laws

This bill was not framed by children and babes, but by the men whose interests it undertakes to guard and conserve. By their leaders and most intellectual representatives they came before the committee of the House of Representatives, as they did before our committee, asking for this bill...which embodies the ideas and propositions which they thought necessary to remedy the public evils of which they complain.15

In examining the immigration restriction statutes, it is crucial to keep in view how their protective and exclusionary structures differed from those of maximum-hours or overtime laws. In the latter, exclusion of white-collar workers constitutes a material deprivation because it withholds from them the right to a standard shorter workweek and/or premium wages for nonstandard longer weeks. The immigration laws operated differently. They were touted as designed to protect

14 As the Occupational Safety and Health Administration observed with regard to the legislative history of the Occupational Safety and Health Act (which does not exclude white-collar workers): "The reason for excluding no employee, either by exemption or limitation on coverage, lies in the most fundamental of social purposes of this legislation, which is to protect the lives and health of human beings in the context of their employment." 29 CFR § 1975.3(a)(2003). Thus, for example, white-collar workers are entitled to use the toilet at work when they need to do so. Marc Linder, Void Where Prohibited Revisited: The Trickle-Down Effect of OSHA's At-Will Bathroom-Break Regulation (2003). On the other hand, not all state laws that require employers to provide rest and/or meal breaks include executive, administrative, or professional employees. E.g., Minn. Stat. §§ 177.23.7(6), 177.253-254 (2003).

“Brain Toilers” under the Alien Contract Labor Immigration Laws

U.S.-citizen or at least resident blue-collar workers from low-wage competitors recruited primarily in Europe or Asia by employers seeking to reduce wages or break strikes. In contrast, the excluded manual workers suffered a detriment; in the racist-tinged words of the author and chief sponsor of the principal alien contract labor law: “A few hundred dollars is to an Italian laborer a fortune upon which he can live in squalid magnificence in sunny Italy the balance of his days. They generally return after having accumulated what to them seems a large and princely fortune.”

By the same token, Congress conferred a benefit on the white-collar workers in Europe or Asia who were exempt from the ban on the importation of contract labor. Despite Congress’s purported efforts to calibrate on a differentiated occupational basis the competitive impact of the admission of contracted-for white-collar workers on their counterparts already employed in the United States in order to avoid harming the latter’s labor market position, some white-collar groups eventually complained bitterly about such wage-cutting competition. In this respect, the exemptions in hours laws and the immigration law operated similarly: although the white-collar workers excluded from the former suffer a detriment, while those exempt from the latter presumably benefited, the immediate beneficiaries of the exemptions under both statutes are/were their employers, who in both cases benefit from the absence of government regulation of working conditions and an international labor market.

An 1882 act in aid of a treaty with China declared that the coming of Chinese “laborers” to the United States endangered “the good order of certain localities.” The statute did not define “laborers” other than to specify that the term included Chinese employed in skilled and unskilled labor as well as in mining. When a case (In re Ho King) arose as to whether the term encompassed a Chinese actor, the federal district judge, initially relying on dictionaries, concluded that it referred

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16 CR 15:5351 (June 19, 1884) (Rep. Martin Foran). He added that even if they remained in the United States, “when we consider their intellectual status, it is questionable indeed whether they would make desirable citizens.” Id. For a brief race-based view of the alien contract labor law, see Gwendolyn Mink, Old Labor and New Immigrants in American Political Development: Union, Party, and State, 1875-1920, at 108-110 (1986).

17 Senator Blair, the chairman of the Senate Education and Labor Committee and floor manager of the bill, conceptualized the kind of competition Congress meant to preclude: “If they [Europeans] come here by virtue of a contract...by which their compensation is to be restricted to a lower rate of wages than the natural rate of wages which they would obtain in fair competition with our own laboring people, the effect upon American labor is precisely that which we undertook to...prohibit by the anti-Chinese act.” CR 16:1630 (Feb. 13, 1885).

18 Act of May 6, 1882, ch. 126, 22 Stat. 58.

19 Act of May 6, 1882, 22 Stat. at 61.
to a person performing physical labor, and therefore did not “include an actor any more than...a merchant or teacher.” This understanding also comported well with the commonly understood problems that the act was meant to solve: “Neither the treaty nor the act have in mind the protection of what are called the professional or mercantile classes, or those engaged in mere mental labor, from competition with the Chinese. No grievance of this kind was ever complained of....” Since the purpose of the treaty was to allow the United States to limit or suspend Chinese laborers’ existing right to compete with U.S. citizens’ labor “for the local means of livelihood,” “[a] Chinese actor engaged in dramatic representations upon the stage of a Chinese theater seems as far removed from such competition as it is possible for a person to be.”

A similar but somewhat more complex construction of the blue-collar/white-collar line was generated by adjudication under an 1885 congressional act restricting the importation of contract labor, which made it unlawful to prepay the transportation of or assist or encourage importation or migration of an alien or foreigner under a contract or agreement made prior to the immigration “to perform labor or service of any kind in the United States.” Congress prohibited construing the act so as to prevent contracting with skilled workmen in foreign countries to perform labor in the United States in a new industry not established in the United States, provided that skilled labor could not otherwise be obtained. Finally and most pertinently, the legislature provided that “the provisions of this act [shall not] apply to professional actors, artists, lecturers, or singers, nor to persons employed strictly as personal or domestic servants.”

The enactment originated with agitation by the Knights of Labor, especially by 1884, when employers began to hire such contract labor to defeat strikes. This tactic was used primarily in coal mining, railway construction, coke making, and glass blowing. And more generally, as Judge Henry Brown (who later became

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20 In re Ho King, 14 F. 724, 725-26 (D. Or. 1883) (quoting from the same judge’s decision in an earlier case).
23 According to Terence V. Powderly, the Grand Master Workman of the Knights of Labor: “We had a law drawn up, a lawyer was consulted, and the law was framed, and our general assembly...which met in Cincinnati that year, approved of the law, and ordered the general officers to present it to Congress.... We did it, and on the 26th of February, the bill was signed by President Arthur.” Report of the Select Committee on Immigration and Naturalization, and Testimony Taken by the Committee on Immigration of the Senate and Select Committee on Immigration and Naturalization of the House of Representatives Under Concurrent Resolution of March 12, 1890, at 238 (H. Rep. No. 3472, 51st Cong., 2d Sess., 1891). In fact, the document approved by that general assembly merely

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a Supreme Court justice) took judicial notice in a case the year after the law was enacted: “The motives and history of the act are matters of common knowledge. It had become the practice for large capitalists in this country to contract with their agents abroad for the shipment of great numbers of an ignorant and servile class of foreign laborers, under contracts, by which the employer agreed, upon the one hand, to prepay their passage, while, upon the other hand, the laborers agreed to work after their arrival for a certain time at a low rate of wages. The effect of this was to break down the labor market, and to reduce other laborers engaged in like occupations to the level of the assisted immigrant.”

The legislative history was replete with express explanations of the statute’s purposes. Ohio Democratic Representative Martin Foran, a former president of the Coopers International Union, who had introduced the bill and was the House Labor Committee’s floor manager for the bill, the report on which he had written, stated that the bill’s “object is to prevent and prohibit men whose love of self is above their love of country and humanity from importing into this country large numbers of foreigners under the terms of the Alien Contract Labor Immigration Laws.”

bodies of foreign laborers to take the places of and crowd out American laborers.” And although the committee amendment adding professional actors, lecturers, and singers had just been read to the House, Foran ignored it in his tour d’horizon, mentioning in addition to laborers only the ban on importing skilled workmen or artisans. He also observed that during the previous five or six years “American capitalists and corporations have imported and shipped into this country, as so many cattle, large numbers of degraded, ignorant, brutal Italian and Hungarian laborers. American citizens have been replaced by these foreign serfs. This is the class of persons, this the species of immigration with which this bill seeks to deal.” To be sure, “American capitalists” had also sent for skilled workmen “by the shipload,” thus causing “American workmen” to be “thrown out of employment and compelled to seek other avocations or starve.” But Foran’s focus was on the Italian and Hungarian laborers, who were “by the greed and rapacity of capitalists being forced into the amalgam of American society.”

29CR 15:5349 (June 19, 1884).
30CR 15:5350. Erickson argued that the charge made by Foran and other members of Congress that “industrial capitalists were importing large numbers of Hungarian and Italian peasants,” though “apparently widely believed,” was “not substantiated by either an investigation of the contemporary records in European countries or a careful analysis of the evidence submitted to Congressmen. ... These accounts made more lurid reading and carried a broader appeal to racial prejudice than did the complaints of craftsmen against the importation of at most a few hundred skilled workmen.” Erickson, American Industry and the European Immigrant at 68, 157-58. Her book’s central “thesis” was that “contract labor was rare in America during the years after the Civil War, and never reached the proportions claimed by the advocates of a law against its importation. When, on rare occasions, American industrialists did resort to importations, they were designed to bring in highly skilled workers for particular jobs. No mass importations of unskilled workers were made by mine operators or railroad contractors. The bulk of the immigration from Italy and Hungary in the eighties was as voluntary as the exodus from Sweden in the sixties and Ireland and Germany in the early fifties had been.” Id. at vii. In her view, the 1885 statute was “originally the program of a highly specialized a-typical [sic] group of craft workers whose skills could be duplicated and whose strikes could be broken only by the importation on contract of skilled workers from England and Belgium. This group, the window glass workers, realizing that their case was a rather special one, sought support by playing on the prejudices against ‘new immigrants’ which other Knights felt, and thus broadened their appeal.” This “racialist appeal” resonated with other occupational groups within the Knights because their strikes had in fact been repeatedly broken by the use of immigrant strikebreakers: “But these strikebreakers were not contract laborers. They were immigrants and others supplied to manufacturers by private labor agencies in large cities.” Id. at viii. See also Calavita, “The Anti-Alien Contract Labor Law of 1885 and ‘Employer Sanctions’ in the 1980s” at 53-55; Calavita, U.S. Immigration Law and the Control of
Republican Senator John Sherman of Ohio, who had opposed the 1882 Chinese labor bill because it departed from the policy of "open[ing] our doors to laboring men for all lands," had not given the new bill much thought, but it was clear to him that its underlying principle was similar—to "discriminate against a class...of people who do not own themselves, who are brought here by corporations or by wealthy persons to compete in mines, manufactures, and establishments of various kinds with the free labor of free men, against hardy miners, mechanics, manufacturers, and even farmers...." The system that the bill was intended to suppress involved "the shysters...sent off by corporations to gather up a gang of a hundred or a thousand men to come here and drive out an equal number of hardy, industrious miners and laborers...."\(^\text{31}\) It seems improbable that in the 1880s such gangs would have encompassed white-collar workers.

The only light that the House debates in 1884 shed on the question of whether Congress actually intended to subject to contract-labor restrictions all the white-collar workers except those employed in the four expressly enumerated occupations (professional actors, lecturers, and singers, and artists) was a brief colloquy between John Adams, a Democrat from New York City, and John O'Neill, a Missouri Democrat, who was the second ranking majority member of the Labor Committee (and its chairman during the following two Congresses) and a strong supporter of the bill. O'Neill had declared that importation of contract labor occurred when labor was struggling against capital for its just rights, when manhood says: "We have submitted all we can to the exactions of unjust capitalists." ...

- Whenever labor, driven to the last edge, is compelled to stand up for its rights, then your capitalists send abroad and bring over this pauper labor to work at...75 or 80 cents a day...for a temporary emergency, to be used in crushing our workmen in their effort to improve their condition and that of their loved ones. And then, after that is accomplished,

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Labor at 44-49; Robert Parmet, Labor and Immigration in Industrial America 49-58 (1981). Isaac Hourwich, Immigration and Labor: The Economic Aspects of European Immigration to the United States 99-101, 394-95 (1912), concluded that the prevalence of contract labor had been greatly exaggerated. Even if Erickson's view is correct that the driving force behind the enactment was protection of skilled craftsmen, it would not affect the argument here, which hinges on the dichotomy between manual labor and white-collar workers, which remained a chasm regardless of whether the manual workers were low-paid Italian miners or highly skilled and paid glass blowers.

\(^{31}\text{CR 16:1634 (Feb. 13, 1885). To be sure, as New Jersey Democrat John McPherson pointed out to Sherman (without receiving an answer), since the bill's phraseology was very liberal, it applied "even to individual cases" and did "not apply to organized labor alone...." Id. at 1635.}
these poor, misguided, wronged, deceived, and robbed forced emigrants are turned out upon the wayside to starve. [T]he most deadly blow ever struck at the roots of protection was done by the importation of this alien labor to take the place of our artisans when contending against what they deemed the unjust demands of capital. It has done more to open the eyes of workmen than all the sophistries of free-traders.  

Almost immediately following this harangue, Adams, who stated that he too favored a bill similar to the one under debate, modestly asked O’Neill for a clarification of “the exact effect” of the bill if enacted. Specifically, Adams—an emigrant from Canada who had himself been a dry-goods clerk in New York City until 1874—wanted to know whether the law would “prohibit Arnold, Constable & Co., or Lord & Taylor, or any of the large retail dealers in the city of New York who may be abroad purchasing goods and who finds there an efficient clerk they would like to transfer to this country, and to whom they would pay a salary, whether this section would not prohibit them from employing any such clerk under penalty of a thousand dollars.”

O’Neill’s response, even if not intentionally evasive, was nevertheless ambiguous: “All I have to say is that if Arnold, Constable & Co. or any other dry-goods house in the city of New York...go to Europe and import this labor for the purpose of breaking down men in their own employ, I hope the law will reach them. That is the intention of the law.” The use of the hypothetical “if” suggests that O’Neill harbored a dichotomous conception of coverage: because overwhelming evidence had persuaded the House Labor Committee that the manufacturing, mining, and construction capitalists’ only purpose in recruiting alien contract labor was to weaken workers’ labor market position, employers of manual workers were per se guilty of violating the law by virtue of prepaying the transportation of aliens with whom they contracted for the performance of labor or service; in contrast, since the committee had apparently been presented with no testimony concerning similar abuses among employers of white-collar workers, O’Neill was in principle open to holding them liable if (and only if) it could be shown empirically that they, too, had engaged in the practice in order to force down wages. Why this outcome was merely O’Neill’s “hope” and not a legal certainty is unclear. In any event, the open-textured character of the inquiry suggests that O’Neill was leaving it to enforcement agents and ultimately the courts to find the facts and interpret the

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32 CR 15:5357-58 (June 19, 1884).
34 CR 15:5358.
35 CR 15:5358.
statute against the background of this crucial element of congressional intent.36
When Adams again asked whether “that is the intent of this bill,” O’Neill explained that the bill was “for the purpose of preventing pauper laborers from being brought here from abroad for the purpose of breaking down the efforts of the workingmen of this country to secure their just rights.” Apparently hoping to resolve the dispute by drawing a distinction between daily wages and weekly or monthly salaries, Adams asked why O’Neill did not instead insert “‘day laborers.’” After informing Adams that the workers in question were not day laborers, but might work by the week or month, O’Neill finally lost his patience with the interrogation about the coverage of white-collar workers: “Never mind about these hair-splitting technicalities....”37
The Senate committee report and floor debates were more illuminating. A few days after the House had passed the bill,38 the Committee on Education and Labor reported it back favorably without amendment, “in the hope that the bill may not fail of passage during the present session,” although there were “certain features...which might well be changed or modified....”39 The report went on to declare:

Especially would the committee have otherwise recommended amendments, substituting for the expression “labor and service”...the words “manual labor” or “manual service” as sufficiently broad to accomplish the purposes of the bill, and that such amendments would remove objections which a sharp and perhaps unfriendly criticism may urge to the proposed legislation. The committee, however, believing that the bill in its present form

36That such inquiries were within Congress’s contemplation was demonstrated by Senate debate over a proviso permitting employers to contract with skilled workers abroad to work in a new industry if “skilled labor for that purpose cannot be otherwise obtained.” When Senator Morrill asked: “How is that to be determined?” Senator Blair replied: “That is a question of fact that arises in the administration of all laws,” and Senator Dawes added that the employer “would have to show...that there was nobody else in the United States to do this work.” CR 15:6059 (July 5, 1884).
37CR 15:5358. Nevertheless, immediately thereafter, when Adams pointed out a gross drafting error in the bill that would have prohibited “the [foreign] workingmen who may be here now from being employed by American capitalists,” O’Neill thanked him for the “practical suggestion” to correct what was “evidently an oversight not intended by the committee” and which he was certain would be amended. Id; on its amendment, see id. at 5370. Why, in contrast, O’Neill was so resistant to correcting the overly broad definition of excludible labor that Adams had pointed out is unclear.
38aNotes from Washington,” NYT, June 20, 1884 (3:7); “The Contract Labor Bill,” NYT, June 20, 1884 (3:2).
39CR 15:6059 (July 5, 1884).
will be construed as including only those whose labor is manual in character, and being very desirous that the bill become a law before the adjournment, have reported the bill without change.40

When a senator pressed him on those changes, Henry Blair, the New Hampshire Republican who chaired the committee, replied that the report had not been intended to give the impression that the possible modifications had been “deemed of very great importance, because” the committee believed that “the bill will be construed the same” with or without the suggested changes. Moreover, Blair announced that he intended to make a motion for the modifications “so that the bill would then be restricted to the evil that exists, and it would be available for the protection of that class of our people who are suffering most from the evil.” He also revealed that the bill’s friends had assured him that the House would agree to the change immediately so that it would be passed before adjournment. Finally, Blair expressed his belief that once the modification had been made, there could be “no objection on the part of any one in either branch of Congress. It would apply only to those engaged in manual labor or service.”41 In the event, however, further consideration of the bill was postponed until the second session of the Forty-Eighth Congress.42

The Senate report and Blair’s remarks confirmed the existence of widespread and potentially lethal congressional unease about the possibility—which Adams had expressed in the House and O’Neill had been unable or unwilling to dispel—that administrative enforcers and courts might hold contracting for the

40 CR 15:6059. Congress in fact adjourned two days later.
41 CR 15:6059. Adrian Vermeule, “Legislative History and the Limits of Judicial Competence: The Untold Story of Holy Trinity Church,” SLR 50(6): 1833-96 at 1848 (July 1998), argued that Blair’s statement about the effect of the amendment contradicted the committee report, which expressed the belief that the exclusion would be construed as limited to manual labor. In fact, Blair was not trapped in a contradiction: the committee was merely speculating, not stating a certainty, and Blair was seeking to achieve that certainty.
42 CR 15:6065 (July 5, 1884). Two weeks after the postponement, the Times reported from Reading, Pennsylvania, that Congress’s neglect to “pass the bill against foreign contract or pauper contract labor is creating a great deal of discontent among American-born workingmen, whose wages are being seriously interfered with” by the employment of Poles, Hungarians, and Italians crowding them out on railroad and canal work, ore and coal mining, and other “arduous labor.” Although the newspaper observed that “[w]hole gangs of them are brought to America under contract, it also emphasized that “[t]he contract labor...is the exception. The majority of these foreigners pay their own way to America.” “Crowding Out Americans,” NYT, July 23, 1884 (3:7).
importation of white-collar workers to be illegal. Blair’s plan to allay these apprehensions by writing the limitation to manual labor directly into the statute reinforces the notion that, despite O’Neill’s hypothetical contention that capitalists might seek to mobilize the international labor market against white-collar workers as well, employers, members of Congress, and perhaps even much of the labor movement recognized a categorical divide that made such real-world assimilation of the two groups improbable and identical legal treatment therefore unnecessary.

Although Congress failed to write all of white-collardom out of the statute, the Senate debate that resumed in February 1885 disclosed relatively uniform views on the need for exempting non-manual workers. Largely responsible for fleshing out this legislative purpose was John Tyler Morgan from Alabama, a former general in the Confederate Army who was in the middle of his second of six consecutive senatorial terms. In addition to his unsurprising penchant for intensifying the racist component of the debate over immigration, Morgan purported to be driven by his hostility to “class legislation”; and like the bill’s other vocal supporters and opponents, he, too, knew that “[t]he classes legislated for and protected by the bill...are almost wholly and exclusively the miners, the men who delve about the iron-works, and the men who do the ruder sorts of work about the manufacturing establishments of this land.” In contrast, however, he was the first to point out that the bill “discriminates in favor of professional actors, lecturers, or singers. It makes an express exception and provision for professional actors, lecturers, and singers, leaving out all the other classes of professional men.” Dismissing Blair’s lame and irrelevant denial—“Not at all; personal or domestic servants are also excepted”—Morgan noted that if “a gentleman...happens to be a lawyer, an artist, a painter, an engraver, a sculptor, a great author, or what not, and he comes under employment to write for a newspaper, or to write books, or to paint pictures, as we are informed that a recent Secretary of State sent abroad for an artist to paint his picture, he comes under the general provisions of the bill.” After failing to elicit any shocked confession of ignorance from Morgan by observing that these prohibitions applied only to contract labor, Blair made two


44After asking Blair whether he did not think that the Irish, Germans, and Italians were not “better people than the Chinese,” Morgan added that restraining the importation of coolies was designed to bar the admission of “a large number of very inferior and very degraded people, people that belonged to a different class from those that possess the Anglo-Saxon blood” and prevent “the infusion of lower blood into the social element in this country.” CR 16:1630, 1631 (Feb. 13, 1885).

45CR 16:1632. Earlier that day Blair himself had offered the amendment exempting personal and domestic servants, which the Senate agreed to. Id. at 1621.
crucial admissions: "If that class of people are liable to become the subject-matter of such importation, then the bill applies to them. Perhaps the bill ought to be further amended." Thus forced to concede that all the white-collar occupations, with the exception of the expressly enumerated groups, were subject to the contract labor provisions, Blair for the first time thought aloud about the possibility of conforming the scope of occupational coverage to the scope of the evil and remedy.

Ignoring the offer of accommodation that he had succeeded in extracting from Blair, Morgan, who seemed to prize obstructionism above practical legislative achievements, blithely continued in the same sarcastic vein, cataloging the white-collar (and other) occupations against which the bill discriminated:

People who can instruct us in morals and religion and in every species of elevation by lectures and by acting plays in the theaters and by singing are not prohibited. ... Chinese singers and Japanese players can come over here...provided they fall within these honorable and distinguished and exempt provisions.

Now, I shall propose when we get to it to put an amendment in there. I want to associate with the lecturers and singers and actors, painters, sculptors, engravers, or other artists, farmers, farm laborers, gardeners, orchardists, herders, farriers, druggists and druggists' clerks, shopkeepers, clerks, book-keepers, or any person having special skill in any business, art, trade, or profession.

These extensive congressional debates may constitute grounds for skepticism about legal theoreticians' (non-empirical) claim that "[t]he drafter probably did not mean to include preachers in the general prohibition, but created a problem" by failing to include them within the group of enumerated exemptions: "By trying to be comprehensive, the drafter produced a statute that could yield unjust results and might not prove flexible enough to deal fairly with new occupational groups that might later want to migrate to the United States."

The proviso exempting three categories of professional or artistic employees (professional actors, lecturers, and singers) from the ban on importation of contract labor

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46 CR 16:1633.

47 Morgan's plea for free entry of contract-agricultural labor was not surprising for a southerner; like most of his sectional colleagues, he was also opposed to protective tariffs, to which he assimilated the contract labor ban. CR 16:1632; Richard Bensel, The Political Economy of American Industrialization, 1877-1900, at 485 (2000). The Senate later rejected a proposed amendment to exempt agricultural labor by a vote of 37 to 14. CR 16:1791 (Feb. 17, 1885).

48 CR 16:1633.

laborers, which had not appeared in the original bill, was included as a proposed amendment in the House Labor Committee report without explanation. The exemption of artists was added during the Senate floor debate. The amendment was offered by Kansas Republican Preston Plumb, who advocated further exemptions for musicians in 1890. In February 1885, the Senate rejected a proposed amendment by Republican Elbridge Lapham of New York to delete "singers" from the exemptions because he believed that "the worst form of tyranny is found in the case of the Italian children who are brought over here and who go about our streets singing, and who are whipped every night when they go home if they do not bring in a certain sum of money. I do not want...the bill so framed that its prohibition will not apply to that class of cases." Although it is unclear why he did not frame the exemption more narrowly, it is noteworthy that the Senate was apparently willing to countenance the importation of such child laborers. By a vote of 50 to 9 the Senate passed the bill in its entirety. Without debate the House then concurred in all the Senate amendments including the exemption of artists.

Seven years later, the defendant in the most prominent Supreme Court white-collar case ever decided under the statute argued in its brief that it was "a well-known fact that, in these days, contracts are constantly entered into between" these four groups and American managers for performances; it then added the speculation that "no doubt, managers...who have many hundreds of thousands of dollars at stake in some of their contracts...wished to be perfectly sure that the Act would not sometime be surprisingly and absurdly applied to them, and their 'star' not allowed to land on the eve of an undertaking, they called the attention of the committee to it, and as the proposed legislation was never designed by the petitioners therefor to apply to any but 'laborers, mechanics and artisans,' the proviso was immediately accepted and inserted...."

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50 H. Rep. No. 444 at 1. The House agreed to the amendment shortly before passing the bill. CR 15:5371 (June 19, 1884). Vermeule, "Legislative History and the Limits of Judicial Competence at 1851, evaded the issue by asserting that congressional members' "motives for approving a statute of such breadth are neither wholly clear nor particularly important."

51 CR 16:1837 (Feb. 18, 1885).
52 See below.
53 CR 16:1837.
55 CR 16:2032 (Feb. 23, 1885).
56 Brief for the Plaintiff in Error at 15-16, Holy Trinity Church v. United States, 143 US 547 (1892).
plausible, its credibility would have been enhanced if such managers had furnished testimony to the House Labor Committee. Although the committee did take testimony at the beginning of February 1884, there is no record of a published or unpublished hearing; all that is extant is the summary that the committee provided of the testimony of about twenty members of the Knights of Labor and labor unions, whose complaints about the importation of foreign laborers in the coke, glass making, coal mining, and railway construction industries had furnished the impetus for the legislation.

In point of fact, the brief may have stood contemporary reality on its head since organizations of musicians and actors appeared at House hearings in December 1888 to persuade Congress to repeal the proviso exemptions. According to the account in The New York Times:

The American actor has taken alarm at the invasion of the theatres of the United States by the ever-increasing army of English and European foot-light artists. He says that the profession is overcrowded and that he is being pushed to the wall by actors from abroad who come here, and, after securing a large share of the wealth of the country, flit back to their native shores to revel in their newly-acquired wealth. He tells the same story that miners, mechanics, and others have told of being supplanted by cheap labor brought to this country under contract. Like the artisans, he wants protection. Louis Aldrich, Harley Merry, and Lewis M. Sanger, a committee representing the Actors' Order of Friendship, appeared today before the Ford immigration investigating committee and asked that the contract labor law be amended so as to include professional actors and musicians among the classes prohibited from entering the United States under a labor contract. ... Under this exemption the committee said that large numbers of foreign actors were annually brought to this country for the sole reason that they would work cheaper than American actors.

By January 1889, the Times was reporting that the actors' agitation had "practically died for want of fuel. The Ford investigating committee took so little notice of the petition of Mr. Aldrich and his friends that it concluded its labors without calling any witnesses on the subject of the actors' plaint, and the originators of the movement admit now that nothing will be done in their interest

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One theatrical manager was seen as supporting the restrictions because he regarded actors as "wageworkers" who "should be protected just as much as any other class of laborers." In contrast, the Times editorialized that: "Actors in no sense of the word can be classed as 'laborers,' and it was for the benefit of laborers that the prohibition of the contract labor law was placed on our statute books. Mr. ALDRICH would be the first to resent any attempt to classify his profession in this manner, but he is not ashamed apparently to ask for the same kind of 'protection' which is now accorded the laborer."

The fact that musicians' organizations tried, for example, to use the law in 1890 to prevent Eduard Strauss's Vienna orchestra from coming to the United States on the grounds that a musician was not per se an "artist" suggests that labor market conflicts reached into the professional ranks. In a critique anticipating by almost half a century attacks on unionized journalists willing to abandon their putative professionalism for overtime protection during the New Deal, The New York Times protested against such tarnishing of the white collar by blue-collar lump-of-labor tactics:

The attempt of certain "local musical organizations" to protect musical "labor" in this country by preventing STRAUSS'S Vienna orchestra from coming here to give concerts illustrates the most vicious practice and principle of trades unionism. A musical

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60 "Booth and Barrett," NYT, Jan. 6, 1889 (5:2). When Ford's committee issued its report in January 1889, it not only did not mention the question of musicians and actors, but continued the tradition of characterizing the objects of the ban as those workers with "vicious" habits and "disgusting" customs. To Regulate Immigration 5 (H. Rep. No. 3792, 50th Cong., 2d Sess., Jan. 19, 1889). Representative Melbourne Ford was a Michigan Democrat.

61 "Views of the Managers," NYT, Dec. 20, 1888 (8:1).

62 "Protection for Actors," NYT, Dec. 17, 1888 (4:5) (editorial). Oddly, in attacking the enactment of the original statute, the Times had asserted that engagements with workmen were "in no sense different in principle" than those for actors, singers, artists, and lecturers. "Imported Contract Labor," NYT, Feb. 19, 1885 (4:3-4).

63 "Trouble Ahead for Strauss," NYT, Feb. 12, 1890 (1:2); "What Is an Artist?" NYT, Feb. 13, 1890 (8:3). Eduard Strauss, though less well known than his father and brother (both named Johann), conducted and managed the family orchestra for decades and was himself a prolific composer. http://www.johann-strauss.org.uk/composers/index.php?content=eduard1. As early as 1889 it had been judicially decided that, based on common usage, milliners, dressmakers, tailors, cooks, and barbers were not "artists." United States v. Thompson, 41 F. 28, 29 (CC SDNY 1889).

64 See below chs. 7 and 12.
"Brain Toilers" under the Alien Contract Labor Immigration Laws

organization that is willing to put in the degrading plea that its members are not "artists," in order to induce the Treasury Department to decide that the members of a foreign orchestra must be excluded under the provisions of the alien contract labor law has reached a pretty low level. The theory of this action is...that the public demands and will pay only for a certain fixed amount of musical entertainment, and that if, in part, its demand is satisfied by and its money paid to foreign performers by that much "local musical organizations" are robbed of their just opportunity and emolument. This puts music upon the same level with street paving, car driving, and bricklaying, and it is the practitioners of the art who put it there. Musicians possessed of greater professional pride and sounder reasoning powers might be expected to welcome the Vienna orchestra on the theory that its concerts would be likely to foster the popular taste for musical entertainment and increase the demand for it. But the laborers of the "local musical organizations" who have appealed to the Collector for protection against the Vienna performers are naturally incapable of that kind of reasoning.65

In the event, the musicians' alleged penchant for positing the existence of one general labor market must have been contagious: a year later the Times itself, when confronted with a complaint that 1,500 musicians were struggling for a livelihood in New York City, knew nothing better to reply than that it was a "pity. Many, very many, of these musicians would be doing better service to the cause of art by laying bricks. They might help to rear fine buildings. They do not help to play fine music."66

While the Collector of the Port of New York was amused by a reporter's question as to whether he was personally going to "examine the musicians to discover whether they were artists or merely contract laborers," the alarmed American representatives of the management of the Strauss orchestra declared that its members were "such mighty musicians that they...would refuse to come to America rather than submit to such an indignity, which they would regard as an insult to their reputation...."67

The controversy was intensified by the testimony of Hugh Coyle, a music manager or head of an organization of musicians, at the joint congressional hearings on the operation of the statute held at Castle Garden in April 1890. Coyle had already denounced the Strauss orchestra to the U.S. Attorney for the Southern District of New York, charging that if these "cheap musicians...incapable of playing in the operatic or regular theatrical orchestras of Vienna" were admitted "to inaugurate the great new Madison Square Garden amphitheater" in violation of the law, "the next year will see herds of cheap charlatan musical organizations from

65NYT, Feb. 12, 1890 (4:6) (untitled editorial).
Europe playing at our watering places, mountain resorts, etc., posing as artists, and the American citizen will be left out in the cold, without employment, creating distress among some of our most worthy citizens.68 At the hearing, Coyle, who disclosed that he had been organizing a band that had lost a contract to Strauss’s orchestra, asserted that in order to qualify as an “artist,” a musician had to be a composer or a soloist. A musician did not have to be a Mozart to achieve the requisite standard, but “the constructors of the law, to protect musicians, had...in view...that the ordinary musician was a laborer, and there are thousands of those who would flood this country and do the American citizen out of employment.” Although he himself played three or four instruments, he emphatically denied “being an artist, as a musician”—other than in the indiscriminate sense (which he attributed to the Collector of the Port of New York) “that every other fellow that plays a Jewsharp is.”69

The testimony failed to satisfy the Times, which judged that Coyle and the committee had been “utterly unable to fix a test by which an artist’s standing was to be determined.”70 Testifying the next day, David Blakely, the manager of the Strauss orchestra, called Coyle’s definition “such sublime nonsense that it is not necessary to answer it.”71 Instead, he preferred a dictionary definition of an “artist” as a “person skilled in the manipulation of his art.”72 In spite of the sharp dispute over an operative definition, Blakely and the committee chairman, Indiana Republican Representative William Owen (who, after failing to be reelected, was appointed Superintendent of Immigration the following year), unintentionally gave powerful corroboration to labor’s viewpoint. Although Blakely initially responded negatively to Owen’s question as to whether salary was an index of acceptance as an artist, his admission that “a very skillful player would be more apt to receive a larger salary than one who is not a fine player” prompted this pithy exchange: “Q. It is a commodity in the market, you know?—A. Exactly.”73

68Report of the Select Committee on Immigration and Naturalization, and Testimony Taken by the Committee on Immigration of the Senate and Select Committee on Immigration and Naturalization of the House of Representatives Under Concurrent Resolution of March 12, 1890, at 387-88.
69Report of the Select Committee on Immigration and Naturalization, and Testimony Taken at 466-68.
70“Not Desirable Citizens,” NYT, Apr. 25, 1890 (8:3).
71Report of the Select Committee on Immigration and Naturalization, and Testimony Taken at 499.
72Report of the Select Committee on Immigration and Naturalization, and Testimony Taken at 498.
73Report of the Select Committee on Immigration and Naturalization, and Testimony
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Despite his aforementioned disclaimer, the Collector of the Port of New York did purportedly examine the musicians. When he informed the Treasury Department that the orchestra was expected in New York and asked whether the members should be permitted to land as “artists,” the department replied that “as the accepted definition of the word ‘artist’ includes musicians who combine science and taste in the manual execution of their art, such members of the Strauss Orchestra may be admitted as artists under the proviso to...section 5 as by their skill, taste, and accomplishments as musicians evidently come within the definition. Whether each member of the Strauss Orchestra comes up to the standard is a question of fact to be decided upon the best evidence obtainable.” From the fact that the members were allowed to land on their arrival, “nearly three months later, after a thorough examination by the collector of the port of New York,” the Treasury Department inferred that the collector must have determined that the evidence had sufficed to establish their claims to be artists.74

AFL President Gompers saw the law’s over- and underenforcement as leading to its eventual repeal. It was construed, at one extreme, to apply to ministers and star actors, but when it came to the laborer or worker, it was held inapplicable. Unlike the Times, however, Gompers regarded the musicians’ proletarian political economy as thoroughly rational: efforts were made, he told a congressional immigration investigatory committee, to introduce bands like Strauss’s “only...because they work cheaper, and to offset and throw out of employment the musicians of our own country who are equally efficient, only that they insist on having some beefsteak, and fair clothes, and a fair home, instead of having sauerkraut and wooden shoes.”75

The struggle over the extent to which musicians could be contracted for internationally resumed in late September 1890 when the Senate began debating H.R. 9632, which the House had already passed.76 After the Senate had agreed to one amendment adding “musical or other artists” to the groups of exempt

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74Decision No. 10429 (Dec. 10, 1890), in Synopsis of the Decisions of the Treasury Department on the Construction of the Tariff, Navigation, and Other Laws for the Year Ended December 31, 1890, at 570 (1891). This decision, which was written by Assistant Secretary O. L. Spaulding, was sent to Joseph Rugraff, who in the course of complaining about the engagement of Mexican musicians in St. Louis, asserted that the U.S. district attorney had stated that the case was covered by the decision in the Strauss case. Spaulding quoted from the Strauss case in his reply.

75Report of the Select Committee on Immigration and Naturalization, and Testimony Taken at 92.

occupations, the same Senator, Preston Plumb of Kansas, who had offered it, moved to add “musicians” as well. He sought to justify it on the grounds that music, like acting, rather than being a commodity, was a civilizational pleasure “not bounded by the boundary lines of nations....” Moreover, in keeping with the proviso as a whole, which was “designed to exclude persons who are not engaged in manual labor,” the amendment did “not touch upon the domain of manual labor. It is not competitive in the ordinary sense of the term. Our musicians go all over the world, and similarly we want other musicians to come here.” Senator Blair, the floor manager of the bill, agreed with Plumb that “[t]he idea of these exceptions is to allow those into the country whose skilled labor in art as well as in other occupations may be a source of instruction to our own people,” but argued that Plumb’s first amendment had already achieved that end. Unlike Plumb, however, Blair focused on the socio-economic fact that:

There is a large class of people in our country who get their living by their practice of music, pursuing it as an avocation. There are at least 20,000 who are in an organized musical union, a union of the common average laborers in music, you may say. They are called musicians; they call themselves musicians; and the term which the Senator would now insert in the bill would bring the common, average, every-day musician of Europe with his low prices and low rates of compensation directly in competition with the general American musician. It is the object of the bill to exclude those as well as others who come in competition with those who practice the art as an avocation of common life.

[...]

While purporting to sympathize with Blair’s view of excluding competitors of manual laborers, Plumb made the incoherent claim that musical competition was “of a different kind entirely. The pay for it comes from persons who are able to indulge in the luxury of it, whether poor or rich....” When the Senate agreed to Plumb’s second amendment too, Blair trusted the Senate-House conferees to dispose of it.

The chronological legislative history of the alien contract labor immigration

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77 CR 21:10466 (Sept. 26, 1890).
79 CR 21:10468.
80 CR 21:10468. See below on its ultimate elimination in 1891.
law is interrupted at this point in order to attend to legal proceedings under the act that were initiated in 1887 and the resolution of which ultimately decisively shaped further congressional action and judicial and administrative understanding of the white-collar exemptions from the statute. The question of whether the act was intended to encompass persons who were not manual laborers was decided by the U.S. Supreme Court in 1892 in a case involving the “high-salaried” Protestant Episcopal Church of the Holy Trinity in Manhattan, which had contracted with the Reverend Edward Walpole Warren, a British subject resident in England, to move to New York City to enter its service as rector/pastor. As The New York Times noted in June 1887 before suit had been filed, Warren, who was “of remarkable executive ability,” having accepted “the call to the rectorate,” would “enter upon his labors” and “his salary will be whatever he may desire it to be.” On his arrival in New York three months later, the Times interviewed Warren, who emphasized that he desired to “feel his way before attempting anything in the line of work”; and the paper itself admitted that it “required but a glance to see that he was a master of his work.”

Almost as soon as Warren began working, the legal process testing the applicability of the law to him was initiated. The matter had been brought to the U.S. district attorney’s attention by someone “actuated by the most disinterested motives” with regard to Warren and the church, “his only object having been to test the law, and to show its absurdity in applying it to professional men.”

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81 “E. Walpole Warren an Alien,” NYT, Apr. 12, 1892 (6:1).
82 Church of the Holy Trinity v. United States, 143 US 457, 458 (Feb. 29, 1892).
83 “The Call Accepted,” NYT, June 9, 1887 (8:5).
85 Already on October 10, 1887, U.S. District Attorney Walker received a letter from Warren’s lawyers requesting that they be allowed to explain the circumstances of the offer and acceptance of the rectorship “before he takes action on the question of the importation from London of Mr. Warren as a contractor laborer.” The district attorney granted the request. “Given Time to Explain,” NYT, Oct. 11, 1887 (8:3). In contrast, a few months later Walker “smiled broadly” when asked whether W. K. Vanderbilt’s “‘gastronomical director’”—who was about to arrive and represented “in his profession a position as far above the old-time chef as the modern ‘funeral director’ does above the old-time undertaker”—came under the law. Although it was “a clear case,” neither he nor the Collector of the Port of New York intended to intervene without a complaint “‘through the regular channels,’” “Vanderbilt’s Imported Cook,” NYT, Mar. 20, 1888 (5:3).
86 “He Is a Contract Laborer,” NYT, May 24, 1888 (8:5). The person in question, John S. Kennedy, purportedly sought to test the law because federal authorities had sent back
At argument on the church’s demurrer to the government’s complaint, the defendant’s lawyer, relying on *In re Ho King* decided under the Chinese labor exclusion act, stressed that the term “laborer” did not mean “the kind of mental and spiritual service which a clergyman renders his congregation.” In contrast, the U.S. district attorney argued that there was no need “for the court to grope for what is called the spirit of the act or the intention of Congress” because its meaning was “clear”: the law constituted a sharp break with the “American policy,” which had prevailed throughout “[t]he whole history of our country,” of inducement to immigration.87 In a remarkable harangue by the government prosecutor against the statute, its underlying policy, and the labor organizations that lobbied for its enactment, District Attorney Walker asserted:

A law against the immigration of the perfectly equipped and willing laborer to our country is as much adverse to the general spirit of our legislation as would be an act to check the natural increase of our resident population, and much more against self-interest, as the immigrant adds at once his matured energies to the working force of the community while the new-born infant is a burden on the body politic. The reversal or checking of this American policy is due partly to the fear of the voting power of labor organizations as operating on, not to say terrorizing, our legislative assemblies. So in the last few years we have had a deluge of short-hour laws, of holiday laws, all having their origin in pure deference to the voting power and independent of any just political principle. Any measure having the endorsement of a labor organization must be carried through Congress as gingerly as eggs in a basket.88

Having excoriated the law, its policy basis, and its chief supporters, Walker

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88"Parsons Need Protection."
then explained the measure as an effort by workmen to achieve the benefits of the protective tariff that they felt had been withheld from them. Using the exclusion of “competitive labor” as the fundamental principle of the law, the district attorney was able to demonstrate empirically that the labor market for parsons was in as much need of protection:

Suppose that its plain interpretation excludes a clergyman from the list of immigrants. It also excludes a blacksmith and a market gardener. The services of each would be useful, but the home supply is abundant. In no department of service has competition been more active than in clerical work. Our choicest and most desirable metropolitan pulpits are invaded by the foreign product. Eight of the best-paying and best-attended churches in New-York are at the present time served by imported...clergymen. Meanwhile our theological seminaries, which are infant industries just as much as carding machines or iron mills, are turning out annually enough of this form of labor product to supply the home demand and meet the exigencies of missionary service also. There are more Congregational ministers in the United States not engaged in the work of their profession in proportion to their numbers than there are carpenters or masons out of employment. Of the 4,090 Congregational ministers in the United States in 1887, only 2,852 were engaged in pastoral work. These suggestions might not be without force in maintaining a prohibitory duty on clergymen if it were the duty of counsel to justify a specific rate of duty, prohibitory or otherwise, on a specific commodity.89

That Walker’s attempt to assimilate professional or brain workers to the model of the manual laborer may have been done tongue in cheek draws some support from his protestation after prevailing that he “had not presented the case in a spirit of levity....” Nevertheless, he declared that “[i]f the decision forced an amendment of the law no one would be more pleased than himself.”90

Making ample use of the district attorney’s argument, the trial court explained that the labor unions had introduced and advocated the measure, which was designed to shield the interests they represented “from the effects of the competition in the labor market of foreigners brought here under contract....” The court then added, not without irony, that: “Except from the language of the statute, there is no reason to suppose a contract like the present to be within the evils which the law was designed to suppress, and indeed it would not be indulging a violent supposition to assume that no legislative body in this country would have advisedly enacted a law framed so as to cover a case like the present.” Be that as it may, however, where the statutory terms were “plain, unambiguous, and explicit,” a judge was “not at liberty to go outside of the language to search for a meaning

89“Parsons Need Protection.”
90“He Is a Contract Laborer.”
which it does not reasonably bear in the effort to ascertain and give effect to what may be imagined to have been or not to have been the intention of Congress.” In particular, the court was barred from resorting to “speculations of policy [or] even to the views of members of Congress in debate to find reasons to control or modify the statute.”

To clinch thehopelessness of the defendant’s argument, the court made explicit the logic of theprofessional proviso: “If without this exemption the act would apply to this class of persons because such persons come here under contracts for labor or service, then clearly it must apply to ministers, lawyers, surgeons, architects, and all others who labor in any professional calling. Unless Congress supposed the act to apply to the excepted classes, there was no necessity for the proviso.”

The only other point the court made was to dismiss as inconsequential a potential self-contradiction in the statute, acknowledgment of which might have opened the way to recognizing the presence of the kind of deep-seated statutory ambiguity that would have made consideration of the legislative history proper. (Curiously, the Supreme Court did not even allude to this issue in support of its interpretation.) From the very first version of the bill to the final enactment, § 4 made it a misdemeanor for “the master of any vessel who shall knowingly bring within the United States and land, or permit to be landed, from any foreign port or place, any alien laborer, mechanic, or artisan who, previous to embarkation on such vessel, had entered into contract or agreement...to perform labor or service in the United States” and imposed a fine of at least $500 for “every such alien laborer, mechanic, or artisan....” Since laborers, mechanics, and artisans were then and are now, in common parlance, all manual workers and neither then nor now could plausibly include a religious minister or professional or clerical employee, the fact that ship masters could not be prosecuted for bringing such white-collar employees into the United States demonstrated either that the latter were not part of the evil that Congress had targeted—or that the bill had been sloppily drafted and that none of the numerous members of Congress who caught and criticized many other flaws detected this one. If it was a flaw, presumably it became one only after the House Labor Committee and Foran reported the bill with the amendment implying that all but four categories of professionals were covered, but neglected to alter the language in § 4 accordingly.

91United States v. Church of the Holy Trinity, 36 F. 303, 304 (SDNY 1888).
92United States v. Church of the Holy Trinity, 36 F. at 305.
94Congress was, at any rate by 1890, aware of the discrepancy: “How can a master
The court attended to § 4 as an afterthought, dismissing it on the merely speculative grounds that the provision was “wholly independent of the others, and the difference in the persons described may reasonably be referred to an intention to mitigate the severity of the act in its application to masters of vessels.”

As the defendant pointed out in its brief before the Supreme Court, the lower court’s observation did “not meet the intendment” of § 4. First the church noted that provision was a “clear and specific declaration as to whom the law makers intended to exclude from our shores. ... These words must mean something or they would not be so explicitly used and repeated.” Second, the defendant argued: “The framers of this Act felt that the Captains of vessels could clearly know the class of persons they desired to keep from the country, as it was openly charged that many of the captains and the ship owner’s agents in foreign countries were financially interested in increasing the importation of the very persons whom it was the desire of the petitioners for the law (the labor organizations) to keep from this shore, namely, ‘laborers, mechanics and artisans’ under contract before they start.” Thus it was precisely at “stop[ping] the masters of vessels from encouraging and knowingly participating in that kind of immigration” that § 4 was directed and not, as the lower court had speculated, “to mitigate any severity of the Act in its application to the masters of vessels.”

The court’s decision holding “ministers of the gospel as contract laborers” was, as far as AFL President Gompers was concerned, an example of what he viewed as “an attempt to bring the law into odium and ridicule, and cause a revulsion of feeling among the citizens and secure its repeal....” Nevertheless, the questions posed by the justices at oral argument before the Supreme Court on January 7, 1892, gave, in the opinion of The New York Times, “good ground for the presumption” that they would decide against the church. Indeed, the questions had

95United States v. Church of the Holy Trinity, 36 F. at 305-306.
96Brief for the Plaintiff in Error at 13-14, Church of the Holy Trinity v. United States, 143 US 547 (1892).
97Report of the Select Committee on Immigration and Naturalization at 91.
98One reason for the passage of almost four years after the lower court’s ruling was the issuance by the attorney general, after the case had been appealed to the Supreme Court, of an opinion to the Treasury Secretary doubting the latter’s authority to compromise cases arising under the alien labor contract law after the district attorney and Treasury Secretary had recommended accepting the church’s offer to settle the $1,000 fine for $100. OoAg 19:345-50 (1891 [June 27, 1889]); “The Rev. E. Walpole Warren’s Case,” NYT, July 2, 1889 (2:4).
persuaded even the assistant attorney general that his participation in oral argument was unnecessary. After all, despite the defendant’s contention that it was not Congress’s intention to exclude ministers, but only laborers, mechanics, and ordinary workmen, the justices’ questions revealed that “although Congress may have intended simply to exclude workingmen, yet the language of the act itself was on its face so plain as not to leave any room for the court to inquire into Congressional intention.” Justice Field was typical of his colleagues—whose questions made it clear that they thought that only the expressly exempted occupations were excluded—in quoting the language of the statute and asking rhetorically: “Don’t we [meaning the Justices] perform service here?” In response to the church’s argument that such an interpretation would be an “absurdity” that the Court should avoid by giving the act a construction that would articulate “the most sensible view that could be taken of the intention of Congress,” Justice Brewer (who wrote the unanimous opinion) replied: “Is it not just as much of an absurdity to prevent the incoming of an honest laborer as of an Episcopal minister?”

The trial judge may have internalized the traditional canons of statutory construction as insuperable constraints, the Supreme Court did not. Although the Court could hardly avoid conceding the great force in reasoning that the text of the law did outlaw this transaction, the justices “cannot think Congress intended” to penalize it: “It is a familiar rule, that a thing may be within the letter of the statute and yet not within the statute, because not within its spirit, nor within the intention of its makers. ... This is not the substitution of the will of the judge for that of the legislator, for frequently words of general meaning are used in a statute, words

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99 “Looks Bad for Trinity,” *NYT*, Jan. 8, 1892 (5:3).
100 Bizarrely, barely a month after the decision was handed down, the *Times* erroneously reported that the Supreme Court had “saved” Warren “on appeal by letting him stay on as a ‘teacher.'” “E. Walpole Warren an Alien.” Ironically, at the same time Warren “put himself on record as a perpetual alien” because New York City was “so wicked and corrupt that I would not wish to be identified with it even as a voter.” *Id.* This declaration impelled the *Times* to interpret the statute as justly excluding professionals who migrated to the United States solely for opportunistic economic reasons: “A man who comes here avowedly and merely to make a living, and remains an alien, does not occupy a particularly admirable attitude.” Although the effort to enforce the contract labor law against him had failed, “if the purpose of the law had been to exclude clergymen who came to this country merely to make their livings by the practice of their profession, while remaining aliens and refusing to identify themselves with the country, we are not prepared to say that the purpose would have been blameworthy. If Mr. WARRREN had been excluded, upon the ground that he himself has now furnished, we are quite sure that the Republic would have taken no detriment by his exclusion.” “The Alien Preacher,” *NYT*, Apr. 12, 1892 (4:1) (editorial).
broad enough to include an act in question, and yet a consideration of the whole legislation, or of the circumstances surrounding its enactment, or of the absurd results which follow from giving such broad meaning to the words, makes it unreasonable to believe that the legislator intended to include the particular act.”

The Court sought to use this spirit and intention to trump the letter in several ways. First, the justices pointed out that the title of the act mentioned only “perform labor,” omitting the term “service,” which could more plausibly serve as basis for including those not engaged in manual labor. “Obviously the thought expressed...reaches only to the work of the manual laborer, as distinguished from that of the professional man. No one reading such a title would suppose that Congress had in its mind any purpose of staying the coming into this country of ministers of the gospel, or, indeed, of any class whose toil is that of the brain. The common understanding of the terms labor and laborers does not include preaching and preachers....”

A second guide to the meaning of a statute was to be found in the evil that it was designed to remedy; here a court might properly examine “contemporaneous events, the situation as it...was pressed upon the attention of the legislative body.” In this regard the Court, in addition to quoting Judge Brown’s aforementioned opinion, observed that from the petitions presented to Congress and the committee hearing testimony, it appeared that “it was this cheap unskilled labor which was making the trouble, and the influx of which Congress sought to prevent. It was never suggested that we had in this country a surplus of brain toilers, and, least of all, that the market for the services of Christian ministers was depressed by foreign competition. Those were matters to which the attention of Congress, or of the people, was not directed.”

The Court located the final guide in the more narrowly defined and conventional legislative history, which it characterized as “[a] singular circumstance, throwing light upon the intent of Congress.” Specifically the Court was referring

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102Some legal scholars regard Church of the Holy Trinity as the first case in which the U.S. Supreme Court used conventional legislative history to interpret a statute or, alternatively, to trump a contrary statutory text. William Eskridge, Dynamic Statutory Interpretation 208-10 (1994); Vermeule, “Legislative History and the Limits of Judicial Competence” at 1836.

103Church of the Holy Trinity v. United States, 143 US at 463.

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to this aforementioned statement in the report of the Senate Education and Labor Committee: “Especially would the committee have otherwise recommended amendments, substituting for the expression ‘labor and service,’ whenever it occurs in the body of the bill, the words ‘manual labor’ or ‘manual service,’ as sufficiently broad to accomplish the purposes of the bill, and that such amendments would remove objections which a sharp and perhaps unfriendly criticism may urge to the proposed legislation. The committee, however, believing that the bill in its present form will be construed as including only those whose labor or service is manual in character, and being very desirous that the bill become a law before the adjournment, have reported the bill without change.”

Although there was apparently nothing “singular” about the House report, which was much more substantive, the Court nevertheless quoted it at length to show that the workers whom Congress intended to exclude were “from the lowest social stratum” and lived on “the coarsest food and in hovels of a character before unknown to American workmen. ... The inevitable tendency of their presence among us is to degrade American labor and to reduce it to the level of the imported pauper labor.” Finding that all these guides “concur in affirming that the intent of Congress was simply to stay the influx of this cheap unskilled labor,” the Court’s “duty” was to state that “however broad the language of the statute may be,” contracting with the minister, “although within the letter, is not within the intention of the legislature, and therefore cannot be within the statute.”

Interestingly, the Supreme Court refrained from advancing one argument in support of its implicit boast that it was better able to express Congress’s intent than the legislature itself—namely, that in 1891 Congress had amended the law (“probably” in reaction to the trial court decision in *Church of the Holy Trinity*) to exempt “ministers of any religious denomination,...persons belonging to any recognized profession, [and] professors for colleges and seminaries....” Apparently, Congress may well have agreed with the *Times* that sustaining “‘professional free trade’” was more important than “‘protecting” a few disgruntled actors, most of

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105 *CR* 15:6059 (July 5, 1884); *Church of the Holy Trinity v. United States*, 143 US at 464-65.


109 United States v. Laws, 163 US 258, 265 (1896). The Court stated that it had not mentioned the amendment “because the review was had upon the record based upon the act as originally passed in 1885.” *Id.*

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whom could get employment if they would take it...”111

During the multi-year interim between enactment of the original statute and its amendment, a large number of bills were introduced to add other exempt occupations in order to preclude repetitions of the lower-court decision in Church of the Holy Trinity, which rested on the canon of statutory construction that the inclusion of certain occupations in an exemption implies the exclusion of all others from it (“expressio unius est exclusio alterius”). Other bills, however, would have limited the existing exemptions in response to partisan demands. For example, in early 1888, bills were introduced in both chambers of the Fiftieth Congress by Philadelphia Republicans that would have declared that “the term ‘artists’ shall not be construed as referring to organized bands of music or orchestras.”112 Later that year, New York Democrat Representative Samuel Cox, who was closely linked to various working-class groups, and Senator Blair introduced amendatory bills that would have substituted for the original exemptions a statement that the act did not apply to “actors, or to foreign musicians, performing under a temporary engagement on a tour of the United States...”113 A bill in late 1889 that had exempted professors in universities and “ministers of the Gospel,” was reported out by committee as excepting school teachers and professional actors as well.114 In contrast, in March 1890, as the controversy over musicians was building, New York Republican Senator William Evarts, a former attorney general and secretary of state, introduced a bill that expressly confined the applicability of the 1885 statute to “alien laborers, mechanics, or artisans.”115

A month later, as the hearings were taking place in Castle Garden, the aforementioned H.R. 9632 was introduced in the House, which was passed in August, exempting “professional actors, artists, lecturers, regularly ordained ministers of the gospel, learned professors of colleges or seminaries, or professional sing-

113H.R. 10897, § 5 (50th Cong., 1st Sess., July 19, 1888); S. 3395, § 5 (50th Cong., 1st Sess., July 30, 1888); H.R. 11685, § 5 (50th Cong., 2d Sess., Dec. 10, 1888); S. 3395, § 5 (50th Cong., 1st Sess., Aug. 10, 1888) (as reported out by the Education and Labor Committee, of which Blair was chairman from 1881 to 1890); S. 3406, § 5 (51st Cong., 1st Sess., Apr. 5, 1890).

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The congressional focus on professors was highlighted by the effort by Republican Representative George Hoar of Massachusetts to add "or teachers" to the "professors for colleges and seminaries" on behalf of Harvard University (of which he was a trustee), which had engaged Felix Klein, "the most famous living mathematician in the world," for three years as a teacher; "when the engagement was made it turned out that that the contract-labor bill, as interpreted by the Treasury Department..., prevented that eminent scholar from coming to this country."117 After the bill died in the Senate, Representative Owen introduced a new bill in early 1891 that added to the exempt groups of the 1885 statute "regularly ordained ministers of the Gospel,...persons belonging to any recognized profession, [and] professors for colleges and seminaries."118 His Select Committee reported the bill out with the same language,119 which the House then passed after amending the clerical exemption to include "ministers of any religious denomination."120

That the amended statute with its expanded list of exempt occupations had not put an end to the struggle over the labor market was made obvious by the fact that the very day it became law, The New York Times published a report that if any enterprise undertook to bring over musicians, the Musical Mutual Protective Union would "again make a test of the alien contract labor law in the courts and see whether a musician of New-York cannot be regarded in the light of a laboring man who works for wages." And even if the legal battle were lost, the union announced that it would "rigidly enforce its own rules," and none of its members would play with any other musicians who were not members.121

Though relatively few in number, court decisions interpreting the 1885 statute offer important insights into both legal and more popular understandings of the distinctions between white- and blue-collar workers. An appellate court in 1899

117CR 21:10555-56 (Sept. 27, 1890).
120CR 22:2295 (Feb. 19, 1891). The House also rejected a proposed amendment to insert "learned" before "professions." ld. See below on the enactment of this qualification in 1903.
had to grapple with whether a draper-cum-window dresser/dry-goods clerk was within or outside the ban on contract labor. Relying on *Church of the Holy Trinity*, the Seventh Circuit Court of Appeals, liberated from strict construction, declared that “when we once break away from the letter of the law, and seek for its true meaning and intent, which was to stay the influx of cheap, unskilled manual labor, then the liberal construction adopted by the supreme court furnishes the only safe resting place.” The straightforward answer for the court lay in the fact that the mischief at which Congress had aimed was great corporations’ contracting abroad for cheap unintelligent labor for mines and mills, not a single person’s coming to the United States as a clerk. Although that consideration alone should have sufficed to dispose of the case, the appellate judges then sought to explain how to identify a manual laborer in the real world:

A silk draper or linen draper is not a common laborer. He may do work with his hands, as does a minister, a lawyer, or surgeon, but to designate him as a common manual laborer would be a misuse of the English language. The habit of working with the hands is not by any means the criterion. All men work with their hands. But in some occupations, like that of working with a spade or shovel and wheelbarrow, or as a common hand in a sawmill or in the lumber woods with a peavey or crosscut saw, the value of the labor consists principally in the physical results accomplished. The surgeon also works with his hands, but the beneficial results in his case come more from the skilled labor of the mind, guided by large study and experience, in connection with that of the hand. A stenographer or typewriter works constantly with the hands, and yet the value of his work does not consist mainly in the manual labor done, and it would be a misuse of terms to call him a laborer. He is not such in the ordinary acceptation of the term, no more than is a draper or window dresser. The need of window dressers in large commercial centers like New York to dress out window fronts for an artistic display of silks and woolens is very well known. It has become a favorite way of advertising, and the tradesman who can present the most attractive window is apt to get the best trade. The occupation does not necessarily require any manual labor at all, as that may all be done under the direction and superintendence of the one skilled in that trade or business. But it evidently requires experience, with good taste and judgment. If such a person is not an artist, he should at least have intelligence with an artistic taste and judgment. He must know the value of perspective, and must be able to arrange and combine light and shade and colors to the best advantage,—something as an artist does in a painting. To do this with proper effect requires something more than mere muscle and a spinal cord. It calls for intelligent skill. So with a skillful salesman of silks and woolens, a mercer or draper, though he employs the labor of his hands to a certain extent, the principal value of his services comes from a different and more occult source. He must know his wares thoroughly, and the best

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122 *United States v. Gay*, 95 F. 226, 229-30 (7th Cir. 1899).
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manner of exhibiting them, and have some knowledge and experience in the treatment and management of customers.124

In another case from 1903 involving the question of whether accountants fit within the professional exemption, the judge, Emile Henry Lacombe—whom "critics of modern liberal tendencies were sometimes disposed to find...too regularly on the side of property"125—manifestly felt that the ruling in Church of the Holy Trinity had made it possible for the judiciary to range freely; in his (possibly ironic) statement of the Supreme Court’s holding: "in construing these statutes we are to get at the spirit of the statute and the intention of its makers, however inconsistent that may be with the words used."126 Lacombe proceeded in this vein to argue that, pursuant to the Supreme Court’s construction that Congress had intended “simply to stay the influx of cheap unskilled manual labor...the exceptions are superfluous. An ‘expert accountant’ is certainly not an unskilled manual laborer.” And whatever the situation under the 1885 and 1891 enactments, it was reasonable to assume that Congress had a restrictive purpose127 in 1903 in qualifying “profession” by adding “learned.”128 Relying solely on “the ordinary use of language,” Lacombe was certain that accountants did not belong to the learned professions, and the attempt by the aliens’ lawyers to circumvent this

126In re Ellis, 124 F. 637, 641 (CC SDNY 1903), appeal dismissed per stipulation sub nom. Ellis v. Williams, 200 US 623 (1906).
127In re Ellis, 124 F. at 643.
128Act of Mar. 3, 1903, ch. 1012, Pub. L. No. 162, § 2, 32 Stat. 1213, 1214. Inexplicably, in the bill from which this act derived the word “learned” was not printed in italics designating a change in existing law. H.R. 12199, § 2 (57th Cong., 1st Sess., Mar. 6, 1902). Nor was there any discussion of the word in the committee reports or floor debates. H. Rep. No. 982: Immigration of Aliens (57th Cong., 1st Sess., 1902); S. Rep. No. 2119: Foreign Immigration (57th Cong., 1st Sess., 1902); CR 35:5764, 5819 (May 21-22, 1902). The Senate report even stated programmatically that: “The absence of comment...indicates that such portion is, either in terms or in substance, existing law.” S. Rep. No. 2119: Foreign Immigration at 1. Quoting this passage, the attorney general opined that insertion of “learned” was “clearly insufficient to justify the assumption that Congress intended the proviso to have any different effect from that given it by the Supreme Court” in Church of the Holy Trinity. OOAG 27:383, 399 (1909 [June 2, 1909]). In the 1902 summary volume of its report, the Industrial Commission published a proposed law draft which it had asked a number of immigration commissioners in various ports to draw up; it included the word “learned.” Final Report of the Industrial Commission 19:1015 (57th Cong., 1st Sess., H. Doc. No. 380, 1902).
obstacle by asserting that all professions were by definition learned failed to
explain why Congress would have gone to the trouble of adding a meaningless
word.129

Until the end, the courts faithfully adhered to Church of the Holy Trinity.
Noting the Supreme Court’s holding that Congress had not had in its mind any
purpose of staying the coming into this country of “any class whose toil is that of
the brain,” a federal judge in 1921 found that because the planning work of marine
engineering originated in the engineer’s mind, it was a recognized learned pro-
fession.130 Similarly, three years later, another court, quoting the Supreme Court’s
remark that it had never been suggested that “we had in this country a surplus of
brain toilers’” and taking judicial notice of the “common knowledge” that “the
work ordinarily and regularly performed by telegraph operators is not manual nor
physical in any proper sense, but is mental,” dismissed from custody under a
deportation warrant a Canadian female telegraph operator.131 And as late as 1929,
the Third Circuit Court of Appeals dismissed a deportation action against a
German who worked as a plant superintendent on the grounds that he did not
belong to the “ignorant and servile class of foreign laborers.”132

The Attorney General, in providing advisory opinions on the scope of the
contract labor statute to other department heads, also had occasion to flesh out the
distinction between manual and mental labor. In 1901, for example, the Treasury
Secretary, in asking whether lace makers should be refused a landing, framed the
inquiry in terms of whether Church of the Holy Trinity had narrowed the appli-
cation of the law to aliens performing manual labor or had simply held that it did
not apply to a clergyman.133 Remaining faithful to this framework, President
McKinley’s Attorney General, John Griggs—who, according to the Times, was
“believed to be friendly to organized labor”134—pointed out that “[t]he proper
distinction” as worked out by the Court was “that between manual labor and the
professions,” which the amendments of 1891 had incorporated.135 He then pointed
out that, although no craft required more skill than was possessed by the members

129 In re Ellis, 124 F. at 643.
130 Ex parte Aird, 276 F. 954, 957 (E.D. Pa. 1921).
132 McCandless v. United States ex rel. Rocker, 30 F.2d 652, 653 (3d Cir. 1929).
133 OAG 23:381, 382 (1902 [Jan. 28, 1901]).
134 “Gregg May Defend Strikers,” NYT, July 28, 1899 (4:4). Griggs was also
“remarkable for the assiduity with which, during his three years in office, he declined every
opportunity except one for enforcing the Sherman [Antitrust] Act.” William Letwin, Law
135 OAG 23:386.
of the American Window Glass Workers' Association, which had provided the original impetus for the contract labor law, they were nevertheless not "brain toilers, as that phrase is usually intended. Such artisans are workers of brain and hand; they use their brains, and mental capacity informs and directs the skill of the handicraftsman; but the distinction is broad and obvious."

Adding dictum on dictum, the attorney general—evincing a remarkable degree of reflectiveness, subtlety, epistemological humility, and self-doubt that neither Congress nor the DOL would ever display in limning the borders of white-collardom—conceded that "there may be an anomalous region between the line of manual labor and that of the professions, in which are to be found occupations of certain superior clerkly functions or involving taste and skill little short of art, the status of which may be difficult to settle." Finally, he alluded to "the same doubtful situation...in the Chinese-exclusion laws, in which the question remains for conclusive decision whether an upper clerk or 'buyer and seller' or 'assistant accountant,' who is not strictly a laborer nor yet a merchant, should be embraced in the exclusion expressly directed at the one class, or admitted under the permission expressly (and perhaps exclusively) granted to the other class and its cognate classes."

Eight years later, President Taft's attorney general from Wall Street, George Wickersham, advised the Secretary of Commerce and Labor that a British-Canadian induced to come to the United States by the promise of employment as superintendent of a lumber mill did not come within the scope of the contract labor statute because his position did not require the performance of manual labor.

More important than this unremarkable conclusion was his insistence that if, in light of the Supreme Court's interpretations, Congress had intended to extend the statute's prohibitory scope beyond manual labor, it would have been duty bound to make that intent "plain and ambiguous"; yet nothing in any of the congressional enactments since 1885 or their legislative history disclosed an intent to make "such a radical change in the policy of the Government...."

The longevity of the struggle over the labor market and the Musical Mutual Protective Union's tenacity in prosecuting it is impressively documented by the fact that 17 years after it had brought the first suit under the alien contract labor law in May 1885 against a German steamship line for importing a 40-member band, the union appealed to President Theodore Roosevelt to help musicians secure "a fair and just interpretation of the alien contract labor law to protect the

136 OOAG 23:387.
137 OOAG 23:388.
139 OOAG 27:405-406, 399.
140 "Under a New Law," NYT, May 10, 1885 (7:2).
interest of our profession.” On the occasion of yet another decision permitting
the entry of an orchestra, the union’s president, Alexander Bremer, complained
of the continuing impact of the “arbitrary” ruling by the Treasury Secretary in 1890
that all musicians were artists. In contrast, it persisted in its view that: “The
ordinary professional musician...has no steady employment,” and “[w]herever en-
gagement is offered him he makes a bare living at best, and lives from hand to
mouth from day to day not knowing when the next engagement may come to him.
He is certainly a wage earner, and as such he is entitled to protection and the
benefit of the law the same as any other wage earner. He may be classed as an
artisan, but not an ‘artist.’” With equal doggedness, the Times remained puzzled
by Bremer’s insistence—so contrary to the “natural tendency of mankind...to mag-
nify their respective offices”—on “elaborately belittling and disparaging the
craft...of orchestral musicians.”

Not until the nadir of the Great Depression, when more than 50,000 of the
158,000 members of the American Federation of Musicians were unemployed, did Congress feel obliged to accommodate musicians’ exclusionary demands. The
legislature had been impelled to act because, in the (not entirely accurate) words
of the Senate Immigration Committee report:

Up to the present no distinction has ever been drawn at the ports of entry...between
those who are artists in the field of fine music and the great mass of those who can play,
however indifferently, some musical instrument.

A man who played a little on a clarinet could be admitted as an artist although in fact
he might be following the trade of a shoemaker.

Under the disguise of artists, thousands evade the contract-labor law in entering the
United States, and although they are inferior to American musicians, they are often
employed here for a long period of time because of the low wage they will accept, and in
this way they deprive talented American musicians of contracts....

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141“Musicians Make Appeal,” NYT, Nov. 28, 1902 (5:3).
143“Musicians Make Appeal.”
146S. Rep. No. 419: For the Protection of Musicians (n.p. [at 1]). In fact, eight years earlier, an Egyptian machinist and clarinet player who made the mistake of admitting, in
response to a leading question at an immigration hearing, that because he was not good
eough to play as a soloist he was not an “artist,” was therefore ordered deported, see
United States ex rel. Deliannis v. Commissioners of Immigration at Port of New York, 298
The House Immigration and Naturalization Committee, while conceding that no instrumental musician who "by any fair interpretation of the word can be called an artist" should be barred and that "[o]ur people are entitled to the cultural pleasures and advancement which visiting artists make possible," insisted that there was "no justification for admitting great numbers of cheap, ordinary alien musicians who are not distinguished at home or elsewhere...." This restrictiveness was rooted not only in the Depression, but also in the previous two decades' "radical changes in the music employment field," as a result of which "the demands of motion pictures, night clubs, cafes, and like places of entertainment, brought about a great increase in the number of instrumental musicians depending upon their employment as such for a livelihood." In addition to the decline of the legitimate theater, technological changes had created "adverse conditions" for musicians: "motion pictures are generally adopting sound and dispensing with orchestras, so that where some 23,000 musicians were employed in motion pictures a year or so ago only half of that number are employed now; also the radio, which of itself decreases musical employment opportunities, is resorting to records and recorded programs."147

As to the need for changes in the legal text itself, the House Committee impliedly assigned the blame for the admission of undistinguished musicians to the Supreme Court's interpretation in *Church of the Holy Trinity* and its progeny, which dichotomized the scope of the law, in effect reading all non-manual contract laborers out of the prohibition. As a result, the 1885 contract labor law got off to a bad start in the courts, and notwithstanding subsequent amendments designed to perfect the statute and to lead to a change of judicial construction, the first decisions still...prevail as precedents. The result is that the contract labor law is not construed as a general prohibition from which certain specified classes, including professional artists, are exempted; instead, the prohibition itself is virtually limited and made applicable to manual laborers only. Under such construction, the exceptions...have little or no effect. Consequently, the test, in substance, is not whether one seeking admission is a "professional artist" but whether he is a manual laborer; if he represents himself as able to play, in some way or other, however indifferently, some musical instrument, he is admitted. The player not being a manual laborer in the judicial sense must be an artist. An alien who played a little on a clarinet was an artist, even if he made the most of his living as a farrier. It has been said, probably with truth, that organ-grinders have been thus admitted.148

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F. 449, 450 (2d Cir. 1924).


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Thus, in 1932 Congress amended the statute to provide that: "No alien instrumental musician shall, as such, be considered an ‘artist’ or a ‘professional actor’...unless—(1) he is of distinguished merit and ability as an instrumental musician, or is a member of a musical organization of distinguished merit and is applying for admission as such; and (2) his professional engagements...are of a character requiring superior talent." Amusingly, just eight years later, the U.S. Department of Labor, in issuing revised regulations identifying the “professional” employees who would be deprived of an entitlement to wage and hour protection under the just enacted FLSA, took precisely the opposite approach. Although the initial regulations promulgated in 1938 had made no mention of artists, Harold Stein, the DOL’s hearing officer who drafted the revised regulations, asserted, with no supporting evidence, that “the general qualifications and methods of work of the bona fide artist make it reasonable to include such workers within the definition of ‘professional.’” He then created as a subdefinition that “the work must be ‘predominantly original and creative in character, as opposed to work which can be produced by a person endowed with general manual or intellectual ability and training.’” Finally, in words that would have been anathema to the opponents of Strauss’s orchestra a half-century earlier, he certified that: “Musicians, composers, conductors, soloists, all are engaged in original and creative work within the sense of this definition.”

The white-collar exemptions, reenacted, both narrowed and expanded, remained embedded in the alien contract labor law through the first half of the twentieth century, until the entire statute itself was finally repealed by the landmark Immigration and Nationality Act of 1952.


Appendix I:
"[T]he higher or more intellectual occupations" and Manual Labor under the Dependent Pension Act of 1890

[All valuable labor involves the exertion of both physical and mental powers.153]

Almost exactly at the same time that Congress was debating and courts and an executive branch agency were adjudicating whether white-collar workers performed "labor" for the purposes of the Alien Contract Labor Law, a very similar controversy was roiling Congress concerning disabled Civil War veterans. After four years of debate and President Grover Cleveland’s veto of one bill, in 1890 Congress passed and President Benjamin Harrison approved a law that conferred a monthly pension (ranging from six to twelve dollars, “proportioned to the degree of inability to earn a support”), on Civil War veterans who were “suffering from a mental or physical disability of a permanent character, not the result of their own vicious habits, which incapacitates them from the performance of manual labor in such a degree as to render them unable to earn a support....”154 These disability pensions were not related to military service in any way: a veteran who developed such a disability after and unrelated to the war was eligible.

Nor was the 1890 law the first (or last) time that Congress had found it necessary to deal with the subject.155 As early as 1866, Congress had made eligibility for receipt of a service-related pension depend on whether the veteran was incapacitated for performing any manual labor or suffered from an invalidity to perform manual labor.156 During the years from 1886 to 1890, while the various


154Act of June 27, 1890, ch. 634, § 2, 26 Stat. 182, 182). The statute also conditioned the entitlement of the dependent parents of a dead soldier to a pension on his, her, or their being “without present means of support other than their own manual labor....” Id. § 1, 26 Stat. at 182.

155Act of May 11, 1912, ch. 123, Pub. L. No. 155, § 1, 37 Stat. 112, 113 (providing a pension for anyone who was wounded in the military during the Civil War and was “unfit for manual labor by reason thereof” or who from other causes incurred in the line of duty resulting in his disability was “unable to perform manual labor”).

156Act of June 6, 1866, ch. 106, § 1, 14 Stat. 56. See also Act of Mar. 3, 1873, ch. 234, § 1, 17 Stat. 566, 567, which was framed in terms of a veteran’s disability for procuring his subsistence by manual labor.
bills were under consideration in Congress, the word “manual,” which appeared and disappeared numerous times, was subject to extended, repeated, and vigorous debate. Two key congressional colloquies took place in the Senate in 1886 and in the House in 1890.

In the Senate, after inconclusive discussion on the difference that adding “manual” might make, several senators requested more precise information on the issue. New Hampshire Republican Henry Blair played a crucial role in the first session of the Forty-Ninth Congress, just as he had with regard to the debate over white-collar exemptions from the alien contract labor bill. At a point when the Senate bill (S. 1886) required an applicant to be incapacitated from performing labor and “dependent upon his own labor for support,” but used total incapacity to perform any manual labor as a measure of the highest pension amount, Blair explained that “labor” in this context meant that a man had to be “dependent upon his labor, not upon his income from other sources, not upon his bonds or money at interest, but upon his labor for support.” This view prompted Kentucky Democrat James Beck to intervene. (Beck, who ultimately voted against the bill—all 14 opponents were Democrats—argued that the pensions should be paid for not by protective tariffs, which oppressed labor and industry, but by an income tax on all with an income above $5,000, but especially on millionaires.) Beck instanced the stenographer at the hearing who lived only on what he earned by his work or labor; if he was discharged from the army a healthy man, but later lost his left arm as a result of being kicked by a horse, would this disability entitle him to a pension despite the fact that he could still earn $3,000 a year? Blair had no difficulty replying that, so long as he was dependent on his labor for support rather than on “outside property,” he was eligible; in this respect the proposed bill differed from the general pension, which awarded a disability pension to any soldier who had

157 On the legislative history, see William Glasson, Federal Military Pensions in the United States 204-33 (1918).

158 For example, S. 389, which became law, as introduced by Minnesota Republican Cushman Davis—chairman of the Senate Committee on Pensions and himself a Civil War veteran—included “manual,” but it was deleted in committee, and reinserted later. S. 389, § 2 (51st Cong., 1st Sess., Dec. 4, 1889); S. Rep. No. 90 (51st Cong., 1st Sess., Jan. 15, 1890). The House conferees “strenuously” insisted that it be reinstated, but Davis did not think it was of “material significance one way or the other.” CR 21:5968 (June 12, 1890).

159 CR 17:4465 (May 13, 1886).

160 CR 17:4465.

161 CR 17:4681.

162 CR 17:4671.
been disabled in battle even if he lived on income from bonds and rents.\textsuperscript{163}

Shifting the example from a stenographer to a lawyer, Kansas Republican John Ingalls, who was a lawyer but not a Civil War veteran, elicited from Blair, who was both, the response that the lawyer too would be eligible. When Ingalls maintained that that outcome was "not right," Blair backtracked: "I do not say that it is right, but I think that it is well enough. At the same time I stated early in the discussion that it might be well to insert before that word 'labor' the word 'manual,' and say 'manual labor.'" Apparently heartened by Blair's concession, Ingalls explained that what he had really meant to say was that, whereas he did not want to pension a lawyer whose postwar disability did "not disqualify him from continuing to earn his livelihood by his labor," he did want to limit a pensionable disability to one that "would prevent a man from obtaining his livelihood in his own calling in life to which he has devoted himself"—in order to "keep him out of the poor-house."\textsuperscript{164}

In other words, Ingalls proposed an occupation-specific disability test that would have disadvantaged white-collar workers, many of whom, as Beck contended, could continue to "make a handsome living,"\textsuperscript{165} precisely because their work entailed relatively little manual labor.

Instead of expressly engaging Ingalls' transformative proposal, which would have programmatically segregated blue- and white-collar workers, Blair implicitly rejected identification of the occupation-specific impact of disabilities without, however, articulating a work-related basis for what in essence was an undifferentiated award for pain and suffering within the working—as opposed to the coupon-cutting—class:

I think the word "manual" is omitted in the eleventh line with design, but the man who is actually disabled and who is dependent upon his work, whatever it may be, for his

\textsuperscript{163}CR 17:4630.

\textsuperscript{164}CR 17:4630. This view was echoed by Nebraska Republican Charles Van Wyck, who started with "the theory of benefiting those who actually need it on account of their necessity, because they are unable to procure their daily bread by daily labor." Consequently, the bill's only purpose was "to prevent the spectacle, revolting to the American people, that there should be a portion of their soldiers, from a disability incurred after the service, dying in the poor-house or begging on the street-corners." \textit{Id.} at 4670-71 (May 19, 1886). Van Wyck, who himself had offered an amendment to add "manual" and then withdrew it, had been a brigadier general in the Civil War and was in 1892 an unsuccessful Populist gubernatorial candidate in Nebraska. S. 1886 (49th Cong., 1st Sess., Apr. 28, 1886) (amendments by Van Wyck); CR 17:4464-46 (May 13, 1886); John Hicks, \textit{The Populist Revolt: A History of the Farmers' Alliance and the People's Party} 259 (1961 [1931]).

\textsuperscript{165}CR 17:4629.
livelihood, shall be entitled to a pension. ... If the physical disability from which a man suffers, disregarding his employment entirely, it being a physical disability, is so great that he can not perform any manual labor—whether that manual labor was the means of getting his living or not is unimportant—then he is entitled for such a degree of physical disability to $24 a month.166

To be sure, Blair muddied the waters again by adding that the variable monthly pensions amounts were a function of “the degree of physical disability from which the man suffers, and that must be got from the idea of the nature of the work on which the man depends.”167 Since Blair had just declared that it was irrelevant whether the claimant actually performed manual labor, it is puzzling why he suddenly focused on the actual work that the claimant performed. This confusion may also have prompted Ingalls to ask Blair: “Now, will the Senator advise me why or upon what principle of justice the lawyer disabled by a railroad accident and losing three fingers of his left hand and still able to carry on the business of his profession should receive any pension at all? That is what I want to know.”168 Blair’s response was largely evasive, hiding behind the small numbers of affected white-collar pensioners, rather than confronting the central issue of whether disability for the applicant’s actual nonmanual occupation was relevant. Alternatively, he speculated that a lawyer might become proletarianized:

He is disabled physically, and he is in that regard. There are very few instances of that kind, of course. But when you pass from the lawyer, who may be one in a hundred thousand or one in fifty thousand throughout the country, and you come to the case of the clerk, how is it? You may assume that there is not any great necessity that the lawyer shall receive under this general bill; but on the other hand you have to consider that there are but very few such, and that in the vicissitudes of life he may come to be dependent upon physical labor. Although then he may have to depend upon his profession, the time may come when he may have to abandon it. It is a comparatively trifling matter.

You come very soon to other classes, the clerks and the teachers of the country who have been in the service.... They are not a very large number, and they suffer from physical disability, and they are all to be dependent upon their labor. There does not seem to be any great objection, they having performed honorable service, to giving them a pension in proportion to the actual degree of physical disability from which they suffer. It is very true that oftentimes this disability in these classes of what you may call the higher or more intellectual occupations would not largely disable them from acquiring a livelihood in their chosen vocation; but after all there are a great many cases where it would; and if you say “manual labor” you exclude a very large class of those who ought

166 CR 17:4630 (May 18, 1886).
167 CR 17:4630.
to take under the provisions of such an act. It was on the whole thought best to omit that word “manual” as the bill came to the Senate because of the hardship that would result in such a very large class of cases if these persons in intellectual employments, if you may so call them, were omitted.  

That Blair was not in the mood for compromise emerged from a follow-up question by Massachusetts Republican George Hoar, who wanted to know whether “manual labor” meant “working with his hands or something equivalent to that” because: “When you give a lien to a laborer you do not give it to a lawyer or teacher....” This reminder of lien law terminology then prompted Senator Ingalls to chime in that in religion, too, “the laborer is worthy of his hire’...does not mean the lawyer is worthy of his hire; it means the laboring man.” But Blair, having tired of semantic instruction, informed Ingalls: “Then the bill is right as it is, and the Senator’s criticism is of no consequence.”

The following day Blair elaborated by observing that, although he had earlier intended to insert “manual,” since the debate had indicated and his own understanding now being, “that the language as it stands would be held to include persons disabled and dependent upon their labor, whether it was that of a teacher or a physician or a clergymen dependent upon the exercise of his usual pursuit in life,” he would withhold the amendment. In a role switch, Ingalls now intervened on behalf of the white-collardom at whose entitlement he had cast such a jaundiced look the previous day; suddenly it was very clear to his mind that the only people who would be entitled to benefits were the disabled “dependent upon their own manual labor for support. I know of no reason why that rule should be applied. A man who has been a soldier and who is a physician or a clergymen or a lawyer or an editor or a merchant or a teacher, being disabled and dependent and unable to pursue his avocation, ought to receive the benefits of this bill exactly the same as a man who follows the plow or makes shoes or manufactures iron in the forge.” In an effort to use “a great deal more comprehensive” term that would extend the bill’s benefits to all the disabled regardless of “their pursuit in life,” Ingalls proposed substituting “exertion” for “labor.” Blair and a majority of the Senate agreed to the amendment, but the House did not pass the bill that

170CR 21:4631.
171CR 21:4677 (May 19, 1886).
172CR 21:4678, 4681. Nevertheless, S. 1886 as passed by the Senate included another reference to “manual labor,” which was not used in the 1890 law: “The highest rate of pension granted under this section, which shall be for total incapacity to perform manual labor....” S. 1886, § 1, (49th Cong., 1st Sess., May 25, 1886) (as passed in Senate). When
session,173 and when a House bill supplanted it in 1887 during the second session of the Forty-Ninth Congress, the bill that passed both Houses and was vetoed by President Cleveland replaced the broader “exertion” with “labor” bereft of the modifying “manual.”174

The aforementioned key discussion in the House in 1890 occurred after the conference committee had reinserted “manual,”175 thus requiring the pensioners to be “incapacitated from the performance of manual labor.” New York Republican Representative John Farquhar, who had been president of the National Typographical Union from 1860 to 1862, was awarded the Congressional Medal of Honor during the Civil War, and became a prominent lawyer,176 asked: “Why was the word ‘manual’ inserted before the word ‘labor’? “Is that definite enough to cover all kinds of disabilities which ought to be provided for?”177 The chairman of the House Committee on Invalid Pensions, Kansas Republican Edmund Morrill, who was also a Civil War veteran and later a bank president, explained that he had investigated the matter very thoroughly. My first impression was in favor of the bill as the Senate had it, but I found that it would entirely revolutionize the rulings of the Pension Office. The only standard recognized by the Pension Office has been and is manual labor. They say there that it is the only possible standard, that they can not measure a man’s mental condition or ability for mental labor, and that manual labor is the only standard that has ever existed in the office and the only standard that they can possibly work by.178

Ingalls asked how any modification could have been achieved by deleting the other “manual” since this one was embedded in the controlling clause, Blair replied, without much force, that the term was there “simply to indicate a measure for the varying degrees of physical disability from which the applicant may have come to suffer, from total incapacity to perform manual labor down.” CR 17:4631. Again Blair failed to explain why that standard was relevant to gauging the disability of, for example, a lawyer who could continue to engage in his profession even though he was incapacitated to perform manual labor.

173 As reported out by the House Committee on Invalid Pensions, “labor” had once again replaced “exertion.” S. 1886, § 1 (49th Cong., 1st Sess., June 15, 1886).


175 CR 21:5945 (June 11, 1890).

176 David Montgomery, Beyond Equality: Labor and the Radical Republicans, 1862-1872, at 94, 213 (1972 [1967]).

177 CR 21:5946 (June 11, 1890).

Morrill’s explanation suggested that the use of “manual” may have been a formality or makeshift designed to accommodate the limits of examiners’ ability to measure; consequently, the eligibility of veterans performing nonmanual labor would be determined by their hypothetical ability to perform manual labor, even though their actual profession required virtually no such labor. As explained by the leading early-twentieth-century chronicler of the history of military pensions:

> But a man might be in receipt of a comfortable or handsome income from his services as a skilled worker, salesman, clerk, lawyer, physician, public official, business man or banker without thereby being ineligible for a pension. The law inquired only as to the ability of the applicant to perform crude manual labor, and rated in an arbitrary manner those physical and mental ills which, when of a permanent character, would hamper a man in performing such labor. ... Pensions were provided for the highly paid but rheumatic lawyer, for the prosperous business man hurt in a street accident.179

Although the Republican Party, which was the chief political engine of Civil War pensions, advocated extending them to still more people in an effort to spend the budget surpluses built up by rising tariff revenues and to gain more votes from those who did not believe that they directly benefited from high tariffs,180 it is not clear that the number of potential white-collar beneficiaries of the new nonwar-related disability pensions among Civil War veterans was either large enough or strategically located in terms of northern and western election geography to have played any part in congressional deliberations.

In spite of its use in pension statutes going back more than a quarter-century, as late as 1895 an appeal from a rejection of a claim by a county surveyor on the grounds that he was not wholly disabled for manual labor stated that: “No accurate definition of ‘manual labor’ as contemplated by the pension laws has ever been given....” The claimant had cleverly argued that surveying was not “manual labor” within the meaning of the law, but chiefly mental; since the only physical exertion required by surveying was walking, and since he was able to adduce a dictionary’s definition as “physical employment with the hands as distinguished from mental

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or professional labor,” he challenged the Interior Department’s conclusion that manual labor also included labor of the legs and feet. John Reynolds, the assistant secretary of the interior, rejected this strict etymological sense of the term on the odd grounds that it led to the reductio ad absurdum that a man totally paralyzed in both legs but with unimpaired use of both hands was not incapacitated for the performance of manual labor. But more importantly, the adjudicator held that “all valuable labor” involved the exertion of both physical and mental powers. Instead of focusing on white-collar professions, however, Reynolds illustrated his view by reference to the blue-collar work of shoemaking, upholstering, painting, and “similar occupations,” the muscular force employed in which was “slight. The chief value-giving element is the knowledge which directs that force. Yet these are all forms of manual labor.” While conceding that surveying required “the exercise of special knowledge and some mental labor,” Reynolds pointed out that it also required considerable physical exertion; the very fact that a man was able to do the necessary walking to overcome the various obstacles usually found in the field, demonstrated that he possessed sufficient physical powers for the “performance of some manual labor....” This refutation of the claimant’s position was, however, merely a preliminary skirmish because “[t]he essential question” was not whether he “actually performs manual labor but whether he is able to perform it.”181 In other words, construing the statutory term did not require an examination of whether a claimant’s actual job involved manual labor, but whether hypothetically he could perform manual labor “to earn a support....”182

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182 The DOL has classified surveyors as engaged in a professional or other related occupation in the same subgroup with architects, lawyers, librarians, models, psychologists, social workers, and urban planners. US BLS, Occupational Outlook Handbook: 1970-71 Edition xii (Bull. No. 1650).
It would hardly do to hold that the general manager of the business of a corporation...becomes entitled to priority, for the reason he incidentally sweeps the floor, dusts the counters, and assists in selling goods. Adopt this rule and general managers of a business would be sure to do enough menial work to bring themselves within the section of the bankruptcy act giving priority to workmen, clerks, salesmen, and servants.\footnote{In re Greenberger, 203 F. 583, 584 (N.D.N.Y. 1913).}

A supervising “chief designer” is not in the same economic class as the workers who follow his designs and do the actual manufacture. The [bankruptcy] statute was intended to favor those who could not be expected to know anything of the credit of the employer, but must accept a job as it comes.... The claimant would have been the first to resent the notion that he was a workman or a servant.\footnote{In re Lawsam Electric Co, 300 F. 736 (S.D.N.Y. 1924).}

The concept of social or economic rank has been so far employed against the wage and salary claimant....\footnote{James MacLachlan, \textit{Handbook of the Law of Bankruptcy} 148 (1974 [1956]).}

Much less obscure than alien contract labor or Civil War pension laws are nineteenth-century lien laws as well as U.S. federal (and British) bankruptcy and state corporate insolvency laws that created a priority for wages, several of which extended protection to clerks. In addition, all states enacted wage payments statutes prescribing when or how often wages had to be paid and/or in what form (and banning payment in scrip or compulsory company stores).\footnote{For an overview and a comprehensive collection of the statutory texts, see Lindley Clark and Stanley Tracy, \textit{Laws Relating to Payment of Wages} (BLS Bull. No. 408, 1926).}

Because these regimes have been explored elsewhere,\footnote{José P. González Blanco, \textit{Protection of Wages} 289-97 (1959); Marc Linder, \textit{The Employment Relationship in Anglo-American Law: A Historical Perspective} 112-16 (1989).} they are treated cursorily here.

Because lien laws often protected workers and ‘contractors’ as well, their dual-class origins and purposes prompted judges to engage in more expansive line-drawing than was common under many other statutes. In particular, lien laws
represented a noteworthy area of the law in which courts early on treated one white-collar occupation—architects—on an equality with blue-collar workers. After all, if, as one court put it, lien laws covered “the material man, who does no work,” there was no reason not to cover architects, who did expend labor. Eventually, many states amended their lien laws to cover architects expressly.

Interpreting an 1862 New York law that created a lien in favor of “any person who shall perform any labor, or furnish any materials in building, altering, or repairing any house, etc., by virtue of any contact with the owner,” the state’s highest court held in 1878:

The architect who superintends the construction of a building performs labor as truly as the carpenter who frames it, or the mason who lays the walls, and labor of a most important character. It is not any the less labor within the general meaning of the word, that it is done by a person who is fitted by special training and skill for its performance. The language quoted makes no distinction between...mere manual labor and the labor of one who supervises, directs, and applies the labor of others. ... Looking at the whole act it is plain that it was not passed simply for the protection of laborers, using that word in a restricted sense as designating those who work with their hands, and are dependent upon their daily toil for their subsistence. Mechanics’ lien acts were originally enacted for the especial protection of this class of persons, but their scope has been greatly extended. Under the act in question a lien may be created not only in favor of workmen employed by a contractor, but in favor of the contractor also. The lumber dealer, the hardware merchant, in short any person who supplies materials for the use of the building, may acquire a lien thereon for their value. The right to acquire a lien is not confined to persons who may be supposed to need the especial protection of the State.

Nor were architects the only non-manual laborers to benefit from lien-law adjudications. In 1881, the U.S. Supreme Court, in a case that arose under a Utah Territory lien law, admitted that it was “somewhat difficult to draw the line between the kind of work and labor which is entitled to a lien, and that which is mere professional or supervisory employment, not fairly to be included in those terms,” but, construing a lien law liberally, nevertheless found that “the overseer and foreman of the body of miners who performed manual labor upon the mine” was entitled to a lien:

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191 Mining Company v. Cullins, 104 US 176, 179, 177 (1881).
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He planned and personally superintended and directed the work, with a view to develop the mine and make it a successful venture. His duties were similar to those of the foreman of a gang of track hands upon a railroad, or of a force of mechanics engaged in building a house. Such duties are very different from those which belong to the general superintendent of a railroad, or the contractor for erecting a house. Their performance may well be called work and labor; they require the personal attention and supervision of the foreman, and occasionally in an emergency, or for an example, it becomes necessary for him to assist with his own hands. They cannot be performed without much physical exertion, which, while not so severe as that demanded of the workmen under his control, is nevertheless as really work and labor. Bodily toil, as well as some skill and knowledge in directing the work, is required for their successful performance. We think that the discharge of them may well be called work and labor.  

The federal bankruptcy law of 1841 included a priority only for an "operative." Following its swift repeal, the next federal bankruptcy statute of 1867 included clerks together with workmen and servants within the protected class. Unfortunately, its legislative history sheds no light on the reason for the inclusion of clerks. But the fact that the priority was limited to $50 earned during the previous six months strongly suggests that it was probably not intended to protect workers earning more than minimal incomes. In any event, this act was in effect only for a decade before it, too, was repealed. Another 20 years passed before Congress enacted another bankruptcy law, which even at the turn of the century protected the wages of the same categories of workers only up to $300 earned during the previous three months. Under it a music teacher charging 50 cents an hour was held not to be a wage-earner, but, rather, like a lawyer or doctor:

192 Mining Company v. Culllins, 104 US at 177-78. See also Banker's Surety Co. of Cleveland, Ohio v. Maxwell, 222 F. 797 (4th Cir. 1915) (working foreman entitled to lien).
195 H.R. 7, § 27 (39th Cong., 1st Sess., Dec. 11, 1865), and H.R. 598, § 27 (39th Cong., 1st Sess., May 27, 1866), both contained the priority for clerks at the time they were introduced, and the congressional debates of the very sections embodying them did not discuss the issue. Nevertheless, inclusion of clerks was apparently not a foregone conclusion since some bills in the early 1860s did not mention them. See, e.g., H.R. 253, § 22 (37th Cong., 2d Sess., Jan. 28, 1862) (bill files by Roscoe Conkling protecting only operatives and physicians). But see H.R. 424, § 30 (38th Cong., 2d Sess., Dec. 13, 1864) (bill introduced by Lafayette Foster protecting operatives, clerks, and house servants).
197 Act of July 1, 1898, ch. 541, § 64 b, 30 Stat. 544, 563; 11 Code of the Laws of the United States of America, § 104(b) (1934 ed.).
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“His work is mental, not physical. He labors with his head, not his hands.” In 1916, Judge Learned Hand, interpreting the bankruptcy statute, added: “Everyone who understands words knows that it is absurd to call an actress who can command $5,000 for a four weeks engagement a workman or a servant.”

In New York State, where an 1859 act incorporating a steamship company made the stockholders individually liable for all debts owing to all their “laborers and operatives for services” provided to the corporation, a court held as early as 1862 that a consulting engineer did not fall under those headings, which applied to “an entirely different class of men...who obtain their living by coarse manual labor, as distinguished from professional men; men who work with their hands, rather than their heads.” More importantly, the court also ruled that the engineer also did not come within “the policy or reason of the law,” because “[t]he purpose of the legislature was to protect a class of men not well qualified to protect themselves. Men who usually labor for small compensation, and who are regarded, to a certain extent, as in the power of their employers—men who usually take no security for their services, who would generally be dismissed for the requiring it, and therefore never make the attempt.” Even though the engineer in question had failed to take such security, the court still held that “he obviously does not belong to the class referred to” because the legislature did not consider “professional men,” who “[a]s a general thing...take care to protect themselves,” “as requiring the aid of such laws.”

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200Erricson v. Brown, 38 Barbour 390, 391-92 (NY Sup. Ct. 1862). The state’s highest court was even more dismissive of the claims of a lawyer who contracted with a corporation to perform its legal work for a fixed salary of $50 a week and then sued it for the salary due him: “When, in section 54 of the Stock Corporation Law, the general word ‘employees’ was added after the words ‘laborers’ and ‘servants,’ it could not have been intended, from the collocation of words and for the want of reason in the thing, to include persons performing services to the corporation of a higher dignity, such as its legal adviser. Indeed, the appellant would be utterly without any reason in claiming the protection of the statute, if he could not pretend that his agreement with the company made him its employee. ... The lawyer does not lessen the dignity and independence of his position towards his client, or in the community, by making such an agreement. He does not, thereby, descend into that inferior and subordinate class of persons who, being continuously employed in the corporate business for a compensation paid in wages, or in salaries, and being under the orders of the managers of the corporation, are usually regarded as its servants or employees.” Bristor v. Smith, 157 NY 158, 160 (1899). But see Conant v. Van Schaick, 24 Barbour 87, 99 (1857), which interpreted a New York railroad corporation statute which made stockholders individually liable for debts due to any of
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A few years later the highest court in New York, interpreting an 1848 statute authorizing the formation of manufacturing corporations and making stockholders individually liable for debts owing to their "laborers, servants, and apprentices," held that the corporate secretary, an officer whose duties involved "a minimum amount of either head or hand work," was not a servant. The law’s purpose "was to protect the classes most appropriately described...as those engaged in manual labor, as distinguished from the officers of the corporation or professional men engaged in its service; in short, to furnish additional relief to a class who usually labor for small compensation, to whom the moderate pittance of their wages is an object of interest and necessity, and who are poorly qualified to take care of their own concerns, or look sharply after their employers."

At the turn of the century the same court, in a case involving the claims of a $100-a-month clerk/bookkeeper, a $125-a-month superintendent, a $125-a-month draftsman, and two foremen with salaries of $125 and $225 a month, interpreted an 1885 law that required the wages of a corporation’s employees, operatives, and laborers to be paid preferentially when the corporation went into receivership. The court found that it was not the law’s purpose “to secure a preference for claims due to the clerical force engaged in transacting the business, nor to the superintendent, foremen or officers of the corporation who are compensated by a fixed yearly salary.” Interestingly, the court remarked that it was “significant...that insurance

is its “laborers or servants” for services performed for the corporation as applicable to a civil engineer: “I see no middle ground, between restricting it to day laborers, and applying it to all persons employed in the service of the company who have not a different proper and distinctive appellation; such as officers and agents of the company. The engineer...is as fully entitled to its benefits as is the man who shovels gravel.”

1848 NY Laws ch. 40, § 18, at 54, 58.

Coffin v. Reynolds, 37 NY 640, 642, 644 (1868). Similarly, fourteen years later the Court of Appeals found in Wakefield v. Fargo, 90 NY 213, 218-19 (1882): “A general manager is not ejusdem generis with an apprentice or laborer; and although in one sense he may render most valuable services to the corporation, he would not in popular language be deemed a servant. The word used is no doubt broad enough, and might without exaggeration, represent all persons connected with the administration or furtherance of the affairs of a corporation; in this instance, from the one who dips or bottles the water, to the president, but this would manifestly be too general. ‘Laborer or apprentice’ are words of limited meaning, and refer to a particular class of persons employed for a defined and low grade of service performed...without responsibility for the acts of others, themselves directed to the accomplishment of an appointed task under the supervision of another. They necessarily exclude persons of higher dignity, and require that one who seeks his pay as servant, should be of no higher grade than those enumerated as laborers or of lesser quality.”
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and moneyed corporations are excepted from the operation of the statute. There was no reason for excepting these corporations but for the fact...that they do not employ labor, in the ordinary sense of the word. The conduct of the business of these corporations requires a large clerical force, graded and organized according to the extent and necessities of the business. If it was intended to protect the claims of this class of employees, there was no reason why all corporations should not be included within the scope of the statute. But it evidently was not. It was supposed that that class of employees could protect themselves, whereas the common laborer, operative or mechanic would be left by the failure of the business in a much more helpless condition.”

The scope of wage payment laws, which generally began to be enacted later in the nineteenth century and, inter alia, prescribed weekly or semimonthly payment, proscribed company stores or payment in scrip, varied widely among the states: some covered “all employees” (New Mexico), “every employee” (Kentucky), and “employees of every description” (California), while others applied to “[a]ll wage earners” (Kentucky), “laborers, servants, or employees” (Illinois), “mechanics, laborers, or other servants” (Kansas), “wageworkers engaged in manual or clerical work” (Maryland), an employee defined as “a mechanic, workingman, or laborer” (Vermont), and “wage workers...engaged in manual, mechanical, or clerical labor including all employees, except officials, superintendents or other heads or subheads of departments, who may be employed by the month or year at stipulated salaries” (Georgia).

The courts of New York were, once again, active in restrictively interpreting the statutory coverage terms that that state’s various wage payment laws used. In 1890 the legislature enacted “An act to provide weekly payment of wages by corporations,” which applied to “each and every employe engaged” in the covered (including municipal) corporations’ business. In a test case brought that same year by the factory inspector on behalf of a clerk in the mayor’s office, a secretary and treasurer of the park commissioners, a member of the fire department, a school teacher, and a patrolman on the police force of the City of Buffalo, the state sought recovery of the $10 penalty for the city’s failure to pay them weekly. The controlling principle that the judges chose to construe the law was the legislature’s intention as determined by the statutory language and “the cause or necessity of making the statute.” The law’s “spirit and purpose” were so crucial that the statute “should be so construed as to carry out the legislative intent, even though such

203Re Stryker, 158 NY 526, 529 (1899).
204Clark and Tracy, Laws Relating to Wage Payment at 105, 72, 51, 71, 64, 70, 78, 135, 61.
2051890 NY Laws ch. 388, at 741.
“Brain Toilers” under the Alien Contract Labor Immigration Laws

construction be contrary to the literal meaning of some of the words used therein.”206 Viewing also “the evil sought by the act to be remedied,” the judges concluded that the “statute belongs to a large class of legislation designed for the promotion of the welfare of laborers and workmen, and may be classed with...the acts of our own legislature for the limitation upon the employment of children of tender age, the limitation of the hours of labor, the protection of laborers under the acts for the inspection of factories...”207 Consequently, although “the word ‘employe,’ as used in the body of this statute, standing by itself, without words of limitation, is sufficient to include, not only persons engaged in manual labor, such as servants and laborers, but also such as may be employed otherwise,”208 the court was able to identify “no special reason observable” why the statute should intervene to override their contractual terms of employment: “Not one of those persons represents a class asking for legislation in its behalf. It would, therefore, be extending the statute beyond what appears to us to be the obvious meaning of the legislature in passing it, to apply it so as to cover the cases of those persons.” Without disclosing how it knew that none of these government workers had sought or might benefit from the wage payment law, the court tried to buttress its value judgment by referring to cases “having a bearing upon the subject-matter involved,” decided under the aforementioned law of 1848, and holding that courts could not interpret “laborers, servants, and apprentices” as encompassing “clerks and contractors and other persons...although the word ‘servant’ or ‘laborer,’ detached from the connection in which it is used in the statute, and used metaphorically, is broad enough to include any person who engages his services to another for compensation.”209 Thus, unlike late-twentieth-century courts interpreting the exclusion of white-collar workers from the overtime provision of the FLSA, the New York judges in 1890 did focus on legislative intent and the evil sought to be remedied—a hallmark of progressive jurisprudence striving to expand the bounds of statutory coverage210—but their analysis was so unencumbered by the empirical realities of work-

206People v. City of Buffalo, 11 NYS 314, 315 (Sup. Ct., General Term, 5th Dept., Oct. 23, 1890).
207People v. City of Buffalo, 11 NYS at 317.
208People v. City of Buffalo, 11 NYS 316.
209People v. City of Buffalo, 11 NYS 317-18. At exactly the same time another court reached the same conclusion concerning the $3,000-a-year property clerk and assistant paymaster of the Parks Department of the City of New York. People v. Myers, 11 NYS 217 (Sup. Ct., Spec. Term. NY County, Oct. 1890).
210The principle was nevertheless venerable: “The office of all the Judges is always to make such construction as shall suppress the mischief, and advance the remedy, and to
ing conditions and so freighted with preconceptions that it failed to do justice to that interpretive guideline.

A quarter-century later New York judges, construing a somewhat differently worded wage payment provision in the state's Labor Law, did not even find it necessary to offer reasoned arguments in support of their exclusion of a series of white-collar workers. The New York State Industrial Commission had sought to impose penalties on the Interborough Rapid Transit Company for its failure to pay wages weekly to the following employees paid the following monthly salaries: stenographer ($80); accountant ($125); typist ($45); chainman who assisted civil engineers ($50); levelman who assisted civil engineers ($85); two civil engineers ($250 and $225); bookkeeper ($100); draftsman ($150); structural designer ($160); and clerk ($90).211 The wage payment provision applied to "each employee" of covered corporations, while the Labor Law defined "employee" as "a mechanic, workingman or laborer who works for another for hire."212 As to all these workers the judges merely asserted that: "It scarcely needs argument to show " that they were "not within the defined classes." The court conceded the "border[-]line" character of two other employees: a $65-a-month rodman who assisted civil engineers by carrying and holding graduated surveyors' rods; and a $40-a-month blueprinter, who prepared blueprints of plans and drawings. They resolved their doubts about the former in favor of exclusion because, while his work was largely manual, "we may infer that he belongs to the engineering staff, although in a humble capacity, rather than among the workingmen or laborers." Without any explanation whatsoever, the court, using a "liberal construction," deemed the blueprinter a workingman, thus classifying him together with a $25-a-month office boy, a $50-a-month switchboard operator, a $35-a-month matron (who helped the operators care for their rooms)—all of whom also required the same construction to achieve inclusion. Only the $85-a-month chauffeur (who drove the field engineers) could be classed as a mechanic or workingman without a liberal interpretive boost.213

suppress subtle inventions and evasions for continuance of the mischief...according to the true intent of the maker of the Act, pro bono publico." Heydon's Case, 3 Co. Rep. 7a, 76 Eng. Rep. 637, 638 (1584).


2121909 NY Laws ch. 36, Consolidated Laws, ch. 31, § 2. This definition went back to the first Labor Law: 1897 NY Laws, ch. 415, § 2, at 461, 462 (May 13), which repealed (id. at 499) an early eight-hour law, which had covered "all mechanics, workingmen and laborers." 1870 NY Laws ch. 385, § 1, at 919 (Apr. 26).

213People v. Interborough Rapid Transit Co., 154 NYS at 630.
The dissenting judge was somewhat more forthcoming in rooting his value judgments in the legislature’s purposes:

Having in mind the beneficent purpose which the Legislature had in view in the passage of the statute in question, of protecting employees from unscrupulous employers who by deferring the payment of the wages due them might ultimately defraud them of the fruits of weeks of labor, amounting in the aggregate to large sums, such a construction should be given to the provisions of the law as will extend its protection to as wide a field of labor as possible, consistent with the language used therein. ... So viewed, the definition of an employee in...the Labor Law...as “a mechanic, workingman or laborer who works for another for hire,” taken in conjunction with the term “wages”...appears to me to clearly indicate the employees whom the statute was intended to protect as those engaged in manual or mechanical labor, as distinguished from those occupying professional or executive positions, and who were paid on the smaller scale of wages rather than on the higher one of salary. It was these subordinates embraced in the first class, whose dependence on their toil made the loss of any of its recompense a serious matter to them, and whose comparative helplessness to assert their right to the prompt reward of their labor, whom the State was solicitous of protecting, rather than the better paid and more independent members of the second class.214

Based on this dichotomy between “manual or mechanical labor” and “professional or executive positions,” the dissenting judge concluded, also without explanation, that only the two engineers, structural designer, and draftsman were excluded from the protection of the statute.215 Perhaps the judge considered them as occupying professional positions (though the draftsman was unlikely to have done so); in any event, they happened to be the four highest paid employees. Apart from the dissenter’s failure to offer reasons, his dichotomous scheme appeared to be deficient since it did not comprehensively span the universe of occupations; most glaringly, even in the case context, its implicit categorization of the accountant as engaged in “manual or mechanical labor” was either idiosyncratic or presciently Marxist.216

214People v. Interborough Rapid Transit Co., 154 NYS at 631 (Dowling., J., dissenting).


216Curiously, the New York State Attorney General, Thomas Carmody, wrote an opinion in 1912 under the same statute stating that “[a]ll ‘employees’ receiving ‘wages’ should come within the scope and protection of the law”; in particular, he opined that salesmen, clerks, stenographers, and draftsmen were “all clearly ‘employees’” and that
Two decades later, by the time of the Great Depression and mass industrial unionism, New York State judges became bolder in their purpose-driven guerrilla warfare against narrow interpretations of the term “employee.”217 In a suit against a stock brokerage brought by an assistant cashier, after he had been terminated, to recover wages that had been withheld under the employer's regime requiring the employees to give up their compensation one week out of six, a highly respected New York City municipal court judge218 denied the employer's motion for summary judgment on the grounds that:

Fine words are in law like fine feathers in life. They do not make an executive out of a

their compensation could fairly be called “wages.” Although he argued that cases decided under the corporate insolvency statutes should not be controlling with respect to the wage payment laws because the former, inasmuch as they gave a preference to one class of creditors to the exclusion and at the expense of others, had to be construed strictly, he failed even to mention that the wage payment law defined an “employee” as a “mechanic, workingman, or laborer,” let alone to explain how any of those terms applied to any of these white-collar workers fit that description. Annual Report of the Attorney General of the State of New York For the Year Ending December 31, 1912, at 538-40 at 539 (1913 [Dec. 12, 1912]). The point here is not that it would have been preposterous to classify, for example, a clerk as a workingman, but that it was incumbent on the attorney general to offer some evidence to overcome dictionary definitions focusing on manual work. Interestingly, the OED, while defining a “workingman” as “a man employed to work for a wage, esp. in a manual or industrial occupation: a term inclusive of ‘artisan’, ‘mechanic’, and ‘labourer,’” nevertheless presented this citation from the Westminster Gazette from 1896: “The word ‘workingman’ was held here to include a clerk or small shopkeeper, or anyone whose total income did not exceed £150 a year.” Oxford English Dictionary 12:299:1 (1961 [1933]).

217To be sure, in 1933, the New York State Attorney General was still citing People v. Interborough Rapid Transit Co. as an impediment to coverage of various white-collar workers in an opinion addressed to the Milk Research Council, which had asked whether the wage payment law applied to “executives, professional writers, translators, and office stenographic help.” New York State Department of Labor, Annual Report of the Industrial Commissioner For the Twelve Months Ended on December 31, 1933, at 89-90 (1934 [Mar. 7, 1933]).

218Two years after Justice David C. Lewis had issued this decision, the Tammany Hall Democratic Party machine refused to renominate him because he had refused to take orders from district party leaders concerning his cases. He then ran for reelection with the support of the leftist American Labor Party and National Lawyers Guild, but was defeated. “Progressives Back Lewis,” NYT, Aug. 15, 1937 (2:7); “Judge and Boss,” NYT, Sept. 16, 1937 (24:2-3) (editorial); “Judge Lewis Is Loser,” NYT, Sept. 17, 1937 (18:4); “Prime Test of Fitness,” NYT, Sept. 29, 1937 (22:1-2) (editorial).
clerk. ... Do the well-paid workers in an organized trade cease to be workingmen or mechanics? Yet one fears that these elements may have been unduly stressed in the distinction that the courts may have written into the statute.

How can this statute serve its real purpose if we put it in the strait-jacket of a too strict or restricted construction. Today clerical work can claim no majesty; and manual labor suffers no menialism.219

219Strom v. Prince, 279 NYS 589, 592 (Municipal Ct. NY, Borough of Manhattan, Mar. 29, 1935). To summarize the subsequent development of the law: In 1956, the legislature added § 196-a, which, inter alia, excluded from coverage salesmen whose principal activity was supervisory, managerial, executive, or administrative. 1956 NY Laws ch. 512, at 1234-35 (Apr. 10). The next day it added § 196-c, which required “[e]very employer” to “pay to each individual in his employ the wages and salary earned in accordance with the agreed terms of employment,” but excluded from coverage executive, administrative, and professional employees earning more than $100 a week. 1956 NY Laws ch. 539, § 1, at 1263, 1264 (Apr. 11). See also People v. Fernandez, 233 NYS2d 86 (City Ct of NY, Port Jervis, Orange Cty., July 5, 1962). Then in 1966, the legislature repealed the old wage payment law and enacted a new one, which, for purposes of frequency of payments, created four categories of workers: manual worker; railroad worker; commission salesman, which did “not include an employee whose principal activity is of a supervisory, managerial, executive or administrative capacity”; and clerical and other worker, which included all employees not included in the other three categories, “except any person employed in a bona fide executive, administrative or professional capacity whose earnings are in excess” of $200 a week—an amount that by 1992 was increased to $600. 1966 NY Laws ch. 548, § 2 at 1293-98 (June 14); NY Labor Law §§ 190-93, 198-c (McKinney 2002). Extensive litigation has ensued over whether these three white-collar groups are categorically excluded from the statute altogether or whether they are, for example, still protected by the prohibition on certain deductions from wages in § 193, which does not expressly exclude these groups. For a detailed discussion of the judicial interpretive controversy, see Miteva v. Third Point Management Co., 2004 US Dist. Lexis 12439 (SDNY, July 2, 2004). Remarkably, this federal court decision denying the investment management firm-employer’s motion for summary judgment concluded, solely on the basis of logically parsing the statute without any analysis of its socioeconomic purposes, that the plaintiff, an analyst whose promised annual salary and bonus amounted to many hundreds of thousands of dollars, was not totally unprotected by the statute. Wage payment laws in several states (including Arkansas, California, Connecticut, Illinois, Missouri, New Mexico, Oklahoma, Texas, and Virginia, as well as the District of Columbia) either categorically excluded the executive, administrative, and professional employees excluded from the FLSA or permitted employers to pay them less frequently than other employees. CCH, State Compensation Laws: Minimum Wage/Overtime, Prevailing Wage, Wage Payment 124, 319-20, 448, 508, 666, 1173, 1469, 1763, 2197, 2287 (n.d. [2000]).
By the end of the 1930s, even the state's highest court expressed a willingness to let purpose trump literalness. After the state legislature had enacted a little Wagner Act in 1937, which was incorporated into the state Labor Law, which still defined an employee as "a mechanic, workingman or laborer," the leftist (and arguably Communist) United Office and Professional Workers of America\footnote{See below chs. 9-13. In the ensuing litigation the union was represented by the internationally famous Marxist, Louis Boudin.} organized the industrial insurance agents of the Metropolitan Life Insurance Company in the New York metropolitan area. However, in what the chairman of the New York State Labor Relations Board later called "a determined effort to deprive white collar workers of the protection of the act,"\footnote{"Lauded by Father Boland," \textit{NYT}, Apr. 12, 1939 (19:2).} the world's largest insurance company\footnote{"Ecker Asserts Size Is Insurance Asset," \textit{NYT}, Feb. 8, 1939 (7:1).} refused to bargain collectively with its insurance agents on the grounds that they were not "employees" within the meaning of the statute. The employer's syllogistic argument was so strong that the trial court observed that the State Labor Relations Board "cannot meet petitioner's argument and its attempts to do so have either resulted in additional grounds for the petitioner's viewpoint or in contentions so patently refutable that a recitation of them would serve no purpose. Counsel for the Board finally reaches the conclusion that the omission of the words 'any employee' included in the National act, is a typographical error or an inadvertency." Instead, the trial court decided to cut the Gordian knot purposively:

While the power of the court to supply omissions of the Legislature, no matter how obvious, is highly restricted..., where, as here, the question is the determination of the intent, it is permissible to consider the purpose of the statute as set out in it. Section 700 states the reasons for the act. [T]he Legislature is seeking to supply actual liberty of contract between employer and employee in place of the theoretical liberty long recognized to be virtually non-existent. The language used indicates an application to all industry, not restricted to manual workers. It would be very strange if the Legislature intended to restrict what it believes will accomplish a beneficent purpose to what in this State would be a fraction of the working population. To so hold would be to determine that if this were done advisedly the Legislature was engaged in the practice of a deceit. The only natural conclusion is that the intention was to use the dictionary meaning of the word employee.\footnote{Metropolitan Life Insurance Company v. New York State Labor Relations Board 6 N.Y.S.2d 775, 778-79 (Sup. Ct., Special Term, July 25, 1938).}

In upholding the lower courts in a 4 to 3 decision, the state's highest court...
rejected the employer’s claim that in omitting the coverage phrase “any employee” of the National Labor Relations Act, the state legislature intended “not to go along with the Congress of the United States in extending the protection of this legislation to so-called white collar workers. We think it unnecessary to set forth our analysis of the many critical refinements which this idea implies. Over and above all such argumentation stands the engendering principle of the New York act as declared by the words already quoted from section 700. The purpose and policy there avowed...dispel all doubt that these agents of Metropolitan are employees in the sense of section 701.”224 Had the dissenters’ lack of purposive imagination prevailed,225 “hundreds of thousands of white collar workers in the State who work in department and retail stores, hotels, restaurants, offices and banks” would, as the chairman of the State Labor Relations Board observed, have been “excluded from the protection of the act....”226


225The three dissenters argued that the law applied only to industrial workers. Metropolitan Life Insurance Company v. New York State Labor Relations Board, 280 NY at 209.

226“Lauded by Father Boland.”
State and Federal Laws

The Department of Labor has an especially heavy responsibility: within its ambit falls the United States Conciliation Service, the Bureau of Labor Statistics, the Immigration and Naturalization Service, the Children's Bureau, the Women's Bureau, and the United States Employment Service. Officials on these agencies have not been able to greatly assist labor's fight for a full dinner pail but they have offered statistics from time to time to prove its emptiness.¹

The drafters of the FLSA in 1937-38 were hardly writing on a blank slate or operating in a regulatory vacuum when they inserted exclusions of administrative, executive, and professional employees into the bill. In fact, so many statutory models and examples of exclusion were available that it might even have qualified as the default or inertial choice, rejection of which would have required a powerful political or socio-economic reason or special legislative imagination. Unthinking preservation of the status quo was underwritten by four sources: state laws; federal bills and laws from the 1930s; National Recovery Administration industrial codes; and international labor conventions. This chapter deals with the first two, while the following two chapters are devoted to the latter two.

Before examining that body of state and federal legislation separately, it is necessary to mention the one cooperative federal-state New Deal regime that represented a different paradigm for dealing with white-collar workers. That system was Unemployment Insurance as embodied in the Social Security Act of 1935 and the coordinate state laws enacted during the next two years. It differed from European systems of the period, in which it was "usual to except from the compulsory provisions of the law at least those nonmanual workers who earn more than stipulated amounts per month or year. The underlying assumption is that such persons can maintain their independence."² The U.S. federal (tax) component did not distinguish between manual and nonmanual workers.³ Initially it imposed the

¹E. Pendleton Herring, Public Administration and the Public Interest 279 (1936).
³Nor did the federal old-age benefits provisions in Title II. Social Security Act, ch.
financing tax regardless of the size of the worker’s wage or salary.\textsuperscript{4} To be sure, in 1939 Congress imposed a $3,000 maximum on wages and salaries subject to the payroll tax in order to parallel the ceiling on covered wages subject to the tax for purposes of federal old-age benefits.\textsuperscript{5} The $3,000 ceiling on covered wages applied across the board, although it manifestly represented a stricter limit on the taxable salaries of higher-paid employees. Nevertheless, the fact of coverage of white-collar workers was in itself significant because it demonstrated legislatures’ recognition that these workers were also exposed to the vicissitudes of economic insecurity.

\textbf{State Laws}

[Engineers of the elevated railway...when forced to work overtime...receive extra pay, generally two hours’ pay for one hour of work, while the poor office man, when he works overtime, which is very frequently the case, is expected to do so for supper money only.\textsuperscript{6}]

Before government intervened with mandatory labor standards, premium over-

\textsuperscript{4}Social Security Act, § 901, 49 Stat at 639.

\textsuperscript{5}Social Security Act Amendments of 1939, ch. 666, Pub. L. No. 379, § 614, 53 Stat 1360, 1392-93. For the old-age benefits tax ceiling, see Social Security Act, § 811(a), 49 Stat at 639. According to the former chairman of the Social Security Board, “in retrospect it is clear the Board made a grievous error in not recommending instead that the maximum of $3,000 under the old age insurance system be removed so that there would be no maximum under either system. The imposition of a maximum not only has made the employee payroll tax regressive but has had a serious effect...in preventing a rise in the level of benefits commensurate with the rise in the general wage level.” Arthur Altmeyer, \textit{The Formative Years of Social Security} 97 (1968). Prior to 1939 five states imposed a ceiling on covered salaries for Unemployment Insurance taxes, but among them only New York totally excluded workers earning above that threshold: Kentucky, Massachusetts, Michigan, and Rhode Island capped covered wages at $2,600, $2,500, $3,000, and $3,000 respectively, whereas New York excluded from coverage altogether employees whose wage or salary exceeded $3,000. Millis and Montgomery, \textit{Labor’s Risks and Social Insurance} at 160-61.

time compensation had not been a typical employment practice in offices staffed by overwhelmingly nonunion white-collar workers. A survey conducted by the Women's Bureau of the U.S. Labor Department in 1931-2 of 34,000 women in 314 offices in seven cities (New York, Philadelphia, Chicago, St. Louis, Atlanta, Hartford, and Des Moines, with New York alone accounting for more than 40 percent of the total) disclosed that supper money was usually the only compensation for overtime work. In the mid-1930s, the American Management Association considered even supper money for overtime work harmful to morale: inasmuch as salaried office workers usually received their regular pay when they were legitimately absent and for an occasional day off for personal reasons, it was "only reasonable to assume that the salaried office employee will be willing to perform a reasonable amount of overtime work...."

Prior to the FLSA, a number of states had maximum hours laws, applicable largely to women, that excluded from their coverage various discrete white-collar occupations. For example, as early as 1912, Virginia amended its 10-hour statute, specifying that bookkeepers, cashiers, office assistants, and stenographers were not subject to it. In 1913, Arizona, California, and Pennsylvania excluded nurses, while Texas excluded stenographers and pharmacists. Oklahoma excluded

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7 U.S. DOL, Women's Bureau, *The Employment of Women in Offices* 1-2, 15 (Bull. No. 120, 1934) (by Ethel Erickson). Interviews with management revealed widely disparate policies. In New York investigators heard managers state that their policy was to hire extra "help" at fiscal periods' special rush and that if continued overtime was necessary, to take on temporary "help." Id. at 31. In Atlanta, whereas an insurance company reported that when extra work came, it could lie over until the next day, a bank stated that it did not allow employees to leave until a balance had been struck in the transit and bookkeeping departments. Id. at 31, 66. A less scientific survey carried out in 1930-31 found that only 30.6 percent of women office workers were reimbursed for overtime work in any way. Interestingly, the median income of those who worked overtime was slightly less than those who did not. U.S. Women's Bureau, *Women Who Work in Offices* 12 (Bull. No. 132, 1935) (by Harriet Payne).


State and Federal Laws

stenographers, nurses, and pharmacists in 1915,12 and Nevada nurses in 1917.13 From a 1915 hours law applying to men and women in manufacturing and factories North Carolina excluded superintendents, overseers, and “office men.”14 A 1921 New Mexico hours law for women broadly excluded “females employed in offices, as stenographers, bookkeepers, clerks, or in other clerical work, and not required to do manual labor.”15 In 1933, North Carolina also excluded bookkeepers, cashiers, and office assistants from its 10-hour law for women, which covered clerks, saleswomen, and waitresses serving the public.16

A politically much more self-conscious legislative process finally emerged in 1935 when Arkansas attached an explanatory preamble to an amendment to its women’s hours statute:

Whereas the act governing the hours and working conditions of female laborers passed in 1915 does not meet the needs of women at the present time, and

Whereas at the time this act was passed there were so few women executives and managers that they were not given a separate classification from other female laborers; and

Whereas employers of some of the larger mercantile establishments in the state have stated that if they are required to classify all women employees as female laborers under the present law that [sic] they will have to dispense with the services of some of their best and highest salaried employees; and

Whereas the Federal Code does not differentiate between male and female employees but does differentiate between executives and employees; therefore, ...

Section 1. In order to meet the present needs of women holding responsible executive or managerial positions, that ...

“No females shall be employed in any manufacturing, mechanical, or mercantile establishment, laundry, or by any express or transportation company...for more than nine hours in any one day, or more than six days, or more than fifty-four hours in any one week....”

Provided...that these provisions shall not apply to female persons employed in an

Penal Code § 717, at 149 (1913); 1913 Cal. Stat. ch. 352, § 1, at 713, 714 (June 12); 1913 Pa. Laws ch. 466, § 3(c), at 1024, 1026 (July 25); 1913 Tex. Gen. Laws ch. 175, §§ 1 and 2a, at 421, 422 (Apr. 16); see also 1915 Tex. Gen. Laws ch. 56, § 1, at 105 (Mar. 15).

121915 Okla. Sess. Laws ch. 148, § 2, at 196, 197 (Mar. 13). Four years later stenographers were omitted from the excluded groups. 1919 Okla. Sess. Laws ch. 163, § 2, at 235 (Apr. 5).

131917 Nev. Stat. ch. 14, § 1, at 14, 16 (Feb. 14). From their women’s hours laws Illinois, Michigan, and Oregon also excluded nurses, while Wisconsin excluded pharmacists. Smith, State Labor Laws for Women at 3, 11, 14, 15.

141915 NC Sess. Laws ch. 148, § 2, at 232 (Mar. 8).

151921 NM Laws ch. 180, § 1, at 386 (Mar. 14).

executive or managerial capacity who exercise real supervision and managerial authority with duties and discretion entirely different from that of regular salaried employees, and who receive as compensation for their labor thirty-five dollars per week, or more, exclusive of any and all bonuses and commissions.17

The amendment went on to require any employer that wanted to avail itself of this exception to file a petition for exemption on its behalf and on behalf of the female executive or manager with the state Industrial Welfare Commission, which was obligated to issue a temporary permit and to hold a hearing on the merits, after which it could issue a waiver to the employee and employer.18 The legislature's reference in this otherwise admirably transparent public policy statement to the "Federal Code" presumably meant the National Recovery Administration codes of fair competition, since no federal law regulated run-of-the-mill women workers' hours in 1935. Many of the NRA codes did distinguish between executives and employees and excluded the former from their hours provisions. Indeed, the Arkansas amendment's definition of excluded executives was taken almost verbatim from a 1933 NRA interpretation.19

The legislative linkage to the NRA codes was neither coincidental nor idiosyncratic. In 1934 Labor Secretary Frances Perkins had called a National Conference on Labor Legislation, asking the governor of each state to appoint as delegates an official of the state department of labor and the state federation of labor; delegates from 39 states then met in Washington, D.C. in February.20 During the discussion on the limitation of hours of work, they repeatedly spoke of the need to coordinate state legislation with the NRA codes, especially with respect to enforcement.21 Most prominently the Arkansas Commissioner of Labor, E. I. McKinley, stated that his agency had "assumed that the difference between the wage paid by the employer and that fixed in the code was unpaid wage and ha[d] taken it to court. Since the N.R.A. has been in effect, there have been brought to

181935 Ark. Acts 150, §§ 2-4 at 426. The Arkansas Department of Labor's next biennial report did not mention that any such permits or waivers had been issued (but it did list the child labor permits issued). Thirteenth Biennial Report of Department of Labor of the State of Arkansas 1936-1938, at 16 (n.d. [1938]).
19See below ch. 7. Schechter v. United States, 295 U.S. 495 (1935), which held the National Industrial Recovery Act unconstitutional, was decided on May 27, two months after the Arkansas statute had been passed on March 20.
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the attention of the labor department more violations of State laws than before and we have had more prosecutions." The report of the Committee on Limitation of Hours of Work—which was chaired by Elmer Andrews, Perkins' successor as New York State Industrial Commissioner and the future first federal Wage and Hour Administrator—made the connection even more specific:

In order to make more permanent the social and economic advantages of the limitation of hours under which industry is operating under the N.R.A., the committee believes it is desirable that State laws be made to conform as nearly as possible to the general standards adopted in the codes. Not only as a protection to the workers, but in fairness to industry, we believe that all States should have uniform regulations pertaining to the hours which employees may work, so that industries in particular States may not have unfair advantage over competitors in others.

The report, which was adopted, went on to recommend as among the general standards for hours of labor for the states to incorporate in their laws that no employer engaged in manufacturing, mining, or construction or employing more than five persons "shall employ any person except in a supervisory capacity or as outside salesman" more than 40 hours a week, "provided that this section shall not apply to persons engaged in professional or agricultural employment...." The report also recommended an exception for professional service and employment "in a managerial capacity" to the prohibition of night work for women.

In spite of these interrelated national discussions, however, the immediate occasion for the Arkansas legislative initiative remains unclear. The Arkansas Commissioner of Labor made numerous recommendations for proposed legislation in his biennial reports, but the reports for 1932-34 and 1934-36 did not mention any need for such an amendment, which would, in any event, have been a curious proposal for a defender of labor standards to pursue. It also seems counterintuitive that owners of "the larger mercantile establishments" in Arkansas of all states would have been the first to perceive the constraints of the 54-hour workweek for

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female executives as sufficiently severe to require a legislative remedy.26

This link to the NRA’s exclusionary framework manifested itself in the North in 1935 when Massachusetts amended its law relating to the hours of labor of women and children in manufacturing and mercantile establishments, specifying that it “shall not apply to persons who may be declared by the commissioner to be employed in a supervisory capacity, or who may be serving exclusively as personal secretaries.”27 In 1937, in the weeks before the FLSA was introduced in Congress, other states acted. In March, North Carolina excluded from its maximum working hours laws for women and men “persons over eighteen years of age in bona fide office, foremanship, clerical or supervisory capacity, executive positions, learned professions, commercial travelers....”28 Adopting the terminology of the aforementioned NRA interpretation and the Arkansas statute, Ohio in amending its women’s hours law excluded “the work of females over twenty-years of age earning at least thirty-five dollars a week in bona fide executive positions where real supervisory and managerial authority are exercised with duties and discretion entirely different from that of regular salaried employees” as well as the employment of women in the “professions” of medicine, law, teaching, and social work.29 Colorado innovated in enacting a fair trade practices law regulating the cleaning and dyeing

26The bill (S.B. 290) had been introduced on February 12 by state senator James Lavesque Shaver. “In the Senate, February 12, 1935,” Arkansas Gazette, Feb. 13, 1935 (3:2-3, 7:6). As introduced the text was identical with the enactment. Senate Bill No. 290; digital photostat provided by David Ware, Arkansas Capitol Historian. It passed the Senate 10 days later by a vote of 29 to 1. “In the Senate, February 22, 1935,” Arkansas Gazette, Feb. 13, 1935 (3:2-3). (According to the unpublished Senate Journal at 464, the vote was 28 to 1; digital photostat provided by David Ware.) The bills passed that day sparked little debate and most passed practically unanimously following explanation by their sponsors. “14 Bills Passed at Senate’s Session,” Arkansas Gazette, Feb. 23, 1935 (3:1). On March 5 the bill passed the House 81 to 0. “In the House, March 5, 1935,” Arkansas Gazette, Mar. 6, 1935 (5:2). Shaver was a member of a prominent eastern Arkansas family with links to plantation agriculture, whose direct constituents would presumably not have been intensely concerned with a statute from which agriculture was entirely excluded anyway. “Governor Vetoes County Turnback,” Arkansas Gazette, Mar. 21, 1935 (1:6, 6:4); telephone interview with Arkansas Capitol Historian, David Ware, Little Rock (Aug. 11, 2004).


281937 NC Sess. Laws ch. 409, § 3, at 849, 850 (Mar. 23). Redundantly, the statute also excluded office and supervisory employees (along with repair crews and other employees) from the weekly hours maximum in emergencies. Id.

291937 Ohio Laws Senate Bill 287, at 539, 540, creating § 1008-2 in the General Code (Apr. 28).
trade, the maximum hours provision of which did not apply to male or female executives earning $30 or more per week. In June, while FLSA hearings were being held in Washington, Pennsylvania both amended its women’s hours law to exclude the work of females over the age of 21 earning at least $25 in executive positions and enacted a radical maximum 44-hour law applicable to men and women, which, however, excluded employees in bona fide executive positions and learned professions earning at least $25 per week—as well as secretaries earning at least $25 a week and rendering private and confidential services to the aforementioned excluded executives. The following May, shortly before the FLSA was enacted, South Carolina amended its 12-hour-a-day and 56-hour-a-week law, which like the Pennsylvania statute, applied to men and women, but excluded bona fide executives and learned professions. In 1938 the Oklahoma Industrial Welfare Commission excluded: female office employees and one executive for each five full-time employees earning more than $25 per week from an order applying to retail, mercantile, and office employment; male and female executives and supervisors earning more than $30 weekly in wholesaling and distributing; and motor vehicle retail managers earning more than $30.

In the wake of the FLSA’s enactment, states continued to promulgate hours rules excluding some white-collar employees. For example, in the pre-World War II period, Maine amended its women’s hour law in 1941, going even farther than the FLSA in excluding females employed in an administrative, executive, professional, or supervisory position, or as a personal office assistant to an administrative, executive, professional, or supervisory employee, and earning an annual salary of at least $1200.

30 1937 Colo Sess Laws ch. 113, § 4.2(b), at 413, 418 (May 4). For emergency breakdown or repair work employers were required to pay at least time and a third. Id. § 4.2(c).
31 1937 Pa. Laws No. 322, § 3(c), at 1547, 1550 (June 4).
32 1937 Pa. Laws No. 567, § 2(c), at 2766, 2767 (July 2). Although the general law was judicially invalidated, the women’s law survived. Marc Linder, The Autocratically Flexible Workplace: A History of Overtime Regulation in the United States 151-241 (2002).
33 Linder, Autocratically Flexible Workplace at 178, 189.
34 1938 S. Carolina Acts No. 943, § 1, at 1883, 1884 (May 11).
36 1941 Maine Laws ch. 294, at 380.
State and Federal Laws

Precisely because they were largely components of maximum-hours laws, these exclusions disadvantaged white-collar workers relatively even more than they would have in the context of overtime laws, which would have permitted employers to work covered employees longer hours so long as they paid the overtime penalty; in the maximum-hours context, in contrast, only the white-collar workers could have worked overtime. In order to appreciate that the FLSA was not created entirely tabula rasa, it should also be noted that these laws excluded not only managerial/executive and professional employees, but, in Virginia, Texas, North Carolina, New Mexico, Massachusetts, and Pennsylvania, also those whom the FLSA would have classified as “administrative” employees, as well as other white-collar workers (such as stenographers) who, not being “bona fide” administrative employees, were clearly protected under the FLSA.

Federal Laws

Bankers' hours are coming to industry—hours of bank executives, I mean, not those of bank clerks—and coming rapidly.37

The depth and longevity of the Great Depression gave rise to a wide range of interventions by the federal government to spur profitable production and defuse destabilizing unrest by reemploying the unprecedented millions of unemployed workers. A number of these programs focused on reducing working hours in order to reabsorb the disemployed through work-sharing.38 In this reemployment context, several programs had to confront the issue of whether to include white-collar workers.

Even before the advent of the New Deal, President Hoover had advocated the establishment of a federal lending entity to support economic recovery. The functions of the Reconstruction Finance Corporation, which Congress enacted in early

38The underlying mechanism was described by the director of the Division Industrial Hygiene of the New York State Department of Labor this way: “[T]he worker, at a disproportionate cost of energy, is getting an increased wage and keeping others out of badly needed jobs. Is this fair on the part of the employer? Is it fair on the part of the worker? Is it good for anything or anybody in these times when we must search the world for work in order to keep people from starving? Extreme use of overtime, at this time, is inexcusable.” J. D. Hackett, “Overtime,” IB 11(3):69 (Dec. 1931).
State and Federal Laws

1932 to offer emergency financing for banks, railroads, life insurance companies, and other businesses, were expanded in the middle of that year when the legislature authorized the RFC to provide loans to state and local governments to construct self-liquidating public works projects. The focal congressional bill was H.R. 12353, which was introduced on May 27 by the Democratic House Majority Leader, Henry Rainey, to broaden the RFC's lending powers and to create employment by authorizing public works. Its original version lacked a maximum hours provision and thus any exclusions from such a limitation. However, at the Ways and Means Committee hearings on the bill a few days later, William Connery, the chairman of the House Labor Committee, declared: "I would like the committee to put in some amendment to this bill for a 5-day week and 6-hour day on all Government work and all these Government projects...and even extend it to where the Reconstruction Finance Corporation is to make a loan...solely with the idea of putting more people to work." Representative Fiorello LaGuardia also spoke in favor of the 30-hour week.

Then Representative Heartsill Ragon of Arkansas, referring to such suggestions, asked Harry Kirk, representing the Associated General Contractors of America, whether it would be "practical" for a contractor on a public building to "use two sets of men a day...." Kirk not only testified that the five-day week and six-hour day would be possible in construction with two shifts, but mentioned that Colonel William Starrett, the contractor on the Empire State Building and then vice president at large of the AGCA, had toured the country in November and December 1931 advocating rotation of forces so as to employ the maximum number of men on construction projects; one of Starrett's plans was two daily six-hour shifts. To be sure, Kirk added that Starrett had "emphasized that it would be hopeless to attempt to rotate the contractor's supervisional forces." This information prompted the following dialog:

Mr. Ragon. If we should put in any of these relief bills any such a provision as that, should

42 *National Emergency Relief: Hearings Before the Committee on Ways and Means House of Representatives on H.R. 12353* at 92.
43 *National Emergency Relief: Hearings Before the Committee on Ways and Means House of Representatives on H.R. 12353* at 208-209.
we not put the qualifying term in there "where it is practical"?
Mr. Kirk. [T]hat has been done in many...States—speaking again about State highway
work—and they have made some exceptions.
Mr. Ragon: Key men, for instance, on the job?
Mr. Kirk. Yes. But the great bulk of the men would work shorter hours.
Mr. Ragon. They might have a superintendent of construction there who could not work
shorter hours?
Mr. Kirk. Yes; they have tried to make the regulations reasonable.44

With this seed planted, the day after the hearings ended Rainey introduced
H.R. 12445, the National Emergency Relief Act of 1932, with similar purposes,
which included the provision that all contracts let for construction projects under
this law "shall be subject to the conditions that...(except in executive and adminis­
trative positions), so far as practicable, no individual employed on such projects
shall be permitted to work more than five days in any one week...."45 In the version
of the bill introduced later in June, the 30 hours was substituted for five days as the
maximum workweek,46 but Hoover vetoed the bill because the centralized financial
power it conferred on the federal government was too great.47

In the new iterations of the bill that the Democrats immediately began crafting
to accommodate Hoover's objections the exclusion of executive and administrative
positions from the 30-hour week was not only retained,48 but promptly extended
to encompass supervisory positions as well.49 Thus the Emergency Relief and

44National Emergency Relief: Hearings Before the Committee on Ways and Means
House of Representatives on H.R. 12353 at 209.
47In his veto message Hoover complained both that the bill would make possible
"loans...for any conceivable purpose on any conceivable security to anybody who wants
money" and that it would place government in business in such a way as to violate "the
very principle of public relations upon which we have builded our Nation...." CR
75:15040-41 at 15041 (July 11, 1932).
48Senator Wagner introduced as an amendment in the nature of a substitute to The
Emergency Relief and Construction Act of 1932, H.R. 9642, § 201(a) (72d Cong., 1st
Sess., July 11, 1932), a provision that made all RFC loans for construction projects subject
to the condition that "(except in executive and administrative positions), so far as prac­
ticable no individual employed on any such project shall be permitted to work more than
thirty hours in any one week...."
49The version introduced in the Senate on July 12 added "supervisory." H.R. 9642
(72d Cong., 1st Sess. July 12, 1932); CR 75:15097 (1932). See also H.R. 12946, § 7 (72d
Cong., 1st Sess., July 12, 1932) (introduced by Rainey): "that (except in executive,
administrative, and supervisory positions), so far as practicable, no individual directly em-
Construction Act, which was enacted on July 21, 1932, made all RFC loans for construction projects subject to the condition that "(except in executive, administrative, and supervisory positions), so far as practicable, no individual directly employed on any such project shall be permitted to work more than thirty hours in any one week...." Congress failed to identify or define the incumbents of these "administrative" positions who were excluded from the 30-hour week. Three years later, the New Deal Congress that enacted the Emergency Relief Appropriation Act of 1935 also provided that, with regard to construction of public highway and related projects, "preference in the employment of labor shall be given (except in executive, administrative, supervisory, and highly skilled positions) to persons receiving relief...." When President Roosevelt issued an executive order prescribing rules for working hours under this act, "supervisory and administrative employees" were excluded from the maximum daily and weekly hours of eight and 40, but the definition of "administrative employees" was now subject to at least some limitations since "clerical and other non-manual employees" were subject to that schedule, whereas manual labor's maximum hours were eight per day and 130 per month. Thus the legislative and executive branches created a tradition on which they could draw in 1937-38, when they drafted, debated, and enacted the FLSA without revealing the characteristics of employees in an administrative capacity were who were excluded from that law's overtime provision.

50Emergency Relief and Construction Act of 1932, Pub. L. 302, ch. 520, 47 Stat 709, 712, § 201(a) (July 21, 1932). This Hoover-era statute is presumably the source of the identical exclusionary language ("those in executive, administrative and supervisory positions")—or its verbatim adoption in the bill that Senator Wagner introduced on May 15, 1933 and that, as discussed below in ch. 7, became the NIRA—that a scholar discovered in an unpublished memorandum on maximum hours and minimum wages by one of President Roosevelt's economic researchers, dated May 23, 1933, which was the earliest reference to such exclusions that she found in the Roosevelt administration's archives. Deborah Malamud, "Engineering the Middle Classes: Class Line-Drawing in the New Deal Hours Legislation," Michigan LR 96(8):2212-2321, at 2236 (Aug. 1998).


52Executive Order No. 7046, Prescribing Rules and Regulations Relating to Wages, Hours of Work, and Conditions of Employment under the Emergency Relief Appropriation Act of 1935, Pt. II (a) and (b) (May 20, 1935).
Mr. Black. [W]hen I think of people in this Nation today...working 16 hours per day, with whirling machinery dinning into their ears, going home tired, worn out, and weary, going into their homes in such a condition that they can do nothing but retire and try to get a little sleep in order to forget the din and whirl in their ears, I do not apologize to the people of America for introducing a bill to use the arm of government to prevent that abuse, to prevent grinding down into human slavery men and women who are too weak and too helpless to protect themselves.

[The bills] offer to those who toil in mill and in factory, to those whose bodies have been drained until as you look at their faces you can see that the blood has been taken away, a shorter working period in order that they, too, may enjoy some of that leisure which should be granted to all when machines can take the place of human beings.53

Mr. Gore. What I think will happen is that hours will decrease, wages will decrease, work will speed up, and labor will be driven to perform as much work in 6 hours as in 8. The wage earners, threatened, frightened by the breadline, will attempt the task.54

With the AFL estimating that 13 to 14 million workers, a quarter of the labor force, were unemployed by the fall of 1932,55 three of its large departments—the building, metal, and union label trades—recommended, a few days before the organization’s annual convention, an aggressive campaign for the five-day week and six-hour day “not as a cure-all but as a stop-gap in which to start to take up the slack caused by technological unemployment.” And even the 30-hour week was not the goal, but “a halting place on the march to an undefined but still shorter work-week, which was regarded as imperative so long as technical progress continued to advance so rapidly.”56 In his keynote address to the convention in Cincinnati on November 21, President William Green called establishment of the

53 CR 77:1295 (Apr. 5, 1933).
54 CR 77:1296 (Apr. 5, 1933).
State and Federal Laws

30-hour week "a step in the right direction." In line with Green’s promise that the convention—the dominant problem facing which was finding a solution to unemployment—would make a “valuable contribution toward ‘the restoration of the impaired capitalistic structure,’” Ohio Governor George White “praised the American workingman for turning a deaf ear ‘to the tenets of Leninism and communism’....”57

In the event, the Committee on Shorter Workday declared—in stilted language oddly juxtaposed to the “forceful methods” to which Green threatened to resort “to compel industry to give us this great reform”58—that a balance had to be achieved between increases in productive efficiency and average labor hours so as to provide a wider diffusion of work opportunities as well as to “grant the workers larger leisure as a condition precedent to enhancing consuming power.” Opposing “the spread-work movement with its pay reduction policy,” the committee recommended that the convention record itself “in advocacy of and as proposing to the country the universal adoption without delay of the six-hour day and five-day work week” with no reduction in pay; it also recommended that this objective be declared the AFL’s “paramount purpose.”59 In support of the proposal, Green opined that it was “quite impossible” for industry to provide 48 hours of work weekly for 50-55 million workers: “We have developed such mechanical technique as to make it impossible to absorb into industry the workers of the nation.”60 The convention then adopted the motion unanimously.61

Barely three weeks later Senator Hugo Black introduced a short bill62 prohibiting the shipment in interstate commerce of any article produced in any mine, quarry, mill, cannery, workshop, factory, or manufacturing establishment in the United States in which anyone was employed or permitted to work more than five

57“Green Urges Labor to Push 5-Day Week,” NYT, Nov. 22, 1932 (12:2-3).
62For the argument that the bill was Black’s idea alone and was not introduced as a result of the AFL convention resolution, see Elizabeth Brandeis, “Organized Labor and Protective Labor Legislation,” in Labor and the New Deal 193-237, at 199-202 (Milton Derber and Edwin Young eds. 1957).
days in a week or six hours in a day. 63 Although Black’s original 30-hour bill did not apply to workers employed at workplaces other than those expressly men­tioned—and thus for example excluded farmworkers 64—it would presumably have covered white-collar employees and not merely production workers at the specified industrial locations. 65 After all, in August 1932, the president of the Chamber of Commerce of the United States, Henry Harriman, declaring that it was “better that 2,000 men work twenty-four hours a week than that 1,000 work forty-eight hours,” had informed a national radio audience that work-sprea9ing “should be applied to ‘white-collar’ workers as well” as to manual labor and to commercial and banking as well as to industrial firms.66 Two weeks after Black, Massachusetts Democrat William Connery, the chairman of the House Labor Committee, introduced that chamber’s counterpart 30-hour bill, which also lacked any occupational excep­tions. 67

63 S. 5267 (72d Cong., 2d Sess. Dec. 21, 1932). Enforcement took the form of a fine of at least $200 and/or imprisonment of at most three months. It took the national newspaper of record more than a week to take note: “Senate to Inquire into 5-Day Week,” NYT, Dec. 29, 1932 (5:1-2). The bill did not set minimum wages, presumably out of deference to the AFL’s traditional opposition to such government measures applying to adult male workers. The unions that originally urged the AFL to adopt the 30-hour-week measure took the position that “wage rates must be left to negotiation, because the tendency always has been for wages to rise...when hours were shortened....” “Labor Plans Drive for Shorter Hours.” It is emblematic of the late-twentieth-century constricted policy universe that even the Congressional Research Service’s expert on the FLSA is unaware of the difference between a maximum-hours and an overtime-pay and therefore called Black’s 30-hour bills “overtime pay legislation....” William Whittaker, “The Fair Labor Standards Act: Analysis of Economic Issues in the Debates of 1937-1938” at 2 n.4 (CRS, 89-568 E, Oct. 10, 1989).

64 Black stated that he had excluded agriculture because it was at the mercy of the elements. CR 77:1114 (Apr. 3, 1933).

65 When James Emery, the NAM general counsel, made this very point in his Senate testimony, no senator contradicted or questioned him about it. Thirty-Hour Work Week: Hearings Before a Subcommittee of the Senate Judiciary Committee on S. 5267, at 189, 190 (72d Cong., 2d Sess. Jan. 5-19, 1933).


67 H.R. 14082 (72d Cong., 2d Sess. Jan. 6, 1933). In quick succession, Connery introduced slightly revised variants: H.R. 14105 (72d Cong., 2d Sess., Jan. 9, 1933), and H.R. 14518 (72d Cong., 2d Sess., Jan. 31, 1933). Whereas Black’s bill covered any person working in a covered workplace, Connery’s covered only those working “in the production of” articles shipped in interstate commerce. In addition, Connery’s bill differed
In the course of the hearings that Connery held on his bill in the second half of January, James Emery, general counsel of the NAM, basing himself on the bill's ambiguous coverage of anyone "employed...to work in the production" of certain articles, made the crucial argument that the bill "does not apply merely to those who are engaged in the actual production of goods, to those employed in mechanical vocations or operations. It applies to...any person, who is permitted or required to work in the establishment, whether he be a superintendent, a foreman, an executive, a chemist, or an analyst...."68 Unfortunately, neither Connery nor any of the other committee members engaged Emery on this vital point because they (and he) were sidetracked by a distinct issue that he raised in the same context—namely, coverage of (blue-collar) workers engaged in emergency breakdown repairs. Connery and Georgia Representative Robert Ramspeck argued that since such repairs did not constitute production of merchandise, they would not be covered.69 Connery, in particular, used this ancillary issue to attack Emery for being "perfectly willing to work men 60 hours a week" and to impute to "the manufacturer" the desire "to have his men work 30 or 40 hours at a stretch to take care of difficulties such as you have in mind and pay them the same wages as for ordinary hours."70

in bringing within its ban articles produced outside the United States. Of this aspect Connery said three years later that the NRA had come into existence because he had refused to remove from the 30-hour bill the provision barring the import of any article whose total landed cost was less than the cost of production of a similar article in the United States: "Perhaps I showed poor judgment at that time, I think I did. I should have done what I did last year and put a bill in the Ways and Means Committee calling for the same thing, and you would have had a 30-hour week today.... You would have had a 30-hour week, easy of administration, a flexible week, not a strict 30-hour week.... We will come to that next session, as sure as you and I are sitting here, and we will put a tax on the machinery, the power of machinery to stop the speed-up system and the stretch-out system." Conditions of Government Contracts: Hearing Before a Subcommittee of the Committee on the Judiciary House of Representatives on H. R. 11554, at 284 (74th Cong., 2nd Sess. 1936).


69Six-Hour Day—Five-Day Week at 134-36.

70Six-Hour Day—Five-Day Week at 134. Connery exhibited a penchant for distracting exaggerations. When Emery predicted that enforcement would require a "vast army of inspectors," Connery asserted that at the most it would require 48 inspectors for 48 states or one inspector per state. To Emery's sarcastic reply, "I would admire his efficiency," Connery made the following rejoinder, the truth of which history has not borne out: "It is common knowledge whether a concern is working more than 30 hours a week or any other number of hours. The employees will tell about that, and it would not be necessary to have
Undeterred, Emery persisted in calling to the committee’s attention that “this bill does not apply merely to the operating force of a factory or shop, merely to those to whom you would give work. This bill stops the work of executives, superintendents, foremen, chemists, of all who may be engaged in connection with any continuous process that must be observed and supervised with special care.” The NAM, in other words, threw down the conceptual and political challenge that the 30-hour bill was designed to spread work only among traditional blue-collar workers. Emery was finally able to provoke debate on this claim by conjuring up the following scenario:

Mr. Emery. ...Where it [continuous process] involves, say, the work of a chemist and a scientific observation of the process, the fact that one person was permitted to work more than a specified time in a factory employing, say, 5,000 would damn the production of that whole establishment in connection with the products entering interstate commerce.

Mr. Ramspeck. Could not the concern affected employ two chemists?

Mr. Emery. One can pick up most any kind of chemist on the street, but the man trained all his life to observe a chemical process, is not so easily found.

Mr. Ramspeck. You know what we are trying to do, spread employment. ... The only way to effect the purpose of the bill is to work through interstate commerce. We do not transport stenographers’ notes or bookkeeping entries through interstate commerce.

Ramspeck thus appeared to acknowledge that ‘professionals’ such as chemists were covered by the 30-hour bill, impliedly because there were unemployed among them and the work-sharing triggered by the maximum-hours law could absorb them. However, Ramspeck failed to contradict Emery’s implicit contention that certain professionals were in such short supply that work-spreading would not apply to them (especially since none or only very few of them might be unemployed). More importantly still was Ramspeck’s apparent admission that, given the necessity of accommodating the Supreme Court’s narrow conception of interstate commerce, the bill’s correspondingly narrow conception of production for interstate commerce meant that white-collar office workers (exemplified by stenographers and bookkeepers) would not be covered, despite the fact that hundreds of thousands of them were unemployed and could be reemployed through work-sharing.

Although Connery’s Labor Committee reported his bill with the recommendation that it be passed, the session ended without action by the House.
Despite the various changes that the 30-hour bills underwent during March 1933 in the new Seventy-Third Congress, none as yet embodied any occupational exclusions. This blanket coverage crumbled on the Senate floor on April 3, 4, and 5, in the course of what turned out to be the most thorough debate that Congress has ever conducted on the exclusion of white-collar workers from hours legislation, which also had the virtue of making the legislative intent transparent.

Senator Arthur Vandenberg, about to become "unquestionably the leading conservative Republican in Congress during the New Deal," was the key figure in creating exceptions to the bill, for which he was ultimately one of very few non-progressive Republicans to vote; and despite the fact that ten days later he voted to reconsider the bill in an effort to insert a provision prohibiting the importation of industrial goods produced outside the United States in establishments in which

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For example, Black introduced a new bill, which added a preamble (implausibly) declaring that while millions of citizens were unemployed, "millions of others are working in factories and industrial establishments ten, twelve, thirteen, fourteen, and even sixteen hours per day." S. 158 (73d Cong., 1st Sess., Mar. 10, 1933). The version of the bill reported out by the Judiciary Committee was subject to expiration after two years. S. 158 (73d Cong., 1st Sess., Mar. 30, 1933); Preventing Interstate Commerce in Articles Manufactured by Labor Employed More Than 5 Days per Week or 6 Hours per Day (S. Rep. No. 14, 73d Cong., 1st Sess., Mar. 30, 1933). Rep. Matthew Dunn (Dem. PA.) introduced a more expansive 30-hour bill that, untethered from interstate commerce, would have applied to "any trade, occupation, or branch of industry or labor...except in case of emergency where life or property is in imminent danger." H.R. 4116 (73d Cong., 1st Sess., Mar. 23, 1933). Connelly introduced a new bill that created the possibility of exemptions for the processing, canning, or packing of perishables if the Secretary of Labor found that it was necessary, "by reason of the seasonal character of the work required and the lack of available labor therefor," to exceed the 30-hour maximum. H.R. 4557, § 3 (73d Cong., 1st Sess., Apr. 3, 1933). The House report accompanying its version of Black's S. 158 offered no explanation of the exceptions. Thirty-Hour Week Bill (H. Rep No. 124, 73d Cong., 1st Sess., May 10, 1933).

James Patterson, Congressional Conservatives and the New Deal: The Growth of the Conservative Coalition in Congress, 1933-1939, at 102 (1967). Vandenberg accepted several New Deal measures in 1933-34 to the extent that they "were designed to reestablish the old order, revive the market economy, and restore faith in traditional institutions." C. David Tompkins, Senator Arthur H. Vandenberg: The Evolution of a Modern Republican, 1884-1945, at 97 (1970). "[G]uided by auto industry representatives," he did oppose the right to collective bargaining embodied in § 7(a) of the NIRA, and by 1935 "vigorously opposed almost every significant New Deal measure" including the National Labor Relations Act and the FLSA. Id. at 100, 119 (quote), 121, 150.
any worker worked more than 30 hours per week—for which many opponents of the bill voted—Vandenberg claimed that he would continue to support the Black bill with or without this amendment.76

Almost at the very outset of the Senate debate, Black informed his colleagues that if there were exceptional circumstances in any industry, they should offer an amendment. More specifically, in response to a query from Vandenberg, he confirmed that it would be possible to operate an emergency license system through the Secretary of Labor.77 In particular, Vandenberg believed that it would be impossible to can perishable fruits in northern Michigan “on the basis of the undiluted formula” of Black’s bill. “On the other hand,” Vandenberg realized that as soon as “exemptions or exceptions” are written, “we may have drawn the teeth of the measure,” which he assured Black he had no interest in doing. Black replied that since there were “probably” firms that could not procure labor within the bill’s framework, he saw no reason not to authorize the Labor Secretary to issue exemption permits, but he insisted that an exemption should not be issued merely because complying with the 30-hour week “might cost a little more....”78 Vandenberg contended that “it would be a physical impossibility to contemplate an adequate labor [sic] on a staggered basis for just a few weeks or months of the year” at the Michigan canneries, located as they were in isolated places;79 if, on the other hand, such labor were imported, housing would be insufficient for the short period.80 In addition to drafting an amendment for canneries, Vandenberg, without identifying what kinds of workers he had in mind, also offered the general exemption permit amendment to accommodate exceptional cases or ones “where there may be an occasional expert whose labor has to be continuous....” Having now presented “all of the legitimate exemptions,” he claimed that Black “agrees that we have not invaded the legitimate and desirable objectives of the bill itself,” and no one contradicted him.81 Chastened, perhaps, by Black’s admonition, Vandenberg later stressed that the exemption permit would be confined to “unforeseen circumstances” under which it would also be a “physical impossibility” to operate within the bill’s general framework.82

76 CR 77:1810-12 (Apr. 17, 1933). Vandenberg had also voted for the amendment when it was defeated 39 to 41 during the main debate. Id. at 1341-42. This provision was, as already noted, embodied in the Connery bill.
77 CR 77:1115 (Apr. 3, 1933).
79 CR 77:1195 (Apr. 4, 1933).
81 CR 77:1178 (Apr. 4, 1933).
82 CR 77:1196, 1195 (Apr. 4, 1933).
The cannery amendment, Vandenberg disclosed during debate, was the result of a conference that he had held on April 4 with Black and Senator Clarence Dill, Democrat of Washington—who at the time was also working with Connery on pension legislation and Black on railway labor legislation—and "represent[ed] a meeting of minds upon a formula which undertakes to provide legitimate exemptions and exceptions without invading the legitimate...purposes of the legislation." In a somewhat obscure supporting statement, Vandenberg then went on to argue that there are certain exemptions in the bill, anyway; and the Senator from Alabama [Black] will correct me if I am wrong. It does not apply, for example, to executives or to office work; it does not apply to railroads; it does not apply, for example, to newspapers; it does not apply to agriculture. Therefore, if a further limited classification of exemptions is created, it is not necessarily in conflict with the genius of the legislation.

Presumably Vandenberg inferred the exclusion of railroads from the fact that, in the language of the Black bill, "no article or commodity" was "produced or manufactured" on a railroad, and the exclusion of agriculture from the fact that a farm was not comprehended within the scope of covered worksites—mine, quarry, mill, cannery, workshop, factory, or manufacturing establishment.” The interpretive exclusion of executives, office work, and newspapers, however, could not be achieved so readily, and thus required and received additional justification.

Further elucidation of the white-collar exclusion was facilitated by Republican Senator David Reed from Pennsylvania, an “extreme conservative” who knew that the average American did not want to be limited to 30 hours of work: “He is not a child to be nursed in such a way.” In a wide-ranging attack, Reed, who claimed that the bill was “sentimentalism run mad” and “utterly unworkable,” posed a number of questions to Black designed to uncover inconsistencies in the bill, not in order to improve it, but to obstruct its passage. When asked whether the bill covered newspapers—a worksite for a large number of

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84CR 77:1195 (Apr. 4, 1933).
85CR 77:1195.
86"David Reed Dies,” *NYT*, Feb. 11, 1953 (29:1).
87Warren, *Herbert Hoover and the Great Depression* at 90.
88CR 77:1191 (Apr. 4, 1933).
89CR 77:1282 (Apr. 5, 1933).
white-collar employees—Black immediately said no, but could find no better explanation than that “a newspaper” was not a factory or manufacturing establishment. When Reed then asked what the difference was between a job printer and a newspaper printer, Black could find no better explanation than that one worked in a (covered) workshop and the other in an (excluded) newspaper establishment. When Reed, finally tiring of the Socratic cat-and-mouse game, asked whether, since both employed printers and produced a printed product using ink and paper, the bill did not apply to newspapers as well, Black retreated to the drafter’s sheerest *ipse dixit*: “I never so intended.” Unimpressed by this home-made legislative history, Reed concluded that the outcome would ultimately hinge on judicial construction of “manufacturing establishment.”

Building on this stalemate, Reed then directly addressed the question of white-collar workers:

Has the Senator given any thought to the exclusion of managing officials and clerical workers from the terms of his bill? For example, it would be very difficult to have four general managers of a factory in order that each of them might have a 6-hour shift, and then, I presume we would have to have a fifth and sixth in order to relay on the sixth and seventh days of the week, if it were a continuous operation. Should not the directing officers of these establishments be excluded from this measure?

Black opined (without adding his definitive legislative intent) that the bill would not apply to such officers, observing that “such executives could be excluded” by making an application pursuant to Dill’s amendment. Dissatisfied with such a cumbersome process for the “hundreds of thousands...of requests” that would “come pouring in” for such a stereotypical exemption and that “would throw a terrible burden on the Secretary of Labor,” Reed urged Black “to make the exemption here, and not leave it to some bureaucrat to handle.” For his part, Black absolved himself of any blame by reminding his colleagues that back in February he had invited them to come forward, but that “[u]nfortunately...nobody presented any requests for exceptions of any kind whatever,” although Black had always realized that “there must be some exceptions in legislation of this character.”

Because both Reed and Black became preoccupied with excluding executive and managing officials, they never addressed Reed’s question concerning coverage of clerical workers, who could scarcely be viewed as the Vandenbergian “oc-

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90 *CR* 77:1196 (Apr. 4, 1933). In order to make “doubly sure,” Senator Tydings offered an amendment excluding newspapers, which was agreed to without debate. *Id.* at 1204, 124, 1283.

91 *CR* 77:1196 (Apr. 4, 1933).

92 *CR* 77:1196 (Apr. 4, 1933).
casional expert whose labor has to be continuous....” When debate resumed on April 5, Reed reopened the matter of continuous process industry such as a blast furnace or chemical pulp mill with four shifts, where, if, “as very often happens,” the relief man did not get there because the street car was late or he was sick, either the law would be violated and every product of the factory would be embargoed or the blast furnace would be ruined.93 From these blue-collar workers Reed advanced again to the white-collar employees:

Take the superintendents and the clerical force and the accountants. Can there well be four shifts of such employees? How can a plant have four superintendents succeeding each other throughout the day? Yet this bill covers superintendents just as much as it covers common labor.94

Once again, Reed threw together big bosses and secretaries indiscriminately without offering any parade of horrors to explain why coverage of run-of-the-mill office workers would be infeasible and absurd. This time, however, Vandenberg brought the issue out into the open by submitting an amendment that he claimed was “in a sense clarifying, and in no degree in conflict with the original purpose of the bill. In fact, I have undertaken its preparation at the suggestion of the Senator from Alabama [Mr. Black], in consultation with the Senator from Massachusetts and the Senator from Connecticut, who are interested in the same point.”95

Mr. Vandenberg. It was not originally intended that the bill should apply to executives and supervisory officers in a business. It would be manifestly impossible to stagger general management or to stagger superintendents or to stagger private secretaries.

Mr. Norris. That will not be so difficult in a few days. [Laughter.]

Mr. Vandenberg. Well, using the word in the technical sense, the statement still remains. Therefore, in order to make it clear that the objective is fully covered, I am suggesting that...the following language be added:

except officers, executives, superintendents, and others in supervisory capacities, together with their clerical assistants.

I am inclined to believe that none of this group was ever intended to be covered within

93 CR 77:1282 (Apr. 5, 1933).
94 CR 77:1282 (Apr. 5, 1933).
95 CR 77:1289 (Apr. 5, 1933). The Massachusetts Senator was David Walsh, who played a key role in federal hours legislation in 1935 and 1937-38; the Connecticut Senator was Augustine Lonergan, whose contribution is mentioned below.
State and Federal Laws

The origins of Vandenberg’s amendment to exclude, inter alia, certain administrative employees are political-economically most instructive. Although Vandenberg’s attitude to legislative regulation of labor-management relations was, according to his biographer, “conditioned by a genuine desire to satisfy the large labor population of Detroit and other Michigan industrial centers,” and he “publicly cultivated the labor vote with some success, he also sought to cooperate discretely with Michigan industrial leaders. Before voting for the Black Thirty Hour Week bill, he consulted with auto magnates Roy D. Chapin and Alfred P. Sloan....” Afterwards, “Vandenberg offered an amendment suggested by Sloan ‘to be sure that officers, executives, etc., were clearly exempted.’”97

In fact, as the crucial Senate vote approached, Vandenberg had taken it upon himself to poll the Michigan automobile industry executives on their views of the 30-hour bill by sending them telegrams. On Saturday, April 1, he telegraphed Roy Chapin, the chairman of the Hudson Motor Car Company (and the last Secretary of Commerce in the Hoover administration): “Senate Judiciary Committee reports bill limiting all labor for next two years to six hour day and five day week. Purpose of bill is to force stagger in employment. I heartily favor idea but want to be sure of my ground. What would be effect on automotive industry[?] What is present average employment per day and per week [?]”98 On Monday morning, April 3, Chapin telegraphed back that: “In talking with other members of industry, I find diversity of opinion. Will try to get you considered opinion of industry by tomorrow or Wednesday.”99

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96 CR 77:1289. See also “Rise to 36 Hours Asked in Work Bill,” NYT, Apr. 6, 1933 (5:4).
97 Tompkins, Senator Arthur H. Vandenberg at 100.
98 Telegram from Sen. A H Vandenberg to Roy D Chapin (Apr. 1, 1933), in Roy Chapin Collection, Box 25, Folder: April 1-5, 1933, in BHL, University of Michigan, Ann Arbor, MI. In the quotation periods have been inserted instead of “STOP.” According to the BHL, which also houses Vandenberg’s papers, they contain no references to Black’s bill. Email from BHL (Dec. 19, 2003).
99 Telegram from Roy D. Chapin to Senator A. H. Vandenberg (Apr. 3, 1933), in Roy Chapin Collection, Box 25, Folder: April 1-5, 1933. Whether Chapin did in fact get Vandenberg such an opinion is unclear, but the National Automobile Chamber of Commerce in Washington, D.C. informed Chapin on April 4 that Vandenberg “would like to know whether there is any compelling reason in the automotive industry for a vote against the Black thirty-hour week bill....” If Chapin had any such reasons, he was asked to register them “without delay,” and Vandenberg would read them into the Congressional Record. Letter from National Automobile Chamber of Commerce to Roy D. Chapin (Apr.
Although the telegrams to Vandenberg ran the spectrum from outright approval to rejection of the bill as a whole, they agreed with regard to the white-collar exclusions. For example, Chrysler Corporation urged Vandenberg to oppose passage of the bill because it would “limit the earning power of men now satisfactorily employed” and “further harasses industry during this critical period by requiring experimentation with new operating conditions at a time when we companies are not able to make both ends meet under conditions with which they are experienced and familiar.” More specifically, however, Chrysler objected because the bill “makes no exception for men engaged in creative and executive work to whom the country must look for the industrial leadership to solve today’s problems.” Thus while regarding “the whole idea as unsound in principle we particularly urge that if experimented with at all its application should be restricted to only men employed at hourly rate of wages and applied on a yearly accumulative basis.” In contrast, the president of Packard Motor Car Company, Alvan Macauley, telegraphed back that “[t]he automobile industry is in hearty sympathy with any proper effort that will put more men back to work but we feel in principle the Black Five Day Labor Bill could be accepted only because of the grave national emergency existing.” In the limited time for discussion, Packard could not see what the bill’s results would be, “but we feel very strongly it should be amended...by limiting it to laborers and mechanics and allowing 36 hours per week...”

Chapin himself telegraphed on April 6 that, while the bill has worthiest of aim it is necessarily experimental and is bound to affect some businesses severely. If passed at all our recommendations are that it be restricted only to men employed on hourly basis that at least thirty-six hours be substituted for thirty that service operations of all sorts be excluded that authority be given Secretary of Labor for other exceptions and that it function on the basis of an annual average of at least thirty-six hours per week thus taking care of seasonal businesses...for which it would be utterly uneconomical and unfair to bring in additional and untrained labor supply for one to three months and then expect them to go back where they came from.
State and Federal Laws

That same day Vandenberg typed, on Senate Committee on Foreign Relations letterhead, a two-page response to “My dear Roy,” explaining all that he had undertaken on behalf of the automobile firms. Because it is an extraordinarily rare extant record of a legislator’s privately explaining to a capitalist constituent exactly how and why he has amended a labor standards bill, and provides a key to understanding the real origins and purpose behind the white-collar exclusion, it deserves to be quoted at length:

The Black Bill presented an exceedingly perplexing contemplation. I was amazed that business men generally were paying absolutely no attention to it as it was starting on its way through the Senate. It was for this reason that I wired you. Apparently I stirred up considerable trouble for myself as a result. But I certainly did not want consideration to proceed with the whole thing in the dark. The first concrete message that came to me from the Motor Industry was from Mr. Sloan who seemed to feel that there was little actual damage threatened by the Bill during the two year emergency period of its life because we can scarcely hope to have gotten back beyond a thirty hour work week in this emergency period. I do not mean that he favored the Bill in any sense. His position was quite the contrary. But he seemed chiefly anxious to be sure that officers, executives, etc. were clearly exempted.

I had no other definite reactions from the Automotive Trade until yesterday and today when the messages began to arrive suggesting the desirability of putting the limitation upon a yearly basis and leaving the allocation to the option of the employer. But these suggestions arrived after we had been defeated on a close vote in an attempt to substitute the thirty-six hour week (with the allocation of time left to the option of the employer). I voted for this substitute; but it was defeated, and manifestly it was impossible to get a yearly allocation after failing to get a weekly allocation. It is entirely possible however that the Bill can be further amended in the House of Representatives.... The House is particularly responsive to the President and I think that if there are really any serious considerations in the Bill (during this two year emergency) that [sic] the Automotive Industry can make its position known to the President and to the members of the House.

Before these latter messages arrived I had already gone to work on other liberalizing amendments. In return for two very important liberalizing amendments I agreed to support the Bill. These amendments accordingly were accepted. One of them specifically exempts officers, executives, superintendents, and their clerical assistants from the terms of the Bill. Another amendment creates a general right of exemption license to be administered by the Secretary of Labor wherever conditions could in an Industry require the exemption. I felt that these two amendments - particularly the latter - represented the best possible contribution I could make to the practical phases of the Bill and to meet the general problem which you and your associates would confront under it.

Couzens (Apr. 6, 1933), in Roy Chapin Collection, Box 25, Folder: Correspondence April 1933, in BHL, University of Michigan, Ann Arbor, MI. Couzens, the senior Michigan senator, was himself a former high-ranking Ford Motor Company executive.
State and Federal Laws

There remains of course the fundamental questions whether the Bill is constitutional. I suppose the doubts are against it. I am told it will be promptly tested. The consensus [sic] of legal opinion seems to be that it will be knocked out by the Supreme Court on the same theory that the child labor law was knocked out.

The fundamental proposition was an exceedingly perplexing one - particularly in view of the perfectly enormous unemployment in Michigan. We have all favored the "share the work" movement. I have repeatedly spoken in favor of the shorter work week and the shorter work day. The combination of these circumstances left me in a position where to vote against the Bill would have been universally misunderstood and I think rightfully condemned in many quarters where I have discussed my shorter work week views. In spite of this fact I could not have voted for the Bill except as these amendments were put into it. I repeat that - in view of the wide margin favoring the Bill - I felt that the success of these amendments was the best possible contribution I could make.103

In the ensuing debate over these exclusions Black stated without explanation that "an exception of this kind should be adopted."104 Senator Walsh, who approved of Vandenberg’s amendment "most heartily," agreed with its author that it would also include operating owners, but they could not determine whether it also embraced a situation in which an owner and three employees agreed that they would all become partners.105 Missouri Democratic Senator Bennett Clark was in sympathy with the amendment’s general purposes, but was troubled that it seemed to include "an exemption of anybody in a supervisory capacity. Now, a machinist is a supervisor over a machinist’s helper. A bookkeeper is a supervisor over an assistant bookkeeper. It seems to me that by the use of this language we would exclude from the operation of this act thousands and thousands of working people.” Chiming in, Senator Huey Long offered an amendment striking "and others in supervisory capacities together with their assistants.” If, in his view, this phrase was not struck, "I should judge that out of a thousand employees there would be no difficulty in working seven or eight hundred of them.” And "anyway,” by previous amendment the Senate had already empowered the Labor Secretary to exempt officers, executives, and superintendents.106

103 Letter from A. H. Vandenberg to Roy D. Chapin (Apr. 6, 1933), in Roy Chapin Collection, Box 25, Folder: Correspondence April 1933, in BHL, University of Michigan, Ann Arbor, MI.

104 CR 77:1289. Malamud, “Engineering the Middle Classes” at 2234-35, in concluding that Black sought to cover white-collar and salaried employees within the industries covered by his bill overlooked the fact that during the course of floor debate Black agreed to exclude many of them.

105 CR 77:1289-90.

106 CR 77:1290.
It had taken Long’s intervention to make it dawn on Black, who admitted that he had not read Vandenberg’s amendment when it was offered, that it “goes farther than the Senator from Michigan desires, and I think what he is after will be reached by agreeing to the amendment of the Senator from Louisiana. I believe the word ‘supervisory’ is of such an uncertain nature that not only would it be unwise to put it there because of those who might be included but on account of the uncertainty of the language, it might affect the legality of the bill.” Vandenberg, asserting that he had borrowed that language from a suggestion by Senator Lonergan, in turn admitted that it “did not occur to me that it had within it the breadth which obviously does exist.” Since Vandenberg had “no desire or disposition to open a back door to, this bill,” he was “perfectly willing to eliminate the additional phrase...’supervisory capacities’, but” it seemed to him that the phrase...’clerical assistants’ should remain, for this reason:

I do not think a man should be expected to have a separate private secretary the last 2 hours in the day, and I do not think it is practicable to expect him to have an extra stenographer the last hour of the day, because that sort of service necessarily is personal and continuous.\(^{107}\)

No sooner had Vandenberg finally disclosed the reason for the exclusion of office workers (if not that he was acting as Sloan’s messenger) than Huey Long declared that he did not object to leaving in the reference to “clerical assistants.”\(^{108}\) But as Homer Bone, freshman Democrat from Washington State who was about to become an ardent New Dealer,\(^{109}\) critically pointed out:

[T]here is nothing in the amendment suggested by the Senator from Michigan...to distinguish between the private secretary of an executive officer of a big corporation and the thousands of clerks and stenographers...working in these big offices.

In Chicago, at the end of the day, thousands of young men and women pour out of those offices, all a part of the clerical staffs of railroad companies and big organizations.... That is true in every great industrial center in this country. Unless some of this language is eliminated, or the meaning made very plain, we will remove from the scope and effect of this bill all of the clerical assistants in the hundreds of big offices in this country.

If we want to vote for this measure with the understanding that we are removing from it all the clerks and stenographers, let us be very certain that we vote on it with that in mind.\(^{110}\)

\(^{107}\)CR 77:1290.
\(^{108}\)CR 77:1290.
\(^{109}\)“Ex-Senator Homer Bone Dies,” NYT, Mar. 12, 1970 (41:4-5).
\(^{110}\)CR 77:1290.
State and Federal Laws

Long then announced that Vandenberg was willing to insert "and their personal and immediate clerical assistants"; and we think that will cover it." Bone also thought that it perhaps would, and so the amendment finally read "except officers, executives, and superintendents, and their personal and immediate clerical assistants," which the Senate agreed to on a voice vote. Thus was forged the core of the future exclusion of administrative employees.

After four days of debate, on April 6, the Senate, by a vote of 53-30, passed the 30-hour bill with the aforementioned white-collar exclusions of "officers, executives, and superintendents, and their personal and immediate clerical assistants." Passage by such a substantial majority had been made possible by the additional aforementioned exclusions of: milk and/or its products; commodities produced by a cannery or manufacturing plant by canning fish, sea food, fruits or vegetables; and newspapers and periodicals. Finally, a catch-all provision authorized the Secretary of Labor to issue exemption permits "upon the submission of satisfactory proof of the existence of special conditions in any other industry...making it necessary for certain persons to work more" than 30 hours.

In the interim between Senate passage of the Black 30-hour bill and House hearings on the Connery 30-hour bill in late April and early May, it became clear that the Roosevelt administration would not support them unless their hours limitations were made sufficiently "elastic" to permit 40-hour operation during a certain number of weeks per year subject to approval by a commission consisting of the Labor Secretary and employer and employee representatives. Pursuant to one plan that would have conferred power on the Labor Secretary to control production, regulate hours, and prescribe fair wages, executive and managerial officials would be excluded from the capping of weekly hours at 30 (or up to 40 in exceptional cases). At the same time reports began to surface of administration draft plans to inaugurate some kind of government control of production.

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111 CR 77:1290-91.
112 CR 77:1350 (Apr. 6, 1933); "Senate Votes 30-Hour Work Week, 53-30," NYT, Apr. 7, 1933 (1:3-4, 7:3-4). Basil Rauch, A History of the New Deal 1933-1938, at 74 (1944), argued that Black's bill had attracted little attention until April 1, when the Chamber of Commerce, opposing legislation, had recommended the temporary and voluntary adoption of the 40-hour week: "As if in defiance of the Chamber, the Senate suddenly passed the Black Bill...."
113 S. 158 (73d Cong., 1st Sess., Apr. 7, 1933).
114 "President Limits 30-Hour Week Bill," NYT, Apr. 13, 1933 (2:1).
115 "Miss Perkins Asks Industry Control," NYT, Apr. 19, 1933 (2:2).
116 Arthur Krock, "'War Board' Proposed," NYT, Apr. 14, 1933 (1:8); "Roosevelt Links Minimum Wage to Huge Job Drive," NYT, Apr. 15, 1933 (1:8); Arthur Krock,
which over the next month evolved into the National Industrial Recovery Act.\textsuperscript{117}

Finally, in mid-April, employers' organizations, while continuing to resist imposition of 30-hour regimes, began to express willingness to accept some outside regulation. For example, the general manager of the Associated Industries of Massachusetts wrote to the general counsel of the NAM that there was a disposition on the part of many of its members to agree to a 40-hour week for an emergency period of one or two years. To be sure, he reported that leaders of shoe, paper, textile, leather, furniture, printing, rubber, and other industries found it possible to readjust their production methods on a 40-hour basis, "but the executives feel that managerial, office, sales and distribution forces should be exempted from its operation, as well as engineers, foremen, repairmen and watchmen, where in order to provide power and also insurance protection, anything less than the present schedule would be impossible without doubling the expense for wages."\textsuperscript{118}

The House Labor Committee hearings on the 30-hour bills lasting from April 25 to May 5 were best known for Labor Secretary Frances Perkins' repetition of her executive session testimony rejecting the flat 30-hour week as lacking "sufficient flexibility." Instead, she suggested a maximum of 40 hours, which could be used under certain conditions with a sliding scale between 30 and 40; a public hearing would have to show extraordinary need for 40; in addition to a cap of eight hours per day, Perkins also recommended a limit of perhaps ten 40-hour weeks a year.\textsuperscript{119} To be sure, the Black bill as passed by the Senate no longer lacked

\textsuperscript{117}Hunnicutt, \textit{Work Without End} at 159-63, 172-73

\textsuperscript{118}Letter from D[L]. Stone, General Manager, Associated Industries of Massachusetts, to James Emery (Apr. 11, 1933), in Hagley Museum & Library, NAM Papers Box 851.2 (copy provided by Colin Gordon). Stone went on to state that the 30-hour week was impossible because, for example, dyeing required a moderate amount of overtime and workers would not respond to two-hour jobs. Moreover, he calculated that the Black bill would benefit only 6 percent of workers: 25 percent were agricultural and excluded; 25 percent in transport and excluded; 25 percent in other activities and excluded; of the remaining 25 percent, 5 percent were not affected; of the remaining 20 percent, 14 percent were working in establishments already on 30 hours.

\textsuperscript{119}Thirty-Hour Week Bill: Hearings Before the House Committee on Labor on S. 158 and H. R. 4557, at 4-5 (73d Cong., 1st Sess., Apr. 25 to May 5, 1933). Perkins insisted on a daily limit as well because "the reason why they [manufacturers] want shortened weekly hours instead of shortened daily hours is because they can take care of their production with the same number of people. In other words, it tends to defeat the purpose of the bill, which is to make more work for more people." She explained that studies showed that firms could produce as much in five days as in six without any increase in
flexibility: its individual industry and white-collar exclusions together with its
general exemption permit system (under the control of the Labor Secretary) permitted much of the elasticity that Perkins and Roosevelt demanded.\footnote{In light of the Roosevelt administration’s demand for elasticity and in the absence of any evidence to support the claim, the later allegation by Republican Representative Melvin Maas must be regarded as baseless that the only reason that the administration had not recommended “an arbitrary statutory prohibition against working over 40 hours [in 1937-8], which is what they were seeking, was because there were certain cases, particularly in the seasonal industries, where it was desirable for short periods to work over 40 hours, and they didn’t want to absolutely bar that, so they put in a penalty, and the purpose of the time and a half...was to create a competitive situation where one man could not abuse working overtime when all the rest of them were playing fair, because his costs would go up so high that in a competitive market he could not survive.” \textit{Hearings on H.R. 6790, To Permit the Performance of Essential Labor on Naval Contracts Without Regard to Laws and Contracts Limiting Hours of Employment, to Limit the Profits on Naval Contracts, and for Other Purposes} (Mar. 19, 1942), in \textit{Hearings Before the Committee on Naval Affairs of the House of Representatives on Sundry Legislation Affecting the Naval Establishment 1942}, at 2771 (77th Cong., 2d Sess., 1942) (Comm. Print No. 205).}

In terms of the treatment of white-collar employees, however, Perkins’ testimony was overshadowed by that of two of the country’s most influential industrial managers—General Electric Company president Gerard Swope and General Motors Corporation president Alfred Sloan, Jr. Swope explained that two years earlier (April 1, 1931) GE had gone over to a five-day week and eight-hour day schedule that also encompassed all clerks, salesmen, and executives, although many of the most skilled employees worked only three or four days for lack of work. Swope was not opposed to mandatory shorter hours, but he believed that the Black-Connery bills were too rigid and failed to go far enough.\footnote{Thirty-Hour Week Bill: \textit{Hearings Before the House Committee on Labor on S. 158 and H. R. 4557}, at 91, 115.} Without disclosing or being asked why he advocated individual means-testing for hours regulation, Swope proposed a salary ceiling (and a rather low one, which was at odds with the universality he had touted at his own company), above which recipients could presumably be worked unlimited hours: “[T]he bill should cover all kinds of public and private employment (except agricultural and domestic workers), provided their earnings are less than $1,800 per annum or that they are employed at a rate which at full time would result in less than that income.”
Careful to secure for GE and other employers the "greater flexibility" that six-month hours-averaging conferred to get out orders, Swope suggested maximum working hours during any 26-week period of 832 or an average of 32 hours per week subject to a weekly and daily maximum of 48 and 8 hours, respectively.\(^2\)

Sloan, who represented the National Automobile Chamber of Commerce (which comprised all U.S. automobile manufacturers except Ford), also focused on the need for "flexibility," and, going even further than Swope, recommended averaging hours at 30 or 32 over an entire year subject to a 48-hour weekly maximum. However, unlike Swope, Sloan warned the committee that if its bill were enacted, GM workers' annual hours would wind up being considerably lower. The GM president also came fully prepared to discuss exemptions (although he did not find it necessary to disclose that through Senator Vandenberg he had already succeeded in having his favored exemptions written directly into Black's bill): "[T]here must be necessarily exemptions, and I have given quite a good deal of consideration to an effort to define them, in the hope that I might be useful." Because industrial operations and classes of employees and conditions varied so much, it was hard to define an exemption "so that it provides the necessary flexibility and at the same time gives the maximum objective that you want; that is, the greatest amount of sharing work." Without explaining why, Sloan, like Swope, suggested that "the most practical and definite way of determining that would be to confine the proposal to those employed in the actual production of the article or commodity."\(^{123}\) And, again like Swope, he asserted without explanation that if the scope could be broadened to include all forms of employment (except agricultural and household workers) "the only practical way to make definite exemptions would be on a salary or wage basis predicated upon a certain amount or earning per year or employment at a definite rate which amounted to that total per year."\(^{124}\)

\(^{122}\)Thirty-Hour Week Bill: Hearings Before the House Committee on Labor on S. 158 and H. R. 4557 at 92, 116. Swope stated that by spreading work, the measure "will entail more work on the supervisory forces in industry and commerce and increase costs." Id. The causality here is unclear: if the supervisors were earning more than $1,800, they would not have been entitled to overtime pay. Swope also insisted that in order to complete an order, at times GE would "have to have that toolmaker work 50 hours this week. ...We couldn't put on more employees. We haven't machinery enough, and it is an individual job." Interestingly, Swope had to be informed by Congressman Griswold that the bill did not cover a toolmaker because he did not make anything entering interstate commerce. Id. at 116-17.

\(^{123}\)Thirty-Hour Week Bill: Hearings Before the House Committee on Labor on S. 158 and H. R. 4557 at 772.

\(^{124}\)Thirty-Hour Week Bill: Hearings Before the House Committee on Labor on S. 158 and H. R. 4557 at 790-91.
Sloan argued that the problem of achieving the maximum distribution of work while "providing for the essential exemptions...to make the plan practical" made it difficult to arrive at a definition that would be appropriate to differing conditions and employment classes in various industries:

However practical it may be—and it certainly is practical to deal with direct production under limited hours through the employment of additional shifts where circumstances justify it, it is entirely impractical to deal with other classes of employment on that basis. There never was a time when the problems of industry required as intense effort, as measured by hours of employment on the part of those charged with the responsibility of management, than [should be: as] right now for upon management depends the stabilization and, in a great many cases, the solvency of the institution....

In the case of the automotive industry it is necessary to maintain as an adjunct to production, large engineering staffs which, if independent, would themselves be large units of industry. Designers, engineers, and others composing such staffs required for the development of new models, constitute employment of a specific character. It cannot be taken care of on a shift basis. It is frequently a case of day and night work 7 days in the week because of the limited time and the absolute necessity of meeting a definite objective when the work must be completed—ready for production. The same thing, although more generally found in other cases of industrial production, applies to maintenance, repairs, and construction to include which within the scope of the limitation would involve industry in a great deal of complication and uncertainty.125

Sloan sought to construct engineers and designers as so creative as to be irreplaceable; in addition, they, together with maintenance, repair, and construction workers, were also to be excluded simply because they had to meet "a definite objective when the work must be completed...." How such deadlines distinguished them from millions of other workers who also had to meet deadlines, Sloan did not explain,126 but he by no means wished to limit exclusions from maximum

125 Thirty-Hour Week Bill: Hearings Before the House Committee on Labor on S. 158 and H. R. 4557 at 790.
126 In her testimony Perkins stated that there were very few cases even in continuous operation industries in which a non-fungible worker had to complete the operation: "[T]here are laboratories that are making wholly independent investigations in which they would, of course, be caught by the time clock with an experiment uncompleted. ... Of course...there are many chemists and other technical men out of work, and they would like to be included wherever possible." Thirty-Hour Week Bill: Hearings Before the House Committee on Labor on S. 158 and H. R. 4557 at 22. When Harvey Kelly of the American Newspaper Publishers Association testified that newspaper publishers could not run two shifts because certain operations in the composing room are intricate so that, for example, the lay-out man could not come in at the end of a short period and take it up, Connery
State and Federal Laws

hours to these few groups. One "very practical and clearly defined way of determining exemptions and one applicable to all forms of production, would be to limit the scope...to...[t]hose employed in actual production of the article or commodity." It was also possible to "designate exemptions by type of employment": "Executives, managers, superintendents, and overseers, their assistants and staffs, and also others engaged in a supervisory capacity; those engaged in the creation and development of new products, also those involved in maintenance, repairs, and construction."\footnote{Thirty-Hour Week Bill: Hearings Before the House Committee on Labor on S. 158 and H. R. 4557 at 790.} Overall, then, Sloan expanded the exclusions that the Senate had created—at his behind-the-scenes behest—to include certain categories of professional employees (engineers and designers) and manual workers in certain non-direct-production areas; and although Sloan restored supervisors, whom the Senate had removed, he did not propose excluding all run-of-the-mill office employees.

That the Black and Connery 30-hours bills of 1933 were sidetracked by the end of April because the Roosevelt administration succeeded in shifting Congress's focus to legislation that eventually became the National Industrial Recovery Act\footnote{Hunnicutt, Work Without End at 163, 172.} did not nullify the significance of these foregoing debates over the exclusion of white-collar workers from hours regulation. Not only did struggles over the NRA codes of fair competition reignite them, but over the next four years Black and Connery continued to introduce 30-hours bills, some of which applied to the codes themselves.

Post-NRA 30-Hour Bills and the Walsh-Healey Public Contracts Act

Profit is still the supreme business incentive. As a whole, business always has and probably always will consider profits more important than human welfare. Presumably, it will continue to oppose higher wages and shorter hours of service. Shorter hours, better wages, and better working conditions have never been achieved without the vigorous opposition

replied: "We have had that same argument or plea from every single representative or manufacturer, every single witness, who has come here. They say that one workman cannot pick up the work started by another workman. I know that a linotyper or a pressman can come into a shop and be told by a man on the job just how the job stands and then pick it up and go through with it. I have been in the shops and seen that done. I do not know about the pea pickers and some other industries, but I do know about this work." \textit{Id.} at 700.

\footnote{Thirty-Hour Week Bill: Hearings Before the House Committee on Labor on S. 158 and H. R. 4557 at 790.}

\footnote{Hunnicutt, Work Without End at 163, 172.}
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The Roosevelt administration viewed the NRA codes as the appropriate implementation of a shorter maximum-hours law, at least for the time being. In early 1934, for example, Labor Secretary Perkins told Connery’s House Labor Committee that “at this moment my own instinct would be to permit the code method of reducing hours to go on in this somewhat experimental and trial period.... [W]hen we get into the regulation of the hours, we are really on very tentative ground at this time, and we ought to keep the hours as flexible as possible in order that we may not undo the effect of the recovery programs, which so far has been very good on the plan of shortening the hours of labor.” At most she was willing to admit that “it would be wiser to express by resolution, perhaps, by Congress, the expectation that the codes should move as rapidly as possible toward a much shorter work week...” Then later, at “some time in the near future,” Congress and/or the States should establish a statutory maximum workweek for all occupations and not just the occupation commonly thought of as mechanical industry. To be sure, she argued that either this maximum—which she deemed necessary also for the individual worker’s health and welfare—should be high enough to permit flexibility or the law should authorize some government authority to fix variations in various industries and areas.

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129 Thirty-Hour Work Week 3-4 (S. Rep. No. 367, 74th Cong., 1st Sess. 1935) (Judiciary Committee reporting out (again) Black’s bill, which would have applied to NRA codes).

130 See below ch. 7.


132 Thirty-Hour Week Bill: Hearings Before the Committee on Labor House of Representatives on H.R. 7202, H.R. 4116, and H.R. 8492, at 124-25. Perkins also favored a maximum workday (which the FLSA failed to impose): “The only way you can enforce any labor law that has to do with hours of labor is to fix a maximum working day. It is almost impossible to enforce a work week that does not run to a maximum on the day.” Whether the schedule consisted of five six-hour days, four eight-hour days, or four and a half eight-hour days was immaterial: “I think adjustment of that sort ought to be made
Black and Connelly and others\textsuperscript{133} were not so sanguine about the achievements and prospects of the codes. Because the codes had resulted in furnishing employment to possibly two million additional workers, still leaving nine to ten million unemployed, Congress, in the view of the House Labor Committee, had to legislate a shorter workweek to employ six to seven million of "this army of unemployed" or to furnish pensions or unemployment insurance immediately:

\begin{quote}
[T]hrough the unwillingness of those whom General Johnson describes as the chiseling few, industry has utterly failed with the 40 hours' maximum working week and minimum—in too many cases maximum—wages of 30 cents per hour to absorb any appreciable number of the millions of unemployed. ... The committee feels that industrial leaders, interested principally in profits and fearful of the competition of those who have hesitated to comply with the restrictions contained in the codes of fair competition, promulgated by the National Recovery Administration, will not place their industries on a sufficiently shorter workweek to absorb these millions of unemployed unless the necessary restriction is made the law of the land.\textsuperscript{134}
\end{quote}

Consequently, members of Congress continued to sponsor 30-hours bills—which opponents dismissed as "[c]onflict[ing] with laws of nature and economics"\textsuperscript{135}—including several that would have applied to the codes themselves. For example, in January 1934, Connelly introduced a bill that imposed a 30-hour condition on all codes of fair competition but contained no exclusions of white-collar or any other workers.\textsuperscript{136} Later in 1934 and then again in 1935 he introduced similar bills.\textsuperscript{137} For his part, Black continued to introduce 30-hour bills that dependent on the desires of the community." In the many communities where growing use of automobiles had made it possible to live considerable distances from workplaces, people "would get much more benefit and much more opportunity to enjoy modern civilization if they had 4 days of 8 hours each than if they had 5 days of 6 hours a day." \textit{Id.}

\textsuperscript{133}E.g., Rep. Emanuel Cellar introduced H.R. 126 (74th Cong., 1st Sess., Jan. 3, 1935), which would have imposed a 30-hour week for federal government employees; where the needs of government service required overtime work, it was to be paid with time off with pay in the amount by which 30-hour weekly average was exceeded or for each hour of overtime in an amount equal to the proportional hourly compensation calculated on the annual salary.


\textsuperscript{137}H.R. 8492 (73d Cong., 2d Sess., Mar. 6, 1934), added that no employee shall be
excluded "officers, executives, and superintendents, and their personal and immediate clerical assistants." Black would also have required the codes of fair competition to contain a condition prohibiting employers from employing anyone (except these excluded groups) longer than 30 hours.\footnote{S. 87, §§ 1 (quote), 4(a) (74th Cong., 1st Sess., Jan. 3, 1935) (reported out by the Judiciary Committee without amendment, Mar. 13). See also \textit{Thirty-Hour Work Week: Hearings Before a Subcommittee of the Committee on the Judiciary United States Senate on S. 87}, at 1-2 (74th Cong., 1st Sess., Jan. 31-Feb. 16, 1935).} Even as late as January 1937, just several months before they introduced the administration's FLSA bills, Connery and Black introduced identical 30-hour bills containing the exclusion of "officers, executives, superintendents, and their personal and immediate assistants" (and authorizing the Labor Secretary to issue exemption permits on a showing of special conditions making it necessary for certain persons to exceed those hours).\footnote{H.R. 1606 (75th Cong., 1st Sess., Jan. 5, 1937); S. 175 (75th Cong., 1st Sess., Jan. 6, 1937).}

Although 30-hour bills and perhaps any hours laws were anathema to big business,\footnote{Letter from Edward Cowdrick (Secretary, Special Conference Committee) to Ernest Draper (Assistant Secretary of Commerce) (Dec. 20, 1935), in \textit{Violations of Free Speech and Rights of Labor: Hearings Before a Subcommittee of the Committee on Education and Labor United States Senate, Part 45: Supplementary Exhibits: The Goodyear Tire & Rubber Co.—The Special Conference Committee} 16896 (76th Cong., 1st Sess., Jan. 16, 1936). Cowdrick insisted that Roosevelt's "definite opposition" to the 30-hour bill and the Walsh government contract bill was among the steps that his administration would have to take to bring about "a reasonably cooperative working arrangement" between it and industry.\footnote{"Excerpt from Minutes of Meeting of Special Conference Committee, New York, January 16-17, 1937," in \textit{Violations of Free Speech and Rights of Labor: Hearings Before a Subcommittee of the Committee on Education and Labor United States Senate, Part 45: Supplementary Exhibits} at 16863.} by 1936 some segments of it had also begun to recognize that "the tendency to lengthen working hours rather than to absorb the unemployed may increase the danger of federal legislation on working time or even a constitutional amendment to give the Government control over industry."\footnote{\textit{Excerpt from Minutes of Meeting of Special Conference Committee, New York, January 16-17, 1937," in \textit{Violations of Free Speech and Rights of Labor: Hearings Before a Subcommittee of the Committee on Education and Labor United States Senate, Part 45: Supplementary Exhibits} at 16863.} Such ambivalence

employed for more than 30 hours in a week "by all his employers combined" and empowered a presidially created Emergency Industrial Extension Board to grant extensions of up to three months to work 40 hours. H.R. 2746 (74th Cong., 1st Sess., Jan. 3, 1935) provided that exemptions could be granted to employers complying with a code of fair competition to work their employees an average of 40 hours a week for up to 90 days (§ 3). The bill, which covered producing, transporting, and distributing goods and services in or affecting interstate commerce, excluded agricultural and domestic workers and employees subject to the Railway Labor Act (§ 5).
was ill designed to thwart passage of the last pertinent pre-FLSA federal hours statute, the Walsh-Healey Public Contracts Act,\textsuperscript{142} which provided that "no person employed by the contractor in the manufacture or furnishing of the materials, supplies, articles, or equipment used in the performance of" any contract in an amount exceeding $10,000 between any manufacturer of or dealer in such items and the United States Government shall be permitted to work more than eight hours a day or 40 hours a week.\textsuperscript{143} To be sure, Congress also provided that if the government contracting agency found that the hours limitation "will seriously impair the conduct of Government business, the Secretary of Labor shall make exceptions...when justice or public interest will be served...." The statute required the Labor Secretary to set a rate of at least time and one-half for any hours she authorized in excess of the statutory maximum.\textsuperscript{144} The Labor Department then

\begin{itemize}
  \item \textsuperscript{142}On the origins of the law in Labor Secretary Perkins’s office during the “period of doubt over NRA’s future,” see Frances Perkins, The Roosevelt I Knew 248 (quote), 249, 253 (1946).
  \item \textsuperscript{143}An Act to Provide Conditions for the Purchase of Supplies and the Making of Contracts by the United States, Pub L. No. 846, ch. 881, § 1(a) and (b), 49 Stat. 2036, 2037 (June 30, 1936).
  \item \textsuperscript{144}An Act to Provide Conditions for the Purchase of Supplies and the Making of Contracts by the United States, § 6, 49 Stat. at 2038-39. At a point when his bill lacked a flat 40-hour maximum—instead, the government would have set the hours in each contract—Senator Walsh stated at a committee hearing: “And why have we a maximum hour? Listening to these manufacturers, they would seem to forget what the purpose of the maximum hours is. It is to spread employment during this depression, to stop people being worked 56 hours and 60 hours and 48 hours, and try to get down to 40 hours, so they could employ more people. ... I don’t want to have this committee think, as was suggested on the floor, how unfair it would be if we put in the provision for 40 hours, as the 30-hour bill does. I can see how unfair it would be, in the face of a great divergence of codes, where the maximum hours varied from 30 to 48 hours.... It is impossible, of course—impossible—to write into a law that 40 hours shall be the maximum, as we would like to do, and give no discretion to anybody.” Conditions of Government Contracts: Hearing Before the Committee on the Judiciary House of Representatives on S. 3055, at 112, 114 (74th Cong., 1st Sess. 1935). According to Rep. Francis Walter, in order to fix hours that would meet with everyone’s approval, Congress obtained data from the DOL on average weekly hours showing that hours exceeded 40 only in one industry (paper and pulp, where they were 41). The legislators then fixed the week at 40 hours, leaving no discretion except where injustice might be done to manufacturer or government. CR 80:10004 (June 18, 1936). The complaint by the American Iron and Steel Institute that “[i]n a steel mill it is a practical impossibility to limit certain types of labor precisely to eight hours in any one day” was undercut by the conversion of the law from a maximum hours into an overtime regime. “Minimum Wage Bill Nears Fight in House,” NYT, June 16, 1936 (5:6-8).
\end{itemize}
issuing regulations stating that the hours provision applied “only to employees engaged in or connected with the manufacture, fabrication, assembling, handling, supervision, or shipment” of the items under the contract and “shall not be deemed applicable to office or custodial employees.” Thus, anomalously, under the Walsh-Healey Act, supervisors were (at least initially) protected by the hours and/or overtime pay provision, whereas office workers were not.

The final unenacted measure that could have served as a model for the FLSA was the proposed National Textile Act, which would have created a kind of successor to the NRA codes for the textile industry, and on which congressional hearings were held in 1936 and 1937. In the 1936 bill, the flat ban on employing production employees more than 35 hours per week or more than 7 hours per day or clerical or office employees more than 40 hours weekly or 8 hours per day, did not apply to those engaged in a managerial or executive capacity at a salary of not less than $50. The 1937 bill excepted employees engaged in a managerial or executive capacity and receiving $40 or more per week from the mandatory time

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145 Regulations for Administration of the Act of June 30, 1936, Public No. 846, 74th Congress, Part II, Art. 102, in FR 1:1405-1407 at 1406 (Sept. 19, 1936). “Office employees” were defined as “engaged exclusively in office work relating generally to the operation of the business and not engaged in the production of the materials, supplies, articles, or equipment required by the Government contract.” US DOL, Division of Public Contracts, Rulings and Interpretations under the Walsh-Healey Public Contracts Act: Rulings and Interpretations No. 1, Section 3.e. at 6 (1937). This distinction is very similar to the so-called administration-production dichotomy, which became a key criterion in identifying administrative employees excluded from the overtime provision of the FLSA. See below chs. 14, 16, 17.

146 Not until 1953 did the DOL, in furtherance of its policy of establishing uniformity of administration of the Walsh-Healey Act and the FLSA, add bona fide executive, administrative, and professional employees to the group of excluded workers. FR 18:1831-32 (1953). Currently, then, office and bona fide executive, administrative, and professional employees are excluded. 41 CFR § 50-201.101 (2002). For that reason the following judgment is difficult to understand. “Regulations under the Walsh-Healey Act afforded some grounds for anticipating that all employees might be deemed executive or administrative workers whose direct function was to give, or to supervise the carrying out of, general orders. Such expectation failed completely of realization.” Frank Cooper, “The Coverage of the Fair Labor Standards Act and Other Problems of Its Interpretation,” LCP, 6(3):333-52 at 348 (Summer 1939).

147 H.R. 9072, § 19, in To Rehabilitate and Stabilize Labor Conditions in the Textile Industry of the United States: Hearings Before a Subcommittee of the House Committee on Labor on H.R. 9072, 74th Cong., 2d Sess. 3, 7 (1936). Interestingly, the hours limitation applied even to proprietors doing production work. Id. § 3(5) at 3.
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and a half provision for hours in excess of 7 per day or 35 per week. At one of the hearings on the bill, which took place just four days before the FLSA was introduced in May 1937, textile industry management, deploying the claim that the performance of uncompensated overtime work was part of the natural order of things for careerist executives, informed the House Committee on Labor that it was "unalterably opposed" to the provision, which revealed the drafters' ignorance of "industrial mill management":

In every mill there are large groups of persons in charge of certain departments covering minor operation [sic], as department managers or executives, where $40 per week would be excessively high, and yet the need for these department heads and managers working in excess of 40 hours per week must be apparent. The efficient department manager interested in his work and in the development of his department never quits when the whistle blows. In fact, very often his best work is done during the brief period after the other employees have left the mill. This is the period in which he plans his work and studies his operation.

[It] must be remembered that from these department managers and executives are frequently recruited the chief executives of the mills and their efficiency and development is controlled not by a desire to quit when the whistle blows, but to maintain contact with their work such hours as they find necessary for their own development.

The industry witness requested that the means-tested salary cut-off be set at no more than $35—the level that had been established by the industry's NRA code.

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148 H. R. 238, §§ 13(d) & (e), 75th Cong., 1st Sess. (Jan. 5, 1937).
149 The same argument was advanced by employers at the regulatory hearings in 1940. See below ch. 12.
150 To Regulate the Textile Industry: Hearings Before the Subcommittee of the House Committee on Labor on H.R. 238, Pt. 6, 75th Cong., 1st Sess. 391 (1937) (testimony of Clement Driscoll, executive director, American Lace Manufacturers Association).
151 To Regulate the Textile Industry at 391.
Within a short space of time, industry and commerce in the United States have changed from a situation in which there was very little legislative intervention with regard to hours of work to one in which every industry or trade is, or is about to be, subject to maximum hours of work proposed by the industry and approved by the President.

The change is indeed a great one, as in January 1933...only two states...had Acts limiting the hours of work of males in private employment.1

Because the hundreds of codes of fair competition issued and administered under the aegis of the National Recovery Administration between 1933 and 1935 represented by a wide margin the most extensive involvement of the federal government with the exclusion of white-collar workers from hours regulation prior to the FLSA, examination of the positions adopted by employers, unions, and the NRA toward these exclusions is crucial to an analysis of the understandings that capital, labor, and the administrative, legislative, and judicial branches of government may have developed of the need for exempting firms from the regulation of overtime work by and pay for some workers.

In particular, a good sense of the spectrum of views that labor representatives developed concerning whether it was necessary to include white-collar workers (and if so which ones) in industry-level hours provisions can be gained by scrutinizing their public statements and silences at the code hearings. Although the hearing transcripts were not published, unlike the Wage and Hour Division hearings on the white-collar exclusions from the FLSA that were held in 1940 and to which the press paid modest attention, except when publishers’ own interests were at stake regarding the classification of reporters,2 the NRA public code hearings—especially those on the cotton textile industry and other early ones on major industries—were page-one headline news and “occasions for considerable pomp and circumstance.” However, in spite of their function as mechanisms of transparency, they were also interludes between preliminary conferences and “the


2.On the 1940 hearings, see below ch. 12.
real bargaining period leading up to approval."

**The National Industrial Recovery Act and an Overview of the Codes**

There seems to be no one basis for occupational exemption. The groups excepted from maximum hours ran the entire gamut of occupations. At one extreme were executives and professional and technical employees who are supposed to derive certain satisfactions from their work which compensate in some measure for the long hours which they may put in. At the other extreme were cleaners, janitors, and outside workers—occupations which in some industries fall to the lot of ill-paid Negro workers.

The National Industrial Recovery Act, which Congress passed in June 1933, authorized the president, on application by a trade or industrial association, to approve a code of fair competition for a trade or industry, and, as a condition of his approval of any such code, to impose conditions for the protection of employees. The NIRA also required every code to contain a condition that "employers shall comply with the maximum hours of labor...approved or prescribed by the President." Roosevelt—whose 1932 national Democratic Party platform had promised

3Leverett Lyon et al. *The National Recovery Administration: An Analysis and Appraisal* 108 (1935). According to a more jaundiced view, the early code hearings were "the so-called goldfish bowl," which merely exposed to view the pressure groups working off steam in public for a brief period...." Louis Stark, "A Penetrating Appraisal of the NRA's Worth," *NYT*, May 26, 1935 (sect. 6, at 4:1-4 at 1).


6NIRA, § 7(a), 48 Stat. at 199. This section was most famous for giving workers "the right to organize and bargain collectively through representatives of their own choosing." See generally, Lewis Lorwin and Arthur Wubnig, *Labor Relations Boards: The Regulation of Collective Bargaining Under the National Industrial Recovery Act* (1935). A possibly unique bureaucratic glitch in the code formation process for one small industry, Rayon and Synthetic Yarn Producing, shed revealing light on the divergent scopes of coverage under § 7(a) of the NIRA as between its collective bargaining and wage and hour provisions. Unlike other codes, the employers' proposed code, instead of excluding executive, administrative, supervisory, technical, and outside sales employees from the hours provision expressly, defined "employees" in the definitions section of the code as excluding them.
the "spread of employment by a substantial reduction in the hours of labor"—himself explained the principle behind the hours provision the day the proposed legislation was introduced in Congress: "My first request is that the Congress provide for the machinery necessary for a great cooperative movement throughout all industry in order to obtain wide reemployment, to shorten the working week, to pay a decent wage for the shorter week, and to prevent unfair competition and disastrous overproduction." Immediately after signing the measure into law, Roosevelt left nothing to the imagination as to the NIRA's purpose and mechanisms: "[T]he first part of the Act proposes to our industry a great spontaneous cooperation to put millions of men back in their regular jobs this summer. The idea is simply for employers to hire more men to do the existing work by reducing the work-hours of each man's week and at the same time paying a living wage for the shorter week." Three days after the NIRA's enactment, the NRA made the

As Deputy Administrator W. L. Allen explained to a member of the code authority, when the NRA was negotiating the code with the employers, the NRA legal department had not yet been organized to assist Allen, but in the meantime had reviewed the proposed code; as far as the lawyers were concerned, this structure, which effectively excluded these "classes" from the wage and hour provisions, was not problematic as to those sections, since the employers had not contemplated regulating the wages and hours of the excepted classes; however, in terms of the code's right-to-organize and collective bargaining provision, the effect of the proposed code as written was to exclude the exempted class of employees from it, whereas "obviously the statute contemplates the mandatory provisions as applying to all employees." Consequently, the NRA changed the definition to include all "all persons employed in the conduct of the rayon and synthetic yarn producing industry" (Art. IV) and transferred the exclusion directly to the hours provision. Letter from W. L. Allen Deputy Administrator to E. R. Van Vliet (Aug. 11, 1933), in A. Henry Thurston and F. C. Lee, "History of the Code of Fair Competition for the Rayon and Synthetic Yarn Producing Industry" 70 (Aug. 2, 1935), in NAMP, Microcopy No. 213: DSNRA 1933-36 (1953): Roll 136: Code 14: Rayon and Synthetic Yarn Producing Industry. The proposed code and the code historians' comment on the change are in id. at 81-82, 12. The question of managerial coverage under § 7(a) does not appear to have been resolved by the National Labor Board or the National Labor Relations Board under the NIRA, but when the Chain Store Managers and Clerks Union sought to represent managers and clerks at a grocery chain, the NLRB did not even raise the issue of the managers' eligibility. Eagle Grocery Co., Decisions of the National Labor Relations Board 2:450-51 (May 4, 1935).


9"Presidential Statement on N.I.R.A.—'To Put People Back to Work,'” in The Public
point qualitatively and quantitatively: "An average work week should be designed so far as possible to provide for such a spread of employment as will provide work so far as practical for employes normally attached to the particular industry."  

And as Hugh Johnson, the NRA Administrator, added a few days later in a nationwide radio address:

The way to work our factories and farms is to see to it that people who work get enough for their labor to buy what they need of the labor of other.

Well, how are we going to do that now, with 12,000,000 out of jobs and not enough business to hire any more men? The answer of the Roosevelt plan is: split up the existing work to put more men on the payroll and raise the wages for the shorter working-shift so that no workers is getting less than a living wage.

How seriously Roosevelt meant to shorten the workweek is unclear in light of the revelation by his Labor Secretary, Frances Perkins, that at this time he "could not feel that a reduction to thirty hours a week was essential even for the health and welfare of the people. 'Is there any harm,' he would say, 'in people working an eight-hour day and forty-eight hours a week?''

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10NRA, Basic Codes of Fair Competition 3 (Bull. No. 2, June 19, 1933).


13Frances Perkins, The Roosevelt I Knew 194 (1946). The 48-hour week appeared to have enjoyed canonical status with Roosevelt, especially during World War II. At his press conference on July 17, 1940, he related that Wage and Hour Administrator Philip Fleming in a letter on the matter of the longer workweek had pointed out that a British munitions study from World War I had showed that if the total production index was 110 at 66 hours, it was 111 at 55 hours and 109 at 45.5 hours. Complete Presidential Press Conferences of Franklin D. Roosevelt Vol.16: July, 1940—December, 1940, at 31-32 (1972). Then at a press conference on April 7, 1942, he said: “I have been giving a good deal of study to certain...studies...in regard to the output of the human being. And I have never seen that stressed. During the World War and after it -- Oh, for ten years -- a great many studies have been made in -- here, and in Great Britain, and on the Continent of Europe, as to...the number of hours per week which, week in and week out, will turn out the most goods. ... It was found definitely...that everybody is agreed that the average human being in industry turns out more goods, week in and week out, when they work 48 hours a week than when they work 60 hours a week. That is something that the people of this country ought to examine and get into their heads. I think it was Mr. (Henry) Ford,
One example of the seriousness with which the work-sharing approach was taken—and which radically distinguished the NIRA from the FLSA—was that numerous codes contained a provision including within the maximum weekly hours those that the employee worked in other plants or industries.\(^\text{14}\) In fact, a great man years ago, who said that over 48 hours -- or it may have been over 44 hours, I don’t know which -- anyway, it was [sic] reasonably small number of hours -- anything over that...does not increase the total stuff he turns out with his hands. Saying which, write your stories.” \(\text{Id.},\) Vol. 19: January, 1942—June, 1942, at 267. Finally, on November 6, 1942, he responded to the information that Senator O’Daniel had introduced a bill to repeal the 40-hour week: “We haven’t got a 40-hour week. We haven’t got a 40-hour week.” The most important war production was operating on a 48-hour basis. When told that O’Daniel wanted a 6-day week and 12-hour day, the president observed that “after the first few weeks or the first few months, you don’t get any more production with a very, very long week -- with a lot of overtime -- than you do in a shorter week. Now...people ought to recognize it. But it is a fact that has been proved in England, over here, and in Germany. ... 48 hours seems to me to be in most industries...a pretty good maximum for steady month in, month out production, giving you at the end of the year certainly as much as 56 hours, and at cheaper cost, and certainly more...production than anything over 56 hours a week.” \(\text{Id.},\) Vol. 20: July 1942—December, 1942, at 204-205, 206, 216.

\(^\text{14}\)E.g., Code No. 164: Knitted Outerwear Industry (Dec.18, 1933), Art. III, § (a), in NRA, Codes of Fair Competition, 4:199-209 at 203 (1934). On the prevalence of the provision, see Reticker, Labor Provisions in Codes at 183. To be sure, several codes contained a proviso “that if any employee works for more than one employer for a total number of hours in excess of such maximum without the knowledge or connivance of any one of his employers, such employer shall not be deemed to have violated the section.” Code No. 156: Rubber Manufacturing Industry (Dec. 15, 1933), Art. V, § 5, in id. at 69-83 at 78. See also Code No. 445: Baking Industry (May, 28, 1934), Art. IV, § 3, in NRA, Codes of Fair Competition, 11:1-23 at 11 (1934). At the House Labor Committee hearings on Connery’s 30-hour bill in April, when one congressman asked Labor Secretary Perkins whether the Labor Department would be able to control the situation if workers worked five hours in one industry and then five in another industry or plant, Perkins replied that in some localities and industries it would destroy the purpose of bill: “I am told there is a plan to do so in certain textile towns.” Thirty-Hour Week Bill: Hearings Before the House Committee on Labor on S. 158 and H. R. 4557, at 18-19 (73d Cong., 1st Sess., Apr. 25 to May 5, 1933). Later, Representative Kent Keller (Dem. Ill.) related that a taxicab driver had told him that he worked 30 hours for an electric company and then drove taxis evenings and weekends; Keller then found out that “such is being done by employees of the Government generally, many of them owning their own cars and renting them out and driving them in the evenings and on Saturdays and Sundays. It seems to me that some direct, specific remedy to prevent that should be arrived at.” Perkins stated that she had not thought of this scenario, but only of movement from one mill to another within the same industry. When the country’s highest labor standards enforcer opined that

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because, as the AFL complained at the time, workers were virtually always ignored in setting up industry-level code authorities,15 “business domination of the code-writing process was virtually inevitable...[and g]enerally speaking...the wage-and-hour provisions were riddled with exceptions and loopholes....”16 Specifically, “in nearly every code,” as the principal contemporaneous scholarly study of the National Recovery Administration concluded, “the so-called basic week is qualified by exceptions—by various types of provisions designed to secure elasticity.”17

These elasticities (or, as they would be called today, flexibilities) were of four types: hours-averaging; general overtime; periods of various types during which basic hours could be exceeded; and permanent exceptions of certain occupational classes from basic hours.18 Of 695 codes, supplements and divisions, exceptions to the hours provisions were permitted: in 113 for hours-averaging;19 in 174 for general overtime;20 in 378 for peak and seasonal periods; in 394 for emergency

“[o]bviously, it is drastic to think about preventing people from earning a few pennies,” Keller had to remind her that: “On the other hand, several hundred Government employees drawing salaries from the Government and doing this same thing, interferes with others making a living. I do not think such should be permitted.” Unbowed, Perkins replied that “[p]erhaps they are earning only $900 a year and have 5 children,” prompting Keller to conclude the discussion by pointing out: “If that is true, the Government should pay wages high enough to make that unnecessary.” Thirty-Hour Week Bill: Hearings Before the House Committee on Labor on S. 158 and H. R. 4557, at 24.

17Lyon et al., The National Recovery Administration at 365.
18Lyon et al., The National Recovery Administration at 369-86.
19Lyon et al., National Recovery Administration at 369-70. Because averaging did not easily lend itself to enforcement and also caused irritation, the NRA in mid-1934 issued a policy precluding further inclusion of averaging provisions in codes. Id. at 374; Margaret Schoenfeld, “Analysis of the Labor Provisions of N.R.A. Codes,” MLR 40 (3):574-603 at 585 (Mar. 1935).
20Of the 174 codes with general overtime pay provisions, 84 provided for time and a third and 81 time and a half; 104 codes permitted unlimited hours, while 20 permitted fewer than 48, and 50 codes 48 or more hours. Four-fifths of the workers under overtime pay systems were covered by 11 codes (trucking alone accounting for 1.2 million). Lyon et al., National Recovery Administration at 375-76. The degree of elasticity made possible by these overtime pay systems was, in the view of a Brookings Institution study, “quite modest,” applying at most to one-fifth of the workers under codes. The authors did not find it easy to account for this result on rational grounds: “In part it doubtless reflects the
reparations and maintenance; in 30 for continuous process operators; in 579 for outside salesmen; in 683 for executives and supervisors; in 290 for office and clerical employees; and in 278 for professional and technical employees. Of the 290 codes excluding office and clerical workers, 58 placed no limits on their hours, 81

hostility of certain business elements to overtime rates of pay....” In part it also reflected the determination to spread employment, and in part it grew out of “a fear of some of the labor group that payment of overtime rates tends to react unfavorably upon basic rates.” Id. at 377. In contrast, an NRA study noted that the declining adoption of general overtime provisions in the codes over time “might seem to indicate a dissatisfaction” with them on the NRA’s part: “Labor was, of course, vocal in code negotiations in protesting overtime provisions as interfering with the Administration’s reemployment aims, but no general NRA policy developed as a result.” Reticker, Labor Provisions in the Codes at 93. Reticker also concluded that although time and a half during “normal times...would not be a significant deterrent [sic] because it would be cheaper than hiring part-time workers in a somewhat restricted labor market,” with the unlimited labor supplies of the mid-1930s, “overtime rates probably were a significant deterrent [sic].” Id. at 93 n.**. The fact that, despite the availability of a one-and-a third overtime provision for certain workers in the PRA, “few codes used it,” meant, in the view of Charles Roos, an NRA economist who was hostile to the program from the employer’s perspective, that “the vast majority of the hour provisions, as written by the NRA, were almost completely unenforceable; it was to the advantage of both employers and employees to disregard them in cases of rush orders....” Code makers did not adopt overtime pay, according to Roos, because unions, in objecting, stated that foremen, who did not personally have to meet added costs, worked employees overtime rather than going to the trouble of hiring additional employees. “Yet it seems the real ground for opposition was that labor wished to legislate power into the hands of the unions so that they could thereby obtain monopolistic control of wages; its leaders therefore fought all attempts to prescribe flexible hours even though they promised the worker extra pay. Moreover, the opposition was not confined to labor; industries also refused to accept the provision for the different reason that they preferred to insert exceptions in the codes to avoid the expense of overtime pay.” Charles Roos, NRA Economic Planning 138-39 (1937). Roos failed to notice that his logic compelled the conclusion that capital and not unions prevailed on this matter. After his forced resignation as NRA administrator, Hugh Johnson expressed his view to Congress that in any revised NIRA: “Provision should be made in all cases for time and a half for overtime.” Investigation of the National Recovery Administration: Hearings Before the Committee on Finance United States Senate, Part 6, at 2453 (74th Cong., 1st Sess., Apr. 13-18, 1935).

set their maximum hours at 48 and over, 26 at 41 to 47 hours, and 126 at 40 hours or under. From the fact that the modal hours-averaging period in codes with special provisions for office and clerical workers was about a month compared with three months for general code provisions, one NRA study concluded that the special provisions had been designed to meet employers' need "for elasticity to cover the end-of-the-month peak in office overtime."

Thus, virtually all codes excluded executive or supervisory employees—46 of them without even requiring payment of a specified (typically $35) weekly salary—on the ground that there was a "consensus of opinion" that such hours limitations were "not appropriate" for them; they were, in the even less enlightening locution of an NRA economist, exempted "for reasons that should be clear." Somewhat under one-half excluded professional employees and office or clerical employees from the basic protection against overlong hours. In articulating exclusions from the overtime provision of the FLSA, therefore, its drafters and Congress had at their disposal a rich set of empirical experiences to draw on. There is, however, no evidence that they ever evaluated the purposes or effects of those exclusions from the codes on the excludees. (Nor, apparently, did the International Labor Organization, which, in a jarringly uncritical conceptualization for the world's premier labor standards setting entity, declared that a "total exemption in favour of employees engaged in executive or managerial capacities is to be found in the P.R.A. [President's Reemployment Agreement] and in most codes....") One lesson, however, that could have been learned from the NRA

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22NRA, Tabulation of Labor Provisions in Codes at tab. VIII. For a somewhat different breakdown showing the same features, see Reticker, Labor Provisions in the Codes, tab. 35 at 129, who stated that of 578 codes 326 contained special provisions relating to office and clerical workers, of which 224 provided for longer hours than the codes' basic provisions.

23Reticker, Labor Provisions in the Codes, tab. 38 at 133, tab. 14 at 72.

24Reticker, Labor Provisions in the Codes, at 131 (quote).

25Calculated according to Leon Marshall, Hours and Wages Provisions in NRA Codes, tab. A-I to A-XI, at 32-73 (1935). According to an alternative NRA calculation, only nine of 578 codes lacked an exclusion of executives and supervisors from the hours limitation provision; of the 569 codes with the exclusion, 524 permitted unlimited hours above a certain wage, while the other 45 did not even impose this requirement. Reticker, Labor Provisions in the Codes, at 156.

26Lyon et al., The National Recovery Administration at 382.

27Roos, NRA Economic Planning at 140. Roos also observed that: "NRA shorter-hours rules, of course, did not apply to research workers because it was believed impossible to divide up creative work." Id.

28Hours of Work Provisions under the National Industrial Recovery Act" at 99. On
involved some employers’ strategy of “making wage-earners ‘executives’ to escape limitations on working hours.”

Some codes sought to avoid this abuse of making run-of-the-mill employees executives or supervisors “overnight” by limiting the number or proportion of workers who were permitted to work longer hours. For example, the Ice Industry Code limited those exercising supervisory functions and excluded from the hours provisions to one-seventh of all employees in manufacturing or distribution. The Retail Food and Grocery Trade Code limited the number of executives, proprietors, and partners working more than the maximum hours to one-fifth of employees in establishments with fewer than 20 employees and one-eighth in those with more.

Contrary to scholarly assertion, it is untrue that the NRA codes contained no exclusions of administrative employees. Indeed, the NIRA itself excluded administrative employees, albeit not in its Title I, which dealt with industrial recovery and the codes of fair competition, but in Title II, which authorized construction of public works to stimulate recovery and employ the unemployed: “All contracts let for construction projects and all loans and grants pursuant to this title shall contain such provisions as are necessary to insure that (except in executive, administrative, and supervisory positions), so far as practicable and feasible, no individual directly employed on any such project shall be permitted to work more than thirty hours in any one week.” These exclusions were contained in the original admin-

the President’s Reemployment Agreement, see below.

30Reticker, Labor Provisions in the Code at 165.

S. 1712, § 205 (73d Cong. 1st Sess., May 15, 1933). The language was identical to that used in the Emergency Relief and Construction Act of July 21, 1932; see above ch. 6. The fact that Wagner had introduced his bill on May 15 renders moot the point of chronological priority that Malamud, “Engineering the Middle Classes” at 2236, made concerning the discovery of an archival memorandum dated May 23 using the same language.

later New Deal white-collar statutory exclusions by failing to shed any light what­soever on the purpose of the exclusions or how an administrative position differed from an executive or supervisory one.

Among the industries whose code provisions on hours expressly excluded “administrative” employees were the electrical manufacturing,\(^\text{38}\) rayon and synthetic yarn producing,\(^\text{39}\) cement,\(^\text{40}\) chemical manufacturing,\(^\text{41}\) railway car building,\(^\text{42}\) fishery,\(^\text{43}\) and machinery and allied products industries.\(^\text{44}\) In addition, all, with the exception of the chemical industry, which—despite the Labor Advisory Board’s request that it be added\(^\text{45}\)—set forth no salary limit, conditioned the exclusion on a minimum weekly salary of $35.

At the chemical manufacturing code hearing on September 14, 1933, there was considerable discussion of the exclusions from the hours provisions, but none pertaining to administrative employees. The following May, after the code had been approved, the NRA issued an official code interpretation of the four categories mentioned in the Article II(a): “[a]ny person employed in an executive, admin-


\(^\text{45}\)Memorandum from LAB (J. S. Gould) to Deputy Administrator Charles Martin on Chemical Manufacturing Code as Revised Dec. 18, 1933 (Dec. 26, 1933), in \textit{NAMP}, Microcopy No. 213: DSNRA 1933-36 (1953), Roll 23: Code 275: Chemical Manufacturing Industry. The LAB mentioned the $35 salary level with respect to managerial and executive employees; it is unclear whether administrative employees were intentionally or inadvertently omitted.
Of greatest interest here is the NRA's "rule of reason" interpretation of "administrative capacity," which even under the FLSA the DOL failed to define until 1940, when it issued expansively pro-employer regulations, which, over the ensuing decades, enabled firms lawfully not to pay overtime to millions of their workers. Unlike the three other groups, the NRA advised that those included under the administrative category "should be strictly limited." It also imposed a $35 minimum salary. It then went on to observe:

It is impossible to lay down any general definition which would be applicable to all companies which are members of the Chemical Alliance. Perhaps the best method of indicating the personnel which may be included under the category is to give examples such as:

1) Plant managers  
2) Chief accountants  
3) Office managers  
4) Department managers  
5) Credit managers  
6) Division heads

In companies where a large number of persons are employed the immediate assistants of the above categories may be included under those employed in an administrative capacity.

46Code No. 275: Chemical Manufacturing Industry (Feb. 10, 1934), Art. II(a), in NRA, Codes of Fair Competition, 6:396.

47NRA, Code of Fair Competition for the Chemical Manufacturing Industry, Official Code Interpretation No. 275-8 (May 11, 1934) (issued by George L. Berry, Division Administrator), in NAMP, Microcopy No. 213: DSNRA 1933-36 (1953), Roll 23: Code 275: Chemical Manufacturing Industry. Berry was the long-time president of the Printing Pressmen's union. Approval of the interpretation was recommended by Deputy Administrator Joseph Battley on the same document; Battley's interpretation of July 13, 1934, which was presumably identical, was in turn approved by the Division of Research and Planning and the Code Authority. Memorandum on Chemical Manufacturing Industry Code; Interpretation of July 13, 1934, from G. K. Hamill, Division of Research and Planning, to Capt. Joseph F. Battley, Deputy Administrator (July 16, 1934); Memorandum on Chemical Manufacturing Industry Code, Interpretation of Article II, Section (a), from Geo. H. Mead, Administration Member, Code Authority, Chemical Mfg. Industry, to Deputy Administrator Jos. F. Battley (July 27, 1934), in id.

48NRA, Code of Fair Competition for the Chemical Manufacturing Industry, Official
With the exception of chief accountants and credit managers, the assignment of the other managers and heads to the administrative rather than to the executive or supervisory categories is puzzling. One reason may lie in the special focus of the NRA’s definition of “executive capacity,” which did not refer to executives in their function as bosses of other workers, but as “officials...who take part in developing the policies to be followed and who make final decisions concerning management problems.” (In addition, “the immediate assistants of the executives who are required by the nature of their duties to work in close cooperation with the executives” and were paid more than $35 weekly could also be included under this rubric.) In contrast, a supervisor was defined as a hands-on boss, “whose major responsibilities and duties consist of directing the work of others....” The NRA commented that the category should be limited to persons such as plant foremen, supervisors of fleets of truck drivers, heads of stenographic departments, and head draftsmen.49 Presumably the plant, office, department, and division managers classified as administrative employees were not situated high enough in the corporate hierarchy to be executives, but were either too high in the hierarchy or too distant from hands-on bossing to qualify as supervisors. Although their relatively prominent positions strongly suggest that the NRA viewed them as executive-like administrators and not as clerical-like administrative employees, the NRA’s history of the chemical manufacturing code exaggerated in asserting that the interpretation had had the effect of clarifying a provision “whose meaning was somewhat doubtful.”50

The problem of the so-called employee or white-collar worker which so bothered early generations of Marxists, and which was hailed by anti-Marxists as a proof of the falsity of the “proletarianization” thesis, has thus been unambiguously clarified by the polarization of office employment and the growth at one pole of an immense mass of wage-workers. The apparent trend to a large nonproletarian “middle class” has resolved itself into the creation of a large proletariat in a new form. In its conditions of employment, this working population has lost all former superiorities over workers in industry, and in its scales of

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pay it has sunk almost to the very bottom.  

Before scrutinizing the provisions of individual codes, it is necessary to examine the exclusion of white-collar employees from the President’s Reemployment Agreement, into which the NIRA authorized the President to enter with, and to approve between and among workers, unions, firms, and industrial associations, if he believed that such agreements would effectuate the NIRA’s policy and were consistent with the industrial codes of fair competition required by the NIRA. President Roosevelt used the PRA as a temporary blanket code to gain more time to draft and adopt individual codes of fair competition for each industry. The PRAs, which went into effect on September 1, 1933—and were, unlike the codes of fair competition, not legally enforceable—contained child labor, minimum wage, and maximum hours provisions. Shortly before the PRA was issued on July 20, 1933, the NRA indicated that “differences in the conditions of employment would be recognized, and that distinct compacts were contemplated for industrial labor and the white-collar worker.” NRA Administrator Hugh Johnson verified reports that “distinctive wage and hour scales were under consideration for laborers and white collar workers. It is his contention that all classes of workers must share proportionately in the new purchasing power if the maximum benefits are to accrue.” Although the PRA neither quite lived up to the Times headline (“White Collar Code and One for Labor, Washington’s Plan”) nor enabled the excluded white-collar workers to benefit at all, it did specify that the hours provisions, which, in an effort to reemploy the unemployed, limited the workweek of an individual factory or mechanical worker or artisan to 35 hours until December 31, 1933, but gave employers the right to work them 40 hours a

53“The President’s Reemployment Agreement,” MLR 37:262, 263 (1933); Bellush, Failure of the NRA at 48-52. According to Basil Rauch, The History of the New Deal 1933-1938, at 93-95 (1944), the stock market crash in July and the probability of companies’ evading those provisions of the NIRA that were unfavorable to them prompted the NRA to launch its campaign for immediate compliance with minimum-wage and maximum hour rules.
week for any six weeks until then, limited the workday to eight hours. In contrast, employers agreed "[n]ot to work any accounting, clerical, banking, office, service, or sales employees (except outside salesmen) in any store, office, department, establishment, or public utility" more than 40 hours per week. These maximum hours did not, however, apply to "registered pharmacists or other professional persons employed in their profession" or to "employees in managerial or executive capacity, who now receive more than $35 per week...." The term "professional persons" was interpreted to include doctors, lawyers, and nurses, as well as newspaper reporters, editorial writers, rewrite men, and other members of editorial staffs, interns, hospital technicians, and research technicians. This salary was about two to three times the weekly minimum wage of $12-$15 for covered white-collar workers (depending on the size of the city) guaranteed by the PRAs.

Despite the PRA's "antisubterfuge" provision, which obligated employers not "to frustrate the spirit and intent of this Agreement which is...to increase employment by a universal covenant..., and to shorten hours and to raise wages for the shorter week to a living basis," employers sought to give "meaningless titles to minor employees to exempt them from the hours provisions...." Consequently, National Recovery Administrator Johnson soon found it necessary to issue a state-

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57 President's Reemployment Agreement, ¶ 3, in NRA, *Bulletin No. 3: The President's Reemployment Program* 7 (1933).
58 President's Reemployment Agreement, ¶¶ 2, 4, in *The President's Reemployment Program* at 7. The maximum hours limitation also did not apply to "very special cases where restrictions of hours of highly skilled workers on continuous processes would unavoidably reduce production but, in any such special case, at least time and one-third shall be paid for hours worked in excess of the maximum." *Id.* at ¶ 4. Bizarrely, the aluminum industry code, which paid time and a half for overtime for continuous operations, denied overtime pay to workers who were held over because of lack of relief by another employee. Code No. 464: Aluminum Industry (June 26, 1934), Art. 3(g), in *NRA, Codes of Fair Competition*, 12:113-29 at 122 (1934).
59 "Official Explanation of the President's Reemployment Agreement," in *NRA, Bulletin No. 4: What the Blue Eagle Means to You* 5-11 at 7 (1933).
60 "Interpretations of the President's Reemployment Agreement," in *NRA, Bulletin No. 4: What the Blue Eagle Means to You* 12-20 at 17.
61 President's Reemployment Agreement, ¶¶ 5-6, in *The President's Reemployment Program* at 7-8
62 President's Reemployment Agreement, ¶ 8, in *The President's Reemployment Program* at 8.
ment defining “manager” and “executive.” He declared that in approving exceptions for such persons from the codes’ maximum hours provisions, the NRA did not intend “to provide for the exemption of any persons other than those who exercise real managerial or executive authority, which persons are invested with responsibilities entirely different from those of the wage earner and come within the class of the higher salaried employees.” Johnson also used the opportunity to emphasize that paying less than the threshold $35 weekly salary created an irrebuttable presumption that the employee was not an “exempt” “manager or ‘executive.’” Why he did not issue a counterpart definition for so-called administrative employees is unclear. That, however, the NRA maintained a breathtakingly generous categorization of white-collar workers emerged from its release in late July of PRA interpretations declaring: “The ‘white collar’ worker class limited to 40 work hours a week includes maintenance forces such as charwomen, window cleaners [sic], & c.”

Under the PRA, then, the salary level and the description of managerial duties were supposed to establish a clear divide between protected and unprotected employees. Although the PRA and the codes of fair competition, unlike the FLSA, did not expressly exclude managerial-executive employees from the minimum wage provisions, the high salary test functioned under both regimes as a super-minimum wage vis-à-vis any employer wishing to take advantage of the exemption. Moreover, whereas the FLSA merely gave employers a financial incentive

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64 *MLR* 37:1083 (1933). This narrow definition was similar to the one used in the Retail Food and Grocery Trade code, which, after defining “executive” as “an employee responsible for the management of a business or a recognized subdivision thereof,” in its hours provision suggested that each establishment had only one excludible executive: “an establishment which operates a grocery and meat department as separate departments shall be permitted to exempt one worker in addition to the proprietor or executive...from all restrictions upon hours....” Code No. 182: Labor Provisions for the Retail Food and Grocery Trade (Nov. 15, 1933), Art. II, § 5, Art. V, § 2(c), in NRA, *Codes of Fair Competition*, 3:633-43 at 637-39.

65 *MLR* 37:1083 (1933). Johnson also issued an interpretation to the effect that so long as he was receiving more than $35 per week, the employee could act “primarily, although not wholly, in a managerial or executive capacity” without causing his employer to forfeit its exemption. “Interpretations of the President’s Reemployment Agreement,” in NRA, *Bulletin* No. 4: *What the Blue Eagle Means to You* 12-20 at 17. For an example of a code that excepted all employees receiving more than $35 per week and executives and managerial and supervisory staffs from any hourly limitations, see Code of Fair Competition for the Automobile Manufacturing Industry, § III, in NRA, *Codes of Fair Competition* 1:251-57 at 253, 255 (1933).

to hire additional workers rather than to pay premium overtime to existing em­
ployees, the PRA sought to expand employment more directly by obliging employ­
ers not to work their workers more than forty hours.67 Nevertheless, freeing
employers from this restriction with respect to their managerial employees weak­
ened the reemployment effect under both regimes.

Textiles and Clothing

The main office where the clerks sat around at old chewed-up desks getting sore about
their wages, instead of going straight into White Collar Heaven....68

The exclusions of white-collar employees from the codes of fair competition
were, as already adumbrated, extensive, varied, and pervasive. The very first code
that Roosevelt approved, that for the cotton textile industry, initially excluded
office and supervisory staffs together with repair crews, engineers, electricians,
firemen, shipping, watching, and outside crews, and cleaners from its 40-hour
week.69 In transmitting the proposed code and his report on it to Roosevelt, NRA
Administrator Hugh Johnson commented: “The exception of office and super­
visory staff from the hour provisions is inconsistent with the principle of the
President’s statement of June 16, 1933, which requires inclusion of the ‘white
collar’ class within all benefits of the Act, and an agreement to remedy this defect
was reached.”70 Johnson was referring to Roosevelt’s statement accompanying his
signing into law of the NIRA, which included a backward glance at his inaugural
address laying down the proposition that “nobody is going to starve in this
country.” Roosevelt then added that it seemed equally plain to him that “no
business which depends for existence on paying less than living wages to its

67Codes of fair competition did include premium overtime provisions. For a tabular
overview, see “Summary of Permanent Codes Adopted Under NIRA Up to November 8,
1933,” MLR 37:1333 (1933).
68Richard Bissell, 7½ Cents 6 (1953).
69[NRA Administrator] Hugh Johnson to the President (July 9, 1933), in Code No. 1:
Cotton Textile Industry, in NRA, Codes of Fair Competition, 1:3 (1933). On the
numerous structural advantages that cotton textile firms enjoyed vis-à-vis labor in the code
creation process, see Louis Galambos, Competition and Cooperation : The Emergence of
a National Trade Association 203-26 (1966).
70[NRA Administrator] Hugh Johnson to the President (July 9, 1933), in Code No. 1:
Cotton Textile Industry, in NRA, Codes of Fair Competition, 1:12 (1933).
workers has any right to continue in this country. By ‘business’ I mean the whole of commerce as well as the whole of industry; by workers I mean all workers, the white collar class as well as the men in overalls; and by living wages I mean more than a bare subsistence level—I mean the wages of decent living.”

To be sure, Roosevelt’s focus on living wages hardly seemed directed at protecting highly paid executives, let alone shortening their hours, but, nevertheless, when he approved the cotton textile code on July 9, 1933, his executive order subjected this approval to several conditions, one of which was that “office employees be within the benefits of the code.”

Despite the presidential order, the final code (which Roosevelt approved on July 17, three days before releasing the PRA), while limiting the weekly hours of other employees to 40, subjected office employees to the first hours-averaging of any code—40 over a period of six months.

One of the numerous studies that the NRA Division of Review performed after the NIRA had been struck down frankly described the dispute over the insertion of an hours provision for office workers in the cotton textile code: “Since the schedule of hours of the Cotton Textile code had been dictated by the desire to
limit production, and since there was no desire to limit the production of office workers, the President’s suggestion was not acceptable to the proponents of the code. Accordingly, a week later the Cotton Textile Industry Committee asked for and secured Roosevelt’s approval of the provision averaging 40 hours over six months: “Thus the Administration had committed itself to looser hours for office workers than for mill workers.”

The first industry to go through the code process, cotton textiles were a “sick industry,” subject to “overcapacity, declining demand, and intense competition for a shrinking market.” The very day that Roosevelt signed the NIRA, the Cotton Textile Industry Committee declared its belief that “the revolutionary reduction of individual working hours and resulting spread of employment that will be effected by the proposed code is a constructive and far-reaching method of dealing with this as with numerous other problems in the industry growing out of the present emergency.” Three days later, against the background of textile production “greatly in excess of any possible consumption, and...a glutted market in the near future...unless stabilized conditions are brought about quickly,” NRA Deputy Administrator William Allen, a former chairman of Sheffield Steel Company and director of American Rolling Mills Company, recommended a hearing for the industry at as early a date as possible: with mills demanding 60 hours or more per week from employees and several strikes having been called, any delay in approving the code would be very disturbing.

The opening session on June 27, 1933, of the textile code hearing, which 800...
spectators attended, was, according to the *Times*, “[h]ailed as one of the most significant assemblages in the history of this country...”80 The hearings’ governing spirit and attitude that the NRA wished to project was embodied with all imaginable clarity in a remarkable quasi-directive that Allen, the presiding officer, issued at the beginning of the second day of the cotton textile hearings:

Before proceeding with the meeting, there is one statement I would like to make, particularly to the newspapermen. [T]his conference and hearing is being carried on for the purpose of ascertaining the facts, and certainly insofar as the actions yesterday would indicate, there was no spirit of fight or animosity. I think it is very proper until such animosities are disclosed, if they are, we are entirely in order in soliciting your support in anything that you may present to the public in keeping away from a portrayal of this situation as being a fight between capital and labor.81

As George Sloan, the president of the Cotton Textile Institute, presented the employers’ proposed code, Administrator Johnson was brought up short by its definition of “‘employees’” as including “‘all persons employed in the conduct of such [cotton textile] operations.’” Falling into the unthinking custom of referring to non-production workers in non-commercial terms, Johnson asked: “Does that mean office help?” Cutting to what was presumably the quick of Johnson’s question, Sloan replied: “General, that is answered in clause 3 where we say that so far as the 40 hour is concerned, it excepts office and supervisory staff....”82 Johnson’s Deputy Allen sought to move on to the next clause in the code, but Johnson’s attention was riveted on the excluded employees:

General Johnson: No, I have another question. In other words, that of course does not affect the minimum wage, because...employers of the cotton textile industry shall not operate on a schedule of hours of labor for their employees—except repair shop crews, engineers, electricians, firemen, office and supervisory staff, shipping, watching and outside crews and cleaners—in excess of 40 hours per week. When you speak of the minimum wage, you do not except those people but they are not on the same basis of

80*“Cotton Industry Opposed by Labor on Its Trade Code,”* *NYT*, June 28, 1933 (1:6). Administrator Johnson was somewhat less effusive in declaring that it “may prove one of the most momentous meetings of this kind that has ever been held anywhere” without revealing what “kind” he meant. *NRA, HCFC*, Hearing No. 133: Cotton Textile, NRA Release No. 13 at 1 [no pagination] (June 27, 1933) (Film No. 22).

81*NRA, HCFC*, Hearing No. 133: Cotton Textile, NRA Release No. 16 at 3 (June 28, 1933).

82*NRA, HCFC*, Hearing No. 133: Cotton Textile, NRA Release No. 14 at 52 (June 27, 1933).
spreading work, although they are on the same basis of minimum wage, is that right?
Mr. Sloan: Well, yes, but their wage would be much higher than this minimum. The
minimum wage would apply, but the hours would not apply....

After Johnson had been seemingly mollified that those excluded from the
hours provision were covered by the minimum wage provision and earned a much
higher salary anyway, Sloan handed off the code presentation to Robert Amory, the
president of the National Association of Cotton Manufacturers, who guessed that,
apart from shipping, two to three percent of cotton textile employees fell within the
exclusions. Amory explained why each subgroup had to be excluded beginning
with repair shop crews, who might be put on a standard 40-hour week, but “it is
obvious in the case of a breakdown you could not tell what you want your repair
crew to do, and you could not get in outsiders, because they would not know how
to do that particular job or repair, so there must be a certain amount of flexibili-

The same considerations applied to engineers, electricians, and firemen; this
last group in particular, though not involving “much work,” required “a great deal
of knowledge and experience,” and, at least in Massachusetts, a license. Conse-
sequently: “You could not double them up suddenly and get the licensed fire-
men...and the job is purely a supervisor job....”

Moving on to office workers, Amory testified that “the word ‘office’ in most
mills refers to a very few people, it covers the paymaster and cost clerk in some
mills. Our cost clerks are working 80 hours a week trying to figure out under the
code; there is only one of him; you cannot double him up.” He then proceeded to
declare watchmen nonfungible, individually irreplaceable, and in need of long
training periods: “Watchmen the same way. In a big plant to educate a new
watchman is a six month’s job before he knows all the corners he has to go around
and pull his time clock,...know where there are fire sprinkler valves, and you have
to trust him not leave a valve in a dangerous condition....” Even Amory was hard-
pressed to construct a justification for shipping clerks: “I do not know exactly why
that was put in, but I think the same thing applies, and you probably have an
average of 40 hours a week, but in heavy shipping periods you might want crews

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83NRA, HCFC, Hearing No. 133: Cotton Textile, NRA Release No. 14 at 52-53 (June
27, 1933).
84NRA, HCFC, Hearing No. 133: Cotton Textile, NRA Release No. 14 at 54 (June 27,
1933).
85NRA, HCFC, Hearing No. 133: Cotton Textile, NRA Release No. 14 at 53 (June 27,
1933).
86NRA, HCFC, Hearing No. 133: Cotton Textile, NRA Release No. 14 at 54-55 (June
27, 1933).
to work overtime for the time being and work slack the next week.” For the final group the justification was so self-explanatory that he did not even attempt to reveal it: “Supervisory staff I am passing over: I will assume we will have to use our regular men.”87 (After the cotton textile industry code’s approval, the code authority defined supervisory staff to include “all who direct the activity of others, such as executives, department heads, superintendents, paymasters, foremen[,] overseers and second hands.”)88

After Amory had completed his survey, Johnson intervened, but his declarations were at times obscure. He began by noting: “I think we have to undertake a little inconvenience. If office workers and the white collar class generally are exempted on account of the way they fit into the particular job we are going to very, very seriously impair the operations.” Equally obscurely, given the total exclusion, Amory retorted: “I do not propose that they should be left out entirely.” He seemed to hint that the exclusions were merely a temporary phenomenon caused by the code authority’s tight schedule: “We have to have the trained men so that they know where all of the pipes go and where all of the valves are, and where all of the wires go. To say we have to put it [a repair gang] suddenly on a 40 hour basis and put in green men—well, I would not sleep nights if we did that.”89

Johnson and Amory then segued into an oddly disjointed colloquy about watchmen: in response to the employers’ renewed assertion that they had to possess firm-specific detailed knowledge, which could not be imparted in six weeks, the NRA Administrator opined: “That is an administrative, executive job.” Since watchmen, though not production workers, are more akin to manual than office employees, it is unclear in what possible sense they could be administrative let alone executive employees. And in fact, Johnson, executing an about-face, then claimed, based on army experience, that they could be trained in much less than two weeks, though he offered employers three. This generosity failed to propitiate Amory, who complained that such a procedure “would mean that our supervisory men, who now work almost to the breaking point, would have to work that many more hours....” Nevertheless, he, too, did an about-face, conceding that Johnson

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was right that “the work should be spread out” and assuring the NRA that the committee had no intention not to do so. In turn, Johnson acknowledged that employers needed “flexibility,” but insisted that he did “not think much of the argument that the banks...do not have to play [sic] and most of the old merchandising industries do not have to pay. I think if we are going to start out here we have to apply this to everybody.”

Despite this exclusion of office workers from the hours provision of the original cotton textile industry code, and despite the apparent possibility that the exclusions would be narrowed before being finalized, none of the numerous labor representatives testifying at this particular hearing took up the cudgels for them (although their counterparts did, as will be seen below, at many hearings in other industries). These acquiescent labor officials ranged all the way from AFL president William Green, Sidney Hillman (the president of the Amalgamated Clothing Workers, member of the Labor Advisory Board, and influential New Dealer), and Thomas McMahon, the president of the United Textile Workers of America, to June Croll, a representative of the Communist-affiliated National Textile Workers Union, who, according to The New York Times, “protested against the code from every angle, saying that it was totally inadequate for the workers.” One labor representative, William Batty, secretary of the New Bedford, Massachusetts Textile Council, did point out that: “Since the purpose of the Act is to spread employment it is clear the opportunity here afforded to absorb unemployed mechanics, engineers, electricians, firemen, etc., should not be lost.” However, the other group of excluded workers he was more than willing to sacrifice: “We submit that the only legitimate exception to the maximum hours are the office and supervisory staff.”

This labor representative, too, received high marks from the Times, which commented that he had “received several rounds of applause from the audience for the presentation of his case in the interest of the cotton mill workers. He exhibited ready knowledge of the technical points involved and was ever ready with some

91NRA, HCFC, Hearing No. 133: Cotton Textile, 104-15 (June 28, 1933).
92NRA, HCFC, Hearing No. 133: Cotton Textile, 126 (June 28, 1933).
93NRA, HCFC, Hearing No. 133: Cotton Textile, 39-68 (June 28, 1933).
95“Cotton Men Raise Minimum Wage $2,” NYT, July 1, 1933 (1:4, 2:6).
96NRA, HCFC, Hearing No. 133: Cotton Textile, 80 (June 28, 1933).
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factual statement relating to working conditions, duties of workers and labor stress." A Machinists union official demanded time and a half for repair shop crews, while an Electrician's official protested the exclusion of electrical workers.

Senator Hugo Black himself, the eponymous congressional advocate of the AFL's 30-hour bill, also appeared at the hearing to urge that, regardless of the length of the maximum workweek, all codes should also include a maximum number of daily hours because a 40-hour week with no daily maximum would lead to reemploying one million workers compared to four times as many in combination with an eight-hour maximum. Black, who had agreed to relax his 30-hour bill to exclude some white-collar workers, also failed to promote their coverage under the cotton textile code.

Although Maud Younger, the chairman of the National Woman’s Party, which opposed labor laws that covered only women, failed to mention office workers in her testimony, Lucy Mason, the general secretary of the National Consumers' League, was the sole witness who did. The NCL, which was originally founded to combat the exploitation of women workers, but later also advocated wage and hour regulation for men as well, had developed a special expertise in the cotton textile industry and southern labor conditions in general. Mason, who, interestingly, had supported herself as a legal stenographer, and in 1937 went to work for the CIO's Textile Workers Organizing Committee in the South, testified that “I think that the President meant what he said when he said ‘including white collar workers.’” In keeping with the NCL’s opposition to discrimination in labor standards legislation, Mason then observed:

97 "Cotton Mills Put a Child Labor Ban into Textile Code," NYT, June 29, 1933 (1:5, 6:5-6).
98 NRA, HCFC, Hearing No. 133: Cotton Textile, 100 (June 28, 1933) (H. J. Carr, general vice president, IAM).
99 NRA, HCFC, Hearing No. 133: Cotton Textile, 103 (June 28, 1933) (Joseph McDonagh, IBEW).
100 NRA, HCFC, Hearing No. 133: Cotton Textile, 96-97 (June 28, 1933).
101 See above ch. 6.
102 NRA, HCFC, Hearing No. 133: Cotton Textile, 29-33 (June 28, 1933).
105 NRA, HCFC, Hearing No. 133: Cotton Textile, 40 (June 28, 1933).
The proposed code excludes from the maximum hours regulations repair shop crews, engineers, electricians, firemen, office and supervisory staff, shipping, watching and outside crews and cleaners. The exclusion of this large group of workers is in plain violation of the act’s intent to spread employment among all types of workers.

Adverting to the ‘grave yard’ shift, last week in Detroit I met a white-collar worker who had worked 36 + 39 hours consecutively in the automobile industry, with only breaks for meals.\textsuperscript{106}

On June 30, two days after the end of the first NRA code public hearing, the Cotton Textile Industry Committee passed a resolution authorizing its president, Sloan, to make a statement on the code organization’s behalf to the NRA to this effect: “An arrangement will be worked out by July 30, 1933, regarding office employees, with a view to bringing them within the hours provisions of the Code, with due allowance for the flexibilities called for.”\textsuperscript{107} Adopting as his own employers’ self-regarding demand for flexibility, Deputy Administrator Allen the next day recommended that immediate steps be taken to include office workers within the code’s hour provisions and that instructions be issued to include all other excepted employees within those sections “as promptly as possible with due allowance for flexibility.”\textsuperscript{108}

When additional hearings were held on October 9, 1933—“invade[d]” by many of the textile strikers from Paterson, New Jersey\textsuperscript{109}—on modifications to the cotton textile code, Francis Gorman, international second vice president of the UTWA, continued the tradition of union disregard of white-collar workers. While four members of the NTWU again ignored them altogether,\textsuperscript{110} Gorman listed among the code’s defects its exclusion of too many groups from the maximum hours provision; though mentioning supervisory staff in addition to the blue-collar

\textsuperscript{106}NRA, \textit{HCFC}, Hearing No. 133: Cotton Textile, 40-41 (June 28, 1933).


groups, he omitted office workers. And even when he noted that since the 40-hour week was not putting the unemployed back to work, the week should be reduced to 30 hours for everyone in the finishing, dyeing, and thread departments, and later in the whole industry, with no exceptions or exemptions (other than for emergencies at time and a half), he still failed to include office workers.111

And even for production workers, the attempt to obtain wide reemployment in cotton textiles was, according to the International Ladies’ Garment Workers’ Union’s lawyer, Elias Lieberman,112 an ““absolute failure.” The seeming advantage of introducing a 40-hour week has resulted in a disadvantage to the workers, owing to the wholesale evasion by the employers of the provision prohibiting the speed-up of the employees.”113

Other codes followed in the exclusionary tracks laid by the cotton textile code.114 Like the PRA, which “profoundly affected later codes in the matters covered and the phraseology used,”115 the cotton textile code established patterns that exerted powerful influence on later codes.116 The very first group of codes


112Lieberman was the “ILGWU legal representative in Washington at all NRA and NLRB hearings on our cases. Here was a labor lawyer who had learned about industrial conflict from the bottom up. Born in Russia, he had come to this country as a student. Becoming a waistmaker, he joined our Local 25, and was its first ‘clerk.’ In those days that job combined the duties of manager, business agent, secretary, and office staff. Lieberman also was the first manager of our union’s weekly publication, Justice, and its counterparts in Yiddish and Italian. Working by day, he studied law at night....” http://dwardmac.pitzer.edu/Anarchist_Archives/bright/pesotta/chap27.htm

113NRA, HCFC, Hearing No. 130: Cotton Garment, 478 (June 19, 1934).

114Ironically, LAB chairman Leo Wolman telegraphed Johnson at the outset of the code process that with respect to the 40-hour week, which was too long to absorb the unemployed, LAB members were “reassured by statement of General Johnson that decision in this industry [cotton textile] will not constitute precedent for others.” Telegram from Leo Wolman to General Hugh Johnson (July 8, [1933]), in NAMP, Microcopy No. 213: DSNRA 1933-36 (1953), Roll 40: Code 1: Cotton Textile Industry. Unintended irony also attaches to the statement that: “[I]f Roosevelt and Johnson expected that the inclusion of office workers in the Cotton Textile Code’s system of hours regulation would set the precedent for all codified industry, they were wrong. ... Without constant vigilance on the part of the administration, industries continued to exempt office workers from hours regulation.” Malamud, “Engineering the Middle Classes” at 2262-63. Since the maximum workweek for office employees was 40 hours averaged over six months, not only was there no limit on weekly hours, but no overtime premium was paid for hours beyond 40.

115Lyon et al., National Recovery Administration at 306.

116Lyon et al., National Recovery Administration at 304.
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approved by Roosevelt in the summer of 1933 also discriminated against white-collar workers. Just days after the finalization of the cotton textile code, the president approved the wool textile code, which imposed a blanket exclusion from its 40-hour rule on office and supervisory staff.\(^{117}\) The coat and suit industry code prohibited a schedule of more than 35 hours except for clerical and service employees working in office and shipping departments; non-manufacturing employees were not permitted to work more than 40 hours. No overtime work was permitted unless the Administrator granted an extension of hours in the busy season if he concluded that labor in the industry was fully employed and conditions made it advisable.\(^{118}\) While the code for the electrical manufacturing industry excluded executive, administrative, and supervisory employees from its 40-hour week limitation,\(^{119}\) and the rayon and synthetic yarn producing industry excluded executive, administrative, supervisory, and technical employees,\(^{120}\) the iron and steel industry code excluded executives and supervisors and their staffs from the 40-hour average over six months subject to a 48-hour/6-day limit.\(^{121}\) The hosiery industry code also contained a provision permitting the averaging of office employees’ 40-hour week over six months.\(^{122}\)

Oddly, at the rayon and synthetic yarn producing hearings, which took place less than a month after her appearance at the cotton textile hearings, Lucy Mason failed even to ask exactly who “administrative” employees were, let alone to raise any objections to their exclusion or that of any of the other categories of white-collar employees. Instead, on behalf of the NCL—which she described as an “organization whose purpose is to arouse the consumer sense of responsibility for conditions under which the workers are employed in industry and distribution”\(^{123}\)—she “want[ed] to congratulate the industry in [sic] including all em-


\(^{119}\)Code No. 4: Electrical Manufacturing Industry (Aug. 4, 1933), § 4(b), in NRA, *Codes of Fair Competition*, 1:43-50 at 47.


\(^{123}\)NRA, *HCFC*, Hearing No. 387: Rayon and Synthetic Yarn Producing 77 (July 27, 1933) (Film No. 59).
ployees except the salary roll in the code on the subject of maximum hours of work...."124 Her rather gentle criticism was largely confined to admonishing the industry for its "unwise laxity" in subjecting all employees covered by the 40-hour week to the "flexible provision" of hours-averaging over four weeks.125 In her report on the code following revision based on the findings at the hearing, Rose Schneiderman of the LAB (who was president of the Women's Trade Union League) failed to mention the matter of hours at all.127

The evolution of the coat and suit industry code was atypical. The code that the three employers' associations in the trade submitted on July 13, 1933 stated that employers "shall not operate on a schedule of hours of labor for their employees, except employees working in office and shipping departments, in excess of...30...hours per week. Overtime is expressly prohibited."128 It thus failed to limit hours for white-collar workers at all. Although the code's main features had been worked out in negotiations with the ILGWU, the union not only broke with the employers over the issue of piece work, but began to prepare a strike of 85,000 workers just hours after presentation of the code.129 When, a week later, on the eve of the code hearing, the ILGWU became the first union to offer its own code,130 the hours provision was identical with the employers' except that it substituted 30 for 40 hours, thus again leaving white-collar workers unprotected.131

At the hearing on July 20, at which attention was focused on the question of absorbing the unemployed by eliminating overtime and reducing hours, no one raised the issue of white-collar workers—not even Morris Hillquit, the ILGWU's

124NRA, HCFC, Hearing No. 387: Rayon and Synthetic Yarn Producing 79 (July 27, 1933).
125NRA, HCFC, Hearing No. 387: Rayon and Synthetic Yarn Producing 81 (July 27, 1933).
129"Cloak Code Filed, Sets 40-Hour Week," NYT, July 14, 1933 (1:7, 10:2); "Garment Workers Vote for a Strike," NYT, July 14, 1933 (10:8).
130"Rival Code Offered by Garment Union," NYT, July 20, 1933 (1:2).
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attorney, who for decades had been the Socialist Party’s leading theoretician. The following and final day’s hearing saw the ILGWU president, David Dubinsky, testify on a wide range of issues, but neither he nor any other witness (including Louis Hyman, president of the Communist Needle Trade Workers Industrial Union) even alluded to the problem. Over the next two weeks a series of intensive negotiations, in part brokered by the NRA, succeeded in averting a strike and reaching a compromise code, which included the 35-hour week for manufacturing workers. Since the parties’ rival proposed codes had ignored clerical workers, it was, in the wake of the debacle over the cotton textile code, presumably under the NRA’s guidance that the clerical and service workers in office and shipping departments, reappearing subsumed under “[n]on-manufacturing employees,” were finally subject to a 40-hour limit.

Practical experience with this restriction over the next few months apparently prompted dissatisfaction among employers, which requested amendments of this and other code provisions. The employers proposed to add a provision that modified (but in fact negated) the prohibition on non-manufacturing employees’ working more than 40 hours a week by permitting certain of these employees, including shipping clerks and “clerical help,” to work overtime under rules issued by the code authority. The neglect characteristic of the union’s attitude toward white-collar workers’ hours at the original coat and suit code hearings in July 1933 was transformed into unprecedentedly passionate concern at the hearing the following May on modification of the code requested by the code authority. One of these proposals was described by an NRA Deputy Administrator as “a minor

132NRA, HCFC, Hearing No. 103: Coat and Suit Industry 35-48 (July 20, 1933) (Morris Hillquit) (Film No. 13). Hillquit died a few months later.

133NRA, HCFC, Hearing No. 103: Coat and Suit Industry 1006-1034 (Dubinsky), 1041-50 (Hyman) (July 21, 1933). No representative of the Labor Advisory Board testified.

134“Moving to Avert Garment Strike,” NYT, July 22, 1933 (5:6); “Unable to Agree on Garment Code,” NYT, July 24, 1933 (8:1); “Cloak Code Ends Threat of Strike,” NYT, Aug. 7, 1933 (1:5).

135Unfortunately, as the NRA’s own history of this code revealed, there was no record of these post-hearing negotiations and what was discussed was not revealed. Walter Simon, “History of the Code of Fair Competition for the Coat and Suit Industry” at 23-24 (Nov. 11, 1935), in NAMP, Microcopy No. 213: DSNRA 1933-36, Roll 28 (1953).


change...."¹³⁸ By permitting non-manufacturing employees to “work overtime under such rules and regulations as the Code Authority shall prescribe,”¹³⁹ employers, who controlled the code authority, thus proposed to arrogate to themselves the power that the original code had conferred on the NRA Administrator. Alexander Prinz, representing the code authority, did not even find it necessary to offer a detailed explanation:

You all know the purpose of that. It is a seasonal business. There comes a time when the work cannot be done properly in 35 hours.

And there is a further little additional help in there, whereby you can stretch the hours, making them start at 8 a.m. and quit at 6 p.m. There is a stretch of more than 7 hours there. You can use any 7 that you want. It is purely a service proposition, and is needed in the industry.

That is all there is to say on it.¹⁴⁰

Since the original code limited clerical workers to 40 and not 35 hours, there was more to say on it and labor representatives immediately objected. When the ILGWU’s lawyer, Lieberman, went on the offensive by proposing that the 40-hour week for non-manufacturing employees be confined to five days, Prinz rejoined that in that case “the agreement might as well be thrown out....”¹⁴¹ The reason for the code authority’s sharp rejoinder was revealed by Dubinsky, the union’s president, who pointed out that as a result of the absence, even in the original code, of a limit on the number of days that non-manufacturing workers were permitted to work, they worked nights, Saturdays, and more than 60 hours a week. This revelation appeared to have caught off guard the presiding officer, Earl Howard, a professor at Northwestern University and former executive secretary of the Chamber of Commerce of the United States and vice president of Hart Schaffner & Marx,¹⁴² who replied: “That is not a question to be discussed here. It is to be assumed that these provisions of the code—I do not think we need to discuss here whether or not the code is enforced. It can be assumed that the code will be enforced.” But then he backtracked, conceding that if experience showed that provisions were “more or less unenforceable, that is a proper topic as to whether

¹³⁸NRA, HCFC, Hearing No. 103: Coat and Suit Industry: Modification 7 (May 4, 1934) (Morris Greenberg) (Film No. 13).
¹⁴⁰NRA, HCFC, Hearing No. 103: Coat and Suit Industry: Modification at 15.
¹⁴¹NRA, HCFC, Hearing No. 103: Coat and Suit Industry: Modification at 16-17.
we should enforce it on that point or not.” This concession gave Dubinsky his opening, allowing him to make it clear to Howard that the lack of a five-day limitation in the code was the equivalent of not having the 40-hour week provision either.\textsuperscript{143}

The ILGWU’s sudden concern for white-collar workers puzzled Howard, who prompted the following extraordinary colloquy:

Deputy Howard: What is your interest in these non-manufacturing employees, Mr. Dubinsky?

Mr. Dubinsky: They are the most oppressed and the most exploited people in the industry, and the most unfortunate element in the industry.

Deputy Howard: Are they elements of your organization?

Mr. Dubinsky: No, sir, they are not. They are the underdogs, and I am taking their part. The employers would not, and I considered it my duty to take their part. Some of them have organized themselves into a union, and it seems that our employers cannot listen to reason unless they get it with a whip over their heads, and then they listen to reason. Because they are not organized, that is why they should be exploited more than the other elements in the industry. It is unjust and unfair.\textsuperscript{144}

Dubinsky then went on to specify that “these shipping clerks” had complained to the code authority, before which they had a hearing, but because they had no union, they were “sidetracked.”\textsuperscript{145} Seemingly in disbelief that the code authority had been “delinquent in securing compliance” with the hours provision for white-collar workers, Howard demanded “to know exactly what the facts” were. Harry Uvalier, a representative of the code authority confirmed that Dubinsky was “correct”: “because of the indefiniteness in the hours and the provisions governing the non-manufacturing employees, very little could be done by the Code Authority to enforce the provision.” When Uvalier added that the code authority had taken “that into consideration when it submitted its proposed amendment,” Howard instead pressed him to explain why it had been difficult to secure compliance.\textsuperscript{146}

It was impossible to police the area 24 hours a day, and since the code provided that a worker may work 40 hours in any one week, if anyone was found violating the code, or at least if we suspected they were violating the code, we were told that these workers, even if they worked until 10 o’clock at night did comply with the 40 hour provision. We were told that although they worked 12 or 15 hours in any particular day, they did not work the

\textsuperscript{143}NRA, \textit{HCFC}, Hearing No. 103: Coat and Suit Industry: Modification at 19.

\textsuperscript{144}NRA, \textit{HCFC}, Hearing No. 103: Coat and Suit Industry: Modification at 20.

\textsuperscript{145}NRA, \textit{HCFC}, Hearing No. 103: Coat and Suit Industry: Modification at 20-21.

\textsuperscript{146}NRA, \textit{HCFC}, Hearing No. 103: Coat and Suit Industry: Modification at 21-22.
next day or the third day. So it was actually—it would actually require a policeman constantly in each place to check up on the actual hours that these non-manufacturing employees put in.\textsuperscript{147}

Uvalier tried to convince Howard that the code authority, which wanted to accommodate employers that needed to work these employees on Saturday, regarded the proposed 8 a.m. to 6 p.m. schedule as a check on such non-compliance, but declared that if the NRA insisted on a five-day limitation, “we will do it.”\textsuperscript{148} Uvalier, however, had spoken out of turn: no sooner had he made this concession than Maxwell Copelof of the Merchants Ladies Garments Association objected that its members’ businesses could not function very well unless closing Saturdays became a “universal rule,” which would not necessarily result from codifying a five-day rule “because the executives will be working and the salesmen will be working.” In response, however, to a surprised Howard’s question as to whether he could operate Saturdays without the non-manufacturing employees, Copelof hedged, stating that since they could not offer the service to the retail trade, a strict five-day week would curtail their business.\textsuperscript{149}

In an effort to break this impasse, Rose Schneiderman of the Labor Advisory Board, who was certain that under the proposed code non-manufacturing employees would wind up working 54 hours a week, suggested that Saturday work be permitted if those workers got another weekday off. In any event, “with the thousands of white collar workers out of work, who are being supported by the taxes of the citizens of the country...they have a right to be considered for reemployment and perhaps they need one and one-half shipping clerks, instead of one; but it certainly can be done within five days, and if more than 8 hours a day is necessary then we must specify the numbers of hours that the non-manufacturing group is permitted to work...overtime, and they should be remunerated for their overtime...at time and one-third and one-half, as is usual in all of the codes.”\textsuperscript{150}

Deputy Administrator Howard, picking up on Schneiderman’s point, asked the employers to comment on the proposal to employ more non-manufacturing employees and stagger their time so that six days’ work could be performed without any individual worker’s working more than five. The coat and suit employers’ response was familiar: like every other white-collar worker, shipping clerks were irreplaceable: “These shipping clerks have a specific, peculiar kind of work to do;
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and to put a new person in for a day or two, or for a week or two, or for a moment, or for a month, means that you cannot properly conduct the affairs of your business in the height of the season, and it gives no employment to anybody.” Imposing the Dubinsky-Schneiderman plan would be an “unnecessary restriction” at cross-purposes with the NRA, whereas Saturday work was “forcing no hardship on these people....”151 And Copelof, the wholesalers’ representative, reinforced the claim of the counterproductiveness of work-spreading by asserting that, because in small firms there was just one receiving clerk or bookkeeper or stenographer, adding employees would hamper the business.152

After Prinz, under attack by Schneiderman, had agreed that the proposal should be modified to make clear that the non-manufacturing workers could not work more than eight hours a day, Howard requested an amended amendment, which Prinz then offered: “That it shall not be more than eight hours a day—that is the regular employment—and overtime, subject to the rules and regulations as the Code Authority may submit.” Howard decided to leave the amendment in that form for the time being, ruling that the wording would be furnished later.153

In the interim, at the end of May and beginning of June, the ILGWU held its biennial convention in Chicago, at which the left-wing Local 22 offered a resolution declaring that in light of the fact that many thousands of shipping clerks in women’s garment shops were totally unorganized and subject to long hours and courageous efforts were being made in New York City to organize them into the Ladies Garment Shipping Clerks Union, the ILGWU should charter the union. The ILGWU convention leadership opposed the resolution on the grounds of unexplained complications; instead, it was able to have the matter merely referred to the incoming general executive board.154

In the event, the amended code that Administrator Johnson approved in August 1934 failed to embody all the proposals that labor had made during the hearing

151NRA, HCFC, Hearing No. 103: Coat and Suit Industry: Modification at 28-29 (Prinz).
152NRA, HCFC, Hearing No. 103: Coat and Suit Industry: Modification at 31.
153NRA, HCFC, Hearing No. 103: Coat and Suit Industry: Modification at 31.
155The Associated Press had reported on the day of the hearing (May 4) that members of the code authority had advised the Administrator that they had come to a “virtual agreement on all major proposals for amending the code,” although organized labor objected to a provision permitting jobbers to change their agreements with contractors. “Suit Men Agree on Code,” NYT, May 5, 1934 (6:7).
in May. The new hours provision now read:

Except as hereinafter provided, non-manufacturing employee shall be permitted to work in excess of...40...hours in any one...week, not more than...8...hours in any one...day. Such hours shall not commence earlier than 8:00 a.m., nor end later than 6:00 p.m. Certain non-manufacturing employees, such as night watchmen, porters, shipping clerks and clerical help, may be permitted to work overtime under such rules and regulations as the Code Authority shall prescribe, with the approval of the Administrator, provided that...shipping clerks ...shall not work more than 45 hours per week, nor more than 9 hours in any one day, nor more 6 days in any 7 day period and that clerical help shall not work more than 40 hours per week averaged over a 5 week period.156

In other words, what had been a flat 40-hour week under the original code turned into a 45-hour week for shipping clerks and unlimited workweeks for clerical workers, subject only to five-week averaging; totally ignored was Schneiderman’s demand for overtime rates. This disregard of labor’s interests was especially poignant in an industry that was 90 percent unionized and in light of The New York Times’s contemporaneous praise for the coat and suit code as “perhaps the one in which labor comes nearest to parity with the employing groups....”157

In the period between the hearing in May and approval of the amended code in August 1934, not all NRA officials involved in the process were satisfied with this provision. For example, the review officer—an official tasked with determin-

157Robert Duffus, “Coat and Suit Industry Is at Peace Under Code,” NYT, Aug. 12, 1934 (sect. 8, 6:1-3). In its lengthy article devoted to the publication of the amended code, the newspaper failed even to mention the changes in the hours provision. “New Code Is Issued for Suit Industry,” NYT, Aug. 23, 1934 (24:1). The outcome in the coat and suit industry, despite the strength of the ILGWU, should be contrasted with this conclusory assertion by the former principal economist and director of research on policy matters of the Research and Planning Division of the NRA, who was a hostile participant-observer: “As for labor, it always demanded and received shorter hours.... In all these bargainings the President’s thesis that hours had to be shortened...and the NRA’s threats to invoke the licensing provision hung like guillotine knives over the heads of industry. Consequently, every code as first submitted guaranteed some reduction in hours.... The bargaining with labor was over further concessions. When an industry in which unions predominated refused to yield to labor’s demand or vacillated too long, a strike call was sounded, and generally such threats were sufficient to force rapid compromises. In other industries a more perfunctory fight for shorter hours...was made; and consequently concessions to labor were smaller. However, even here labor’s demands had to be met in part to avoid unionization.” Roos, NRA Economic Planning at 69.
ing whether codes conformed to NRA policy—recommended that the five-week averaging arrangement for clerical workers be revised to make the hours for these employees definite and in conformity with NRA policy. Bizarrely, three weeks later, although the wording had not been changed, the acting division administrator declared that the provision had been amended to meet the review officer’s exception and now conformed to present policy.

The code authority, however, was not confused. In its enforcement and inspection report issued just a week after the NRA had approved the amendments, it referred to the many complaints it had received from non-manufacturing employees about hours of work: the fact that the original code had set the hours at 40 but failed to specify any limitations to work had made the 40-hour week practically impossible to enforce. Nor was the code authority optimistic that the new provision would bring about an improvement: “While the amended code is more specific on the subject, the problem still presents considerable difficulties as to enforcement, unless the Code Authority should formulate and adopt very definite rules and regulations on the subject.” That the code authority apparently failed to act was revealed by the fact that at a meeting of the code authority (on which two ILGWU members sat) seven months later and only two months before the Supreme Court declared the NIRA unconstitutional, the Shipping Clerks Union appeared to present amendments and Isidore Nagler, an ILGWU vice president, proposed regulations limiting shipping clerks’ working time, which the code authority did not accept. Instead, it merely adopted a resolution to enforce the existing regulations for non-manufacturing employees and appointed a committee to draft rules and regulations concerning the hours provision that had been approved in August 1934.

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158 Lyon et al., National Recovery Administration at 64-65.
159 Review Officer to Division Administrator Division 5 on Amended Code for the Coat and Suit Industry (July 17, 1934), in NAMP, Microcopy No. 213: DSNRA 1933-36, Roll 27.
That Dubinsky and the ILGWU had not spoken disingenuously on behalf of the shipping clerks at the code hearing in May 1934 became clear in the course of that summer. On July 12 leaders of the needle trades unions, including Dubinsky and Lieberman, met with the New York state director of the National Emergency Council (a body that President Roosevelt had created at the end of 1933 to coordinate the activities of the various federal economic recovery agencies), declaring “unanimously that there was widespread non-compliance relative to shipping clerks, who were found to be overworked.” A year later, the Ladies Apparel Shipping Clerks Union, Local 19,953, AFL, claiming to represent 15,000 shipping clerks (including packers, porters, sorters, charge clerks, order clerks, errand boys, and “push” boys) in the Manhattan garment district, voted to strike in protest against $10 to $14 in weekly wages for 72 hours and more of work. As the strike progressed, the ILGWU contributed money to the striking union and ordered truck drivers not to make deliveries to struck plants. Then more than 15,000 cloak and dress workers walked out, declaring that they would not return until the shipping clerks’ demands for shorter hours and other changes had been met. When Dubinsky announced that the ILGWU would pressure the employers to come to terms with the shipping clerks, The New York Times stated that “it will be the first time that a big labor organization has intervened to force a settlement of a strike conducted by a union not affiliated with it. The Ladies Apparel Shipping Clerks Union...is expected...[to] affiliate with the I.L.G.W.U. after a strike settlement is obtained.” In the event, the shipping clerks settled for a $15 minimum weekly wage for a 44-hour week, but failed to gain employer recognition. Explaining this failure as resulting from the lack of an effective organization, Dubinsky declared that the ILGWU would make sure that employers adhered to the agreement.

Eighteen years later, Dubinsky authorized a drive by the ILGWU to organize all the shipping clerks in the New York dress industry in a new Local 60-A Shipping Clerks Union.

The hearing on the proposed wool textile code, which simply excluded office (and supervisory) staff from its 40-hour standard, saw UTWA president...

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164“Codes Called Aid to Needle Trades,” NYT, July 13, 1934 (24:4).
166“Teamsters Union to Aid Striking Clerks,” NYT, Sept. 2, 1935 (1:6-7).
167“Garment Union to Act in Strike,” NYT, Sept. 4, 1935 (26:8).
169“Union Authorizes Drive,” NYT, Sept. 22, 1953 (42:8).
McMahon testify again; he proposed a 30-hour week, but not for office workers.171 Ann Burlak of the Communist NTWU, a very feisty witness—a "fiery" 21-year-old organizer soon to be "acclaimed by her followers as the 'Joan of Arc'" of the silk strike in Patterson, New Jersey172—who repeatedly refused to be intimidated by Deputy Administrator Arthur Whiteside, a "thorough Tory," former president of the Wool Institute,173 and president of Dun and Bradstreet, criticized virtually every aspect of the code, including its discrimination against women and blacks, but not that against white-collar workers.174 Nor did either of her testifying comrades.175 Nevertheless, at the end of the final hearing, Whiteside called the final product "the finest piece of sportsmanship that I have seen exhibited in Washington since I have been here."176

171NRA, HCFC, Hearing No. 543: Wool Textile 71-117, 275-97, 303-304, at 73 (July 24, 1933) (Film No. 75).
175NRA, HCFC, Hearing No. 543: Wool Textile 144-49 (July 24, 1933) (Simon Haryegian and Gus Gosslein).
176NRA, HCFC, Hearing No. 543: Wool Textile at 307 (July 25, 1933). The only relevant amendment made by employers at the hearing was insertion into the hours provision of a prohibition, designed to prevent speed-ups, on requiring workers to work in excess of practices prevailing on July 1 without the Administrator's approval. Id. at 302; Code No. 3: Wool Textile Industry (July 26, 1933), Art. III, in NRA, Codes of Fair Competition, 1:39. See also "2 Textile Groups End Code Hearings," NYT, July 26, 1933 (15:5). A half-year later the NRA approved an amendment to the code that limited the exclusion from the hours provision of office employees to those receiving more than $30.00 per week; no office employee receiving $30.00 or less was permitted to be employed more than 48 hours in any one week subject to a 13-week, 40-hour average. Code No. 3—Amendment No. 1: Wool Textile Industry, Art. II (Jan. 23, 1934), in NRA, Codes of Fair Competition, 5: 679-83 at 683 (1934). It is unclear why this change was made. Johnson's report to Roosevelt stated that the amendments had been presented by the industry at a hearing on December 8, 1933. Id. at 681. Although a wool textile code hearing did take place on that date, it was very brief and the transcript discloses no discussion of office workers' hours. NRA, HCFC, Hearing No. 543: Wool Textile (Dec. 8, 1933). The Consumers' Advisory Board objected to the amendment on procedural grounds because it had not been published before the hearing as a matter to be taken up at the hearing. The Board recommended that it be raised at a later hearing after proper notice. M. S. Massel (attorney, Consumers' Advisory Board), to R. B. Ludlum, Jr. (deputy administrator) (Dec. 27, 1933); Memorandum from Executive Officer to Administrator, Subject: Summary of Amendment to the Wool Textile Industry (Jan. 9, 1934), in NAMP, Microcopy No. 213: 290
At the hosiery industry code hearing on August 10, 1933, Emil Rieve, the president of the American Federation of Full Fashioned Hosiery Workers, testified that labor had been consulted in the drafting of some of the code provisions, but since the entire code had been changed in the interim, the union took exception to a number of provisions, including one that limited the 40-hour week to employees “in productive operations.” His objection had been prompted by employers’ practice of making workers work two or three additional hours doing repairs. But neither Rieve nor Sidney Hillman, the Labor Advisory Board member present at the hearing, said anything about the hours of office workers.177

After a Seventh Day Adventist had testified about the problems the code would cause for members of his religion, and the hearing officer, Deputy Administrator Professor Lindsay Rogers, who was the head of the Department of Public Law and Jurisprudence at Columbia University and owed his NRA appointment to his having once been chief executive of the National Wholesale Women’s Wear Association,178 asked in vain whether anyone wanted to make a similar statement with respect to Orthodox Jews, before inquiring whether anyone else wished to speak on behalf of labor. Timidly, one would-be witness began to ask: “If I am in order,” when Rogers peremptorily interrupted: “I do not know whether you are in order or not; who are you and for what purpose do you arise?” After the speaker had revealed his name to be Ernest Hall, Rogers asked whether he was a manufacturer: “No, I represent the bookkeepers, stenographers, and accountants union of New York.” Apparently incredulous, Rogers asked: “And you object to certain provisions of this proposed Code?” The following colloquy then ensued:

Mr. Hall: Well, I wanted information as to what the industry is going to do for the office workers. We have a code in too and nothing has been said as to their conditions in this industry.

Deputy Rogers: This is a code for the industry rather than for bookkeepers and stenographers; Mr. Constantine, suppose you read the section of the Code which is applicable.

Mr. [Earl] Constantine [chairman of the hosiery industry code authority]: I think...he will probably find his answer in Section 3 of Article IV, which states that...the maximum hours of labor for office employees...shall be an average of 40 hours per week, over each period of six months. That is in substance giving him the same limit of working hours..., but not...
necessarily holding it rigidly to 8 hours a day, five days a week, because as the gentleman himself must understand, at the end of the month and beginning of the month there is always a peak of work in the office and then it departs down into the valley....

Deputy Rogers: What is the minimum wage provision for office help in the hosiery industry?

Mr. Constantine: There is no provision.

Mr. Hall: I simply wanted to say, Mr. Chairman, gentlemen and ladies, that we have always observed a 39 hour week all through the United States and a minimum scale of $21.

Deputy Rogers: As you said a moment ago, you are presenting your own code.... [H]as it been presented yet?

Mr. Hall: Well, it has been presented, surely; we are waiting for a hearing.

Deputy Rogers: I trust you will get your hearing.

Mr. Hall: I thought I would embrace the opportunity to talk.

Deputy Rogers: You have embraced the opportunity and you have gotten your viewpoint.

Mr. Hall: All right. 180

Both the hosiery employers and the NRA kept their word: the code as adopted retained the provision on which the code authority chairman had lectured Hall. That Rogers, an experienced labor arbitrator in the clothing trades, displayed such an openly dismissive and sarcastic attitude toward interloping office workers who, though not involved in production, nevertheless had the gall to take umbrage at the code’s discriminatory treatment of them, captured a vital dimension of white-collar workers’ second-class citizenship under the NRA codes. 181 Amusingly, Rogers praised himself in his own obituary notice for having recognized, as deputy administrator for the daily newspaper code, that “organized white-collar employees were as much entitled to a hearing as were typesetters....” 182

On January 30, 1935, a year and a half after the hosiery code hearing, the National Industrial Recovery Board, which replaced the lone NRA administrator in September 1934, 183 held a policy hearing in Washington 184 which three repres-
tatives of white-collar workers attended to express the view that office workers had “not derived any real benefits from any of the codes....” Walter M. Cook, representing the Bookkeepers, Accountants, and Stenographers Union, Local 12646, AFL, which had been organized in 1910, told the Board that it was with regard to office workers that the NRA had “missed its greatest opportunity for increasing employment” by approving codes that failed to reduce the workweek below the pre-NRA custom of 39-42 hours, while 800,000 of four million office workers were unemployed.\(^\text{185}\) Cook reported that of 639 codes and supplements: only 13 gave office workers less than 40 hours; 449 specified 40 hours; 123 an average of 40 hours (adding “that when hours are averaged as they are in the Stock Exchange and Banking Codes, over a four months [sic] period, they mean very little”); 70 codes set workweeks of 40-48 hours, four of 50-56 hours; and 10 set no limits at all. Disaggregating the data and examining the industries with the largest employment of office workers, Cook found that the situation was even worse: in the retail and wholesale trades employing 600,000 office employees (as of 1930) the hours ranged from 40 to 56; in banks and brokerage houses with 350,000, codes set weekly hours at 40 to 44 hours averaged over three to four months; the printing, publishing, and engraving codes called for 40 to 48 hours for 100,000 workers. Finally, three major employers of white-collar workers had not even been codified: the telephone and telegraph industry with 325,000 workers; insurance companies with 300,000; and public utilities with 55,000.\(^\text{186}\)

A month later, the NRA approved an amendment to the hosiery code that limited clerical and office workers to 40 hours per week, except that during six weeks of the first and second half of the year they were permitted to be employed up to an additional eight hours per week at time and a half. In addition, the code now specified that supervisory, managerial, and executive employees regularly earning more than $35 or more weekly were excluded from the hours provision, but that supervisors earning less than $35 weekly but not less than 50 cents an hour could not work more than 44 hours a week.\(^\text{187}\) These changes had originated at a

\(^{185}\)“The N.R.A. and the Office Worker,” *Ledger*, 1(2):11-12 (Feb. 15, 1935). The two other representatives at the hearing appeared on behalf of 127,000 office workers in the YMCA. A year earlier, at a so-called field day for criticism of the NRA, Cook had urged on behalf of office workers that hours be reduced from 40 to 35 to absorb the unemployed. “Johnson Meets NRA Critics, Proposes 12-Point Revision,” *NYT*, Feb. 28, 1934 (1:8, 11:1-6 at 4).

\(^{186}\)“The N.R.A. and the Office Worker.” The two other representatives at the hearing appeared on behalf of 127,000 office workers in the YMCA.

hearing held a year earlier, on March 9, 1934. The proposed amendments altered one provision to exclude “employes who discharge executive or managerial duties” and received more than $35 per week, while another provision permitted the extension of the working time of supervisors, foremen, shipping forces, and other non-production workers beyond 40 hours “when or where required.” In addition, the overtime rate for these workers was set at the regular rate for hours 40-44 and time and a half for hours above 44. If by 1934 it was not entirely unexpected that the Machinists Union protested the exclusion from the maximum hours provision of a large variety of non-production blue-collar workers (and shipping clerks), astonishingly, the AFL’s representative at the hearing, Fred Hewitt, who was also editor of the Machinists Journal, submitted a supplementary brief, which went further than the employers’ proposed or the approved amendment in excluding white-collar employees from hours limitations by excepting not only executives and supervisors, but also those employed in an administrative capacity and their immediate assistants, as well as salaried technical men and field service engineers receiving at least $35 a week. Like many before and after him, Hewitt did not define “administrative capacity” or explain why such workers should have to work unlimited hours.

The rayon and silk dyeing and printing industry—which employed only about 20,000 workers permitted itself the flexibility of working “office staff” (excluding executives) 40 hours a week averaged over six months; although this average was subject to a weekly ceiling of 48 hours, even it could be ignored “in cases of emergency,” which were, however, not defined. At the hearing on November 10, 1933, Francis Gorman, vice president of the UTWA and Labor Advisory Board representative, devoted some of his wide-ranging criticism to the treatment of office workers, which, to be sure, he undermined by yielding on the main point before he had even begun. Thus, after conceding that their maximum hours “may well need to be 48 hours per week to take care of the periodic peaks in office work,” he asked why their hours had to be “averaged over such a long

189 NRA, HCFC: Hosiery at 73-74 (Mar. 9, 1934).
190 NRA, Hearings on the Codes of Fair Competition: Hosiery at 84-85 (Mar. 9, 1934) (David Kaplan, International Association of Machinists).
191 NRA, HCFC: Hosiery at 100, 148-49 (Mar. 9, 1934).
192 Code No. 172: Rayon and Silk Dyeing and Printing Industry (Dec. 21, 1933), in NRA, Codes of Fair Competition, 4:311-23 at 312 (1934).
National Recovery Administration Codes of Fair Competition

period as six months...” As far as the union was concerned, one month or six weeks seemed to “meet all the needs of the situation and would certainly be easier to administer...”\textsuperscript{194} Gorman’s advocacy on behalf of office workers derived from his overall concern to limit exemptions to as few as possible as part of realizing the UTWA’s second-best plan—necessitated by recognition that the desired 30-hour week was not currently feasible—to make the 40-hour week the industry’s “real standard...” That concern rested on the dual foundation that “[e]xemptions make the hours limitations so much more difficult to enforce” and that widespread unemployment still prevailed. But whereas office workers fit only under the first heading and joblessness impliedly constituted no problem for them, “[u]nemployment exists among engineers, electricians, machinists, firemen, maintenance and transportation crews as well as among the productive workers. These workers have become the ‘forgotten man’ in some of the Codes. It is just as important to absorb the unemployed among these exempted workers as among the productive workers. Therefore, their hours should be made as short as possible, considering their special functions in the organization.”\textsuperscript{195}

In the event, however, Gorman succeeded on none of these fronts: like the employers’ proposal, the approved code included six-month hours-averaging for office workers, 48-hour weeks for the blue-collar non-productive workers, and no time-and-a-half compensation for production workers whom employers were permitted to work up to two hours of overtime daily in certain continuous operations.\textsuperscript{196} After the hearing the LAB informed the NRA Division Administrator that it could not approve the code unless the hours-averaging for office workers were restricted to 12 weeks and the 48-hour maximum were stripped of its exceptions.\textsuperscript{197} But the deputy administrator ignored this protest on the incoherent grounds that the code’s provisions did not permit employees to work “an excessive number of hours, as this is a service industry not having direct control of their production.”\textsuperscript{198}

\textsuperscript{194}NRA, HCFC, Hearing No. 386: Rayon and Silk Dyeing and Printing 75 (Nov. 10, 1933) (Film No. 59).

\textsuperscript{195}NRA, HCFC, Hearing No. 386: Rayon and Silk Dyeing and Printing at 73.


\textsuperscript{198}Deputy Administrator Herbert Marrow to Administrator Johnson (Dec. 8, 1933);
The code for the men’s clothing industry was the first to exclude from its hours provision (36 hours per week and eight per day) “employees engaged in bona fide managerial or executive capacities....” In contrast, the code subjected office staff (together with various categories of blue-collar non-production workers such as repair shop crews) to a 40-hour week averaged over an entire year. Unfortunately, the code hearing shed no light on the meaning of “bona fide,” which was presumably designed to exert a limiting impact on the scope of the white-collar exclusions under the FLSA, but which was not included in the employers’ proposed code for the men’s clothing industry, which referred to office and supervisory employees. At the hearings, Sidney Hillman, president of the Amalgamated Clothing Workers and representative of the Labor Advisory Board, while insistent on a 35-hour week for production workers, failed to address the white-collar exclusions at all. Secretaries together with factory department heads and executives earning more $35 a week were excluded from the hours provision of the cotton garment code, which created a 40-hour week averaged over three months for office employees (including accounting, clerical, and stenographic “help”).


\textit{Code No. 15: Men's Clothing Industry (Aug. 26, 1933), Art. IV, in NRA, Codes of Fair Competition, 1:229-37 at 232.}


\textit{NRA, HCFC, Hearing No. 288: Men’s Clothing 22 (July 26, 1933) (Film No. 50).}


\textit{NRA, HCFC, Hearing No. 288: Men's Clothing (July 27, 1933).}

\textit{Code No. 118: Cotton Garment Industry (Nov. 17, 1933), Art. III.C., in NRA, Codes of Fair Competition, 3: 77-102 at 92. Manufacturing employees were subject to a 40-hour week without averaging. \textit{Id.} Art. III.A at 91. Unfortunately, the 76-reel microfilm collection of the hearings lacks the transcript of the original code hearings of Aug. 3-4, 1933. The only relevant testimony in a later hearing from 1934 (over reopening the code to determine whether the 40-hour week could be reduced) was the reply by Ralph Hunter, the chairman of the Cotton Garment Code Authority, to a question from NRA division administrator Sol Rosenblatt as to whether he had any recommendations concerning maximum hours for non-manufacturing employees except office employees: “It should never have been written into the Code.” NRA, HCFC, Hearing No. 130: Cotton Garment
Exclusionary provisions were also found in the earliest codes of smaller clothing industries. For example, in the corset and brassiere industry the maximum hours provision of 40 hours did not apply to executives, executives' assistants, office workers, or shipping clerks. Labor representatives had an opportunity to raise this issue at the code hearing on August 7, 1933. Lieberman, the ILGWU attorney, did object that the influence of the cotton textile code was evident in the employers' request for a 40-hour week for production workers regardless of unemployment in the industry, but he failed to mention the white-collar workers. The presiding officer, NRA Deputy Administrator Earl Howard, had to ask Lieberman directly whether there were any objections to the exemptions for executives and executive assistants, and even then the ILGWU attorney ignored the issue, replying: "There would only be, so far as we are concerned, the question of outside employees...." The matter, however was not dropped because Rose Snyder, representing the Labor Advisory Board, finally asked: "How about office workers? Doesn't the President [Roosevelt] expect office workers to benefit by shorter hours and by increased wages?" Turning to Waldemar Kops, president of the Corset and Brassiere Association of America, Howard asked: "Why do you exempt them?" Kops had a ready reply:

We had a long discussion about that.... I think most of our office workers work fewer hours than the factory does. ... I think that [is] the rule.

It happens in running any business there are some times at the end of the month when statements must be made out, or when a particular problem in the production department of getting up a production schedule must be made up, and the work of the factory is


NRA, HCFC: Hearing No. 128: Corset and Brassiere 66 (Aug. 7, 1933) (Film No. 19).

NRA, HCFC: Hearing No. 128: Corset and Brassiere at 97.

It is possible that the Labor Adviser was really Rose Schneiderman, who is mentioned in the NRA "History" as having been present at the hearing. B. E. Oppenheim and A. Feibel, "History of the Code of Fair Competition for the Corset and Brassiere Industry" at 5 (Oct. 10, 1935), in NAMP, Microcopy No. 213: DSNRA 1933-36, Roll 35 (1953).

NRA, HCFC: Hearing No. 128: Corset and Brassiere at 99.
continued, so that these people must work longer than their average hours. That is why they were included. Actually the practice is to work less hours in the office than in the factory.210

Neither Snyder nor Lieberman requested any data in support of what sounded suspiciously like self-interested speculation; they also failed to ask the obvious question as to why a penalty should not have been imposed to discourage employers from requiring office workers to work overtime. When Kops’s response prompted no further objection and the point was exhausted, the representative of the Industrial Advisory Board seized the initiative by eliciting from Kops the information that, unlike the factory workers, the office force was paid when they were “sick or otherwise.”211 Four days after the hearing Labor Adviser Rose Schneiderman wrote a letter to LAB chairman Leo Wolman reporting on amendments to the labor section of the code that she had made and that had been incorporated into the code, but mentioned nothing about the white-collar exclusions. Two years later, however, after the NIRA had been struck down by the Supreme Court, the NRA’s own “History” of the corset and brassiere code included a section on “undesirable” provisions, which said of the white-collar exclusions: “This very apparently includes too many exceptions to the maximum hour provisions of the Code and is not in accord with the present policy of the Administration.”213

As the patterns already established by the first codes revealed, some exclusions included a salary criterion in addition to the occupational identifier, while others did not. Under the dress manufacturing industry code, work in mechanical processes of manufacture was limited to 35 hours even for employers and anyone “operating on his own account,” while all other employees (except foremen and executives receiving $35 or more per week) were prohibited from working more than 40 hours per week; both blue- and white-collar workers were allowed to work additional hours during six weeks in any one season at time and a half. Cutters, who were paid $45 and sample makers who received $30 for 35 hours were not excluded.214

210NRA, HCFC: Hearing No. 128: Corset and Brassiere at 99-100. In the transcript Kops’s name is consistently misspelled “Kopps.” See “W. Kops, 55, Dies,” NYT, Jan. 14, 1945 (40:3).
211NRA, HCFC: Hearing No. 128: Corset and Brassiere at 100.
212Letter from Rose Schneiderman to Leo Wolman (Aug. 11, 1933), in NAMP, Microcopy No. 213: DSNRA 1933-36, Roll 35.
214Code No 64: Dress Manufacturing Industry, Art. III.1-.3 (Oct. 31, 1933) in NRA,
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Automobiles

Many a highly paid executive frequently pitches in and does a substantial amount of work of the same nature as that performed by non-executive employees, without losing his executive status by any common conception of that status. If [GM president] Mr. [William] Knudson [sic; should be Knudsen] decided he wanted to work one day a week on the assembly line, would anyone challenge his status as a bona fide executive of General Motors?215

Because of the key position it occupied in the U.S. economy and of expectations of the central role it would play in overcoming the depression, considerable attention was paid to the formulation of the automobile code. In the automobile manufacturing industry the firms represented on the code committee agreed from the start both that some form of hours-averaging was necessary to give them enough "flexibility in the handling of their labor force" to cope with fluctuations in production and that some employees "vital" to the production

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Codes of Fair Competition, 2:77-95 at 88. At the public hearings no one (including ILGWU president David Dubinsky, LAB representative Rose Schneiderman, who did deal with it at other hearings, and two representatives of the Communist Needle Trades Workers Industrial Union, Irving Potash and attorney Boudin) raised the subject of the working hours for white-collar workers. NRA, HCFC, Hearing No. 153: Dress Manufacturing (Aug. 23-24, 1933) (Film No. 25). Outside the textile and clothing industries, the code for the retail trade, which defined executives as responsible for the management of a business or a recognized subdivision, allowed executives receiving more than $35 per week in cities of more than 500,000 in population, down to $25.00 in cities of under 25,000 population (with 10 percent lower wages permitted in the South) to work in excess of the specified hours. If, in a further complicating restriction, a workplace had 20 or fewer workers, not more than one worker in five could work unrestricted hours; if more than 20, one in eight among those over 20 could work unrestricted hours. In addition, professional persons were not subject to the hours restriction. Code No. 60: Retail Trade (Oct. 21, 1933), in NRA, Codes of Fair Competition, 2:27-45, at 31, 33-35, 40-48 (1934).

process had to be exempt.\textsuperscript{216} Similarly, the initial automobile manufacturing code, which provided for an average week of 35 hours (averaged over the period from September 5 to December 31, 1933) and a maximum week of 48 hours for factory workers, and a 40-hour average and 48-hour maximum for office and other salaried employees receiving less than $35 weekly, excluded from these limitations employees receiving more than $35 a week and executives, managers, and supervising staffs; this “noncontroversial total exemption”\textsuperscript{217} was inserted “\[i\]n order that production and employment for the main body of employees may be maintained with as few interruptions as possible....”\textsuperscript{218}

The course of the code hearings in an industry deemed by the NRA key to the entire recovery effort\textsuperscript{219}—“It is generally recognized and conceded that the Automobile Manufacturing Industry has established itself as the one to lead all others out of the depression”\textsuperscript{220}—revealed how undemocratically the code process was structured.\textsuperscript{221} Almost three weeks before the hearing, the National Automobile Chamber of Commerce announced that its members had agreed on a code, which set the maximum average weekly hours for production workers at 35 and maximum hours for “white-collar” workers at 40.\textsuperscript{222} At the hearing on August 18, 1933, Donaldson Brown, vice president of General Motors and chairman of the code committee, explained that factory workers would work no more than 35 hours per week averaged over the life of the code subject to a maximum of 48 hours, whereas the corresponding limits for office and other salaried employees receiving less than $35 weekly would be 40 and 48 hours.\textsuperscript{223} In his lengthy counter-


\textsuperscript{217} Fine, \textit{The Automobile under the Blue Eagle} at 66.


\textsuperscript{221} The NRA code historian for this industry remarked after the termination of the NRA that it was a unique peculiarity of the automobile code that “an employee may work 84 hours per week for six months and then be compelled to be idle the following six months.” Everitt, “History of the Code of Fair Competition for the Automobile Manufacturing Industry” (n.p.) (Preface).

\textsuperscript{222} “Code Is Approved by Auto Chamber,” \textit{NYT}, Aug. 1, 1933 (12:2).

\textsuperscript{223} NRA, \textit{HCFC}, Hearing No. 32: Automobile Manufacturing 18-19 (Aug. 18, 1933) (Film No. 3).
presentation (accompanied by a substantial brief), AFL President Green proposed a 30-hour week for factory workers with time and a half for additional hours up to a maximum of 35. The AFL proposal would also have permitted the exemption of factory executives who were salaried and working full time in a supervisory capacity, whereas: "Office and salaried employees receiving less than $35 a week shall be employed not more than 40 hours in any one week, and not more than 35 hours a week, on the average, for any three month period." Thus the AFL proposed to retain the disadvantages that the companies had imposed on white-collar workers, although it would have lowered the hours for both groups.

It is important to note that, according to the employers’ proposed and NRA-approved code, white-collar workers could be required to work longer hours than factory workers even though their salaries were lower. Thus, whereas the minimum weekly salary of an office or salaried employee working 40 to 48 hours ranged between $14 and $15, depending on the size of the community in which the plant was located, the minimum wage of factory employees varied between 40 and 43 cents an hour, which at 35 hours worked out to between $14 and $15.05, but at 40 hours equaled from $16 to $17.20.

The AFL’s failure to achieve the relatively modest gains it had demanded on behalf of white-collar workers did not reflect the organization’s lack of interest in nonproduction workers; rather, it was continuous with the labor movement’s weakness vis-à-vis large industrial capital and the New Deal administration’s refusal to subvert employers’ power. This lopsided factory labor-management relationship was visible, for example, in the AFL’s inability to secure its radical demand for establishment of a tripartite planning and coordinating committee, consisting of equal numbers of representatives of labor, management, and the NRA, which would have to approve increases in line speeds and regulate overtime work. Similarly, the AFL was not even able to secure approval of its demand for premium overtime pay as a deterrent and a powerful incentive for employers to spread work, despite the fact that, as Green noted, such extra pay was familiar in the industry. (A pre-Depression BLS survey had found that 55 of 94 establishments reported paying higher than regular rates for overtime.) In fact, a few

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224NRA, HCFC, Hearing No. 32: Automobile Manufacturing at 181-236.
225NRA, HCFC, Hearing No. 32: Automobile Manufacturing at 56.
226NRA, HCFC, Hearing No. 32: Automobile Manufacturing at 57.
228NRA, HCFC, Hearing No. 32: Automobile Manufacturing at 60-63.
229NRA, HCFC, Hearing No. 32: Automobile Manufacturing at 69-70.
230US BLS, Wages and Hours of Labor in the Motor-Vehicle Industry: 1928, at 15-16 (Bull. No. 502, 1930). This survey was one of several conducted by the BLS, the others
months later automobile manufacturing employers were able to obtain approval from the NRA to increase factory workers's average workweek from 35 to 40 hours, and when, following the emergence of a more militant labor force in the industry, in 1935, a few months before the U.S. Supreme Court held the NIRA unconstitutional, the code was amended to provide for time and a half, the penalty/premium did not kick in until a worker had worked 48 hours in a week.

Heavy Industry

"You'd be amazed at how many useless white collar people there are. We're going to get rid of them."

At the electrical manufacturing industry code hearings in July 1933 neither AFL President William Green nor any of the other union officials testifying asked what an "administrative" employee was let alone raised the issue of the exclusion of executive, administrative, and supervisory employees from the hours provision when it was read into the record. The closest approach to the subject occurred at the end of the hearing with the (presumably) mock refusal of Charles Keaveney, finding premium overtime even less prevalent: US BLS, Wages and Hours of Labor in the Boot and Shoe Industry 1910 to 1928, at 32 (Bull. No. 498, 1928) (vast majority of establishments did not pay premium rates); US BLS, Wages and Hours of Labor in the Men's Clothing Industry 1911 to 1928, at 26-27 (Bull. No. 503, 1929) (only 22 of 200 establishments paid premium rates for overtime work in 1928); US BLS, Wages and Hours of Labor in the Hosiery and Underwear Industry 1907 to 1928, at 29 (Bull. No. 504, 1929) (vast majority of establishments did not pay premium rates).


235NRA, HCFC, Hearing No. 159: Electrical Manufacturing 87-122, 197-212 (July 19, 1933), 1007, 1060 (July 21, 1933).
international vice president of the International Brotherhood of Electrical Workers, to accede to the request by presiding officer Allen to meet with him on a Saturday. Observing that the union did not work Saturdays, Keaveney asked Allen whether he was paid overtime; when Allen replied that he had no such rule, Keaveney told him that he “ought to get [him]self regulated.” However, given “[t]he lack of penalty [sic] overtime provision,” even to workers under the electrical manufacturing industry code who may have thought that they had gotten themselves regulated it later “became evident due to the lack of enforcement that overtime could be worked with impunity” and employers did not have to employ more workers.238

The hearing a few days later on the code for the iron and steel industry, which was hailed by NRA Administrator Johnson as “of course an important day in the development if this whole idea,” saw AFL President Green submit labor’s own code, which, in order to effectuate the NIRA’s goal of reemployment, imposed a 30-hour maximum week, subject to an exception “to a fair and reasonable extent” for executives and those employed in supervisory or technical capacities and in

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236NRA, HCFC, Hearing No. 159: Electrical Manufacturing at 1054-55 (July 21, 1933) (Film No. 26).


238McKittrick et al., “History of the Code of Fair Competition for the Electrical Manufacturing Industry” at 289. The example of the Emerson Electric Co. (St. Louis) illustrated the problem for white-collar workers. The company, allegedly to deal with peak office work, employed office workers beyond the 40 hours permitted by the code on a straight salary with no additional pay. The employer argued that “since these employees were paid a guaranteed weekly wage, were given supper money when required to work overtime, and were given two weeks vacation with pay each year, as well as being permitted reasonable absence for sickness without losing pay, it was not equitable that the company be asked to reimburse these employees with additional pay for excess hours.” The NRA viewed the case as “one of the few examples of actual industrial self-government,” by which members of an industry “dealt with one of their number unofficially, and on friendly terms, for the purpose of ameliorating a controversial situation.” The result was that the office workers were “reimbursed for excess hours worked and a general industry understanding was reached to the effect that office employees would not be employed in excess of forty hours a week. So far as is known, this arrangement was adhered to by the Industry merely on the basis of a gentlemen’s agreement.” ld. at 115-16.

239NRA, HCFC, Hearing No. 245: Iron and Steel Industry 2 (July 31, 1933) (Film No. 41).
emergency work. But neither Green nor officials of the Amalgamated Association of Iron, Steel and Tin Workers, an AFL craft union, or of the Communist-affiliated Steel and Metal Workers Industrial Union (SMWIU) who testified, nor Secretary of Labor Perkins who submitted an analysis of the code, objected to the potential sweep of the white-collar exclusions. Instead, the focus was on the exception for emergency workers. Thus, John Maldon, the national secretary-treasurer of the SMWIU, argued that a section of the proposed code exempted from hours regulation both those employed on emergency work “and, in effect, practically everybody else that the employers see fit to exempt.” Creating a 40-hour week averaged over six months and enforced only “insofar as practicable” and so long as employees qualified for the work were available and having due regard for product demand was “obviously no limitation at all.” Moreover, even if the maximum hours provision had been enforced, it would have been unacceptable to the SMWIU if the result had merely been that speed-ups, which were already excessive, caused the same amount of work to be done in shorter hours. To be sure, the employers’ code authority and the NRA no more accepted the union’s demand that permission to work emergency workers beyond the maximum hours be granted only with the consent of the workers’ elected committees than they deleted from the final code any of the weasel words that Maldon had criticized.

The paper and pulp industry code adopted one of the more complex hours provisions, which permitted extensive hours-averaging for production workers, subject to time-and-a-third payments to some of them. While no limitations applied to executives, “their personal secretaries,” or supervisory employees receiving more than $35 weekly, the code conferred enormous additional flexibility on employers, which were authorized to average office workers’ 40-hour weeks over an entire calendar year, subject only to a further average of not more than 48 hours during any 13-week period.

Although the Times reported that “[o]nly scattered opposition was evidenced to the...maximum-hour provisions” at the code hearing on September 14, 1933,
the Federation of Architects, Engineers, Chemists and Technicians, which had been formed barely three weeks earlier, made an appearance to propose that: no employee-technicians (most of whom were chemists or engineers) be employed more than six hours a day or five days a week; no overtime work be performed except in extreme emergencies; and all time worked in excess of scheduled hours be subject to double-time—the very same demands made by FAECT that same day at the chemical manufacturing code hearing. In vain, objections were also raised to the exclusion of “easily replaceable” blue-collar non-production workers and to the averaging of production workers’ hours over many months. No witness, however, addressed the question of office workers’ hours, and perhaps for that very reason the exclusion of office workers earning less than $35 weekly became even more discriminatory on the way from proposed to approved code. In the employers’ proposed code, whereas office or salaried employees receiving $35 or more per week had, like executives, been excluded altogether, other office workers had been subject to a 40-hour week averaged over (only) three months—as opposed to the whole year of averaging in the approved code.

These even more expansive exclusions were adopted despite the objections of the LAB, which pointed out that there was little reason for excepting office or salaried employees from the prescribed maximum hours: “The degree of unemployment among ‘white-collar’ workers has been deplorably high. Office and salary workers are not less in need of positions than are other classifications of labor.” Moreover, the LAB warned, since “the common practice of industry” had been to employ its office and salaried employees shorter weekly hours than its

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247*NRA, HCFC*, Hearing No. 336: Paper and Pulp 62, 66 (Sept. 14, 1933) (Leo Hirsch) (Film No. 56).

248See below.


250In a letter to the LAB chairman, the AFL president vigorously protested against the code provisions, but said nothing about white-collar workers. Letter from William Green to Leo Wolman (Nov. 3, 1933), in *NAMP*, Microcopy No. 213: *DSNRA 1933-36* (1953), Roll 124: Code 120: Paper and Pulp Industry.


252At a later hearing the LAB representative proposed a 36-hour week averaged over four weeks and subject to a maximum of 40 hours in any one week, but this proposal was never adopted. *NRA, HCFC*, Hearing No. 336: Paper and Pulp 161 (Feb. 13, 1934) (J.L. Donovan).
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manufacturing employees: "Reversal of this practice will certainly cause dissatisfaction in the case of office and salaried workers." The LAB's proposed revisions may have been responsible for the removal of the higher-paid office employees (except personal secretaries) from the blanket exclusion in the code as adopted, but the LAB was unable to protect any of the office workers from the expansive hours-averaging provision.

The baseline limitation in the chemical manufacturing industry employers' proposed code was a self-generous 40-hour week averaged over four months subject to a 48-hour maximum; it covered production workers as well as accounting, clerical, office, and sales employees, but excluded all those employed in an executive, administrative, supervisory, or technical capacity. Befitting an industry that purportedly employed more technicians than any other, the Federation of Architects, Engineers, Chemists and Technicians appeared to "denounce" this provision "as particularly offensive to employee professionals" because it failed to limit the hours of "technical men, notwithstanding the fact that the 40-44 hour week has long since prevailed in the industry for this type of worker—and because the widespread unemployment calls for a sharp cut in hours in order to re-employ all unemployed professionals in industry." Instead, the FAECT proposed a 30-hour week for technicians; overtime work would be permitted only in extreme emergencies and then only at double-time rates. This position was reinforced by the Labor Advisory Board representative, who observed that he had argued at the preliminary hearing that technical employees in the lower grades such as laboratory assistants should be subject to the general hours provision, whereas it was "perfectly clear that your chief chemist, even a chief plant chemist, can not


254 Berry and Barkin (LAB) to Mr. Pickard (Deputy Administrator), "Labor Provisions of the Code of Fair Competition Proposed by the Paper and Pulp Industry" (n.p. [11, 15, 16]).

255 NRA, HCFC, Hearing No. 89: Chemical Manufacturing 20 (Sept. 14, 1933) (Film No. 11). Although the LAB had pointed out that averaging hours over four months was dangerous, would lead to abuse, and should be deleted, it was not. Memorandum from Gould to Martin (Dec. 26, 1933). Nevertheless, the chairman of the LAB, Leo Wolman, approved the code. Leo Wolman to [Hugh] Johnson (Feb. 8, 1934), NAMP, Microcopy No. 213: DSNRA 1933-36 (1953), Roll 23: Code 275: Chemical Manufacturing Industry.

256 NRA, HCFC, Hearing No. 89: Chemical Manufacturing at 66.

257 NRA, HCFC, Hearing No. 89: Chemical Manufacturing at 51 (J. Jay).

258 NRA, HCFC, Hearing No. 89: Chemical Manufacturing at 56 (J. Jay).
be limited in time. He is on duty for 24 hours every day in the year, if necessary....” He also expressed the hope that if the chemical industry accepted this approach, other industries such as cement and steel would follow.259

W. B. Bell (of American Cyanamid Co.), the president of the Chemical Alliance, the employers’ organization that submitted the proposed code, disagreed: his company did not employ anyone in the laboratory “unless we think he has in him the making of a first class research worker.”260 But although he conceded that only technicians with “scientific backgrounds, and that sort of thing” “should be exempted,”261 he insisted that in chemical manufacturing: “You just cannot stop cooking some of this stuff at the end of eight hours” and “any particular cook, having worked 10 hours today will, in the course of a period be provided for,...giving an average of 40 for the week.”262 When reminded by the presiding officer, Deputy Administrator Major General Clay Williams, former Chief of Ordnance during World War I263 who knew the chemical industry “inside and out,”264 that the federal government was able to operate on “absolutely a flat eight hour day, and we can not work the men overtime, except in an emergency, and we have to prove to the Legal Department that it is an emergency when we do it,”265 Bell vented an opinion that not every employer was willing to be associated with at a time of unprecedented unemployment: “Major, do you know what I would do? I would make all of these technical men work 56 hours. I can [sic; must be: cannot] think of anything that would go further to put this country on its feet and a full recovery program, than to make the technical men of this country work overtime. That may be a very radical statement. But the chemical industry...under-

259NRA, HCFC, Hearing No. 89: Chemical Manufacturing at 63, 64 (Dr. Eckel). The NRA did eventually adopt an approach similar to the LAB’s, when it defined those employed in a technical capacity as “limited to persons trained in the sciences engaged on research or other work requiring scientific training. In general, such employees should be...capable of working without immediate supervision and...have had several years training, whether in universities or colleges or in actual work. This category should include engineers who are qualified as such, sales engineers, process advisors and trained technicians engaged in conducting field tests. This category should not include ordinary draftsmen, assistants in laboratories who perform chiefly manual labor, etc.” NRA, Code of Fair Competition for the Chemical Manufacturing Industry, Official Code Interpretation No. 275-8.

260NRA, HCFC, Hearing No. 89: Chemical Manufacturing at 65 (W. Bell).

261NRA, HCFC, Hearing No. 89: Chemical Manufacturing at 84 (W. Bell).

262NRA, HCFC, Hearing No. 89: Chemical Manufacturing at 87-88 (W. Bell).

263“Washington Picks Recovery Boards.”


265NRA, HCFC, Hearing No. 89: Chemical Manufacturing at 88.
lies the other industries. ... My suggestion was that you write into the code a provision by which our technical men be required to exceed the minimum. I am aware that this is not in the minds of this Board, but this is a very peculiar industry.”266 In advocating the feasibility of a “straight 8-hour day” for technicians, Williams was careful to emphasize that that approach would not “interfere with the progress in industry, or interfere with the inventive spirit, or interfere with the work of your research laboratories...because this limitation does not apply to those men, and they are the ones, as I understand it, who contribute to progress in any industry.”267 In the event, in this particular instance, labor was able to achieve a small post-hearing success: the final approved code excepted “nonprofessionally trained laboratory workers” from the exclusion.268

When Williams also pointed out that under yet another exception that the employers had granted themselves, average weekly hours could reach 48 on continuous operations where an adequate supply of qualified labor was unavailable and restricting hours would unavoidably reduce production,269 the Labor Advisory Board representative observed that the only way to limit such overtime would be to force employers to pay overtime—a measure that in his opinion “would be an improvement on most of those clauses.”270 Such a possibility immediately prompted Bell to opine that “we all know very well what would be the result of that. That would result in our people all trying for overtime, because the overtime would be so exceedingly profitable that they would be absolutely inefficient.” When Williams again intervened, noting that other employers took the diametrically opposite view that “overtime is a stimulus [sic] to the management to make them watch the operations more closely, and see that no overtime is necessary,” Bell retorted that “[i]t certainly is that, but unfortunately it is not a sufficient stimulus [sic],”271 suggesting the possibility that he considered that penalty rates beyond time and a half would be sufficient. This ambiguity did not need to be resolved since the NRA approved the clause just as the employers had

266NRA, HCFC, Hearing No. 89: Chemical Manufacturing at 89-90 (W. Bell).
267NRA, HCFC, Hearing No. 89: Chemical Manufacturing at 91.
269NRA, HCFC, Hearing No. 89: Chemical Manufacturing at 92.
270NRA, HCFC, Hearing No. 89: Chemical Manufacturing at 93 (Dr. Eckel).
271NRA, HCFC, Hearing No. 89: Chemical Manufacturing at 93, 94.
Likewise, the day after the chemical manufacturing hearing, several labor representatives opposed the proposed hours provisions in the cement code, but none even alluded to the exclusion of administrative employees. David Kaplan, speaking on behalf of the AFL, criticized the proposed code for permitting the 36-hour week to be averaged over six months subject to a limit of 42 hours in any one week, and requested instead a maximum 30-hour week. (Bizarrely, he wished to substitute “Clerical employees are permitted to work no more than 40 hours in any one week” for “Clerical employees are limited to 40 hours in any one week.”) Kaplan urged the 30-hour week on the grounds that the NIRA’s “major purpose” in providing maximum hours “is to make possible the reemployment of the workers in that industry who lost their jobs during the depression.” The cement industry, like all others covered by the act, was “charged with the responsibility of providing employment for as many workers as were actively engaged in production in the industry in 1929.” This exclusive focus on production workers, which was in no way prescribed by the NIRA, may in its own right explain the labor movement’s failure to exert itself on behalf of nonproduction workers. In any event, Kaplan’s citation of partial employment and unemployment data to support the argument that an average 36-hour week would be considerably less efficacious than a maximum 30-hour week failed to persuade the NRA, whose administrator was content to approve the industry’s code in spite of the fact that Johnson recognized that it would “cause absorption” of only about one-fourth of the number

272Code No. 275: Chemical Manufacturing Industry, Art. II(d), in NRA, Codes of Fair Competition, 6:397.

273The NRA did adopt several suggestions submitted by the LAB, including time-and-one-third overtime pay for production workers and conditioning exemption of supervisory employees on payment of a $35 weekly salary. Leo Wolman (LAB chairman) to [Malcolm] Pirie (deputy administrator) on the Code of Fair Competition for the Portland Cement Industry (Oct. 30, 1933); Deputy Administrator Malcolm Pirnie to Administrator Johnson: Report on the Code of Fair Competition for the Cement Industry (Nov. 11, 1933), in NAMP, Microcopy No. 213: DSNRA 1933-36 (1953), Roll 23: Code 128: Cement Industry. Interestingly, Wolman himself wrote at the beginning of 1934 that, whereas limitation of the workday and workweek had won almost general acceptance, “the unsettled question” was the amount of the overtime penalty, with employers insisting on time and a third and labor on time and a half. Leo Wolman, “Labor under the NRA,” in America’s Recovery Program 89-103 at 93 (Clair Wilcox et al. eds. 1934).

274NRA, HCFC, Hearing No. 88: Cement 13-14 (Sept. 15, 1933) (Film No. 11).

275NRA, HCFC, Hearing No. 88: Cement at 14.

276NRA, HCFC, Hearing No. 88: Cement at 14-18.
of cement workers who had lost their jobs between 1928 and 1932. The FAECT, which appeared on behalf of technical-professional workers at several hearings, protested the proposed code's exclusion of technical employees from its hours limitation. For its part, the union proposed a maximum 30-hour week and six-hour day for technicians subject only to an exception for "extreme emergency" and double time for all additional hours.

Following another hearing in July 1934, the white-collar exclusions underwent further amendment, which, however, was not approved by the NRA until May 11, 1935, two weeks before the Supreme Court struck the statute down. Whereas previously no “executive, administrative, supervisory, or technical employees” paid at least $35 weekly were covered by the hours provision, now the universe of excluded workers was extended to “[p]ersons in a managerial, executive, supervisory or technical capacity and their immediate assistants (excluding skilled production workers)” paid at least $35. In addition, whereas hours-averaging was, in accord with NRA policy, abolished for production workers, it was introduced for the first time for clerical and office workers, whose previous 40-hour week was now subject to averaging over five weeks and a weekly maximum of 48 hours. This latter change was made despite a memorandum from an NRA review officer stating that, although NRA policy allowed clerical employees’ hours to be averaged over up to five weeks in order that end-of-the-month billing peaks could be expeditiously performed, the (general) eight-hour tolerance (embedded in the 48-hour maximum) was contrary to policy and should

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277Code No. 128: Cement Industry, in NRA, Codes of Fair Competition, 3:326-27. The assertion by the Labor Advisory Board’s representative, Dr. E. Eckel, that the many detailed objections raised by the AFL “can be ironed out without any great difficulty” was, given the NRA’s cavalier dismissal of labor’s demands in the more than hundred codes that it had already approved, naive. NRA, HCFC, Hearing No. 88: Cement at 59.

278NRA, HCFC, Hearing No. 88: Cement at 27-30 (A. Passman).

279Unfortunately, the microfilm collection of the NRA Hearings on the Codes of Fair Competition lacks the transcript of the July 11, 1934 cement code hearing.


be amended.\textsuperscript{284}

At the machinery code hearing an AFL representative also paid attention to the exclusion of white-collar workers from the hours provision of the proposed code, but his objections did not bring about their elimination from the final approved code. The labor movement, according to K.C. Davison, wished to point out "the imposing list of exceptions":

"Seasonal or peak demands, emergency maintenance, highly skilled workers, executives, administrators, supervisory and technical employees and their respective staffs, travelling salesmen and service employees, watchmen and firemen."

Thus, a substantial proportion of these employees are permitted unlimited hours. With this large number of exceptions it seems unnecessary to have any maximum hours written in the Code. We suggest that the list of exceptions be materially reduced and that reduction should conform to the needs of the industry. ... We would interpose no objection to a limited allowance above the maximum hours established by the Code, but all such time should be at overtime rates of not less than time and one-half. We are not arguing for putting more money in the pockets of the wage earner by this method. We regard an overtime provision as a penalty. The penalty should be high enough to make the practice prohibitive....\textsuperscript{285}

The AFL representative then suggested Labor's own code provisions, which excluded from the hours limitation travelling salesmen, executives, and supervisors (but not administrative employees) earning $35.00 or more weekly.\textsuperscript{286} Dr. John O'Leary, president of the Machinery and Allied Products Institute, stated that industry would consider the suggestions,\textsuperscript{287} but the final approved code encompassed the same broad groups as the proposal that the AFL had criticized.\textsuperscript{288} The only relevant change involved the initial wording of the exception: "executives, administrative, supervisory and technical employees and members of their

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\textsuperscript{284}Review Officer to Division Administrator Division 1 on Cement Code (Mar. 21, 1935), in \textit{NAMP}, Microcopy No. 213: \textit{DSNRA 1933-36} (1953), Roll 23: Code 128: Cement Industry. \\
\textsuperscript{285}\textit{NRA, HCFC}, Hearing No. 277: Machinery and Allied Products 51 (Dec. 21, 1933) (Film No. 48). \\
\textsuperscript{286}\textit{NRA, HCFC}, Hearing No. 277: Machinery and Allied Products at 61. \\
\textsuperscript{287}\textit{NRA, HCFC}, Hearing No. 277: Machinery and Allied Products at 68. \\
\textsuperscript{288}Code No. 347: Machinery and Allied Products Industry, Art. 3, § 2(a), in \textit{NRA, Codes of Fair Competition}, 8:246. To be sure, other AFL proposals were also rejected, including subjection to the maximum hours limit of employers who personally perform manual labor. \textit{NRA, HCFC}, Hearing No. 277: Machinery and Allied Products at 63.
\end{flushright}
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respective staffs, who are paid at the rate of $35.00 or more per week."\textsuperscript{289} At a conference of basic code representatives of the machinery and allied products industry with representatives of labor and the LAB on February 6, 1934: "A great deal of discussion developed on the point of omitting the works [sic; must read: words] 'and their respective staffs' in the $35 class as the labor representatives contended the Code as presented excepted too many employees from the hour provisions. This was finally left for the consideration of the industry overnight."\textsuperscript{290} Unfortunately, the extant summary of the following day's conference made no further reference to this point, but the appearance in March in the final approved code of somewhat different wording ("executives, those employed in a supervisory or administrative capacity or their immediate assistants...being paid...$35.00...or more per week")\textsuperscript{291} suggests that the adoption of "immediate assistants"—recalling the Sloan-Vandenberg addition to Black’s 30-hour bill a year earlier—instead of "respective staffs" may have been designed as a very minor accommodation of labor's objection to the more expansive nature of the earlier variant. The LAB, in any event, offered no objection to any version of the white-collar exclusions.\textsuperscript{292}

De facto exclusion of administrative employees was embedded in codes that, like the aforementioned iron and steel code, also excluded the staffs or immediate assistants of excluded executives and supervisors (subject to satisfying the $35

\textsuperscript{289}\textit{NRA, Proposed Code of Fair Competition for the Machinery and Allied Products Industry as Revised for a Public Hearing on February 9, 1934}, at 8 (Art. III).


\textsuperscript{292}The LAB did state that it did not approve the labor provisions unless certain changes (such as lowering the weekly hours threshold at which engineers and firemen became entitled to overtime pay) were made, but they were not adopted either. Leo Wolman (chairman, LAB) to W. A. Harriman (div. admr): Code of Fair Competition for the Machinery and Allied Products Industry, revision of Mar. 1, 1934 (Mar. 3, 1934); Alvin Brown (LAB) to General Johnson through Mr. [Edw. F.] McGrady, Subject: Code for the Machinery and Allied Products Industry (Mar. 9, 1934), in \textit{NAMP}, Microcopy No. 213: \textit{DSNRA 1933-36} (1953), Roll 103: Code 347: Machinery and Allied Products Industry.
salary level). Such codes included those of the non-ferrous foundry, aluminum industries, and machinery and allied products industries.\textsuperscript{293} Other codes, such as the rubber manufacturing, rubber tire manufacturing, and aluminum industries, went so far as to exclude from their hours provisions all clerical employees whose weekly salary exceeded $35.\textsuperscript{294} Other expansive exclusions were contained, for example, in the can manufacturing industry code, which excluded research technicians and those employed in any other capacity of sole responsibility.\textsuperscript{295}

The Labor Advisory Board representative at the rubber manufacturing code hearing did insist that because such excluded groups as shipping crews, electricians, watchmen, elevator operators, firemen, engineers and maintenance men were "victims of unemployment in the same way that other workers" were, they should be covered by the maximum hours provision, but he failed to mention white-collar employees,\textsuperscript{296} and the LAB promptly approved the code following the


\textsuperscript{296}NRA, \textit{HCFC}, Hearing No. 412: Rubber Manufacturing 104 (Oct. 25, 1933) (Film No. 64) (Dr. A. Howard Myers). The only significant change that the employers’ proposed hours for white-collar workers underwent after the hearing was an increase from $30 to $35 in the salary level for totally excluded managerial, executive, supervisory, and technical employees. NRA, \textit{Proposed Code of Fair Competition for the Rubber Manufacturing Industry As Revised October 20, 1933 for Public Hearing on October 25, 1933}, Art. V.A.4 at 6 (1933); L. L. Krentalin, "History of the Code of Fair Competition for the Rubber Manufacturing Industry" at 27 (May 20, 1936), in \textit{NAMP}, Microcopy No. 213: \textit{DSNRA 1933-36} (1953), Roll 151: Code 156: Rubber Manufacturing Industry. The original proposed code of Sept. 26, 1933 did not contain any regulation of lower-paid
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hearing. Similarly, the general president of the Shoe Workers Protective Union, who testified that he expected that the payment of time and a half for overtime would mean that it would be worked only infrequently, did not apply it to office work.

The code hearing for the rubber tire manufacturing industry, which took place on October 20, 1933, was notable for testimony by AFL President William Green, who mounted what was perhaps the most forthright, radical, and eloquent plea on behalf of hours parity for white-collar workers that has ever been presented at a public labor standards hearing. Amusingly, the account in the national newspaper of record failed even to report Green’s presence, although it mentioned far less significant testimony. The tire hearing took place about three weeks after Green had served a “virtual ultimatum on the Recovery Administration” that: “Unless further revision of maximum hours provided in codes reduces the work week to five days of about six hours each, organized labor will be compelled to go before Congress at the next session and support a thirty-hour bill....”

Although white-collar workers’ hours; only after a formal pre-hearing conference on Oct. 4, did the provision appear in the proposed code (which was retained in the approved code) permitting 40-hour weeks averaged over a month for accounting, clerical, and office workers subject to a 48-hour maximum. Krentalin, “History” at 20; NRA, Proposed Code of Fair Competition for the Rubber Manufacturing Industry Revised October 27, 1933 (Nov. 28, 1933), in NAMP, Microcopy No. 213: DSNRA 1933-36 (1953), Roll 150: Code 156: Rubber Manufacturing Industry.


298NRA, HCFC, Hearing No. 412: Rubber Manufacturing at 122 (John Nolan).


300“Tire Makers Point to $33,000,000 Tax,” NYT, Oct. 21, 1933 (7:4). Similarly, the official NRA code history also ignored Green’s plea on behalf of white-collar workers; it stated that discussion and testimony regarding hours at the hearing had centered on the 36-hour week plus 104 annual hours without overtime pay. G. S. Earseman, “History of the Code of Fair Competition for the Rubber Tire Manufacturing Industry” at 13 (Sept. 1935), in NAMP, Microcopy No. 213: DSNRA 1933-36 (1953), Roll 151: Code 174: Rubber Tire Manufacturing Industry.

301Louis Stark, “Green Threatens Plea to Congress,” NYT, Sept. 28, 1933 (1:2).
the NIRA was, according to The New York Times, "[m]anifestly...in part a result of the campaign" for the 30-hour week that the AFL had vigorously supported in Congress, "[t]hat campaign had come to grief because there was no agreement between capital and labor as to how much should be paid for the shorter week. Capital, with some exceptions, was reluctant to increase the hourly rate much or any. Labor wanted the same pay for the short week that it had been receiving for the long." The Times viewed the NRA's policy as shortening the workweek in each industry to reemploy all those who had been attached to it, while fixing wages "at the level which the industry can reasonably be expected to bear."\(^{302}\)

Whereas production workers would be limited to 36 hours per week plus an addition 104 hours annually,\(^ {303}\) the employers' code authority proposed permitting accounting, clerical, office, service, and (inside) sales employees to work 40 hours a week averaged over a month, subject to a maximum of 48 hours in any one week. The Rubber Manufacturers Association justified these extended hours for white-collar workers on the grounds that, as long as business was conducted on a monthly basis with respect to billing and similar procedures, it was impossible to flatten out the work load throughout the month—unless temporary workers were hired for one or two weeks each month and then laid off again.\(^ {304}\)

After an AFL representative on the LAB had counterproposed a 30-hour week with time and a half for the 104 additional hours in order to discourage overtime work,\(^ {305}\) Green took as his point of departure the fact that there were still 10 million unemployed four months after the NIRA had been signed.\(^ {306}\) He therefore proposed a 30-hour week and six-hour day not only for factory workers, but all employees, including office workers, supervisors, maintenance crews, engineers, firemen, electricians, tire testers, and shipping crews. When it was necessary for the operation of a particular job, as a result of the specific character of the work, be it mechanical, manufacturing, or office work, the employee would be permitted

Ironically, Green made this threat at the annual convention of the Metal Trades Department of the AFL, at which the individual unions had protested efforts to organize mass-production industries along vertical lines, thus interfering with the "property rights" of the old-line craft unions. \textit{Id.}

\(^{302}\)Robert. Duffus, "We Begin Our Greatest Labor Experiment," \textit{NYT}, Aug. 6, 1933 (sect. 9, 1:1-8 at 5-6).

\(^{303}\)NRA, \textit{HCFC}, Hearing No. 413: Rubber Tire Manufacturing 48 (Oct. 20, 1933) (Film No. 65) (Art. IV).


\(^{305}\)NRA, \textit{HCFC}, Hearing No. 413: Rubber Tire Manufacturing at 78 (F. L. Phillips).

\(^{306}\)NRA, \textit{HCFC}, Hearing No. 413: Rubber Tire Manufacturing at 116.
to work overtime, but subject to several conditions: a maximum of six overtime hours in any week; a maximum of 120 hours (including overtime) in any four consecutive weeks; time and a half pay for all hours beyond six per day and 30 per week and double time on Sundays and holidays; a prohibition on overtime work when another worker of the same classification competent to perform the task was working fewer than 30 hours per week (except where such work was necessary for completion of a particular job). Green allowed for further flexibility by permitting maintenance and repair crews to work more than six weekly overtime hours in the case of emergencies. In addition, technical men earning more than $35 a week and shift foremen would be permitted to work as many as 40 hours per week. Finally, all overtime hours had to be reported monthly to the Code Authority to enable it to establish rules to eliminate overtime.307

Green then explained why the AFL’s program was not merely for blue-collar workers:

I am intentionally providing the same short hours for the white-collar workers as for the factory workers.

Mr. Administrator, I think that we have all been neglecting the white-collar workers. Time was when they worked shorter hours than the man in overalls.

However, with the coming of the five day week during the depression, we have gradually accepted the idea that office workers should work a longer week because the telephone must be answered, orders must be acknowledged, and planning and scheduling activities must be carried forward on all business days.

To effectuate the purposes of the National Industrial Recovery Act, the hours of these workers must also be reduced and the slack of unemployment in this field be taken up.

It is difficult to secure detailed figures on unemployment among office workers, but every employer, every employment office, every employment agency, every high school testifies to the large number available.

All during the depression, our public schools have been turning out thousands of young people trained to do office work, and eager to find work.

The President’s Reemployment Agreement with its temporary standard of forty hours per week has not sent them back to work. Why not try thirty hours and see what that will do to take up the slack of unemployment?

The provisions suggested for flexibility of hours will take care of the office workers’ peaks of work due to monthly reports.308

Green went on to propose what later would be called a Fordist program for the tire and automobile industries, which focused on lowering hours to thirty so that

307NRA, HCFC, Hearing No. 413: Rubber Tire Manufacturing 118-19.

308NRA, HCFC, Hearing No. 413: Rubber Tire Manufacturing 126-27 (Oct. 20, 1933) (Film No. 65).
workers could use more time to drive cars. Drawing out the logic of this posi-
tion, he pointed out that as tire manufacturing productivity rose strongly in the late
1920s and early 1930s, wages did not rise, but the tire companies did not gain
either: “You gave it away.” While conceding that higher wages would lead to
higher prices, he conjectured that it seemed “likely” that the industry could pass
some of the increased cost on to consumers. In addition to a minimum wage of
$18 a week (or 60 cents an hour) for factory and office workers, remarkably the
AFL president urged the highly interventionist step (obviously dictated by the re-
employment campaign) of freezing the highest line speeds, which would be
registered with the Code Authority and could not be increased without its ap-
proval.

Although the final code as approved by the NRA and Roosevelt adopted none
of Green’s proposals, the rubber tire manufacturing industry was not one in which
discrimination against white-collar workers resulted from benign or malevolent
neglect by the labor movement.

At the aluminum industry code hearing, the employers’ proposed code ex-
cluded from the hours provision employees receiving $35 or more weekly and
employees employed in an executive, supervisory, or technical capacity and their
immediate staffs. The representative of the Union of Aluminum Workers (AFL),
Boris Shishkin, who was alive to the need to abolish piecework and incentives as
subverting the reemployment process in production, urged a 30-hour week, coun-
terproposed that no employee employed in clerical or office work—which was

309NRA, HCFC, Hearing No. 413: Rubber Tire Manufacturing at 128-31.
310NRA, HCFC, Hearing No. 413: Rubber Tire Manufacturing at 141-42.
311NRA, HCFC, Hearing No. 413: Rubber Tire Manufacturing at 133. To be sure,
since Green proposed that the National Code Authority for this industry consist of eight
industry members plus three non-voting members representing the NRA, consumers, and
labor (the latter chosen by the LAB from nominations submitted by the AFL), the principal
result would have been exposing increased line speeds and their impact of employment
to public debate rather than prohibiting such increases. Id. at 143.
312In retrospect, the NRA code history asserted that the exceptionally severe
technological displacement in the industry had made it a “foregone conclusion” that the
code’s maximum hours would not bring about a considerable increase in employment
Manufacturing Industry” at 54.
313NRA, HCFC, Hearing No. 14: Aluminum at 25 (Sept. 28, 1933). See also NRA,
Proposed Code of Fair Competition for the Aluminum Industry as Submitted for Public
Hearing Art. V at 3 (1933), reprinted in NAMP, Microcopy No. 213: DSNRA 1933-36,
314NRA, HCFC, Hearing No. 14: Aluminum at 81-82, 74 (Sept. 28, 1933).
not even mentioned in the proposed code—unless employed in a managerial or executive capacity earning more than $35 per week, be permitted to work more than 40 hours a week or seven hours a day. Unsurprisingly, however, neither the employer-monopolized code authority nor the NRA and Roosevelt adopted his proposal. Indeed, the exclusions in the approved code became even more expansive, permitting employers to require clerical and office workers to work not only 40 hours a week and eight hours a day, but even 48 hours one week every month without having to pay an overtime penalty, in addition to excluding even clerical employees earning at least $35 weekly from any hours limitations. The LAB, too, had declared that it could not approve the code's labor provisions unless the blanket exclusion of “persons engaged in a...clerical...capacity” receiving at least $35 a week and the “immediate assistants” of all those engaged in a “managerial, executive, clerical or supervisory capacity” (also earning at least $35) were deleted. Notwithstanding negative reports of this and other advisory boards, however, the deputy administrator in charge of the code, feeling that further conferences would only serve to widen the breach between the parties, recommended adoption of the code so that the industry could operate under the code, which could then be modified based on experience or changed circumstances. No such modification ever occurred.

Newspaper Reporters

Because he is unorganized, therefore impotent in his individuality, the white collar man as a class, and the class includes newspaper editorial workers, has been an especial victim of the deflationary era.

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315 NRA, HCFC, Hearing No. 14: Aluminum at 75 (Sept. 28, 1933).
316 "Johnson Approves the Aluminum Code," NYT, June 28, 1934 (2:3).
317 Code No. 470: Aluminum Industry, Art. III(b) and (d), in NRA, Codes of Fair Competition, 12:121-22.
318 Leo Wolman (Chairman, LAB) to K. M. Simpson (Division Administrator), Subject: Proposed Code of Fair Competition for the Aluminum Industry as revised April 23, 1934, at 1-2 (May 16, 1934), in NAMP, Microcopy No. 213: DSNRA 1933-36, Roll 3: Code 470: Aluminum Industry.
320 NRA, HCFC, Hearing No. 143: Daily Newspaper Publishing Business at 1404 (Sept. 22, 1933) (Lloyd White, managing editor of Cleveland Press and president of the
We reporters...would at times look down upon the members of the typographical union who were making it possible for the dear public to read our masterpieces. But when it came to Saturday night our trade union brothers had the laugh on us. Their collars...might not be so white,...their pay envelope was far fatter, their hours shorter and the boss would think twice before asking them to work overtime. Overtime meant a lot of money out of the coffers of the newspapers.321

Perhaps the most high-profile exclusion of professional employees appeared in the daily newspaper business code.322 Because it had long been customary for reporters to work extended hours without additional pay or compensatory time off, “protection against abuses of the overtime system”323 was one of their chief goals. The antagonists’ unique positions in the media fairly preordained extensive press coverage. Thus as early as President Roosevelt’s press conference on July 26, 1933, one potential covered employee asked: “Can you tell us whether the news writers will be placed under a code or not?” To which Roosevelt replied: “Let us take a vote on it. (Laughter).” The follow-up query prompted a response only from the questioner’s colleagues: “I understand they are placed in the category of white collar workers? (Laughter)”324

Two days later, the NRA general counsel Donald Richberg, when asked by newspaper reporters whether they were professionals, replied: “I've heard it argued both ways, but I'll leave it to you to decide’....”325 Three days later the NRA issued new interpretations of the PRA, stating that (in addition to interns, nurses, and hospital and research technicians) newspaper reporters, editorial writers, rewrite men, and other editorial staff members fell within the meaning of its excluded professional persons.326 The next day Johnson characterized this

Cleveland Editorial Employees’ Assoc.) (Film No. 23).

322Although Representative Connery, who was leading the campaign for a 30-hour bill in the House, stated to a publishers’ representative at a hearing on his own bill on May 4 that it would not apply to newspaper reporters, the reason was that they did not produce or manufacture in a factory. Thirty-Hour Week Bill: Hearings Before the House Committee on Labor on S. 158 and H. R. 4557, at 699 (73d Cong., 1st Sess. 1933).
325“NRA to Leave Pay in Higher Scales to the Employer,” NYT, July 29, 1933 (1:1).
326“New Exemptions from NRA Code,” NYT, Aug. 1, 1933 (10:3).
reference to reporters as a “slip,” which was “subject to reversal.” Two days later, the materially interested publisher of *The New York Times* was doubtless relieved to able to report that: “In regard to news forces, the present intention of the administration was described as leaving to each publisher the decision on bringing them under a work-week limit. ... If publishers wish to take the stand that their reporters are professional men, it was indicated today that there was little prospect that the administration would feel called upon to interfere.”

Thereupon the American Newspaper Publishers Association was emboldened to offer a code that it hoped would enable members to operate under a modified version of the PRA. Although the text itself did not identify the “professional persons employed in their profession,” who, unlike managerial, executive, and supervisory employees, were not subject to a $35 weekly salary requirement, the Associated Press reported that editors and reporters were excepted “as members of a profession.” Doubtless looking over its shoulder, the ANPA conceded that daily newspapers “have no desire to set for themselves any threadbare arguments” alleging, as many other trade associations had, that this particular industry was “peculiar,” but then proceeded to assert that (despite the proposed exclusion of reporters from the maximum hours provision) they had already “substantially maintained” the NRA’s aforementioned principle of calibrating the length of the workweek in order to spread employment sufficiently to employ the entire contingent of workers normally attached to that industry. This code, whose predecessors Johnson had already rejected as unsatisfactory and which unsurprisingly one-sidedly favored its drafters’ interests, was also rejected

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330 "Text of Code Offered by Daily Newspaper Publishers," *NYT*, Aug. 9, 1933 (2:2-6 at 4). ANPA’s legal counsel, Elisha Hanson, implausibly asserted that the classification of reporters drawing more than $35 a week as professionals “is not of our liking any more than theirs [reporters’]. In fact, we were utterly amazed during the progress of our negotiations to hear of a ruling by the NRA that all reporters were professional men.” *NRA, HCFC*, Hearing No. 143: Daily Newspaper Publishing Business 1439-40 (Sept. 22, 1933) (Film No. 23).
333 For example, it recited that the code’s purpose was not to require the payment of “punitive overtime rates,” and that in any city lacking a surplus of labor essential to the production of a daily newspaper, the code’s maximum hours did not apply. "Text of Code
by him in part because of "its failure to provide a short work-week for reporters." A week later, however, he approved it (but only as a temporary PRA code) after revisions, including a 40-hour week for reporters receiving less than $35 per week.335

The code hearings on September 22-23, 1933, gave articulate journalists a national platform to mock publishers' profit-driven professionalism rhetoric designed to deprive reporters of protection against overwork while their colleagues remained unemployed.336 This dispute was in an important sense the origin of the employer tradition that consolidated itself five years later under the FLSA and continues to the present of rejecting workers' entitlement to hours protection based solely on invoking a word ("professional") and pinning that title on them without reference to any underlying public policy. Thus, for example, Elisha Hanson, who remained the ANPA's principal legal authority on and driving force in resisting white-collar coverage under the FLSA,337 found it sufficient to refer to the publishers' aforementioned proposed exclusion as "the usual exception paragraph covering professional persons" without any accompanying explanation.338

The Guild of New York Newspaper Men and Women had been founded a few days before the hearing to urge adoption of an NRA code providing for a five-day week for all newspaper writers and "desk men, except authentic executives and those engaged in supplying syndicate material."339 Doris Fleeson,340 a staff reporter at the New York *Daily News*—a "progressive"341 newspaper on which "[n]ot even executives are deprived of the five day week" and both the city and managing editor342 worked five days under this employment-increasing regime—did not re-

Offered by Daily Newspaper Publishers," *NYT*, Aug. 9, 1933 (2:2-6 at 6).


337Leab, *A Union of Individuals* at 38.


339"News Writers Form Guild Under NRA," *NYT*, Sept. 18, 1933 (4:4-5). Haywood Broun, the founder of the organization and later president of the American Newspaper Guild and a syndicated columnist, testified that columnists did not need to be under the 40-hour week rule "since they work five or six hours a week at the present time." NRA, *HCFC*, Hearing No. 143: Daily Newspaper Publishing Business at 1375 (Sept. 22, 1933).


342Another witness advocated excepting editors-in-chief and managing editors "be-
quest the five-day week in order to interfere with the continuity of news assignments; for example, at the Daily News, reporters covering a kidnapping remained on the job until it was finished, taking their days off following its conclusion. Partially falling victim to a negative version of the publishers' talismanic approach, Fleeson then insisted that reporters "object to being classified as professional men and women for the purpose of depriving us of the NRA. (Laughter) We do not believe it was the intent of the framer of the recovery Act to exclude us. We do not fix our fees and do not accept and reject assignments."343 (This thoroughly instrumental attitude344 can be contrasted with that of nurses in California in 1914 who

cause they are executives in fact.” NRA, HCFC, Hearing No. 143: Daily Newspaper Publishing Business at 1395 (Sept. 22, 1933) (Lloyd White).

343NRA, HCFC, Hearing No. 143: Daily Newspaper Publishing Business at 1366 (Sept. 22, 1933). Another reporter proposed in the alternative that if publishers desired sole discretion in order to avoid disruption, reporters should be paid time and a third for overtime work. Id. at 1434-35 (Andrew Parker). This overtime rate was the same that publishers had proposed for highly skilled workers on continuous process. "Text of Code Offered by Daily Newspaper Publishers." While assuring the NRA that "[n]o newspaperman objects to working long hours in a real emergency," Lloyd White argued that "the emergency shall be real and not an executive whim," the best protection against which was "punitive" time-and-a-third overtime compensation or an equivalent of time off. Id. at 1410 (Sept. 22, 1933). Given the rather accommodating stance that the Guild took on long hours, it is unclear whether the Times was spreading a canard when it later reported, without a source, that: "It is said to be the desire of the guild that any one [sic] not actually owning a share in a newspaper work under hours restrictions. It is suggested that if news executives 'pile up' time they receive a sabbatical year off.” “Roosevelt Delays on Newspaper Code,” NYT, Dec. 24, 1933 (16:5). Arthur Krock, the Washington correspondent of The New York Times, took much glee in arguing that the time-off approach was not viable, for example, in reporting on NRA labor issues because they had been arising daily for months and would continue to do so indefinitely, and reporters had had to become such specialists that only by employing “two men for every one-man task,” and thus forcing bankruptcy, could the problem be eliminated. Arthur Krock, “Reporters’ Five-Day Week Offers a Problem,” NYT, Mar. 16, 1934 (20:5). ANPA had tried out this argument at the House Labor Committee hearings on Connery’s 30-hour bill in May. Thirty-Hour Week Bill: Hearings Before the House Committee on Labor on S. 158 and H. R. 4557 at 684 (Harvey Kelly, chairman, Special Standards Committee, ANPA).

344Many decades later it occurred to a judge in a FLSA overtime case involving newspaper reporters that: “The issue of whether an employee is an exempt professional forces the opposing parties into paradoxical positions: The management argues that the employee’s work is distinct and creative, and thus does not merit overtime pay; the worker maintains that he deserves overtime pay because his work is routine and non-specialized. Both parties are compelled to make arguments contrary to their customary economic
opposed coverage under an eight-hour law because hospital doctors had told them that it would "debas[e] their noble profession to include them under a law that would be enforced by the Bureau of Labor. Many women were honestly incensed by the bureau’s action [in introducing the bill], believing that it took from them their professional standing."  

If Fleeson seemed to conflate professional status with the markers of self-employment, Edward Angly, a reporter for the New York Herald Tribune, after sarcastically equating the proposed code’s designating them as professionals with Burke’s dubbing them the Fourth Estate, proceeded to an occupational-sociological analysis:

We do not feel we are professionals, and we should like to have that stricken from the code. We feel that we are members of a craft.

Professionals, as we understand it, are persons engaged in a life work which has some requirements for entrance [sic] into it, some test for competency, and some examination, and perhaps even a code of ethics. Of these we have none. (Laughter)  

Reverting to the sarcastic mode, Angly proposed striking the clause designating them as professionals and “permitting us to work as long as we like....” Instead, reporters wanted to be brought in as “simple craftsmen (laughter) and taken up on the heights of the Blue Eagle instead of being left down in the valley of ragged individualism. (Laughter and applause.)"  

In a derisively playful manner that disappeared from organized labor’s formal


345Katherine Edson [Commissioner, Cal. State Industrial Welfare Commission], “Student Nurses and the Eight-Hour Law in California,” Survey 31(7):499-500 at 499 (Jan. 24, 1914). Eighty years later, a large group of operating room nurses at the University of Iowa Hospitals and Clinics who were dissatisfied with their employer’s overtime pay policies but were profoundly conflicted by the thought of securing overtime pay under the FLSA only at the price of having to disavow the word that their union had drilled into their heads for decades as the absolute foundation of their working lives, told the author indignantly: “If we are ‘professionals,’ then why are we made to account for every minute of our time?” Meeting, Aug. 13, 1994.


and bureaucratic post-World War II criticisms of employers’ demands for expanded exclusions of the white-collar workers from the FLSA, further scorn was heaped on the ANPA’s relentless campaign to drive reporters out of the code’s hours provision as professionals by the Cleveland Editorial Men’s Association, whose lawyer, Marvin Harrison, observed that “[W]e in Ohio know a great deal about professional persons. We, within the last year, have added the real estate agents and insurance agents, and we have [added] licensed and tagged funeral directors and barbers to the professionals, so if we include farmers and pedestrians we would have everyone now professionalized in Ohio.”349 In a similar vein, Andrew Parker, a reporter at the Philadelphia Record who objected to the discriminatory imposition of a $35 salary level criterion—he counterproposed $100—related that when his own publisher had conceded that although he felt that men in the higher brackets should not be subject to the code’s maximum hours, he had also added: “‘I can’t think of any good reason for feeling that way....’”350 To underscore the arbitrariness of the $35-salary marker of professionalism, Frank Morrison, the AFL secretary, pointed out that professional journalists’ salaries were far lower than that of the skilled workers employed in the production of those same newspapers. He therefore proposed $75 as the appropriate salary in tandem with a proviso that the weekly minimum salary be no less than the wages paid to the highest class of skilled mechanics employed in producing the same publication.351

The most sustained and broadest criticism of the professional exclusion came from Lloyd White, managing editor of the Cleveland Press and president of the Cleveland Editorial Employees Association, who emphasized that the newspaper


350NRA, HCFC, Hearing No. 143: Daily Newspaper Publishing Business at 1419-21 (quoting J. David Stern at 1421) (Sept. 22, 1933). To be sure, Stern was an unorthodox publisher, who boasted of having overridden his penny-pinching executives and made sure that his employees were paid for overtime work. J. David Stern, Memoirs of a Maverick Publisher 284-85 (1962). He was the first publisher to enter into a collective bargaining agreement with the Guild (in 1934) and resigned in protest from ANPA in 1936. Edwin Emery, History of the American Newspaper Publishers Association 227, 235 (1970 [1950]). The contract with the Record excluded from the five-day, 40-hour week editorial workers earning $4,500 or more annually and any “employees who in the opinion of the Publisher and the Guild are doing highly skilled and specialized work of such a nature that it cannot reasonably be performed by temporary substitutes.” “Text of Philadelphia Guild Contract,” EP 66(48):20 (Apr. 14, 1934) (¶ 10).

industry, like any other, lent itself to fulfillment of the NIRA’s goal of reducing the hours of the employed in order to reemploy the unemployed—in this case, “the thousands of editorial workers who have been forced to the streets by newspaper mergers and in consequence also of a general program of operative retrenchment in which the publishers have participated with industry generally...and compelled their staffs to work longer hours....”352 White attacked the exclusion of professionals as linked to a $35-a-week salary on the grounds that the criterion would justify excluding “virtually every skilled artisan in the unionized crafts,”353 especially since

[n]ewspaper editorial knowledge is...the same type...as that possessed by the bricklayer who has learned by practice to build a wall to plumb.

Editorial workers are not professional men, but skilled artisans and hired hands.

This attempt by the A. N. P. A. to describe them otherwise has no other justification...than a knowledge that the men and women who write and edit their papers do not work with a trowel.354

The first inkling that the ideology of professionalism may also have gained a grip on reporters’ consciousness that interfered with their own and their co-workers’ welfare came from Paul Anderson, a reporter at the St. Louis Post Dispatch, who represented Washington, D.C. correspondents. He testified that he knew of no class of worker needing protection of an NRA code more than reporters, who, being individualistic and incapable of concerted action, needed to be protected from their own enthusiasm. In particular, it was all well and good for reporters to insist on being permitted to stay with their story night and day, but precisely for that reason some other reporter was unemployed.355

In December 1933 the LAB sent a memorandum to Lindsay Rogers, the hearing officer, informing him that it objected to the exemption for persons employed in a professional capacity (as well as the comp-time off provision, which it believed should have been time and a half).356 The objections were in vain: when

President Roosevelt approved the daily newspaper publishing business code in February 1934, the 40- to 48-hour provision, exactly like that of the code that the ANPA had proposed half a year earlier, excluded “professional persons employed in their professions” (as well as persons employed in a “managerial or personal capacity”). Roosevelt, who vacillated between not wanting to alienate the working press (whose leaders were among the very few affected workers who ever had the opportunity to discuss their code with the president several times) and publishers, included in his executive order approving the code sarcastic language to the effect that the constitutionally protected freedom of expression did not afford publishers “freedom to work children, or do business in a fire trap,” but confined to a nonbinding letter to Administrator Johnson the mere “observation” that publishers of newspapers with a circulation of 75,000 or more in cities of 750,000 population or more were “requested to install a five-day, forty-hour week for their staff of reporters and writers with the purpose of giving employment to additional men and women in this field.” Significantly, both at this time and earlier, the leading trade magazine, Editor & Publisher, published articles detailing how several big city dailies had successfully gone over to a five-day, 40-hour-week system, under which reporters who worked long hours one week took vacation the next week. The Guild, which regarded Roosevelt’s request as a victory, soon

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357 Code No. 288: Daily Newspaper Publishing Business (Feb. 17, 1934), Art. III, § 1, in NRA, Codes of Fair Competition, 7:69-84, at 80 (1934). See also “Text of the Code for Daily Newspapers as Finally Approved by President Roosevelt,” NYT, Feb. 20, 1934 (8:1-8). The 40-hour week applied only to cities of over 50,000 population; for smaller cities the maximum was 44 or 48 hours.

358 At a meeting on December 11, 1933, Guild leaders complained to Roosevelt that the code failed to define “news department workers” or to specify hours for editorial employees, for whom they demanded a five-day week. “What the Guild Told Roosevelt at a Tea Party,” GR 1(3):1:2 (Jan. 12, 1934). On another meeting on Nov. 5, 1934, see “Officers Tell Guild Needs to Roosevelt,” GR 1(13):1:1, 6:1-2 (Nov. 15, 1934).

359 Leab, A Union of Individuals at 114.

360 Code No. 288: Daily Newspaper Publishing Business (Feb. 17, 1934), in NRA, Codes of Fair Competition, 7:70. One publisher testified before a Senate committee in 1934 that he would be a hypocrite if the “board of health ordered me to clean up my toilets and I claimed that it was interfering with freedom of the press.” Stern, Memoirs of a Maverick Publisher at 21-22.


reported that a number of New York City newspapers were complying with the request.³⁶⁴

The newly founded American Newspaper Guild, as the Times had reported
anticipatorily two months earlier while Roosevelt was considering the code, “lost
its first test” insofar as most newspaper writers “are not considered laborers but
professionals.”³⁶⁵ More tests, however, awaited the Guild. In May 1934, the code
authority, as the approved code had authorized it,³⁶⁶ submitted to the NRA a
schedule of maximum hours for news department workers, which included new
language excluding from the 40- to 48-hour week reporters on out-of-town
assignment and correspondents employed outside of the place of publication
(unless they worked in a bureau with two or more correspondents).³⁶⁷ In response,
the Guild, which regarded the proposal as “so objectionable’ as to be almost
inconceivable,”³⁶⁸ submitted a survey it had conducted showing that the proportion
of editorial employees working more than 40 hours weekly had fallen from 1930
to 1934 from 88 percent to 54 percent, and that two-thirds of editorial employees
were paid nothing for overtime, while one-quarter were given time off.³⁶⁹ For a

magazine also reported that Roosevelt had stated in an offhand way that, to a “reasonable
degree,” it would be permissible for reporters to work more than 40 hours in a week and
accumulate credits toward vacation. George Manning, “President’s Approval of Dailies’
time an Associated Press report recounted an informal discussion that Roosevelt had
carried (with unidentified persons) in which he purportedly stated that “using men
sixty-five or seventy hours a week and permitting them to accumulate long vacations”
³⁶³“News Guild Wins First Major Battle for 5-Day Week,” GR 1(4):1:5 (Feb. 23,
1934).
³⁶⁴“Dear Mr. President: Here’s How N.Y. Papers Are Reducing Hours,” GR 1(6):8:1-2
(May 1934).
³⁶⁶“Text of the Code for Daily Newspapers as Finally Approved by President
Roosevelt” (Art. III, §1, para 2).
³⁶⁷Schedule “A” Code Authority for the Daily Newspaper Publishing Business:
Schedule of Maximum Hours and Minimum Wages for News Department Workers
submitted by the Code Authority to the National Recovery Administration (May 10, 1934),
in NRA, HCFC, Hearing No. 143: Daily Newspaper Publishing Business at 5-6 (Dec. 5,
1934) (Film No. 24). See also “Asks 40-Hour Week in Newspaper Code,” NYT, May 19,
1934 (4:2).
³⁶⁸Leab, A Union of Individuals at 197 (quoting ANG correspondence).
³⁶⁹David Brown and Spencer Reed, “Editorial Employees (Newspaper Guild Data)”
(Sept. 13, 1934), in NRA, HCFC, Hearing No. 143: Daily Newspaper Publishing Business

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final code hearing in early 1935, the Guild then proposed a 40-hour 5-day maximum workweek for news department employees—defined as including anyone regularly employed in gathering or writing, editing, or preparing, directing preparation of, or helping to prepare material for newspaper publication, including clerical employees, all of whom had to be paid at least $45 weekly—which could be exceeded in emergencies if compensated for by one and a half hours off for every hour of overtime.370

On March 2, 1935, the LAB sent a 12-page memorandum to Jack B. Tate, the NRA Graphic Arts administrator, explaining that, since the publishers’ proposed amendments were “deficient” and the Guild’s, though “more flexible,” could not be approved, it was submitting its own substitute. Its proposals included an hour and a half off for every overtime hour (beyond 8 or 40) worked. In contrast to the employers’ compensatory time off proposal, which was “relatively worthless because no definite time limit is set during which the time must be granted,” the LAB argued that it was “not advisable to require overtime to be taken until at least” eight hours had been accumulated. The punitive character of the time and a half provision was not designed to give employees a vacation once a month, but to prevent overtime and to provide employment: there would be little reemployment if publishers were permitted to adjust employees’ hours as they saw fit without incurring any penalty. In addition, the LAB insisted that the exclusion of out-of-town reporters was unacceptable.371

Six weeks later Tate recommended to the National Industrial Recovery Board that the publishers’ proposed amendments to the code be approved. Although he reported that the LAB had withheld its approval and dealt with two of its objections, he failed even to mention its central criticisms and proposals relating to overtime.372 The NRA Review Officer then informed Tate that the amendments that he had approved were not consistent with NRA policy; specifically, the officer agreed with the LAB’s objections to the overtime provisions and declared that policy demanded that the exclusion of certain workers (including the out-of-town reporters) be conditioned on payment of at least a weekly salary of $35.373 The

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371Memorandum from Clyde Mills, LAB, to Jack B. Tate at 1-3, 8-9, 12 (Mar. 2, 1935), in NAMP, Microcopy No. 213: DSNRA 1933-36, Roll 44.
373Alvin Brown, Review Officer, to Division Administrator, Graphic Arts Division
position that Tate developed in rebutting this view to the NIRB was remarkable for its willingness to move to new argumentative terrain. Tate contended that it was open to question whether a policy applicable to a manufacturing industry, for example, should be considered as necessarily applicable to such an industry as...newspaper publishing. In general, all labor provisions in approved codes have as their basis the concept of workers engaged in production with machines. The mechanical employees in the newspaper publishing industry are so considered and the labor provisions in this code are so drawn; but the nature of the work done by News Department Employees is such that it may be considered as falling within an unchartered area between craftsmanship and a profession.374

Without explicating the basis for his dichotomous treatment of blue- and white-collar workers, Tate conceded that the review officer’s objections were “undoubtedly sound,” but not “when the nature of the work done by the employees covered by the proposed amendment is properly considered.” Again, conceding that “no specific answer is possible to” the review officer’s exception to the amendments’ deviation from the strict policy of the 40-hour week, Tate conjured up the black box of work that is “closer to a profession than a craft” without explaining why reporters should work longer workweeks or why the imperatives of reemploying their out-of-work colleagues should not assert themselves.375

When the NIRB approved the amendments to the code in May, just a few weeks before the Supreme Court declared the NIRA unconstitutional, the definition of news department employees subject to the 40- to 48-hour week tracked the publishers’ proposal by excluding persons employed in a managerial, executive, or personal capacity, editorial writers, employees on out of town assignment, and correspondents (unless employed in a permanent bureau of at least two full-time correspondents).376 As the Guild sarcastically observed: “News


374Jack B. Tate to NIRB at 1 (Apr. 27, 1935), in NAMP, Microcopy No. 213: DSNRA 1933-36, Roll 44.

375Jack B. Tate to NIRB at 2 (Apr. 27, 1935), in NAMP, Microcopy No. 213: DSNRA 1933-36, Roll 44.

376Code No. 288—Amendment No. 2: Daily Newspaper Publishing Business, Art. III (May 2, 1935), in NRA, Codes of Fair Competition, 23:55-58 at 58 (1935). This wording suggests that classification as “professional” no longer excluded all reporters. The trade’s leading magazine accepted this interpretation: “Code Wage Changes Accepted by NRA,” EP 67(52):28 (May 11, 1935). See also Emery, History of the American Newspaper Publishers Association at 226. The term “editorial writers” was usually synonymous with “news department”; if it was used in that sense here, then the references to correspondents...
department employes will get the ‘benefit’ of these...hours for about six weeks.”

White-Collar Industries

The code minimums usually relate to workers employed directly in manufacturing or productive processes. The "white-collar" workers scattered through thousands of business establishments, poorly organized, considered for the most part in the category of "general overhead" rather than "direct production cost," were to a large extent an afterthought. Most of the codes do not classify clerical workers according to occupation but merely lump accountants, bookkeepers, stenographers and office and clerical help in one category, with a single minimum-wage provision.

It is instructive to compare the treatment of white-collar workers in manufacturing and allied industries with that accorded them in such virtually purely white-collar businesses as banking, investment banking, and stock exchanges. Given the almost uniform lack of success which labor had in pressing demands in mass production industries, it is hardly surprising that these political-economically powerful industries that had been barely touched by unionism did not have to make concessions to labor after they had formulated codes that one-sidedly served their own interests.

Bankers were the first to go through a code hearing. On September 28, 1933, the American Bankers Association presented its code, which self-generously proposed a 40-hour week averaged over 13 weeks. This ample basic flexibility was then considerably widened by the supplementary provisions. First, in areas in which seasonality of business “making necessary the moving of some product within a limited period imposes upon banking facilities an unusual demand, employees of banks subject to such peak demand may work...48...hours per week for a period not to exceed...16...consecutive weeks.” Second, all employees “required would have been superfluous; if it literally meant those who wrote editorials, then most reporters would have been covered. Leab, A Union of Individuals at 200, interprets the maximum hours provision in the 1935 code as having remained the same as those the 1934 code had established for other newspaper workers but without mention of the five-day week.

"Amendment on Wages Adopted; Code has only Month to Run," GR 2(11):1:3-5 (May 19, 1935).

"Labor and the Government: An Investigation of the Role of Government in Labor Relations 279 (Alfred Bernheim and Dorothy Van Doren eds. 1975 [1935]).
to perform extra work or observe later hours in connection with periodic examination by Federal or State banking authorities, over which the bank has no control either as to the time of occurrence or as to the duration, shall be exempt during such periods" from the aforementioned hours limitations. Third, employees in banks in towns of less than 2,500 population employing no more than two persons in addition to executive officers were also excluded as were employees in a managerial or executive capacity “or in any other capacity of distinction or sole responsibility” receiving more than $35 weekly.379

Five days before the hearing took place, Joel Berrall of the LAB sent a memorandum to Deputy Administrator A. D. Whiteside pointing out that the proposed 40-hour week was “[o]bviously...too long to re-absorb a significant number of white collar workers who have lost their jobs as a result of the depression and of the enormous number of bank failures since 1929.” The 13-week averaging “cannot be allowed” because it would permit “banks to work regular employees over time [sic] during temporary peaks without adding a single member to their staffs. It is our contention that it is socially desirable that every business should take on part-time workers and relieve the community of the burden of caring for the unemployed during the peak periods when it is most able to do so.” To be sure, Berrall conceded, banks, like any business had to have “flexibility,” but time and a half for overtime would permit banks to “retain key men as long as necessary during such peaks” but would also give them an “incentive to taking [sic] on part-time workers for routine work.”380

Unsurprisingly, bankers’ overreaching prompted sharp opposition from labor. Rose Schneiderman of the Labor Advisory Board straightaway made “a plea to the bankers to lead the way in doing something for the long neglected and long-suffering white collar workers.”381 In light of the fact that more than 20 percent of office workers had lost their jobs between 1929 and 1932, with even more unemployed since then, she could not understand how a workweek longer than 35 hours would alleviate unemployment.382 Because governmental examinations were a regular part of banks’ operations, Schneiderman found it so incomprehensible and “wholly unjust” that the employees should bear their cost that she hoped the proposal would be withdrawn.383 The representative of the AFL, Annabel Lee

379NRA, HCFC, Hearing No. 39: Bankers 10-11 (Sept. 28, 1933) (Film No. 4).
381NRA, HCFC, Hearing No. 39: Bankers at 65.
382NRA, HCFC, Hearing No. 39: Bankers at 65, 67.
383NRA, HCFC, Hearing No. 39: Bankers at 70-71.
Glenn, who spoke on behalf of stenographers, typists, bookkeepers, clerks, and other office workers who were members of Federal labor unions affiliated with the AFL, beyond agreeing with Schneiderman about examination work, objected to the hours-averaging. Instead, she proposed a seven-hour day and 35-hour week, with time and a half for longer hours, but urged that new workers be hired at rush times.384 Since every bank employee occupied a position of “distinction” and “responsibility,” Glenn asked,

why should an employee be penalized because he is getting a salary of $35 per week, which in itself is no very high wage. Surely such an employee should be protected from exploitation and should come under the same limitation of hours of work as any other employee, or receive additional consideration at a rate of time and a half for overtime.385

The rather lengthy account of the hearing in the *Times*, which mentioned Schneiderman and Glenn, but failed to explain the hours provisions or their criticism of them, bizarrely asserted that “no substantial opposition” had developed, but correctly predicted that the code would quickly “be whipped into shape.”386 Five days after the hearing, Deputy Administrator Whiteside wrote a memorandum to Johnson reporting that at the hearing the LAB and AFL had “presented a plea for white collar workers generally. Conceding that banking employees received higher comparative wages, they requested the bankers, in substance, to lead the way in doing something for this class. To that end they suggested voluntary changes in the proposed Code providing shorter hours with overtime pay in rush periods.” Nevertheless, Whiteside concluded that the code complied with the NIRA and recommended approval.387 Disregarding his Labor Advisers’ objections, the previous day LAB chairman Leo Wolman had already approved the code’s labor provisions.388 Thus despite the fact that all of the bankers’ aforementioned extraordinary self-serving hours provisions remained unchanged, and totally ignoring labor’s objections, NRA Administrator Johnson

384NRA, *HCFC*, Hearing No. 39: Bankers at 72-75.
385NRA, *HCFC*, Hearing No. 39: Bankers at 75.
388Leo Wolman to A. D. Whiteside (Oct. 2, 1933), *NAMP*, Microcopy No. 213, *DSNRA 1933-36*, Roll 10. Thomas Emerson, who later became one of the leading legal-academic advocates of civil liberties, approved the code on behalf of the NRA Legal Division. Thomas I. Emerson to A. D. Whiteside (Sept. 20, 1933), in *id.*
claimed that the "concessions and the shortening of hours" in the code would "bring about additional employment...."\textsuperscript{389}

A sense of the distinctly non-paternalistic approach of banks toward their employees can be gleaned from correspondence preserved in the NRA archives. For example, just days after the code had been approved, the Banking Code Committee received an inquiry from the Montclair Trust Company as to whether a bank could take credit for "time out taken by an employee due to Holidays, Illness and Vacation, deducting these hours from the average for the thirteen-week period in order to ascertain the overtime due, if any...." The committee straightforwardly commented that, given the code's employment-increasing objective, it could be assumed that the drafters of the maximum-hours provision included usual holidays and paid vacations in the 40-hour calculation. After all: "If this were not the intention and the employees were required to make up such time, holidays and vacations would have no meaning as a rest period free from labor." However, in spite of this basic insight and without explanation, not only did the committee leave the treatment of sick days to the employer's discretion, but it soon reversed its aforementioned opinion on the treatment of holidays as well, expressing the feeling that the bank should be given credit for holidays for purposes of hours-averaging: "It can be readily understood that in the case of single day holidays affecting all of the bank employees, the entire work of the bank becomes necessarily congested on the succeeding business day, and [sic] for which the bank might reasonably be entitled to some leeway."\textsuperscript{390}

In January 1934 a bank employee in Queens working 39.5 hours a week as a floorman for $100 a month wrote to Administrator Johnson to explain that when a national holiday is celebrated, "[m]y employer claims that I owe him for this time." Henry J. Oestreich wanted Johnson to tell him whether the bank was "living up to the code.... It is not so much...the hours that is troubling me but if an employer displays a NRA sign he should live up to it."\textsuperscript{391} A month later, presumably in response to Oestreich's question, the LAB Interpretations Committee, taking a more pro-employer position than the bankers themselves on the Banking Code Committee, informed an assistant deputy administrator dealing with


\textsuperscript{390}Banking Code Committee, Memorandum Opinion No. 24 (Oct. 9, 1933) (including excerpt of letter to Montclair Trust Co. Dated Dec. 22, 1933), in NAMP, Microcopy No. 213, \textit{DSNRA 1933-36}, Roll 10 (1953). See also letter from Thomas B Paton [?] (Banking Code Committee) to Myron F. Ratcliffe (NRA) (Feb. 14, 1934), in \textit{id}.

the banking industry that the answer to whether employees on a monthly salary had to “make up days lost to legal holidays” turned exclusively on whether they had been required to do so before the code’s adoption.\(^{392}\) Or, as the NRA put it two months later in an interpretation that was emblematic of the agency’s timid attitude toward a whole range of labor-management relations, “the intention of the Code is not to change established customs of employers with respect to legal holidays.”\(^{393}\)

The labor provisions in the stock exchange and investment banker codes coincided with one another, in Johnson’s words, “because of the inseparable relationship of the two businesses.”\(^{394}\) At the hearing on October 17, 1933, the stock exchange firms packaged their basic “maximum hours” proposal as “a 40-hour week, except that in order to meet contingencies which cannot be anticipated and over which the employers have no control and in order to consummate contracts for the purchase and sale of securities and commodities the said hours...may be increased but not to exceed a total of 44 hours per week averaged over a period of 4 months without overtime.” The employers asserted that 40 hours was “an irreducible weekly minimum\(^{395}\) and that sudden and unexpected fluctuations made it “impossible to employ additional help so as to clear the transactions with the speed required by Stock Exchange Rules and the general nature of the business.” Without explaining why firms could not simply lease more telephones, they claimed that the physical equipment they used such as phones “only permit the effective work by a certain number of persons....”\(^{396}\) The stock exchange firms illustrated, as the bankers had not, whom they meant by employees in a capacity of “distinction or sole responsibility”: senior employees in charge of various special services who needed to complete transactions had to remember many details and be so well versed in the business that they acted “almost instinctively. It would be utterly impossible...to allow these employees...to consider the day’s work closed and endeavor to fill their places with other employees. They must, in view of the nature of their responsibility, continue to work...until the day’s trans-

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\(^{394}\) Code No. 141: Investment Bankers (Nov. 27, 1933), in NRA, Codes of Fair Competition, 3:509-16 at 511.

\(^{395}\) NRA, HCFC, Hearing No. 466: Stock Exchange Firms 38-39 (Oct. 17, 1933) (Raoul Desvernine) (Film No. 69).

\(^{396}\) NRA, HCFC, Hearing No. 466: Stock Exchange Firms at 44 (Desvernine).
actions are completed.” In effect categorizing them as what would under the FLSA be known as administrative employees, the stock exchange firms included them with what, after the NRA codes had barely been in existence for three months, employers already felt justified in calling “the customary exemptions of executives, managers, partners, etc., for, in many respects, the nature of their employment is very much of the same type that is expected from a manager, although it cannot strictly be so classified.”

Labor representatives were not impressed by these justifications. E. J. Tracy of the AFL, who characterized most of the industry’s employees as “clerical employees of one form or another,” spoke with reference to “that vast unorganized group of workers....” In particular he objected to the averaging scheme, under which an employee might be required to give 64 hours of overtime during four months—“over a week and a half of the employee’s time granted gratuitously to the employer.... We protested vigorously time and again over those average hours, we feel it is wrong, it is stopping up reemployment.... and we would like to see it stopped...as soon as it can be.” Having made similar protests “continuously before all of the boards,” Tracy cut short his remarks, declaring frankly that labor was not satisfied that the NRA was meeting its responsibility.

Representing the Labor Advisory Board, William Calvin (who was also assistant to the secretary of the AFL’s Hotel Trades Department) complained not only that 44 hours were too many, but that employers had submitted no evidence to indicate to what extent unemployment would be relieved by such a long workweek. Doubting that it would restore a single person to employment and refusing to approve such a long week in the face of 10 million unemployed, he advocated a 30-hour week plus double time for additional hours “to make it more profitable to employ additional help rather than work regular employees overtime.”

Yet more specific criticism came from Joel Berrall of the Labor Advisory Board, who, several days before the code hearing, wrote a memorandum to Deputy Administrator Whiteside pointing out that the $35 weekly salary identifying excluded executives and managers was “not high enough to guarantee the Administration against the chiselling employers who may create a title for some relatively unimportant employee now receiving more than $35 per week in order

397NRA, HCFC, Hearing No. 466: Stock Exchange Firms at 45 (Desvernine). To be excluded these employees also had to receive more than $35 weekly.
398NRA, HCFC, Hearing No. 466: Stock Exchange Firms at 110.
399NRA, HCFC, Hearing No. 466: Stock Exchange Firms at 112.
400NRA, HCFC, Hearing No. 466: Stock Exchange Firms at 113.
401NRA, HCFC, Hearing No. 466: Stock Exchange Firms at 121, 139 (quote).
to exempt him or her from the maximum hours provision....” Instead, he proposed a minimum weekly salary level of $45. Instead, he proposed a minimum weekly salary level of $45. At the hearing, against a background of “a great number of experienced employees ready and willing to jump into a part-time job when a part-time boom may develop,” Berrall proposed a 35-hour week with overtime permitted “only when no other part or full time help is available, and then only at a time and one half rate which will act as an incentive to good management to seek out this extra help from the list of those laid off since 1929.” With custom and data showing that the average workweek in brokerage houses was 40 hours, Berrall called employers’ 40-hour proposal a “joke” in the face of a million unemployed office workers and left it to his listeners to devise an epithet for the 44-hour averaged week without overtime. The Labor Advisory Board was willing to accommodate the “flexibility” it conceded as an “undeniable necessity” in an industry that probably owed its existence to temporary fluctuations in economic activity. Not only would it exempt executives and the “indispensable minimum of key men,” but it “permitted extreme latitude” in daily hours, requiring time and a half—than which there was “no better way of forcing management to do the thing which the country expects of it”—only on a weekly basis. Berrall contrasted this rule with employers’ time and one-third proposal, which would have kicked in only after 48 hours (and at the end of each four-month period for hours in excess of the 44-hour average), and would not have amounted to much of a penalty on wages as low as $14 a week or 35 cents an hour. As Berrall had noted in his memo to Whiteside, averaging hours over four months would not induce employers during peak periods to hire the plenty of unemployed brokerage clerks in New York City.

Ignoring all these objections, Wolman, the chairman of the LAB, quickly approved the code’s labor provisions. In recommending that Roosevelt approve the stockbrokers’ and investment bankers’ codes, Administrator Johnson highlighted this payment of overtime (without mentioning its rate), but then quickly added that it was “of minor importance” given the “common knowledge that

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403 NRA, HCFC, Hearing No. 466: Stock Exchange Firms at 146-47.

404 NRA, HCFC, Hearing No. 466: Stock Exchange Firms at 148.

405 NRA, HCFC, Hearing No. 466: Stock Exchange Firms at 149-50.

406 Berrall to Whiteside at 1 (Oct. 13, 1933).


408 Code No. 141: Code of Fair Competition for Investment Bankers (Nov. 27, 1933),
Stock Exchange firms are exceptionally generous in bonus distributions to employees during active markets."409 How useful this generosity was likely to be to office workers remained doubtful in light of the employers' claim that "[c]ontrary to common belief, the brokerage business is not highly lucrative," with all New York Stock Exchange firms having lost money during the preceding three years.410

That the labor representatives' criticisms and proposals had little chance of being adopted was foreshadowed by the comments of the presiding officer, Deputy Administrator Arthur Whiteside, the president of Dun & Bradstreet,411 who, while admitting that "[i]t may be that the codes have been giving too long working hours" and that the NRA might be "required to moderately step into the hours of work to bring back employment," cautioned that reemployment had to be accomplished "without undue hardship or without very great additional burden to any industry or trade."412 And in fact, scarcely two weeks later Roosevelt approved the stock exchange firms' code without any changes having been made to the hours provisions.

With the president's approval of the identical rules in place two days before the hearing on the investment bankers' code, the outcome was a foregone conclusion. Nevertheless, labor representatives persisted, as a Brookings Institution study put it, in "striking an attitude."413 A researcher from the Women's Bureau of the DOL pointed out that since hours for clerical workers had been much shorter than for industrial workers, reemployment might require setting maximum hours at a lower than the industrial level. Moreover, since one-fourth of female and one-half of male office workers were paid $150 or more per month, raising the exemption level from $35 to $50 would also accelerate reemployment.414 The representative of the Bookkeepers, Stenographers and Accountants

in NRA, Codes of Fair Competition, 3:509-16 at 511.

409 Code No. 95: Code of Fair Competition for Stock Exchange Firms (Nov. 4, 1933), in NRA, Codes of Fair Competition, 2:481-87 at 482.

410 "Brokers Tell NRA of Lost Business," NYT, Oct. 18, 1933 (5:3-5). Disregarding labor enforcers' universally registered perception of the lack of correlation between few complaints and few violations, the NRA's in-house history of the code concluded from the small number of complaints that it was evident that employers had "universally complied" with the hours provision. William R. Clark, "History of the Code of Fair Competition for the Stock Exchange Firms" at 51 (Jan. 1936), in NAMP, Microcopy No. 213: DSNRA 1933-36, Roll 164: Code 95: Stock Exchange Firms Industry.

411 "Washington Picks Recovery Boards and Chief Experts."

412 NRA, HCFC, Hearing No. 466: Stock Exchange Firms at 156, 157.

413 Lyon et al., National Recovery Administration at 443.

414 NRA, HCFC, Hearing No. 244: Investment Bankers 25, 26, 29 (Nov. 6, 1933)
Union, referring to a 1928 survey showing that 64 percent of firms did not pay for overtime, urged an end to this "abuse" and imposition of time and a half after 35 hours as a means of increasing employment.\textsuperscript{415}

The Labor Advisory Board, complaining that the hours-averaging procedure was very difficult to control and that white-collar workers "were more exploited by being forced to work extra time without overtime payment than...the majority of factory workers," proposed a maximum 42-hour week and nine-hour day subject to time and a half after 35 and seven hours, respectively, and inapplicable to managers and executives receiving at least $50 a week.\textsuperscript{416} The NRA's Division of Research and Planning, objecting to Whiteside that the exceptions to the hours provision were too broad, asked the obvious question as to the meaning of "in any capacity of distinction or sole responsibility,"\textsuperscript{417} but these objections, like labor's, were fruitless: three weeks later President Roosevelt approved the investment bankers' code with its hours provisions intact.

One white-collar industry, however, constituted an exception to this sequence of bootless interventions by labor advocates: real estate brokerage, which in 1933 employed about 30,000 people, more than half of whom were commission employees, down from about 38,000 and 23,000, respectively, in 1928.\textsuperscript{418} The code as proposed by employers was, like that of the other white-collar industries, exceedingly self-generous. Accounting, clerical, inside sales, and office employees' 40-hour week was subject to averaging over 13 weeks and one further exemption: "Where cases of peak or seasonal (Spring and Fall Renting Seasons) requirements impose upon the Real Estate Brokerage Industry an unusual demand, employees...may work 48 hours per week for a period not to exceed 12 consecutive weeks." Like the other white-collar industries, employees in a "capacity of distinction or sole responsibility" were totally excluded.\textsuperscript{419}

\textsuperscript{415}NRA, HCFC, Hearing No. 244: Investment Bankers at 29-30 (Evelyn Wright).
\textsuperscript{416}NRA, HCFC, Hearing No. 244: Investment Bankers at 36-37 (Walter Cook).
\textsuperscript{417}James E. Hughes, Division of Research and Planning, to A. D. Whiteside (Nov. 1, 1933), Code 141: Investment Bankers Industry, in NAMP, Microcopy No. 213, DSNRA 1933-36 (1953), Roll 79.
\textsuperscript{418}Code No. 392: Real Estate Brokerage Industry (Apr. 9, 1934), in NRA, Codes of Fair Competition, 9:259-71 at 260 (1934). The figure of 30,000 referred to those employed by members of the National Association of Real Estate Boards; it was estimated that total industry employment was 50,000. Roy Wenzlick and Arthur Fridinger, "Real Estate Brokerage Industry" (n.p.) (Jan. 15, 1934), in NAMP, Microcopy No. 213: DSNRA 1933-36 (1953), Roll 137: Code 392: Real Estate Brokerage Industry.
\textsuperscript{419}NRA, HCFC, Hearing No. 390: Real Estate Brokerage 7-8 (Jan. 10, 1934) (Film
Joel Berrall, the Labor Advisory Board representative who had failed to effect change at the stock exchange hearings, had apparently not expected to fare any better with the real estate brokers: at the hearings on January 10, 1934, he lamented that although he had pointed out his objections to the code proposal regarding office workers to the employers’ representatives at a conference a month earlier, unfortunately none of them had been met by the time of the hearing. Berrall focused first on the 13-week averaging procedure, which he characterized as “almost impossible to enforce” because it interfered with employee self-enforcement: “no employee will be able to tell whether he has worked an average of 40 hours or not unless he keeps note of his hours every day for 13 weeks. Not one in a hundred workers would do it. And even if they did, I hardly need tell you what the result would be if they disputed their employers’ word at the end of the 13 weeks.”

Berrall recognized that he was “running up against the argument” that office workers’ hours had never before been “definitely limited. They have always worked overtime if the work was there to do...and were compensated for this overtime by being given vacations with pay and also paid while they were sick.” However, reemployment was the NIRA’s “primary business,” and “some adjustments, which will be inconvenient and disrupting temporarily, will have to be made.” Since 40 hours was at that time the typical workweek for clerical employees, it could not relieve unemployment, which was “very nearly as acute among this class of workers as it is among manual workers.” Since, according to a 1932 NICB survey, 800,000 of the four million office workers enumerated by the 1930 census were unemployed, and since very few codes provide less than a 40-hour week for office workers, the NRA had “done practically nothing for the ‘white collared’ worker.” Because “the place to begin to do something for the white collared worker, of course, is in an industry like this one where they predominate,” Berrall recommended a 35-hour, 5-day week. And in order to preempt the objection that he was not accommodating the need for “flexibility for the busy spring and fall renting season,” he proposed permitting employees to work two hours beyond the seven-hour limit one day a week, provided that they were either given equivalent time off so that the weekly limit of 35 hours was not exceeded or paid time and a half for hours beyond seven or 35.

Remarkably, the “Code was revised during the recess of this hearing,” as a

No. 59).

420NRA, HCFC, Hearing No. 390: Real Estate Brokerage at 56-57 (Jan. 10, 1934).
421NRA, HCFC, Hearing No. 390: Real Estate Brokerage at 57-58 (Jan. 10, 1934).
422NRA, HCFC, Hearing No. 390: Real Estate Brokerage at 58-60 (Jan. 10, 1934).
423Code No. 392: Real Estate Brokerage Industry (Apr. 9, 1934), in NRA, Codes of
result of which the 13-week averaging was deleted and an eight-hour ceiling added to the 40-hour limit. Instead of an explicit and limited seasonal deviation, the approved code permitted employees to work beyond these daily and weekly limits up to 48 hours “[i]n cases of necessity and when additional labor is not available or temporary substitution is found impracticable,” provided that they were paid at a one-and-a-third overtime rate.424 Perhaps real estate brokerages agreed to make these revisions because, as Johnson noted in his report to Roosevelt, there was “no real labor problem” in the industry since most offices were not working longer than 40 hours anyway.

Industries with Strong Union Influence on the Codes

Mr. Wharton [president of the Machinists union] asserted that labor’s part in the making of the codes was “insignificant,” and that the conviction was growing in its ranks that the policy of the NRA, “which is glorified by the term ‘industrial self-government,’ is in reality promoting the establishment of a system of industrial feudalism, a dominion of industry by employers and for employers.”426

A final test of unions’ ability and/or willingness to press demands for shorter hours on behalf of white-collar workers under the NRA codes can be conducted

Fair Competition, 9:260. The hearing transcript ended with the hearing officer’s informing the code’s proponents that “[w]e can only act as gentlemen when we meet with gentlemen” and declaring a recess sine die. NRA, HCFC, Hearing No. 390: Real Estate Brokerage at 125 (Jan. 10, 1934).

424Code No. 392: Real Estate Brokerage Industry (Apr. 9, 1934), Art. III, §§ 1-2, in NRA, Codes of Fair Competition, 9:264. The language exempting employees in a capacity of “distinction or sole responsibility” was also deleted.

425Code No. 392: Real Estate Brokerage Industry (Apr. 9, 1934), in NRA, Codes of Fair Competition, 9:261. The NRA in-house code history also opined that no real labor problems had necessitated code control. Moreover, since two-thirds of the employees worked outside of offices and much of their work was done after the clients’ office hours, compliance would have resulted in a material reduction in office workers’ hours and little change for salesmen and collectors. Effie Lee Moore, “History of the Code of Fair Competition for the Real Estate Brokerage Industry” at 54-56, 64 (Feb. 24, 1936), in NAMP, Microcopy No. 213: DSNRA 1933-36 (1953), Roll 137: Code 392: Real Estate Brokerage Industry.

National Recovery Administration Codes of Fair Competition

by comparing the codes of the few unions in the few industries in which unions exercised real collective bargaining strength that was then embodied in codes. At the time of the NIRA’s enactment, many union leaders had hoped that before issuing labor standards, the NRA would request employers and employees to confer and execute collective agreements. These union officials were, however, as the contemporaneous and encyclopedic Brookings Institution study noted, “soon disillusioned. During the very first day of the NRA, the Administrator ruled that it was not necessary for code labor standards proposed by employers...to be the outcome of collective negotiations between employers and organized employees. The privilege of formulating and presenting labor standards, in the first instance, was to be the exclusive prerogative of the employers.”

In substance, this judgment did not differ fundamentally from that expressed by left-wing Local 22 of the ILGWU: despite the fact that the international had achieved greater representation on code authorities than any other union, the local offered a resolution at the 1934 convention declaring (with a bow to Marx) that since code authorities were the executive committees of powerful employers’ trade associations, union leaders had undermined their organizations’ independence by serving on them, especially in a minority position.

The head of the local, Charles Zimmerman, a former Communist who had broken with the Communist Party to return to the ILGWU as one of “the foremost anticomunist tacticians in the American labor movement,” was also not substantively transcending the Brookings report when he told the convention that the NRA was not an attempt at industrial democracy, but an effort to stabilize the shaky foundations of the capitalist system.

Only a handful of code labor provisions were determined largely by collective bargaining: regional agreements under § 7(b) of the NIRA (such as the Appalachian agreement supplementary to the bituminous coal industry and in the building trades); codes incorporating terms of previous agreements (such as in the coat and suit, dress manufacturing, men’s clothing, and legitimate theater industries). In these “special” codes, based on direct collective bargaining, the length of the maximum workweek was, in the view of the Brookings study, clearly

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427 Lyon et al., National Recovery Administration at 427.
defined, exceptions were rigidly restricted, and no allowance was ordinarily made for averaging maximum hours over a period of weeks or months. In the normal codes, on the other hand, it was "extremely difficult, as a rule, to discover just how long the maximum workweek is supposed to be; exceptions and exemptions abound; seasonal and emergency variations are permitted; the maximum allows for averaging over a period of weeks and months." To determine whether a violation had taken place under such codes "would call for complex and drawn out computations." The AFL and the LAB, which spoke for it, demanded that union members be represented on all code authorities so that organized labor could watch over the enforcement of labor provisions and collective bargaining requirements. However, with few exceptions, employer associations opposed such participation, insisting that code authorities were agencies for governing industry, which was exclusively an employer prerogative: "In this matter, as in others," according to the Brookings study, "the NRA hastened to adjust itself to the balance of capital-labor power in the various codified industries. As a result, organized labor secured code authority representation only in very few codes." This higher level of involvement occurred largely in industries in which unions were fairly strong and had, for years, also made common cause with a dominant group of unionized employers against other groups of anti-union employers. In January 1935, of 775 approved basic and supplementary codes, no more than 26 allowed for labor representation on code authorities, some of which governed small and insignificant industries. Of these, 15 were branches of the clothing industry: coat and suit, dress, men's, millinery, blouse and skirt, leather and wool knit glove, ladies handbag, infants and child's wear, cotton cloth glove, men's neckwear, cotton garment, hosiery, light sewing, pleating, hat manufacture; five were in the amusement industry: legitimate theater, burlesque theater, radio broadcasting, motion picture, motion picture laboratory; and six in miscellaneous industries: bituminous coal, brewing, transit, refractories, Nottingham lace curtain, and Schiffli hand machine embroidery. Of Morris Hillquit's view of this representation in the case of the ILGWU one of the union's historians wrote: "The old Socialist was modifying his view of 'the state.' As a Marxist, he continued to believe that 'the state is the Executive Committee of the

431 Lyon et al., *National Recovery Administration* at 430-31, 440.
432 Lyon et al., *National Recovery Administration* at 441.
433 Lyon et al., *National Recovery Administration* at 458.
434 Lyon et al., *National Recovery Administration* at 459 and 459 n.33. In four industries (coat and suit, legitimate theater, dress, and Nottingham lace curtain) unions had enough bargaining strength to get this participation written into the code itself. *Id.* at 459-60 and 460 n. 34.
ruling class.' But, he added with a twinkle, 'the working class is now getting a few seats in the Executive Committee.'

In the vast majority of industries, however, the NRA blocked organized labor’s efforts to participate fully in industrial self-government.

Of the 26 codes that provided for labor representation on the code authority, 21 discriminated against clerical-office employees vis-à-vis production workers with respect to regulation of hours—whether in terms of the length of the maximum workday or workweek, hours-averaging, lower overtime rates, or the exclusion of administrative or confidential employees or assistants. Of the five, mostly small, industries whose codes did not discriminate against office workers (other than executives, managers, or supervisors), only the transit industry capped general office employees’ hours at a lower level than that of blue-collar workers.

**Summary**

Today...[t]he office is highly mechanized.... There are countless inventions to replace skill by speed. Technology has taken charge of the office just as it has taken charge of the factory. And hand in hand with technology have come the problems which have long been associated with the industrial worker—low wages for unskilled workers; long hours; overtime; rush seasons; piece work; unemployment; over-supply of labor in the market and

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437 Bituminous coal, blouse and skirt, burlesque theater, brewing, coat and suit, cotton garment, dress, hat, hosiery, infant and childwear, ladies handbag, light sewing, men’s clothing, men’s neckwear, millinery, motion pictures, Nottingham lace curtain, pleating, radio broadcasting, refractories, and Schiffli hand machine embroidery. Radio broadcasting is classified here because it excluded announcers as managerial employees. Code No. 129: Radio Broadcasting Industry (Nov. 27, 1933), Art. III, § 2(a), in NRA, Codes of Fair Competition, 3:353-64 at 358. This classification was contested by a union at the 1940 white-collar hearings. See below ch. 12.

438 Cotton cloth glove, leather and wool knit glove, legitimate theater, motion picture laboratories, and transit.

blind alley jobs with little or no chance for promotion. The clerical worker with her white collar used to feel herself superior to her sisters in the factories. ...

Today she knows that she is in the same boat with the industrial worker and that the problems of the two groups are practically the same. Her hands may be cleaner when she leaves the office but she works as long if not longer today and her wages are as low if not lower. ... Because of the tremendous over-supply of clerical workers...wages are being cut and women are being made to work long hours without overtime pay; without any protection from the law (except in rare instances). 440

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One principal reason for the exclusion of white-collar workers from the codes’ protective hours provisions was that in some industries no one advocated their interests at code hearings because labor unions, preoccupied with their own blue-collar members’ interests, either passively acquiesced in management’s exclusion of office workers or tacitly traded them off. 441 Nevertheless, the history of the NRA codes shows that, in contrast to the situation surrounding the FLSA, when neither the labor movement nor any other organization protested the exclusion of white-collar workers from the law’s overtime provision, the AFL at some code hearings vigorously protested their exclusion from the hours provisions of the codes. However, even when union or Labor Advisory Board representatives advocated coverage, they were, in most instances, institutionally too weak to overcome employer resistance aided and abetted by the NRA’s indifference or support.

In establishing the machinery of the codes of fair competition, Roosevelt determined that after a trade association had prepared a code, a public hearing would be held on it at which “every affected labor group,” whether organized or not, would be “fully and adequately” represented in an advisory capacity by a representative of the Labor Advisory Board, which was appointed by the Labor Secretary. 442 The LAB, according to a critical contemporaneous study by the Brookings Institution, had a real albeit small voice in determining labor standards

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441 An NRA study took an altogether too narrow view in applying the following judgment only to the unlimited hours for office workers in the Bituminous Coal, Retail Solid Fuel, and Graphic Arts codes: “It would seem that the labor unions which participated in the code making for these latter codes neglected the office workers in their industries.” Reticker, Labor Provision in the Codes at 141.

442Text of President’s Statement on Recovery Act Policies,” NYT, June 17, 1933 (2:2-6 at 5).
in most normal codes: “On the whole, however, the LAB was ineffective” because
the NRA tried to push through codes as quickly as possible and in most situations
“resistance by employers was a much more important factor to reckon with than the
possible resistance of labor”; because prior to the NIRA unions had organized only
small segments of industry (primarily the railroads and the building, printing,
needle, various skilled metal trades), in most industries workers “were unable to
exert much direct pressure upon their employers. For this reason they were also
unable to exert much pressure upon the NRA.... In other words, the continuous
effort of the NRA to adjust itself to the balance of power in capital-labor relations
reflected itself in the code labor provisions which were finally approved. In most
cases, therefore, the Labor Advisory Board could not accomplish much more than
rendering service and striking an attitude.” The LAB brought about minor
modifications and established limits beyond which the NRA could not yield
without running the risk that organized labor might withdraw its cooperation. But:
“Only in the unionized industries was the Labor Advisory Board able to shape
labor provisions and to reinforce collective bargaining in accordance with the
desires of the labor groups....” Moreover, in the crucial post-hearing “negotia­
tions with the NRA administrators, business clearly held the upper hand.”

In fact, few if any industrial unions were organizing white-collar workers as

443 Lyon, *National Recovery Administration* at 442-43. Labor Secretary Perkins also
conceded that the LAB “was not in a strong position when it came to pressing the point of
view of the workers in the consideration of the codes. There was relatively little
organization in the large manufacturing and distributive industries where codes were
needed most.... [R]epresentation of working people through their own organizations was
hearing two months before the NIRA was declared unconstitutional, Donald Richberg,
NRA general counsel testified that not a single code had been adopted in the form it in
which it had been presented: “it was subjected to fire from the Labor Advisory Board.”
Senator Costigan’s response that the impression prevailed that the LAB and the
Consumers’ Advisory Board had not been successful in their efforts to obtain concessions
prompted Richberg to assert that the impression was “contrary to the fact, because I know
it was otherwise.” In final analysis “the result would be somewhat in the nature of a
compromise, and very seldom were the entire recommendations of the Labor Board...ever
accepted.” *Investigation of the National Recovery Administration: Hearings Before the
*Labor and the New Deal* 193-237, at 206 (Milton Derber and Edwin Young eds., 1957),
may have been right in calling labor’s participation at the public code hearings “largely
window dressing,” it is not, as shown above, correct to state that “labor’s part was virtually
limited to an appearance...just to give approval of the draft.”

444 Himmelberg, *Origins of the National Recovery Administration* at 211.
early as 1933 when the codes were being negotiated. Indeed, white-collar unions were themselves a rarity at that time, and, where in existence, often focused on organizing the insurance industry, which never underwent codification under the NRA. In the 1930s, industrial unionists commonly “lumped [office workers] together with management, and office-workers in general were viewed as potential spies for management. ... Male unionists evidently saw nothing wrong with signing contracts through the 1930s and 1940s which exchanged gains for blue-collar members for agreements eliminating office-workers’ bargaining rights.” Even later in the 1930s, with the exception of a few progressive locals of the UAW and United Electrical Workers, “few CIO unions included clerical workers in their contracts, and therefore these industrial union monopolies were tantamount to a ‘no-union’ policy for clerical workers employed by manufacturing firms.”

The blatant discrimination against white-collar workers in the NRA codes is ironic in light of the fact that even before the first code of fair competition was approved, Donald Richberg, the NRA’s general counsel, had stated with regard to white-collar employees’ status under the NIRA that “the ‘white collar’ worker was one of the great concerns of the administration and this group had the right to be heard before the adoption of any code.” The Bookkeepers, Stenographers, and Accountants Union was so “encouraged” by Richberg’s statement that it requested

445In 1923, the Bookkeepers, Stenographers and Accountants Union, Local 12,646 AFL, received a surprise gift of $1,000 from a former member who “unexpectedly came into a large inheritance after marriage” toward the goal of $100,000 to help organize 500,000 “‘white collar’ workers” including bank clerks. “Gives $1,000 to Aid White Collar Union,” NYT, Sept. 10, 1923 (19:4). In 1927, the BSAU announced that it would seek 10,000 office workers—of whom more than 7,000 were said to be girls—at Metropolitan Life Insurance Company as members of their “‘white collar’ workers’ union”; among its demands was payment for overtime. Haley Fiske, the president of the company, said that the announcement was made periodically in an attempt to persuade “our people to join a union they laugh at.” “Union to Invade Insurance Field,” NYT, Oct. 17, 1927 (42:1). In 1943, the successor to the BSAU, the UOPWA, signed the largest union contract ever for white-collar employees when it entered into a national agreement with the Prudential Insurance Company affecting 18,000 workers. “Prudential Signs with Office Union,” NYT, Feb. 4, 1943 (19:5):

446Sharon Strom, “‘We’re No Kitty Foyles’: Organizing Office Workers for the Congress of Industrial Organizations, 1937-50,” in Women, Work and Protest: A Century of US Women’s Labor History 206-34 at 213 (Ruth Milkman ed. 1985). The UAW was the first major CIO union to try to organize clerical workers, but not until 1941 and then only halfheartedly. Id. at 214. See also below ch. 14.

a hearing on behalf of 500,000 white collar workers in New York City offices and four million altogether in the United States.448

The maximum hours provisions were openly driven by the need for reemployment, but even then employers were given considerable flexibility—in many cases much more so than the FLSA later offered (for example, regarding hours-averaging)—which was not monocausally rooted in absorbing the unemployed, but also had to confront the reality that one condition from which labor unrest resulted was "the duration, extent and intensity of the labor exacted from" workers.449 Nor may it be overlooked that since about 90 percent of all workers subject to the NRA's jurisdiction worked under codes providing for at least a 40-hour week, "for the most part the codes did not establish basic hours maxima which were greatly lower than the hours actually being worked. ... The codes did not, therefore, immediately force any widespread additional sharing of work," although they did halt the tendency prevailing in early 1933 to lengthen the workweek, and, consequently, "more workers shared in such work as was available" while the codes were in effect.450 Indeed, one NRA retrospective concluded that the "bewildering variety of provision[s]" created a situation in which in general "hundreds of thousands of employees were working long hours under the so-called 40-hour codes,"451 while for office workers in particular the NRA did little to change working hours despite the considerable unemployment to which this group was exposed.452

Although he did not have the discriminatory treatment of white-collar workers in mind, the historian of the automobile industry under the NRA was inadvertently right in speculating: "It is not easy to generalize about the N.I.R.A. since its history is so much a history of individual codes... but if the experience of the automobile manufacturing industry is typical, the statute had a more enduring impact on the nation's industries and particularly on employer-employee relations than has generally been recognized."453

448 "Accountants' Code Has 35-Hour Week," NYT, July 11, 1933 (4:4). It does not appear that any such hearing was ever held or that any code was ever approved for white-collar workers.
449 Lyon et al., National Recovery Administration at 546.
450 Harry Millis and Royal Montgomery, Labor's Progress and Some Basic Labor Problems 482-83, 484 (quotes) (1938).
451 Reticker, Labor Provisions in the Codes at 170.
452 Reticker, Labor Provisions in the Codes at 138.
453 Fine, Automobile Under the Blue Eagle at 429-30.
Exemption on the ground of exercise of confidential or managerial functions is worthy of notice, for a more or less liberal interpretation of these terms would exclude a large number of employees from the scope of the regulations. ... It is apparent that there is an advantage in being as precise as possible on this point unless it is desired to make the regulations limiting hours of work inapplicable to large numbers of employees.1

The last model of treatment of white-collar workers for purposes of working-hours legislation that Congress had available to draw on in 1937 was the set of standards codified by the International Labor Organization2 in its Hours of Work (Industry) Convention of 1919, Hours of Work (Commerce and Offices) Convention of 1930, and Forty-Hour Week Convention of 1935. The industrial hours convention may have been most present to the congressional mind since it had been debated and adopted at the first annual meeting of the League of Nations International Labor Conference, which had taken place in Washington, D.C., and over which Secretary of Labor William Wilson had presided, even though the United States ultimately never joined the League or ratified the convention.3


2The International Labor Organization is a specialized agency of the United Nations, which was established in 1919 by the Versailles Treaty, which also created the League of Nations. The International Labor Office is the permanent secretariat of the ILO. The International Labor Conference is the annual meeting of the member states of the ILO. See Treaty of Versailles, Art. 387-420 (June 28, 1919). The governments of the states represented at the conference guaranteed that they would present the conference recommendations to their national legislatures for approval. “Labor Conference Closing Its Work,” *NYT*, Nov. 24, 1919 (5:2-5 at 3-4).

3“Secretary Wilson Heads Conference,” *NYT*, Nov. 1, 1919 (9:1). In 1934 Congress authorized the president to accept membership in the ILO, its first stated purpose having been that progress toward solving the problem of international industrial competition could be made through international action regarding wage earners’ welfare. S. J. Res. 131, ch. 676, 48 Stat. 1182 (June 19, 1934). For the details of the Roosevelt administration’s
International Labor Organization Hours Conventions

Hours of Work (Industry) Convention (1919)

[T]he monster office in which vast numbers of clerks are herded together for their daily work, just as the concentration of capital in industry herded former craftsmen or cottage workers in the factory.4

Against the background of labor union agitation and governments' fear of Bolshevism in the wake of World War I and the Russian Revolution,5 the Treaty of Versailles, in creating the International Labor Organization, declared:

Whereas the League of Nations has for its object the establishment of universal peace, and such a peace can be established only if it is based upon social justice;

And whereas conditions of labour exist involving such injustice, hardship, and privation to large numbers of people as to produce unrest so great that the peace and harmony of the world are imperilled; and an improvement of those conditions is urgently required: as, for example, by the regulation of the hours of work, including the establishment of a maximum working day and week, the regulation of the labour supply, the prevention of unemployment, the provision of an adequate living wage, the protection of the worker against sickness, disease and injury arising out of his employment, the protection of children, young persons and women, provision for old age and injury, protection of the interests of workers when employed in countries other than their own, recognition of the principle of freedom of association, the organisation of vocational and technical education and other measures;

Whereas also the failure of any nation to adopt humane conditions of labour is an obstacle in the way of other nations which desire to improve the conditions in their own countries;

The HIGH CONTRACTING PARTIES, moved by sentiments of justice and humanity as well as by the desire to secure the permanent peace of the world, agree to the following:

A permanent organisation is hereby established for the promotion of the objects set forth in the Preamble.6

The Treaty scheduled the first meeting of the annual labor conference for decision to join the ILO in 1934, see Frances Perkins, The Roosevelt I Knew 337-46 (1946).

6Treaty of Versailles, Part XIII, § 1 and Art. 387 (June 28, 1919).
October, 1919, in Washington, D.C., requested the government of the United States to convene it, and placed as the first item on its agenda "Application of principle of the 8-hours day or of the 48-hours week." In its "General Principles," the Treaty then explained:

The High Contracting Parties, recognising that the well-being, physical, moral and intellectual, of industrial wage-earners is of supreme international importance, have framed, in order to further this great end, the permanent machinery provided for in Section 1 and associated with that of the League of Nations.

They recognise that differences of climate, habits, and customs, of economic opportunity and industrial tradition, make strict uniformity in the conditions of labour difficult of immediate attainment. But, holding as they do, that labour should not be regarded merely as an article of commerce, they think that there are methods and principles for regulating labour conditions which all industrial communities should endeavour to apply, so far as their special circumstances will permit.

Among these methods and principles, the following seem to the High Contracting Parties to be of special and urgent importance: ...

Fourth. The adoption of an eight hours day or a forty-eight hours week as the standard to be aimed at where it has not already been attained.8

The ILC in Washington was, from the vantage point of contemporary labor advocates, "merely one part of a very great movement of immense social importance which took place for the shortening of the working hours in 1919-20." Before the Treaty instructed the ILC to draft its eight-hour day or 48-hour week convention in 1919, 21 countries, during or in the immediate aftermath of the war, had embodied the principle in their legislation or constitutions.10 Only Sweden,

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8Treaty of Versailles, Art. 427. In February 1919, the U.S. delegates on the Commission on International Labor Legislation of the Peace Conference proposed as one of the fundamental principles to be incorporated into the treaty that "the work day in industry and commerce shall not exceed eight hours per day, except in case of extraordinary emergency, such as danger to life or property." "Americans Submit Labor’s Peace Ideas," NYT, Feb. 9, 1919 (2:7). Samuel Gompers was the general chairman of the commission, which drafted the language cited in the text above. “Report on Labor to Plenary Session,” NYT, Apr. 12, 1919 (5:1). In general, see “Report of the Commission on International Labor Legislation to the Peace Conference” (Mar. 24, 1919), in MLR 8(5):1227-52 (May 1919).
9166 H.C. Debates 5 Ser. 253 (July 3, 1923) (Charles Buxton).
however, had "anticipated the international convention by specifically excluding persons employed in a managerial capacity and in positions of confidence."\(^{11}\) In fact, the Swedish law, which King Gustav had signed only two weeks before the conference began, excluded foremen or other officials in a superordinate position, draftsmen, bookkeepers, and persons in a similar position, and porters or other subordinate office assistants, as well as shop assistants.\(^{12}\)

The Organizing Committee for the first ILC, created by the Treaty to assist the host government (in fact the United States) in preparing documents to be submitted to the Conference,\(^{13}\) did profess to proceed from the principle of the actual eight-hour day or 48-hour week, which

will not be merely a "standard" or "basic" week on which normal wages will be calculated and which determines the point at which overtime pay at increased rates is to begin. Such a standard leaves the number of hours of work unlimited except insofar as may be agreed upon between the employers and workers or the enhanced rate of payment may make the employer less willing to work the longer hours. It therefore fails to provide the protection against undue fatigue, to ensure the reasonable leisure and opportunities for recreation and social life, which it is the purpose of the Treaty to secure to all workers.\(^{14}\)

The Committee also clearly recognized that:

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David Magnusson, "Comparison of Foreign Eight-Hour Laws" at 781.

Lag om arbetstidens begränsning, § 2 and § 1(j) (Oct. 17, 1919), in Svensk Författningssamling, Nr. 652 at 1787-91 at 1787 (1919). For a somewhat wooden English translation, see BILO 14(1-3):199-205 at 200 (1919). The need for regulation of white-collar workers’ working hours in Sweden was said to be less urgent because, with the exception of shop clerks, they worked shorter hours than manual laborers. The claim that salaried workers were employers' special confidential employees also played a part in the resistance to including them in the law. Folke Schmidt, Tjänsteavtalet 216-17 (1959).

Treaty of Versailles, Part XIII, § 1, ch. III, Art. 424 and Annex. The United States was one of seven members of the committee, the others being Great Britain, France, Italy, Japan, Belgium, and Switzerland; four of the seven national representatives were government officials, the other three professors. The U.S. representative was Prof. James Shotwell, who was then replaced by Samuel Gompers. League of Nations, Report I: Report on the Eight-Hours Day or Forty-Eight Hours Week (Item I of the Agenda): Prepared by the Organising Committee for the International Labour Conference, Washington, 1919, at 148, 13 (n.d. [1919]).

Except where the workers are very highly organised and strong enough to prevent any encroachments by the employer, enforcement of a statutory limitation of working hours is impossible unless the daily hours of work are ascertained and published beforehand. A Government inspector cannot check effectively the hours that are being worked in a particular factory, unless the times for work each day are definitely fixed and work outside those times made illegal.15

In spite of these important insights, the Organizing Committee nevertheless not only advocated solely the 48-hour week,16 but expressly left it up to the Conference to choose either the 48-hour week or, alternatively, the eight-hour day.17 The Committee's departure from the fundamental requirements of hours standards legislation and its sympathetic understanding for national laws "[t]o ensure such elasticity in the application of the principles as will allow industry to adjust itself to technical and commercial exigencies"18 may in part have been a function of the extensive information that it solicited from the various national governments on the existing state of the law on which it based its recommendations "as to the extent to which an agreement between the States may be found to be possible at the present time."19 The hundred pages of summarized legislative eight- and 48-hour regimes that the Committee published constituted unmistakable proof of a broad spectrum of regulatory approaches almost all permeated with and perforated by an overwhelming number of exceptions and exclusions.20 Significantly, with the exception of Siam, whose royal government contemplated taking no legislative measures at that time,21 the United States was the only government that failed to state whether (let alone that) it was prepared to adopt a limit of eight hours a day or 48 hours a week.22

17League of Nations, Report on the Eight-Hours Day at 3. The Committee also took the position that it was to deal only with industrial workers and not at all with commerce or agriculture. Id. at 3-4.
22League of Nations, Report on the Eight-Hours Day at 105-108, 153. In addition to numerous countries that had already adopted such laws, the United Kingdom stated that it was prepared to do so (although it did not), while Canada, Australia, and New Zealand either expressed interest or stated that these hours regimes already prevailed. In contrast, the U.S. government merely summarized the existing (inadequate) state of the law without taking a stand on the issue.
The Organizing Committee prepared a "Draft Convention," which excluded "persons holding positions of supervision or management or employed in a confidential capacity who are not usually employed in manual labor."23 Intriguingly, this exclusion appears to have been prompted by the objection of a single country. The Organizing Committee had solicited responses from the various governments to the question as to whether it would be "necessary to except from the limit" of eight and/or 48 hours any industries, branches of industries, or "[p]articular classes of workers," and if so for what reasons.24 Only the United Kingdom—whose numerous requests for various exemptions accounted for about 40 percent of the replies the Committee published25—responded straightforwardly that among the "particular classes of workers needing exemption"26 were "[p]ersons who hold positions of supervision or management, or are employed in a confidential capacity, including foremen and overlookers."27 This wording, which was adopted almost verbatim by the Organizing Committee and has remained in the convention into the twenty-first century, was ironically requested by a state that neither ratified the convention28 nor ever enacted its own general hours statute.29 Nor did the

28The House of Commons voted that it was "not expedient" to proceed with legislation to give effect to the convention. PD, HC (5th ser.) 142:471-552 at 535-38 (May 27, 1921). Only 52 countries have ratified the convention, of which one (New Zealand) later denounced it; four countries (Austria, Italy, Latvia, and France) registered meaningless conditional ratifications. Belgium, Luxemburg, Portugal, Romania, and Spain are the principal European ratifiers. http://www.ilo.org
29On Aug. 18, 1919, the Minister of Labour, Robert Horne, presented a 48-hour bill (permitting overtime at a one-and-a-quarter premium), which excluded "persons employed in a confidential capacity who are not usually employed on manual labour" and "persons holding responsible positions of supervision or management, who are not usually employed in manual labour, or...persons who are in receipt of upstanding [i.e. fixed] wages which have been fixed upon a basis of hours equal to or less than the statutory working week, and which cover overtime necessarily worked to enable such persons to perform their duties to their employers and to the workers under their charge." A Bill to Regulate the Number of Hours of Employment, Bill 197, in Bills, Public: Two Volumes, Session 4 February 1919 - 23 December 1919, Vol. I (1919). It made no progress. See also A Bill to Regulate Conditions of Employment, Bill 77 (May 12, 1919), in id. Another bill was
British government furnish a reason for the exclusion, as it at least attempted to do, for example, with "[l]aboratory chemists and persons engaged in research work and testing work. It is impossible to break off such work until it is finished." Otherwise, only the state of Queensland in Australia suggested that hours limitation should not apply to men engaged on "management works and superintendents." Not even Sweden, which, as noted, was in the process of enacting an hours law that expressly excluded the same categories whose exclusion Britain demanded, mentioned them in the long list of requested exemptions that it submitted. The United States government modestly raised the mere possibility that transportation, agriculture, and seasonal employments "may call for exemptions generally or for special consideration."

The rather capacious and vague definition that the Draft Convention devised must be gauged against a whole array of broad definitions and exclusions that significantly constricted the coverage of the hours limitation. First, the convention applied only to industrial undertakings and left it to individual national laws to introduced in the House of Commons on July 3, 1923, both to carry out an agreement reached in April 4, 1919 at the National Industrial Conference, held under government auspices, of employees and employers to regulate the working hours of all employees, and to effectuate the Washington Convention, but the bill "made no progress...." League of Nations, *International Labour Conference: Twelfth Session: Geneva — 1929*, Vol. I — First, Second and Third Parts 98 (1929) (Joseph Hallsworth, workers' adviser, British Empire, and secretary general of the National Union of Distributive and Allied Workers). See A Bill to Limit the Hours of Employment, Bill 184, in *Bills, Public: Three Volumes (1): Administration and Justice [H.L.] to Housing (No. 2), Session 13 February 1923 - 16 November 1923*, Vol. I (1923). For a speech about the bill by Charles Buxton, see 166 *H.C. Debates* 5. Ser. 252-54 (1923). The British government had called the National Industrial Conference in response to an ultimatum by the miners, railway workers, and transport workers unions threatening a general strike if the government did not meet their demands. The conference unanimously adopted the principle of the 48-hour week for all employees and of discouraging systematic overtime, although it permitted various exceptions. "Joint Industrial Report," (London) *Times*, Mar. 27, 1919 (8:1-4); "To-Day's Industrial Conference," (London) *Times*, Apr. 4, 1919 (13:4); "Masters and Men Agree," (London) *Times*, Apr. 5, 1919 (8:1-5). Arthur Henderson, Labour Party MP and a party leader, stated that the conference had also taken those who worked long hours "by their brains" into consideration: "They had said, and the employers had agreed, that excessive hours for the brain worker must either cease or be paid for at a special rate." "Masters and Men Agree."

draw the line between covered industry and excluded commerce and agriculture. Second, the entire panoply of exclusions was driven by a notion of "elasticity" and the practice of hours-averaging that subverted the principledness of a maximum hours regime. The eight-hour day itself was abandoned in favor of the 48-hour week for the sake of "more elasticity in the arrangement of the hours of work..."34 (By the late twentieth century, employers’ favored hours-regulation doctrine had been renamed "flexibility.").35 Employers were empowered to work shift workers more than 48 hours a week subject to an average 48-hour week over a month. Continuous process industries were also empowered to exceed 48 hours, provided that the average workweek did not exceed 56 hours. Sixty-hour weeks were authorized for workers "who have to come in before the normal hour for beginning work, or to remain after the day’s work is over," such as boiler attendants and electricians, as well as for maintenance and repair workers; 60-hour weeks were also the maximum for laboratory chemists and those engaged in research or testing work. Annual overtime of 150 hours (at one and a quarter time) was permitted for seasonal industries as well as for those "liable to sudden press of orders arising from unforeseen events" such as the clothing industry.36

The committee, characterizing the decision facing the ILC on overtime in other industries as "perhaps the most important" that it had to make, recommended, in light of the fact that "overtime is not an economical means of increasing production," that the conference not permit such overtime, but that if the ILC decided that during the postwar reconstruction period "the power to work overtime...can not be entirely taken away,"37 employers in other industries should be permitted to work their employees as many as 150 overtime hours annually during the following five years and up to 100 hours annually thereafter.38

Two interconnected controversies ran through the debates at the first ILC in November 1919. One dealt with the more general issue of whether it was more important to limit, for all covered workers, the workweek to 48 hours or the workday to eight hours; the other involved the more specific question of the coverage of office workers.

At the session on November 4, George Barnes,39 one of Great Britain’s govern-

38Art. 6(b), in League of Nations, Report on the Eight-Hours Day at 143. Employees had to be paid at least time and a quarter for overtime work.
39Barnes (1859-1940), had been chairman of the Labour Party in 1910-11, but left to
ment delegates and a former Labour Party chairman, opened the discussion by setting a general framework for understanding the debate: "In some respects...the eight-hour day has figured more and lingered longer in the minds of the workers of the world than any other industrial topic.... Labor...is ceasing to be regarded as a commodity and is being thought of more and more in terms of sentient human beings. ... The principle has been generally conceded that labor is entitled to leisure, that the workers are entitled to live their lives outside of the workshop, are entitled outside of working hours to time for recreation, for education, and for the discharge of social and family duties." The short-term reason for adopting shorter hours, however, was that governments had to keep their promise because throughout World War I workers had "kept to their work, in the hope and belief" that their hours would be reduced afterwards. At the same time, Barnes also made it clear that "whole-hearted cooperation in the largest possible production of goods" was "due from labor" in order to reconstruct the "accumulation of wealth of generations" that had been "blown from the cannon's mouth...." He then sought to reconcile these two aspects by arguing that the way to obtain that desired productive effort was not through long hours, but by "better organization of labor" and "humanizing the conditions of labor."

In contrast to the exclusionary tenor of the Organizing Committee’s draft and recommendations, Barnes stressed that:

[I]t is not a mere basic 8-hour law or 8-hour rule with additional pay for additional hours of work that we are after. That would not give us what we want. What we want is leisure, and we must therefore keep that in mind all the time. We are after leisure rather than pay. Moreover, even if we arranged for additional pay to be made to the workers for additional time (inasmuch as wages...tend to certain levels, determined by many things apart from hours of labor), the additional pay would disappear from the very moment it began to be paid. Therefore, what I want to impress upon the conference in the first place is that we are now discussing how to get more leisure for workers and not how to get more pay for them. Notwithstanding this principled call for a maximum hours limitation, Barnes

join the National Democratic Party.

40Each member was to have four representatives, two of whom were government delegates; the other two were to be delegates representing the employers and “workpeople” of each member. Treaty of Versailles, Art. 389.


then did an about-face and urged the adoption of a 48-hour week instead of an eight-hour day: “That is to say, I should adopt the principle of averages.” He saw “no reason” why the eight-hour day should be spread uniformly over the week “if industries can be better served otherwise.” Without any explanation, he asserted that averaging would help “avoid or prevent troubles arising from overtime.” In general, Barnes believed that the need for overtime had been “much exaggerated,” and left it to “friendly discussion afterwards” to reconcile this position with employers’ feeling that the draft was “not sufficiently elastic” and needed to be improved by “provisions for a larger amount of overtime.”

Finally, in an expansive interpretation bereft of any socio-economic grounding, Barnes contended that the Organizing Committee’s draft convention “except[s] those who are in...confidential positions as distinct from manual workers. That is to say, it...excludes the clerk or manager or superintendent or person of confidential character in a factory....” Given the virtually infinite plasticity of the term, if even clerks—who were not expressly mentioned by the committee—in “confidential” positions were to be excluded, the convention would have hugely magnified the scope of exclusions.

At the outset of the following day’s proceedings, Great Britain’s employer delegate, D. S. Marjoribanks (the managing director of Sir W.G. Armstrong Whitworth & Co.), claiming to speak on behalf of all the member states’ employers’ delegates, declared: “We felt that the draft convention did not fully meet the present conditions under which both employers and workpeople must work....” Among the more radical points in his extensive catalog of proposals deviating from the draft, Marjoribanks included a demand for 300 hours of overtime annually.

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44League of Nations, *International Labour Conference: First Annual Meeting* at 34. As U.S. Labor Secretary Frances Perkins pointed out in the 1930s, the absence of a daily maximum made enforcement more difficult: “The only way you can enforce any labor law that has to do with hours of labor is to fix a maximum working day. It is almost impossible to enforce a work week that does not run to a maximum on the day. The only way to enforce any of these provisions is to post a schedule of hours for every plant.” If there was a schedule for each individual worker, her mere presence there outside of those hours would be a prima facie violation. *Thirty-Hour Week Bill: Hearings Before the Committee on Labor House of Representatives on H.R. 7202, H.R. 4116, and H.R. 8492*, at 124-25 (73d Cong., 2d Sess., Feb. 8-23, 1934).


47League of Nations, *International Labour Conference: First Annual Meeting* at 40. Contradicting Marjoribanks, the Dutch employers’ delegate stated that he did not agree with the proposals. *Id.* at 41.

Léon Jouhaux, the long-time general secretary of the Confédération Général du Travail, spoke as the French workers’ delegate when he challenged Barnes regarding not only retention of the eight-hour day, but also the stress on production, which did “not depend solely on the presence of labor in the workshop,” but also on the organization of labor and improvement of machinery. Consequently, on behalf of all labor delegates Jouhaux wished “that at the beginning of its work the conference state explicitly that it has done with that human slavery which binds the worker to his factory....”

Samuel Gompers, who was an unofficial labor representative, insisting that workers would not even debate the abandonment of the eight-hour day—“and when we say the 8-hour day we say it as a maximum workday”—and pointing out that employers had not yet understood that “a long workday does not yield the greatest product,” declared that when Marjoribanks proposed up to 300 extra hours per year, it was the first time in his life that Gompers had ever heard the suggestion that the work period be calculated not on week or month, but year, a system under which employers could work employees 168 days a year 16 hours a day and let them go idle the rest of the year. Jouhaux, reinforcing Gompers’ point, sarcastically observed that employers’ proposal of 300 hours of overtime annually was the equivalent of saying: “Article 1. We establish an eight-hour day.

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49 Jouhaux was the head of the CGT from 1909 to 1947 and of the CGT-Force Ouvrière from 1947 to 1954; he received the Nobel Peace Prize in 1951.


Article 2. We establish a nine-hour day.\textsuperscript{56}

On the second anniversary of the Bolshevik revolution, the workers’ delegations presented their own amendments. Although they began with the proposal that the scope of the draft convention be extended to cover commercial undertakings and generally reduced the various categories of overtime work permitted by the draft, they retained verbatim the exclusion of supervisory, managerial, and confidential employees.\textsuperscript{57}

On November 10, after the general discussion in the plenary session, the conference voted unanimously to refer for consideration and report the draft convention together with the proposed amendments submitted by the employers’, workers’, and government delegates to a commission.\textsuperscript{58} In addition to declaring that both the eight-hour day and the 48-hour week were controlling principles and introducing a few compromises regarding overtime,\textsuperscript{59} the Commission on Hours of Work on November 24 revised the Organizing Committee’s draft by striking the phrase “not usually employed in manual labor” because “[s]everal members were afraid that this would be wrongly interpreted and tended to exclude, quite wrongly, the office and similar personnel of industrial establishments from benefiting by this

\textsuperscript{56}League of Nations, \textit{International Labour Conference: First Annual Meeting} at 60.


\textsuperscript{58}The Commission was composed of 15 members, five each from the government, employers’, and workers’ delegates, and was chaired by the British workers’ delegate Tom Shaw. League of Nations, \textit{International Labour Conference: First Annual Meeting} at 77.

\textsuperscript{59}“Report of a Draft Convention to the Eight-Hours Day and the Forty-Eight Hours Week,” in League of Nations, \textit{International Labour Conference: First Annual Meeting} at 222-26 at 223-25. That these compromises retained the bias in favor of elasticity for employers is illustrated by the Commission’s revised Art. 5, which authorized governments to give regulatory force to collective bargaining agreements permitting daily hours beyond eight “over a longer period of time,” subject to the condition that “[t]he average number of hours worked per week over the number of weeks covered by any such agreement shall not exceed forty-eight.” The International Labor Office later commented: “Where this Article...applies, there is no international limit to the number of weeks over which hours may be averaged. ... The International Labour Office was asked on behalf of the Swiss Government whether the number of weeks covered by such an agreement might extend over the entire year. On 11 May 1920 the International Labour Office advised as follows: ‘Nothing in the Convention indicates the length of the period over which the agreement should operate. However desirable it may appear that this period should be reduced to the absolute minimum possible, I think that Article 5...gives your country all the necessary facilities.’ International Labour Office, \textit{The International Labour Code 1939: A Systematic Arrangement of the Conventions and Recommendations Adopted by the International Labour Conference 1919-1939}, at 66-67 n.2 (1941).
International Labor Organization Hours Conventions

Although the Commission observed that the convention covered the entire personnel of an industrial establishment, including "the office which has charge of correspondence," it stressed that it was not proposing to extend the draft convention to include commercial establishments...inasmuch as banks and administrative offices with their numerous personnel are not subject to the convention. In refusing to extend the benefits of the eight-hour day to commercial establishments at the present time, the majority of the commission based their decision on the fact that its application would be difficult in shops and small stores, and also on the fact that the question was not yet ripe, and deserved special study.

Since seven of the aforementioned countries (Ecuador, France, Poland, Portugal, Kingdom of the Serbs, Croats, and Slovenes, Sweden, and Uruguay) with newly enacted eight-hour laws had already included commercial and office workers, it is unclear why the commission, which adopted this decision by a vote of 9 to 6, found the issue in need of further study.

On November 25, requesting the floor to discuss the wording of the white-collar exclusion, the Swiss workers' delegate, Conrad Ilg (a National Counsellor and secretary of the Swiss Federation of Metal and Clock Workers), moved to omit "supervisory and confidential capacity," leaving only "managerial capacity." Ilg asked: "What is meant by 'supervisory' 'confidential capacity'? There are perhaps as many supervisors as workers, and it is not clearly understood just what is meant by 'confidential capacity.' That is why I move that it be struck out, and the word 'managerial' left." Because his motion had not been seconded, the presiding officer ruled that it was not before the conference and gave the floor to Arthur Fontaine, a French government delegate (as director of the Labor Department of

63Magnusson, “Comparison of Foreign Eight-Hour Laws” at 779-80.
65League of Nations, International Labour Conference: First Annual Meeting at 125. Employers’ delegates unsuccessfully presented a motion to add this vague and capacious phrase: “After the words ‘manual labor’ add the words ‘or for whom by reason of their occupation the limit of 48 hours is impracticable.’” Id. at 266.
the Ministry of Labor and chairman of the executive committee of the French State Railways), who was the reporter for the Commission on Hours of Work (as well as having been chairman of the Organizing Committee), who explained:

The paragraph is certainly worded in a rather elliptic fashion, but that arises from the fact that our worker colleagues requested that the last words be omitted, and for good reasons. The article was originally worded: “Providing that they are not engaged in manual labor.”

They considered this provision dangerous, as it seemed to create a sort of prejudice against employees, and they believed that if this phrase were adopted it would result in including in this class of persons all employees of offices, etc. That is the only reason for omitting the words which were contained in the text of the Organizing Committee. There is thus no danger of the comprehensive interpretation feared by our colleague, Mr. Ilg. The commission examined the text with care, and it would be difficult for us to come back with a new text. We request that the text be adopted with this explanation and this interpretation.66

With no further opposition recorded, the conference had completed its discussion of and left this point.67 The provision ultimately adopted—the vote on the entire convention was 82 to 268—thus read that the convention with its eight-hour day and 48-hour week “shall not apply to persons holding positions of supervision or management, nor to persons employed in a confidential capacity.”69 Despite the fact that neither the United States nor the major European countries ratified the convention before World War II, it came into force in 1921 and was in force for 18 ILO member states by the start of the war.70 During the interwar period the International Labour Office was also requested on several occasions to interpret it, thus giving a more nuanced sense of the scope of the exclusion. In one instance, for example, it stressed the crucial role of the “responsibility” required of the position’s incumbent rather than its intellectual demands:

70France ratified but subject to the (unfulfilled) condition that Germany and Britain ratify; Italy ratified subject to an even more elaborate (unfulfilled) condition. International Labour Office, The International Labour Code 1939 at 54 n.2.
The International Labour Office was asked whether the effect of this paragraph is to exclude private employees whose work is principally, if not exclusively, of an intellectual character, and advised: That as the convention does not apply to commerce, the majority of private employees are not covered by it, but as regards employees in industrial undertakings, who are included within the scope of application of the convention, this paragraph applies to them only if their jobs involve a fair degree of responsibility and are really posts of supervision or management or confidential posts. The criterion is not the intellectual character of the work but the nature of the post.71

Rather early on the International Labor Office was also asked on behalf of the Swiss government whether the exclusion applied to the following occupations: on railways, the general administrative staff, those entrusted with the supervision of the maintenance of the permanent way, of goods despatch and train services, locomotive, and depot, and accessory services; in postal services, the general administrative staff and those entrusted with directing and supervising construction, maintenance, and repair work; and in telegraph and telephone services, the staff entrusted with directing and supervising construction, maintenance, and repair work, and the general administrative staff and staff entrusted with supervising the regular working of the services. On May 11, 1920, International Labor Office advised that the following groups would be excluded: On the railways—general administrative staff, employees supervising way-maintenance, dispatching and the train services; in the postal service—general administrative staff and employees supervising the ordinary work; and in telegraph and telephone service—employees charged with controlling and supervising direction, maintenance and repair, general administrative staff, and those supervising the ordinary work.72 More generally, the International Labor Office commented that the provision:

applies exclusively...to persons occupying a post involving responsibility in a considerable degree. ...

On the railways, posts, telegraphs and telephones, only the workers who carry out real functions of direction should be left outside the scope of the Convention, and not employees carrying out the ordinary work of the offices. On the railways, for example, Article 2 (a) is applicable to...foremen... and to all who, occupying a managing post, do not take part in the execution of the work. The original draft indicated this in a precise manner, but the indication was omitted out of a fear that it might be used as a pretext for withdrawing from the scope of the Convention the ordinary office employees in industrial establishments.

There is no doubt that a foreman (of a gang) working with his comrades, and an

71 International Labour Office, The International Labour Code 1939 at 62 n.6 (cont. from 61).
employee on the clerical staff (in an office) which is part of an industrial establishment should benefit by the same regulations of hours as the workmen in the same establishment.73

Subsequent ILO conventions also emphasized the notion of responsibility. Thus the Reduction of Hours of Work (Textiles) Convention of 1937 permitted the exclusion of “classes of persons who by reason of their special responsibilities are not subjected to the normal rules governing the length of the working week,”74 while the Proposed Convention Concerning the Reduction of Hours of Work in Industry of 1939 and the Proposed Draft Convention Concerning the Reduction of Hours of Work in Commerce and Offices of 1939 excluded “classes of persons who by reason of their special responsibilities are not subject to the normal rules governing hours of work.”75

**Hours of Work (Commerce and Offices) Convention (1930)**

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[T]he social space in which we still find modern slavery...is today no longer the factory, in which the great mass of the workers work, rather this social space is the office....76

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75Proposed Convention Concerning the Reduction of Hours of Work in Industry, Art 3(a), in International Labour Office, *The International Labour Code 1939* at 858; Proposed Draft Convention Concerning the Reduction of Hours of Work in Commerce and Offices, Art. 3(a), in *id.* at 862, 863. These two proposed conventions effectively transformed maximum-hours conventions into mere FLSA-like overtime regimes: “In any country in which it is not desired to place a fixed number of hours of overtime in the year at the disposal of undertakings, the competent authority may permit the limits of hours authorised by the preceding Articles to be exceeded, subject to the condition that all time worked in virtue of this paragraph shall be paid for at not less than one-and-a-half times the normal rate.” Proposed Convention Concerning the Reduction of Hours of Work in Industry, Art. 12.3, in International Labour Office, *The International Labour Code 1939* at 860; Proposed Draft Convention Concerning the Reduction of Hours of Work in Commerce and Offices, Art. 12.3, in *id.* at 863.
The question of the regulation of the hours of commercial workers, which the Commission on Hours of Work had not deemed ripe for discussion in 1919, had, despite employer resistance, advanced to that point by the latter half of the 1920s. At the 1925 ILC session several workers’ delegates submitted a draft resolution suggesting that private (salaried) employees’ working conditions should be placed on the agenda of the next ILC session, but the Conference officers, deciding that, absent a clearly defined question, it was not desirable to ask the Conference to consider it, declared that in the interim the International Labor Office could investigate the subject further. Following passage of a resolution by the first congress of the International Association for Social Progress in 1926 declaring the need to limit salaried employees’ daily hours to eight, at the tenth session of the ILC in June 1927 the Swiss workers’ delegate proposed a resolution, which the Conference adopted by a vote of 60 to 24, asking the ILO’s executive council, the Governing Body of the International Labor Office, to consider the possibility of placing on the agenda of an early session of the ILC the question of the regulation of commercial employees’ hours, since the Treaty of Versailles provided that all workers’ hours should be regulated and some countries had regulated commercial employees’ hours of work. Then in October 1927, the Governing Body voted to include the subject of the working hours of employees outside of industry among possible items on the agenda of the 1929 session of the ILC, and in February 1928 it voted 12 to 9 to place the matter on the agenda for twelfth session in 1929.

To provide the twelfth session of the ILC with a comprehensive overview of the state of legal regulation of the salaried employees’ working hours throughout the whole world, the International Labor Office prepared a very detailed classificatory report. After surveying the pertinent national legislation, the Office con-

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International Labor Organization Hours Conventions


International Labour Office, International Labour Conference, Tenth Session, Geneva, 1927, at 363-64, 382-84, 533-34, 683-84 (1927). The delegate, Ch. Schürch, was the secretary of Swiss Federation of Trade Unions. The British government’s delegate was the most prominent speaker in opposition, contending that extension was “premature.” Id. at 382. See also International Labour Office, International Labour Conference, Twelfth Session, Geneva, 1929: Hours of Work of Salaried Employees: Report and Draft Questionnaire: First Discussion 2 (1929).


It was in part based on “Regulation of Hours of Work in European Industry,” ILR 18(1-5): 58-74, 216-40, 375-405, 574-610 (July-Nov. 1928).
eluded that it appeared “to be inevitable that for the moment it is impossible to arrive at a definition [of salaried employee] which would both meet all cases and be applicable in all countries.”82 This conclusion derived from the perceived deficiencies of the existing statutory definitions:

[A]ny theoretical definition of the salaried employee resting on the mental or non-manual nature of his work would be inadequate, in that it would fail in many cases as a clear test for determining whether a particular person was a salaried employee or a manual worker. Nor is the distinction that has been drawn more recently in France and Italy, the criterion of which is the participation of the worker in the management of the undertaking, precise enough. ... The exclusion in Germany of persons in receipt of an annual salary of 8,400 marks from the application of the Act cannot be regarded as a criterion upon which a definition of the salaried employee can be based.83

That the International Labor Office thought it “impossible,” at least for the time being, to provide a precise definition of “salaried employee”84 in an international convention did not mean that it recommended against drafting a convention; rather, this definitional inadequacy merely meant that instead of breaking with tradition and shifting to a personal-functional approach, the ILC should continue to base hours conventions on classes of firms, such as industry, mercantile marine, and agriculture, this time adding commercial enterprises.85

In preparation—“in accordance with the double-discussion procedure”86—for the fourteenth session in 1930, the twelfth session referred to a special Committee

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84Indeed, the Office considered that it was also “impossible to find an English equivalent for the French term ‘employé.’ The English word “employee” means any employed person, and there is no comprehensive term in English which covers all the various categories of workers denoted by ‘employé.’” *International Labour Office, International Labour Conference: Twelfth Session: Geneva, 1929: Hours of Work of Salaried Employees: Report and Draft Questionnaire* at 178.


on Hours of Work of Salaried Employees for revision a draft questionnaire (which had been prepared by the International Labor Office) to be submitted to the member governments on the basis of the replies to which the convention could be formulated. In the course of the committee’s proceedings, the Italian workers’ adviser proposed deleting question 2—which asked whether the governments considered that the scope of the convention should be based on a general definition of “salaried employee” and if so, what definition—“lest a definition of the term...should be found to be too difficult or of too restrictive a nature, his intention being to extend measures of protection to all persons not covered by the Washington Convention.” After this amendment was overwhelmingly rejected (with only three yes votes), a number of advisers to workers’ delegates and government delegates, “contemplating the impossibility of finding a sufficiently exact definition,” submitted amendments that were eventually combined in one and adopted with only two negative votes: “If it is found impossible to reach a sufficiently exact definition of the term ‘salaried employee’, to what categories of workers do you consider the scope of application should extend?”

In light of the importance of the issue, the ILC held a general discussion in June 1929 on whether to send a questionnaire to the member governments. Employers’ and workers’ representatives expressed opposed views, with the former contending that the matter was still not ripe for international action, while the latter did not shy away from asserting that the question of salaried employees’ working hours “concerns the foundation itself of the construction of modern societies, of their culture and civilization.” With obvious Schadenfreude, the

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British employers' delegate, who opposed the entire project, took glee in reporting the conclusion of the Committee on Hours of Work of Salaried Employees "that it is impossible internationally to find a definition of the term 'salaried employee'. It is somewhat a sad commentary to think that the Governing Body placed on the Agenda for this Conference the question of the regulation of the hours of a class of people whom no one can describe or define."\(^92\)

Not all governments supported even proceeding with the questionnaire, while others were willing to approve the questionnaire without taking a position on whether ultimately they would vote for a convention. For example, the Swedish government, claiming that salaried employees' working conditions were already as favorable as those that the Washington Convention had set forth for industrial workers, contended that recourse to voluntary agreements between employers and workers was preferable to legislation "in spite of the resistance of one or other party."\(^93\) Although the British government did not outright oppose the effort—as it had when the Governing Body discussed the issue—its delegate emphasized the empirical and conceptual difficulties facing the drafters, positing that "the industrial workers on the whole are a homogeneous quantity. It is not true that the commercial workers can be equally so described. It is truer...that there is as much difference between one of the commercial workers' class and the other as there is between the whole class taken together and that of the industrial workers."\(^94\)

Having voted 92 to 15 to adopt, without amendments, the entire questionnaire as revised by the Committee,\(^95\) the twelfth session of the ILC, following a brief and uninspired debate, voted 103 to 17 (with employers' delegates accounting for all the no votes) to place the question of salaried workers' hours on the agenda of the fourteenth session for 1930.\(^96\)

Intriguingly, the vast majority of governments that replied to the specific question agreed that devising a general definition was either impossible, probably


impossible, extremely difficult, or impracticable. A total of six countries (Chile, Cuba, Finland, Greece, Luxemburg, and New Zealand) proposed formulations that stressed the predominance of mental or intellectual over physical, manual, or mechanical effort, two of them (Chile and Luxemburg) being able to cite their own statutes, which already contained such language.

In addition, the questionnaire asked the member countries: “Which categories of staff...should be excluded from the scope of the Draft Convention...?” In an addendum to this question (not included in the questionnaire, but inserted so that countries could respond if they chose), members were asked: “Do you not consider that persons occupying a post of a confidential, managerial or supervisory character should be excluded?” All countries from Austria to Uruguay responded that


98 Decree No. 857 [to approve the text of the Act respecting salaried employees] (Nov. 11, 1925), § 2, in LS 1925 - Chile 1 (“salaried employees shall be deemed to mean all persons... who perform work in which the intellectual effort predominates over the physical effort required...”).

99 Gesetz vom 31. Oktober 1919 betreffend die gesetzliche Regelung des Dienstvertrages der Privatangestellten, § 3, in LS 1920 - Lux. 2-4 (“if not exclusively of an intellectual nature, is mainly so”).

100 The proposals were as follows: “intellectual predominates over physical effort” (Cuba); “primarily of a mental nature in the widest sense of that word” (Finland); “either exclusively or mainly mental work” (Luxemburg, Act of Oct. 31, 1919, § 3), in [International Labour Office], International Labour Conference, Fourteenth Session, Geneva, 1930, Report II: Hours of Work of Salaried Employees at 26, 33-34, 52; “mainly requires mental effort for its performance” (Greece); “person performing other than manual or mechanical work” (New Zealand), in [International Labour Office], International Labour Conference, Fourteenth Session, Geneva, 1930, Report II (Supplementary): Hours of Work of Salaried Employees at 9, 10; “of a mental rather than a physical character (Chile, decree of Nov. 11, 1925), in [International Labour Office], International Labour Conference, Fourteenth Session, Geneva, 1930, Report II (Second Supplement): Hours of Work of Salaried Employees at 4.


102 [International Labour Office,] International Labour Conference: Fourteenth
managers should be excluded and some added those in supervisory and confidential positions as well. Several governments made it clear that they meant only higher management. For example, Denmark observed that by management it meant employer-like officials with hire- and fire-power. Finland specified those who “can regulate the organisation of their working hours as they think best themselves.” France favored excluding higher managerial officials, but not subordinate confidential, managerial, or supervisory employees. Germany proposed excluding employees engaged in scientific, artistic, spiritual or religious activities, while India suggested as a criterion a salary exceeding a level fixed by each state.

In summarizing these replies, the ILC concluded that very few countries had proposed excluding people holding supervisory positions because it would, “owing to the extent to which supervisory functions, though often of a subordinate kind, are entrusted to salaried employees, open the door to the exclusion of many classes of the latter whom there is no real reason to exempt....” One illustration of these dangers was the large department store employing a few hundred assistants at counters and in the accounting and secretarial departments. Similarly, the ILC concluded that the exclusion of those in a confidential capacity was also proposed by only a very few countries because it, too, “might lead to considerable misunderstanding or even abuse, in view of the large numbers of more or less subordinate employees engaged in the establishments to be covered by the present regulations (e.g. clerks, typists, secretaries, etc., particularly in offices), whose work may be more or less of a confidential nature.” In contrast, the universal support for excluding those holding positions of management was linked to “the untroubled position” that this formulation had held during the previous ten years “in international labour legislation as the result of its being contained in the Washington
Based on these survey findings, the Proposed Draft Convention concerning the Regulation of Hours of Work in Commerce and Offices declared that it was open to each country to exclude management. Supplementary surveys revealed that several countries did not support exclusion of any employees from the protection of the convention. Chile and Canada/Manitoba took this position. Czechoslovakia did not consider that certain categories of employees, especially those mentioned in the aforementioned addendum, should be excluded. Since almost every salaried employee in commerce had some confidential or supervisory function, excluding such persons "would be tantamount to excluding the majority of salaried employees in commercial establishments." Moreover, excluding them "would have an unfavourable effect on the working hours of the persons under their control."

Some insight into employers' mind-set can be gleaned from the speeches at the fourteenth session of the ILC in June 1930 of their chief spokesman on this issue, the British employers' delegate, John Ballingall Forbes Watson, who was director of the National Confederation of Employers' Organizations. He emphasized "not only...complexity but also...diversity" as the principal obstacles to achieving an international convention on salaried employees' hours:

We know that all the time we are taking for granted the service of those who help us to do our work, but I doubt if we realise...that all our lives are not lived in the same way; that each of us here has a social life in his own country which is different from that in other countries. For we are all the children and the result of our environment. We are what our hills and plains have made us, and the waters that wash our coasts, and when you sit down to think for one moment of putting within an iron circle the whole intimate routine of daily


life not in one country but in all countries, I say you are setting out to put on record the most glaring example of international make-believe that the world has ever seen.\textsuperscript{114}

In contrast to this undifferentiated and diffuse attack, which could just as well have served to resist an eight-hour convention for manual workers, G. J. A. Smit, Jr., president of the Dutch General Federation of Commercial and Office Employees and the workers' delegate from the Netherlands, speaking on behalf of a class of workers numbering tens of millions of whom it seemed to be very difficult to give a "scientific definition," centered his remarks on the fact that "nous avons été prolétarisés": the growth of large firms, even in retail, and the concomitant decline of patriarchal relations had totally altered the position of salaried employees, who had also become subjected to intensification of their work as a result of mechanization and rationalization; this development had, in addition, lowered their economic level to that of manual workers.\textsuperscript{115}

The original text proposed by the International Labor Office had limited national governments' discretion to exclude only persons occupying management positions,\textsuperscript{116} retention of which was approved 54 to 34. In the course of the conference, numerous proposals were made to add various groups of workers, but only the addition of persons employed in a confidential capacity was approved (45 to 43). Proposals failed to add the following groups: persons occupying positions of supervision (45 to 31); persons whose work was of a scientific or artistic nature (50 to 38); persons whose work was technical or administrative (50 to 37); and persons employed in establishments pertaining to the liberal professions (50 to 37). Finally, "[c]ertain members of the Committee on Hours of Work of Salaried Employees considered that these words ["management" and "confidential"] imply a well-defined and continuous responsibility of the employee to his employer."\textsuperscript{117} In addition, the Committee reviewed several proposals by employers' representatives to make the optional exclusion obligatory, rejecting them by narrow margins. For example, it rejected by a vote of 43 to 39 the Italian employers' representa-


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The Swiss workers' delegate Conrad Ilg had already pointed out in 1919, the term "confidential" opened the way to extraordinarily expansive exclusionary interpretations. In 1930, Joseph Hallsworth, workers' adviser from the British Empire and secretary general of the National Union of Distributive and Allied Workers, resumed that debate by complaining that "we have gone a very long way indeed from the position from which we started and have excluded large bodies of people whom we contemplated having within this Convention last year and since. The time is ripe for a Convention for commercial and office employees—those who serve us and minister to our most intimate needs. They deserve and ought to have the same measure of protection that has been accorded in so many places to industrial employees. We have excluded large bodies of people whose hours of work are atrocious." He then asked: "Is not every commercial employee in every country more or less in a confidential capacity? If you admit that, you have gone a very long way towards saying that this Convention will exclude the greater body of those for whom it was intended; and if you fail to define management, then tens of thousands of people in minor posts of management will also be excluded."

Instead, Hallsworth submitted as a substitute amendment, "Persons occupying higher positions of management," and went on to explain:

[Unless you delete these words "or employed in a confidential capacity", you are going to exclude an enormously large class from the Convention. Take the ordinary shorthand-typist, a person employed in a confidential capacity. Is a shop assistant employed in a confidential capacity? He is supposed under the law to keep his employer's secrets. He is not supposed to tell other employers anything about his employer's business. Surely, therefore, in a Convention which is supposed to provide for commercial and office employees, there will scarcely be a single grade of which it cannot be stated that the persons are employed in a more or less confidential capacity. For that reason we think it is very unfair to have words like this in a Convention which is supposed to be for the benefit of those named at the head of it.

Then with regard to persons occupying positions of management: what sort of management is intended? Surely it is not intended to exclude from the benefit of the
Convention large classes of persons occupying minor positions of management? Surely it is only intended that persons in the highest positions of management shall be excluded here; people who control their own conditions of employment and who are therefore not subject to anybody else as to those conditions. But there are tens of thousands of managers and manageresses in charge of shops; they are not in positions of the highest form of management. But, as the Convention stands, without the word “management” being qualified, it is possible that you will have in many of these establishments the ordinary shop assistant included (unless he is ruled out on the ground being in a confidential capacity), while the shop managers themselves would not have the benefit of the limitation of their hours of work. 120

After this amendment was rejected 59 to 54, the Conference discussed the amendment by the workers’ group to delete “or employed in a confidential capacity.” Smit, noting that the phrase had not been in the original draft of the International Labor Office and had been inserted by an amendment121 approved by a vote of 45-43, contended: “I am certain that this amendment was adopted by mistake. It is true that one also finds this clause in the Washington convention, but that is easily understandable because the Washington convention dealt with manual workers, to the exclusion of salaried employees. Here, it is a question precisely of a convention for the salaried employees.”122 Smit went on to explain why salaried employees were by the very nature of their positions occupying confidential positions—why a convention protecting them but excluding those serving in a confidential capacity would be as ridiculous as building a horse stable but specifying that horses were not to be admitted:

Un correspondant, un dactylographe, un comptable, un caissier et ses assistants, l’employé même qui fait le service de messager seraient exclus, puisque tous occupent un poste de confiance. Cette règle s’appliquerait également aux gérants des entreprises à succursales multiples, aux chefs de rayons dans un magasin et à leurs remplaçants.123

In contrast, chief factory inspector H. J. Scholte, a Netherlands government technical adviser, sought to alert the workers’ delegates to how the real world worked. He was not unaware that they hated the exceptions, but he also knew that it had never yet been possible to enforce any serious regulation of working hours without a considerable number of exceptions: “The more one restricts the possibility of exceptions, the less one makes a serious application possible. ... I am cautioning you, gentlemen, about the fact that the more you eliminate or restrict the exceptions from this convention, the more you will contribute to making its application and ratification impossible.”

Joseph Bribosia, director of the Ministry of Industry, Labor, and Social Welfare, and a Belgian government technical adviser, offered additional support for voting against the proposed amendment to strike the confidential employees. He believed that for the same reasons as in the case of the 1919 hours convention, it was right to exclude people in positions of confidence, such as secretaries, chief accountants, holders of the power of attorney—namely, that they bore an important share of the responsibility in the exercise of their powers from the point of view of running the establishment. Moreover, there were many fewer of them than of those in supervisory positions. Their functions meant that they collaborated in managing the firm and gave them a responsibility distinguishing them completely from supervisory personnel. After the workers’ amendment was narrowly voted down 59 to 56, Article 1 in its entirety was adopted 80 to 19.

On its first vote, the fourteenth session of the ILC adopted a draft convention fixing working hours in commerce and offices at eight and 48. With employers’ delegates voting against, workers’ delegates for, and government delegates either favoring it or abstaining, the vote was 78 to 31. Although the convention, which came into force in 1933, did not directly exclude any workers on an occupational

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127 “Favors 8-Hour-Day Draft,” *NYT*, June 28, 1930 (13:6). Of the 31 votes against, 25 were accounted for by employers’ delegates, four by government delegates (two each from the Irish Free State and Japan), and two by workers’ delegates (one from South Africa and one from Britain). Since these two workers’ delegates did not address the Conference on the question, it is unclear why they voted against the Convention. [International Labour Office,] *International Labour Conference: Fourteenth Session Geneva — 1930*, Vol. 1 — First and Second Parts 463 (1930).

128 Only 30 countries have ever ratified the convention, of which two (Finland and New
(as opposed to a workplace) basis, it did provide that "[i]t shall be open to the competent authority in each country to exempt...persons occupying positions of management or employed in a confidential capacity."  

**Forty-Hour Week Convention (1935)**

The application of social legislation to "salaried employees" is rendered extremely difficult by the absence in most countries of a clear definition of what is covered by that term. ... The term...is taken to apply to commercial and industrial workers entrusted by their employer with work requiring mental rather than physical effort. But this distinction is not absolute or universal. Moreover, in addition to the distinction between salaried employees and manual workers, a line has to be drawn between salaried employees and those of a higher category, and this line is not drawn at the same level in every country.  

By the early 1930s it was clear to the ILO both that "unemployment has become so widespread and long continued that there are at the present time many millions of workers throughout the world suffering hardship and privation for which they are not themselves responsible and from which they are justly entitled to be relieved" and that "a continuous effort should be made to reduce hours of work in all forms of employment to such extent as is possible." The textual consequence was the adoption in June 1935 by the nineteenth ILC of the Convention Concerning the Reduction of Hours of Work to Forty a Week. ILO members that ratified the convention thereby declared their approval of "the principle of a forty-hour week applied in such a manner that the standard of living
is not reduced...."132 Because this conference was the first ILC to which the United States had sent delegates since joining the ILO the previous year, The New York Times devoted almost daily coverage to it. With the U.S. Supreme Court’s Schechter decision striking down the NIRA having been issued just one week before the conference opened, the paper reported that the idea was gaining ground within the U.S. governmental delegation that the government’s “treaty-making power might provide a way out of the NRA difficulties”: since treaties become the supreme law of the land under the constitution, “the basic features of the NRA might be incorporated in an international convention.”133

If this notion of the internationalization of U.S. labor standards and Americanization of international standards did not immediately strike observers as fantastic,134 reality set in soon enough.135 The Times, overlooking the Hours of Work (Commerce and Office) Convention, called the adoption of the convention “easily the most important and most unexpected advance the I.L.O. has made in the field of hours reduction” since the Washington 48-hour convention of 1919. Without revealing any real-world political-economic framework for such an impact, the newspaper observed that backers attributed importance to the convention “because it gives workers everywhere a strong talking point in negotiating hours reductions in their own countries and industries.” Nevertheless, although adoption left workers’ delegates, the U.S. delegation, and the ILO “jubilant,”136 it was understood from the outset that the convention was essentially aspirational. In fact, the International Labor Office had expressed its view to the ILC that “the convention form

134The following day it was reported that “European worker delegates fear the NRA decision has weakened their chances of getting reductions in hours.” Clarence Streit, “Americans to Aid Work Hours Study,” NYT, June 5, 1935 (4:4). The U.S. delegation, including the employers’ delegate, supported the convention “because since the United States has a forty-hour week or less already in many industries, its competitive and marketing positions in the world will benefit from helping foreign workers not to cheapen themselves.” Streit, “40-Hour Week Pact Adopted by I.L.O.”
135In contrast, editorially, the Times was very skeptical of the convention. “Forty Hours in Principle,” NYT, June 25, 1935 (18:3).
136Clarence Streit, “40-Hour Week Pact Adopted by I.L.O.,” NYT, June 23, 1935 (17:1). The reporter’s reliability was severely challenged by his claim that the 48-hour convention “had never gone into force largely through the British Government’s failure to ratify....” Id. In fact, the convention went into effect on June 13, 1921 and has remained in effect ever since. http://www.ilo.org/ilolex/english/convdisp1.htm. Streit, who covered the League of Nations for ten years for the Times, later had a prominent career as an author and promoter of Atlantic Union. http://www.loc.gov/rr/mss/text/streit.html

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was inappropriate for what was in substance a proclamation of future policy” and
that the principle should instead be embodied in a special resolution, but the ILC
“preferred to give the intended declaration of principle greater solemnity of
form....”\textsuperscript{137} Ratification of the convention, as the \textit{Times} itself reported, did not
even bind a ratifying member country to ratify any of the industry-by-industry
implementing conventions, without which the Forty-Hour Week Convention
remained impotent.\textsuperscript{138} In the event, only one country (New Zealand) ratified the
convention before World War II, the convention did not go into effect until 1957,
after the three Soviet Republics had ratified, and to this day only 14 countries have
ever ratified it.\textsuperscript{139}

Of relevance here, especially since U.S. Government and especially DOL
officials had now become involved in the ILO\textsuperscript{140} and U.S. policy makers thus
became institutionally linked to the formulation of international approaches to
labor standards, is how the Forty-Hour Week Convention was to apply to white-
collar workers. With regard to a reduction-of-work convention, as early as 1933
the International Labor Office composed a list of points on which it considered that
the ILC should request it to consult the member governments to indicate the
persons to exclude or whom it might be possible to exclude from the regulations;
prominent among the points was the exclusion, once again, of those employed in
a supervisory, managerial, or confidential capacity.\textsuperscript{141} For the Eighteenth Session
of the ILC in 1934, the International Labor Office prepared draft conventions

\textsuperscript{138}Streit, “40-Hour Week Pact Adopted by I.L.O.” The convention stated that a
ratifying country “undertakes to apply this [40-hour] principle to classes of employment
in accordance with the detailed provision to be prescribed by such separate Conventions
as are ratified by that Member.” Forty-Hour Week Convention, Art. 1.
\textsuperscript{139}http://www.ilo.org/ilolex/english/convdisp1.htm
\textsuperscript{140}Isador Lubin, the Commissioner of Labor Statistics, was the first U.S. representative
to address the Governing Body of the International Labor Office in January 1935, when
he expressed the U.S. government’s support for applying the 40-hour principle to as many
(6:5). The DOL’s contact work with the ILO continued to be through Commissioner
Lubin. \textit{Twenty-Seventh Annual Report of the Secretary of Labor for the Fiscal Year
Ended June 30, 1939}, at 83 (1939). A member of Roosevelt’s brain trust, Lubin was once
called the president’s favorite economist. John Hess, “Isador Lubin Dies, 82,” \textit{NYT}, July
8, 1978 (22:3). At the first ILC attended by U.S. delegates, Charles Wyzanski, Jr., the
Solicitor of Labor, was a member of the ILC committee that drafted the Forty-Hour Week
\textsuperscript{141}League of Nations, \textit{International Labor Conference: Seventeenth Session: Geneva

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concerning the 40-hour week in industry and commerce and office: the former provided for the exclusion of all three categories and the latter of employees in a managerial and confidential capacity.  

Then, however, in sharp contrast to their failed efforts with the earlier conventions, workers’ delegates succeeded in radically shrinking the white-collar exclusions. First, they submitted an amendment that reduced the supervisory/managerial category only to “persons occupying the highest posts of management.” After this amendment was adopted 56 to 31, they were able to gain adoption of an amendment excluding only “exceptionally confidential positions.” The Draft Convention concerning the Forty-Hour Week in Industry thus incorporated these two definitions, while the Draft Convention concerning the Forty-Hour Week in Commerce and Office instead used “high managerial positions” and “exceptionally confidential character.”

This more restrictive method was, however, nullified by the different regulatory approach taken by the ILC in 1935, which entailed removing such details from the principal convention, which established the principle of the 40-hour week, and transferring them to the industry-by-industry implementing conventions. The ILC was set to vote on five of them—public works, iron and steel, building and contracting, coal mines, and glass bottles—of which even the optimistic Times reporter predicted that only the last seemed likely to secure the required two-thirds majority. In fact, by the beginning of World War II, the ILC had adopted only three conventions providing for the application of the 40-hour principle: glass-bottle workers (1935), public works (1936), and textiles (1937). Proposed conventions for building, iron and steel, coal mines, the chemical industry, and

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147 Streit, “40-Hour Week Pact Adopted by I.L.O.”
148 The proposed draft conventions for building and construction and iron and steel prepared by the International Labor Office gave the individual member states discretion to exclude those employed in supervisory, management, and confidential capacities, while the exclusion was limited to supervisors in coal mining. League of Nations, International
the printing industry all failed of adoption in 1935, 1936, and 1937.149

The 1937 textile convention—which was never ratified by any country, never came into force, and was withdrawn in 2000150—used, as already noted, the expansively spongy definition of “classes of persons who by reason of their special responsibilities are not subjected to the normal rules governing the length of the working week.” The proposed draft public works convention prepared by the International Labor Office in 1935 left it up to the member states to exclude those employed in supervisory, management, and confidential capacities.151 As adopted the following year, the Reduction of Hours of Work (Public Works) Convention, effectuated the 40-hour principle as an average;152 the individual member states were then given the discretion to “determine the number of weeks over which this average may be calculated and the maximum number of hours that may be worked in any week.”153 The Twentieth ILC narrowed the scope of excludible white-collar employees to “persons occupying positions of management who do not ordinarily perform manual work,”154 but this refinement was moot since this convention, too, never was ratified by any country or went into force and was finally withdrawn in 2000.155 Finally, the Reduction of Hours of Work (Glass-Bottle Works) Convention, 1935 is irrelevant here because it applied only to (certain) production workers.156

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150http://www.ilo.org/ilolex/english/convdisp1.htm
152Reduction of Hours of Work (Public Works) Convention, 1936, Art. 2.1, on http://www.ilo.org/ilolex/english/convdisp1.htm
153Reduction of Hours of Work (Public Works) Convention, 1936, Art. 2.4.
154Reduction of Hours of Work (Public Works) Convention, 1936, Art. 1.3(b).
155http://www.ilo.org/ilolex/english/convdisp1.htm
156Oddly, the convention “[c]onfirm[ed] the principle laid down in the Forty-Hour Week Convention” by setting forth a 42-hour week averaged over four weeks. Reduction of Hours of Work (Glass-Bottle Works) Convention, 1935, preamble, and Art. 2.2 and 2.3.

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The ILO's View of the Sociological Convergence of Blue- and White-Collar Workers During the Great Depression

Albert Thomas, Director of the International Labor Office of the League of Nations,...voiced his disapproval of attempts...in some circles to make these salaried workers believe that they formed a sort of new middle class.

In reality...there had always been a growing feeling among the white collar men that they really belong with the manual workers. Day by day they were becoming more and more specialized, so that they did only a part and not the whole of any task. This might be a tragedy for them in a certain sense, but it also meant that their organization was becoming more important as a factor in the final emancipation of the working class.157

As DOL officials became increasingly involved in the ILO during the second half of the 1930s, they became increasingly familiar with the approaches developed by the international labor standards agency for dealing with white-collar workers. They should also have begun to perceive the need to assimilate office workers to the same types of protective regimes that already covered production workers: after all, by the latter half of the 1930s, as the world-wide depression dragged on seemingly interminably, the ILO began emphasizing that the impact of machinery and mechanization on office work and workers was analogous to that in industry.158 For example, in 1936 its Advisory Committee on Salaried Employees declared that to protect office employees from some of the effects of mechanization, steps should be taken, including the introduction of variety into the duties of employees in charge of machines, the application of motive power to operation of most machines, the elimination of noise and vibration, "and above all, the reduction and better arrangement of hours of work."159 Two years later, an International Labor Office draft in advance of a session of the Advisory Committee on Salaried Employees became even more explicit: "[T]he position of manual workers and salaried employees has tended to become more uniform in recent years since the

157"Clerical Workers Rising in Industry," NYT, Nov. 11, 1928 (58:5).
159"The Influence of the Use of Office Machinery on the Conditions of the Work of Staff" (Resolution Adopted by the Advisory Committee on Salaried Employees at Its Fourth Session (Geneva, 18-19 November 1936), in International Labour Office, The International Labour Code 1939 at 630.
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workers have been granted advantages similar to those formerly granted only to salaried workers, particularly as regards notice of dismissal, holidays with pay, and social insurance.\textsuperscript{160}

After noting that the monotony of mechanized office work was due to its uniformity and lack of technical interest and that this uniformity and simplicity resulted from an extreme division of labor, the ILO Advisory Committee on Management adopted the following conclusions in 1938:

The evolution of office work as a result of mechanisation has introduced a much clearer distinction than formerly between managing staff and executive staff. Some of the workers—a minority—are normally required to solve problems and take decisions; a somewhat larger group carries out material tasks which nevertheless require highly specialised training; the great mass of employees is increasingly employed on uniform tasks with machines in which every detail is fixed in advance. The first group requires analytical ability and a sense of initiative, but practically all that is required of the third group is rapidity and accuracy in their work. This group is daily becoming numerically more important at the expense of the other two. The growth of this structure, which is entirely analogous to that which has long existed in the workshop, necessarily brings office workers closer to those engaged in the actual work production. There are at present in any large office...specialised manual workers who have merely had a rapid training or often simply an explanation of their duties.\textsuperscript{161}

As a result of this development, workers engaged with machinery had become more “interchangeable”:

In spite of the considerable differences...from the technical, physiological and psychological point of view between office work and that carried out in a workshop, it would seem that from the occupational angle present developments make it increasingly difficult to separate one category of workers from the other. Consequently, the social guarantees of every kind recognised as due to industrial workers should be granted equally to office employees, more especially by a general extension of social legislation and of the system of collective agreement.\textsuperscript{162}

\textsuperscript{160}"The Problem of Defining a 'Salaried Employee,'" \textit{ILR} 37(6):764-87 at 764 (June 1938) (draft in advance of the Fifth Session of the Advisory Committee on Salaried Employees (Apr. 23, 1938)).


By the mid-1930s the ILO had also turned its focus on professional workers, on whose unemployment, as an aspect of world economic depression, the rearrangement of working hours would have a positive effect. Nevertheless, since the "overcrowding of the professions" had reached such a "critical" stage that the ILO sought a safety valve: "It would be well to give increasing facilities for the settlement of professional workers in colonies and undeveloped countries."163

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Because there is no hopper into which we can toss all the workers of the country to be automatically sorted by machine into the categories of the protected and the unprotected, the burden of interpretation thrown upon us is heavy and important.¹

The hundreds of thousands of white collar employees who were denied overtime pay by their employers as a matter of policy because their salaries exceed the exemption standard, are the exploited victims of a low standard.²

¹"Address Scheduled for Delivery by Elmer F. Andrews, Administrator Wage and Hour Division, U.S. Department of Labor, Before the Cleveland City Club, Cleveland, Ohio, February 18, 1939 at 1:00 P.M." at 8, in US DOL, WHD Press Release (R-197, Feb. 18, 1939) (copy furnished by Wirtz Labor Library, US DOL).

"Well, I still have my nice white collar!

You have nothing to lose! Organize!"
The Vacuous Legislative and Puzzling Regulatory History: 1937-38

Sen. [Elbert] Thomas. What are you going to do about it if certain groups don't want to come under the Fair Labor Standards Act? You see, those of us who were working with that legislation tried to extend it as far as we could, but the groups that didn't come under it remained out at their own request.

Mr. [Boris] Shishkin. There are groups...who don't want to come under the act, and don't belong under it because they have nothing to do with the salary or wage range with which the act deals. Evidence was developed before Congress in the consideration of the Fair Labor Standards Act and in the hearings held before the Administrator to show that the exemptions that were put in the act are leaving out those [low-wage] people in New Orleans I have mentioned, and in other places who may be classed as administrative or professional workers, but who are wage earners in a very real sense of the word, and who must have assurance of minimum pay that the policy of the act is designed to provide for everyone alike.1

Virtually nothing said at the extensive 1937 congressional hearings on the FLSA (transcribed on more than 1,200 printed pages)2 or during the 1937-38 protracted congressional debates (transcribed over almost 600 tightly printed, double-columned pages),3 or written in the Senate or House committee

1Wartime Health and Education: Hearing Before a Subcommittee of the Committee on Education and Labor United States Senate, Part 3: Fixed Incomes in the War Economy 1:1369 (78th Cong., 2d Sess., Jan. 25-Feb. 9, 1944). Elbert Thomas was a pro-labor Utah Democrat who became chairman of the Senate Education and Labor Committee after Hugo Black’s appointment to the Supreme Court in August 1937 and retained that position through the 78th Congress. Shishkin was an AFL economist who in his testimony had referred to clerks in New Orleans earning as little as $11.53 for 48 hours in 1943. Id. at 1365.


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reports of those years\(^4\) sheds any light whatsoever on the purpose or scope of the exclusion of executive, administrative, or professional employees.\(^5\) With regard to them, the first Wage and Hour Administrator, Elmer Andrews—who had been future Labor Secretary Frances Perkins’ deputy from 1929 to 1933 and then successor as New York State Industrial Commissioner from 1933 to 1938\(^6\)—egregiously erred when he asserted of the FLSA to the National Association of Manufacturers in December 1938:

Few statutes enacted by Congress have ever been given the consideration which this measure received. Every related problem was discussed and debated by the members of Congress. Every proposal, practically every provision was scrutinized in private and in public. Exhaustive hearings were held at which leading industrialists, economists and public officials contributed information and advice.\(^7\)


\(^5\)Among protagonists later in the 20th and 21st century amnesia ultimately settled over this tabula rasa, but at least Reuben Haslam, associate counsel of the National Association of Manufacturers, admitted at the 1947 WHD hearings on the white-collar regulations that: “As far as I have been able to determine, there were no legislative debates or comments concerning these terms” (i.e., employees employed in a bona fide executive, administrative, and professional capacity). “Statement of National Association of Manufacturers at Wage-Hour Division Hearings on 13(a)(1) Exemptions” (Dec. 12, 1947), printed in Fair Labor Standards Act Amendments: Hearings Before a Subcommittee of the Committee on Labor and Public Welfare United States Senate, Part 2: 925-35 at 929 (80th Cong., 2d Sess., Apr. 27-May 4, 1948).


\(^7\)Remarks by Elmer F. Andrews, Administrator Wage and Hour Division U.S. Department of Labor Before the National Association of Manufacturers at the Waldorf-Astoria Hotel in New York City on December 9, 1938” at 4 (US DOL, WHD, R[elease]-126) (copy furnished by US DOL Wirtz Labor Library). Three weeks earlier, Rufus Poole, Assistant General Counsel of the WHD and in his earlier capacity as DOL Associate Solicitor the Department’s representative in the preparation of the FLSA, made a very similar assertion in a public speech, emphasizing that during three sessions, Congress had not limited its “debates to the question of the relative benefits of the bill to labor and capital, but...discussed literally scores of incidental questions....” “Address by Rufus G. Poole, Assistant General Counsel Wage and Hour Division, U.S. Department of Labor Scheduled for Delivery at 3:30 P.M., Friday, Nov. 18, 1938, at Syracuse, N.Y., Before the Associated Industries of New York at Its Annual Meeting” at 1-2, in US DOL, WHD, Press Release (R-97, Nov. 18, 1938) (copy furnished by Wirtz Labor Library, US DOL). On Poole, see US DOL, WHD, Press Release (R-18, Sept. 29, 1938) (copy furnished by
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One of two mutually contradictory conclusions can be drawn from this congressional silence: Either Congress’s intent in excluding administrative, executive, and professional employees from the FLSA was so obvious that identifying it was as superfluous as defining the intuitively obvious borders of these groups themselves;8 or Congress itself had not thought through the policies underlying, or the scope of, the exclusions, which it reflexively adopted from the multitudinous state, federal, and international legal sources discussed above in Part III. However, even (or perhaps especially) if Congress had not adequately considered the purposes and consequences of the exclusions, there would have been all the more reason to have expected employers to demand some answers or at least to raise some questions.

The burden of this chapter is to document the uniformity with which some white-collar workers were excluded from almost all drafts of the FLSA, to identify the changes that these exclusions underwent during enactment, and to demonstrate the virtual explanatory void in the entire legislative history. In order to show that congressional silence was not, for example, as several high-ranking former DOL officials have speculated, “due in part to the complexity of the issues involved in operationally defining the named occupational categories,”9 the second section focuses on congressional inclusion of a very detailed definition for one of the other major exemptions in 1937. Since any possible purpose of the white-collar exclusions must be related to the purposes of the overtime provision of the FLSA itself,


8Three high-ranking former DOL officials speculated that the reason for the silence may have been “the perception that those who would qualify for the exemptions at that time constituted a relatively small portion of the national workforce whose jobs were readily distinguishable from the much larger portion of jobs to which the Act’s provisions would apply.” John Fraser, Monica Gallagher, and Gail Coleman, “Observations on the Department of Labor’s Final Regulations Defining and Delimiting the [Minimum Wage and Overtime] Regulations for Executive, Administrative, Outside Sales and Computer Employees” at 3 (July 2004), on http://www.aflcio.org/yourjobeconomy/overtimepay/upload/OvertimeStudyTextfinal.pdf. Although it is certainly plausible that, for example, mining coal was and is “readily distinguishable” from office work, this conjecture overlooks the fact that that distinction was not the relevant one; rather, the distinctions in question were located within white-collardom, where the task of separating out the “bona fide” executive, administrative, and professional employees from the white-collar workers who were to receive minimum wage and overtime protection was not intuitively obvious—especially since Congress had failed to give the WHD any hint of its purpose in excluding the former occupations.

9Fraser, Gallagher, and Coleman, “Observations on the Department of Labor’s Final Regulations” at 3.
the chapter, in a third, parallel, step, also seeks to account for that congressional intent as well. The final section of the chapter is devoted to the origins of the Wage and Hour Division’s first set of white-collar overtime regulations with special attention directed to the puzzling fact that employers apparently acquiesced in the WHD’s fusion of the categories of executive and administrative employees only to do an almost immediate about-face and denounce it in a two-year campaign that ultimately led to a second set of revised regulations that detached them.

No Light on White-Collar Exclusions

Mr. [Foster] PRATT. ... Request that FLSA be amended to include technical engineers, architects, and draftsmen.

Sen. THOMAS. It is a most helpful request. It only took us 3 full years of consideration to get the Wage and Hour Act passed, but I don’t think any association of architects or draftsmen appeared to help us. ... [T]hat is more helpful than ever to have someone admit that organized labor is getting some benefit from the Fair Labor Act, because the act was primarily for the great masses of unorganized workers.11

[T]he War Manpower Commission lengthened the workweek...from 40 to 48.... [P]romptly the Communists and fellow travellers in this bureaucratic Government of ours used the event to make a vicious underhanded attack on the very way of life the longer workweek was designed to help protect. They did it...by making “class” the criterion by which it was decided how much pay a worker was to get for those extra 8 hours that were

10On the legislative history and purposes of the FLSA overtime compensation provision, see Marc Linder, The Autocratically Flexible Workplace: A History of Overtime Regulation in the United States 245-62 (2002). All drafts and versions of the FLSA permitted overtime work provided that employers paid time and a half. The claim is erroneous that after the House bill had finally been discharged from the Rules Committee, significant changes were made including “the move from a true maximum hours bill to a bill that permitted unlimited overtime so long as a time-and-one-half wage premium was paid....” Deborah Malamud, “Engineering the Middle Classes: Class Line-Drawing in the New Deal Hours Legislation,” Michigan LR 96(8):2212-2321, at 2288 (Aug. 1998).

11Wartime Health and Education: Hearing Before a Subcommittee of the Committee on Education and Labor United States Senate, Part 3: Fixed Incomes in the War Economy 1:1394, 1400. Pratt was president of the International Federation of Technical Engineers, Architects, and Draftsmen’s Unions, AFL. Thomas, whose obituary called him “[o]ne of the most erudite men ever to sit in the United States Senate,” was wrong about the FLSA: it took only one year to pass. “Elbert D. Thomas, U.S. Official, Dies,” NYT, Feb. 12, 1953 (27:1).
added to the workweek. And by “class-angling” the decisions concerning the pay ques-
tions, they are destroying the worker’s will to work.... Almost every worker wants to
become a foreman or superintendent; once such a promotion carried with it a substantial
material reward, but now the case is different. ...

The laborer and the mechanic get time and one-half for 8 hours of that 48.... But that
Federal law specifically excludes from its provisions the foreman and the superintendent
and the engineer (but the bureaucrats still call it the Fair Labor Standards Act).

What has happened to American justice, when a man’s pay rate is based on what
“class” he belongs to? ... Why shouldn’t pay rates for overtime, whether they are time-
and-one-half or straight time or no pay at all, be applied equally to all men?

It seems to me that is a drive by the bureaucrats to put into practice the theory (long
abandoned by the Russians, who couldn’t make it work...) that every man should get the
same dollars pay regardless of his work-contribution to society.¹²

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Vacuous Legislative and Puzzling Regulatory History

What ultimately became the FLSA originated, according to Labor Secretary
Perkins’s early post-New Deal narrative, in her efforts during the “period of doubt
over NRA’s future...to explore means to save what I thought was basic and
important—the limitation of hours of labor and the establishment of a floor under
wages.”¹³ Specifically, she persuaded the Solicitor of Labor to draft two bills: a
public contracts bill and one calling for general wage and hour standards and em-
bodying the ideas that Senator Black’s 30-hour bill of 1932-33 had lacked.¹⁴
Perkins then told President Roosevelt that she had these bills “locked up in the
lower left-hand drawer of my desk against an emergency.”¹⁵ The public contracts
bill became the Walsh-Healey Public Contracts Act of 1936, which, in Perkins’
view, was “an important forerunner of the Fair Labor Standards Act, since it
established the forty-hour week for contractors manufacturing supplies for the
government....”¹⁶ (It was also a precursor of the FLSA in converting the maximum
40-hour week into a mere overtime regime and excluding, by Perkins’ own
regulation, all office workers).¹⁷ Since Perkins was not convinced that a more
comprehensive measure was not feasible: “Some time earlier, I had asked Charles
Gregory, Labor Department solicitor to prepare a bill....” It provided for minimum
wage boards, which, after investigation, could recommend a maximum workweek,

Ohio), inserting brochure from a constituent).
¹⁵Perkins, The Roosevelt I Knew at 249.
¹⁷See above ch. 6.
but extending in no event more than 48 hours; it also provided for administrative
discretion in fixing the amount of overtime payment: "This was one of the bills
that I told the President I was keeping in my bottom drawer." Finally, two Su-
preme Court decisions in March and April of 1937 upholding the constitutionality
of a state minimum wage law and the NLRA—the day after the Wagner Act
decision congressional leaders declared that its broad interpretation of the federal
government’s interstate commerce power over industry “was certain to bring action
at this session on new maximum [hour] and minimum wage legisla-
tion”—prompted Roosevelt to try to enact a comprehensive minimum wage and
maximum hour bill, partly as means of reuniting the Democratic party; he ap-
proved a draft, which included the principles of the bill that Gregory had drafted
for Perkins plus other theories suggested by others, all of which were included in
a lengthy bill drafted by Roosevelt’s braintrusters Thomas Corcoran and Benjamin
Cohen.

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22Perkins, The Roosevelt I Knew at 256. The chronology of events recounted by
Perkins is internally inconsistent: Gregory (who was on leave as a professor from the
University of Chicago Law School from the spring quarter of 1936 until July 1, 1937) was
not nominated until March 23, 1936 and not confirmed by the Senate as labor solicitor
until April 28, 1936; he resigned on February 17, 1937. CR 80:4187, 6292 (Mar. 23 and
Apr. 28, 1936); “C. O. Gregory Quits Federal Job,” NYT, Feb. 18, 1937 (24:4); Twenty-
Fourth Annual Report of the Secretary of Labor for the Fiscal Year Ended June 30, 1936
(n.p. [ii]) (1936); Association of American Law Schools, Directory of Teachers in Member
Schools: 1938-1939, at 77 (1938); email from Julie Meyer, Faculty Support Coordinator,
University of Chicago Law School (Dec. 2, 2003). According to DOL records, Gregory
was actually in office from May 1, 1936 to Mar. 1, 1937. Historical Office, DOL; email
from Judson MacLaury, DOL historian (Dec. 4, 2003). In other words, he did not become
solicitor until well after the Supreme Court had struck down the NIRA as unconstitutional
on May 27, 1935, which, in turn, had to have been after the “period of doubt over NRA’s
future,” which lasted from 1934 to 1935. Since the Walsh-Healey Act antedated Gregory’s
tenure as solicitor, he could not have drafted it; since, as will be seen below, he did draft
a FLSA bill in early 1937, either Perkins conflated Gregory with an earlier solicitor
(perhaps Charles Wyzanski, whom she mentioned as having commented on the Supreme
Court decision in Schechter) or the earlier solicitor had also drafted a wage and hour bill
in 1934-35, which is not extant. Perkins, The Roosevelt I Knew at 252. It seems unlikely
that Wyzanski drafted such a bill since his memorandum to Perkins from late 1935 could
not envision “regulatory devices embrac[ing] more than a dozen industries” and insisted
that any hours regulation “provide[ ] for such flexibility as the particular demands of the
As one in a series of Roosevelt administration draft bills that ultimately became the FLSA, the version of the proposed National Labor Standards Act that Solicitor Gregory sent to Perkins on February 12, 1937 ("I am submitting another draft, with changes you have suggested") created tripartite (employer-employee-government) industrial councils in industries that the Secretary found obstructed the free flow of commerce; the councils were to formulate articles of labor standards, which had the force of law after being signed by the President. Enforced by the Labor Department, the articles were required to contain a sweeping array of standards, including provisions of the NLRA, child labor, maximum hour, and minimum wage regulations, workers' compensation and safety provisions, as well as collective bargaining agreements. In particular, the hours provision prohibited an employer from requiring or permitting an employee "to work more than ____ hours in one week, or ____ days in one week by any single employer or through employment by more than one employer," subject to variation or modification conditioned (for example) on an inadequate labor supply, and the granting of any variation or modification permitting a worker to be employed more than an average of 44 hours per week during the period of modification unless such limitation would result in diminishing rather than increasing total employment. Remarkably, this post-NRA code-like regime excluded, by its definition of "employee,"

industry justly require." Mr. Wyzanski to the Secretary of Labor at 2, 6 (Nov. 8, 1935), in Francis Perkins, Papers, Columbia University Rare Book and Manuscript Library. Wyzanski left the DOL to join the Justice Department two weeks after having written this memo. "Wyzanski Gets New Post," NYT, Nov. 2, 1935 (9:6).


24As late as November 6, 1936, Gregory had responded to Perkins’ request for a memorandum on laws embodying NRA standards “with some chance of being held constitutional by the Supreme Court” by outlining four possible models none of which resembled traditional wage and hour legislation. Memorandum from Charles O. Gregory Solicitor of Labor to the Secretary of Labor (Nov. 6, 1936), in Francis Perkins, Papers, Columbia University Rare Book and Manuscript Library. In January 1937 Gregory informed Perkins that proposed legislation compelling employers to bargain collectively and enter into agreements with labor representatives lacked constitutional validity and should not be presented to Congress. From Mr. Gregory to The Secretary: Subject: Constitutional Validity of Proposed Collective Bargaining Legislation (Jan. 19, 1937), in Francis Perkins, Papers, Columbia University Rare Book and Manuscript Library.

25From Mr. Gregory to The Secretary (Feb. 12, 1937), in Francis Perkins, Papers, Columbia University Rare Book and Manuscript Library.

26A Bill To Safeguard and Promote the General Welfare, §§ 2, 4-5, 8(b) (quote), in Francis Perkins, Papers, Columbia University Rare Book and Manuscript Library.
only agricultural employees or those employed by a parent or spouse; white-collar workers were not expressly excluded.27

It was, as the administration moved away from particularist approaches that focused on one or a few industries,28 also the last such embrace of white-collar workers. The Corcoran-Cohen Confidential Revised Draft of a Bill to Provide for the Establishment of Fair Labor Standards in Employments in and Affecting Interstate Commerce of April 30, 1937 excluded only two occupational groups—“any person employed in an executive or supervisory capacity, as defined by regulations of the Board.”29 The version of May 12 added those employed in an administrative capacity to the excluded;30 and the final iteration of the bill on May 20 expanded the list of excluded white-collar workers to include the professional category, so that the exclusion now encompassed “any person employed in an executive, administrative, supervisory, or professional capacity...as such terms are defined and delimited by regulations of the Board” and added agricultural laborers as well.31 It was this last version that four days later, on May 24, 1937, the chairman of the Senate Education and Labor Committee, Hugo Black, and the chairman of the House Labor Committee, Representative William Connery, introduced as S.

27A Bill To Safeguard and Promote the General Welfare, § 9(d).
28E.g., Walter L. Pope of the Attorney General’s Office was as late as March 1937 still drafting individual bills to cover specific industries such as bituminous coal. Memorandum from [Solicitor of Labor] Gerard D. Reilly to The Secretary Re Major Berry’s Bill to establish Labor Standards (Mar 8, 1937), in NA, Department of Labor, Solicitor’s Office 1937-38 File.
31Confidential Revised Draft of a Bill to Provide for the Establishment of Fair Labor Standards in Employments in and Affecting Interstate Commerce, § 2(a)(7) (May 20, 1937), in NA, Labor Dept Records, Labor Standards—1937 File, Fair Labor Standards Bill. Section 19 on regulations was revised to authorize the Labor Standards Board “to define and delimit employments in which persons are deemed to be employed in an executive, administrative, supervisory, or professional capacity or as agricultural laborers.”
2475 and H.R. 7200 containing the identical exclusionary wording.\textsuperscript{32} To be sure, such exclusionism was hardly alien to Connery: the thirty-hours bill that he had introduced in January 1937 was even more expansive, excepting “officers, executives, and superintendents, and their personal and immediate clerical assistants” from the five-day, six-hour maximum.\textsuperscript{33}

The only hearings that Congress held on the original FLSA began a week after the bills had been introduced. Organized jointly by the Senate Education and Labor Committee and the House Labor Committee and presided over by Senator Black, the hearings lasted from June 2 to 22 and generated over 1,200 pages of testimony. Though in many respects a treasure-trove of congressional intent or at least of insight into the positions of capital and labor and the background information available to the legislature, it is singularly devoid of discussion of the purpose of the overtime provision\textsuperscript{34} and virtually blind to the existence of the white-collar exclusion.

The only quasi-substantive remarks were made by future Supreme Court Justice Robert Jackson, then assistant attorney general, who was the very first witness and the Roosevelt administration’s chief spokesman on the bill’s constitutionality. Almost at the conclusion of Jackson’s all-day testimony, chairman Connery had been engaging Jackson in an extended and wide-ranging colloquy on the interstate commerce underpinnings of the bill’s coverage, when he suddenly switched from taxi drivers to the newspaper business: “Would the editorial staff and printers in the newspaper establishment itself—would they come under this, and how far do these go down? To the newsboys, or what?” After Jackson replied that those engaged in the newspaper’s production would come under the act if the paper moved in interstate commerce, Connery continued pressing him about the reporters, until the witness apparently chose to escape further constitutional hair-splitting and to shift the terms of debate: “They can come under the group of professionals. ... I don’t know whether the newspapermen consider that they are engaged in a professional capacity or if they are engaged at such low wages as not to come within the bill.” Although it is unclear what Jackson meant by that last comment, when Connery asked whether, if the reporters’ “wages are down pretty low, would they come under it then?” especially if they were not “these ‘big shot’ fellows, but...the small-town fellows,” Jackson, admitting that there might be


\textsuperscript{33}H.R. 1606, § 1, 75th Cong., 1st Sess. (Jan. 5, 1937)

\textsuperscript{34}For one substantive exception, see Marc Linder, \textit{The Autocratically Flexible Workplace: A History of Overtime Regulation in the United States} 252 (2002).
different interpretations, repeated that "I would not think that the newspapermen would be included, because I would regard them as a profession."  

This brief, happenstantial, haphazard, disjointed, opaque, and inconclusive dialog about one single group of white-collar workers—of which newspaper publishers sought to make the most at regulatory hearings in 1940—constituted the sole direct contribution to the subject during the entire hearings.

One other comment appeared in a very lengthy filed statement submitted by Roy Cheney, the managing director of the Underwear Institute, which, however, was not read aloud or discussed at the hearings. In it the organization—whose members had been subject to an NRA code of fair competition that permitted them to average the 40-hour workweek of “office and supervisory staff” over one month—representing 70 percent of national production proposed that “members of supervisory staffs, including all who direct the activities of others, such as executives, superintendents, foremen, and assistant foremen, also office help, be exempt from the provisions relating to the maximum hours,” which provided for

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36Nevertheless, a federal judge who was unsympathetic to the overtime claims of reporters characterized this colloquy as “throw[ing] considerable light on whether Congress ever intended to include newspaper reporters within the Act.” Sherwood v. The Washington Post, 677 F.Supp. 9, 13 (D.D.C., Jan. 13, 1988), rev’d, 871 F.2d 1144 (D.C. Cir., 1989). To be sure, he omitted from his quotations passages that spoke against his interpretation and he also outright misquoted.

37See below ch. 12.

38The only other tangential reference stemmed from the magazine publishers’ representative, who noted in passing that although office workers in New York City worked fewer than 40 hours, editorial staff had no stipulated hours: “They have to perform their duties.” Fair Labor Standards Act of 1937: Joint Hearings Before the Committee on Education and Labor United States Senate and the Committee on Labor House of Representatives at 715 (Guy Harrington, National Publishers’ Association).

39The statement filled 25 pages of small print. Fair Labor Standards Act of 1937: Joint Hearings Before the Committee on Education and Labor United States Senate and the Committee on Labor House of Representatives at 519-44.

40Code No. 3: Underwear and Allied Products Manufacturing Industry (Sept. 18, 1933), Part II, §§ 3(a) and (c), in NRA, Codes of Fair Competition: Vol. 1: 309-22 at 316-17 (1933).

41Fair Labor Standards Act of 1937: Joint Hearings Before the Committee on Education and Labor United States Senate and the Committee on Labor House of Representatives at 516.
time and a half after 40 hours. In addition, the Underwear Institute proposed excepting supervisory staffs and office employees from the $12 weekly minimum wage. In spite of this proposal, however, Cheney in his detailed line-by-line objections to the bill did not object to the subsection in the definitions section that listed the excluded occupations, although he did note that "[l]ack of standards will vitiate this section." Similarly, he objected to § 19 of the bill, which authorized the Labor Standards Board to issue regulations defining and delimiting employments in which persons were deemed to be employed in an executive, administrative, supervisory, or professional capacity on the grounds that "proper standards" had not been set up to guide the Board. Again, however, Cheney did not object to the named categories themselves, suggesting either that he believed that the bill's "administrative" classification covered his proposed "office help" and "office employees" or that he did not consider the matter of importance—an unlikely alternative in view of the overpowering detail of his objections. In any event, the Senate and House Labor Committees heard none of these criticisms.

On June 1, the day before the joint Senate and House Labor Committee hearings began, Katharine F. Lenroot, a long-time official and, since 1934, the chief of the Children's Bureau within the DOL, and thus primarily focused on the bill's child labor provisions, attached to her internal memorandum to Perkins on the latter more general "Notes Regarding the Black-Connery Bill S. 2475," which included her advice: "I think it would be very undesirable to specify 'supervisory' as outside the definition of 'employee.' These exclusions should be very carefully

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42 Fair Labor Standards Act of 1937: Joint Hearings Before the Committee on Education and Labor United States Senate and the Committee on Labor House of Representatives at 521.

43 Fair Labor Standards Act of 1937: Joint Hearings Before the Committee on Education and Labor United States Senate and the Committee on Labor House of Representatives at 522.

44 Fair Labor Standards Act of 1937: Joint Hearings Before the Committee on Education and Labor United States Senate and the Committee on Labor House of Representatives at 530.


46 Lenroot's notes and suggestions concerning the bill were attached to her June 1 memorandum to Perkins. From Miss Lenroot to The Secretary Re: Situation with reference to the child labor provisions of the Black-Connery Bills (June 1, 1937), in Frances Perkins, Papers, Rare Book and Manuscript Library, Columbia University.
limited to bona fide executives."47 Since the bill as reported out by Black’s Senate Education and Labor Committee on July 8 deleted “supervisory” and added “bona fide,” it seems most probable that Lenroot’s suggestion prompted the change. When Solicitor of Labor Gerard Reilly reported to Perkins on the changes that the committee had made at the mark-up session,48 he did not mention these two as among “our amendments,”49 thus suggesting that they had not stemmed from him or her, but since Lenroot, who also testified before the Committee,50 had her own connections to key Senators,51 it is possible that she conveyed her suggestions to the committee directly. In any event, the deletion of “supervisory,” breaking with

47“K.F.L. 6/1/37 Notes Regarding the Black-Connery Bill S. 2475,” NA, RG 174, Records of Sec. Frances Perkins, 1933-40, Boxes 11-12, HC 59/Entry 20, at 1. Lenroot’s note was keyed to section 2(7) at page 4, line 9 of the bill. The notes, which were presumably directed to Perkins, were attached to two child labor memos dated May 29, 1937. Copies of these documents were furnished by Lysandra M. López-Medina, Farmworker Justice Fund (July 1, 2002).

48It is not clear that Reilly personally attended the session. His statement to Perkins that Ben “Cohen informed me that Black balked at having two sets of regulatory authorities although I think that had the amendments been properly explained to him he could have perceived that there would have been no conflict” seems to suggest that Reilly had not been present. Memorandum from Mr. [Gerard] Reilly [Acting Solicitor of Labor] to The Secretary [of Labor, Frances Perkins] (July 9, 1937), in Frances Perkins, Papers, Rare Book and Manuscript Library, Columbia University, Box # 38: Documents R-Se, Folder: Reilly, Gerard D., Washington, July 9-17, 1937.

49Memorandum from Mr. [Gerard] Reilly [Acting Solicitor of Labor] to The Secretary [of Labor, Frances Perkins] (July 9, 1937), in Frances Perkins, Papers, Rare Book and Manuscript Library, Columbia University, Box # 38: Documents R-Se, Folder: Reilly, Gerard D., Washington, July 9-17, 1937. In contrast, in the same memo Lenroot had also suggested that the phrase “permitted or suffered to work” be added as a definition of “employee,” and Reilly did mention the committee’s adoption of this change “for the purpose of clarification” as one of “our amendments.” “Amendments Proposed by Secretary of Labor To Black-Connery Bills (S. 2475 and H.R. 7200),” in id. This insertion constituted the final link in the source of that FLSA definition that had been lacking in the otherwise encyclopedic and gapless account in Bruce Goldstein, Marc Linder, Larry Norton, and Cathy Ruckelshaus, “Enforcing Fair Labor Standards in the Modern American Sweatshop: Rediscovering the Statutory Definition of Employment,” UCLA LR 46(4): 983-1163 at 1096-97 (Apr. 1999).

50Fair Labor Standards Act of 1937: Joint Hearings Before the Committee on Education and Labor United States Senate and the Committee on Labor House of Representatives at 381-89.

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the terminology of the NRA codes, was very significant because it meant that “executive” was not intended to subsume “supervisory.” Nor are the two synonymous in common parlance: huge numbers of low-level supervisors are in no way executives, while many executives, even—or perhaps especially—those in the highest reaches of corporate hierarchies, may supervise far fewer employees than do many non-executive supervisors. It is possible that the overlap between supervisors and executives accounts for only a small proportion of the incumbents of the two categories.

As reported out by Black’s committee, then, S. 2475 defined an “employee” as “not includ[ing] any person employed in a bona-fide executive, administrative, professional, or local retailing capacity (as such terms are defined and delimited by regulations of the [Labor Standards] Board)....” In shedding absolutely no interpretive light on the purpose of these exclusions, the committee report set an example scrupulously followed by the House and conference committee reports. The press occasionally took note that the bill “exempts...professional men and executives,” but the administrative category was apparently not deemed distinctly separate enough to merit mention. The Senate and House, however, did retain it, together with the executive and professional exclusions, through all the radical changes in structure and procedures that the bill underwent during 1937 and 1938—including an unsuccessful House floor amendment that was introduced on behalf of the AFL and called the Green bill for the organization’s president—and this trinity of white-collar exclusions has remained in the statute itself into the twenty-first century.

In excluding white-collar workers from the minimum wage provision of the FLSA but failing to specify a definitional salary floor for these excludees, Congress

55Sidney Olson, “Power to Fix Wages Taken from Board,” WP, July 9, 1937 (1:5).
created another unsolved puzzle. Why did Congress deviate from the model of the NRA codes, which did link these excluded categories to a salary level? Did Congress assume that any employee legitimately classified as executive, administrative or professional would automatically be paid far more than the statutory minimum wage? Why did it not give the Wage and Hour Administrator any guidance in this matter? Or did Congress consider the salary level irrelevant to the process of identifying those in need of protection from employer overreaching? Although a positive answer to this last question appears implausible, the historical record offers no documented support for answering any of the questions.58

In the end, then, the mystery surrounding the congressional exclusion of white-collar workers is so dense that it is not even clear whether the legislature consciously “shr[a]nk from defining”59 the terms or failed even to reflect adequately on the question to have been aware of the importance of what it had done.60

58The aforementioned high-ranking former DOL officials also speculated that Congress may have delegated authority to the WHD to define the excluded occupations because of “the recognized need to undertake careful workforce analyses (which we do not see evidenced in this [2003-2004] rulemaking) to make reasonable, informed judgments about the proper definitional scope of the exemptions.” Fraser, Gallagher, and Coleman, “Observations on the Department of Labor’s Final Regulations” at 3. There is no evidence whatsoever that anyone in Congress expected the WHD to perform such analyses, and in fact the WHD performed none in 1938 before publishing the regulations. Even the extensive hearings that the WHD held in 1940 and 1947-48 preliminary to revising the regulations could not qualify as such analyses since the testimony was presented at random by parties with an economic interest in the outcome who were not there to furnish objective information. Nor did the hearing officers, Harold Stein and Harry Weiss, undertake such analyses. See below chs. 11-14. If the Bush administration also failed to perform them in 2003-2004, it was merely the most recent in an unbroken string.


60The claim by a former deputy and acting solicitor of labor that in “the FLSA, Congress quite consciously left undefined those broad terms describing which jobs were exempt” is meaningless and ignorant rhetoric. Final Rule on Overtime Pay: Hearing Before a Subcommittee of the Committee on Appropriations United States Senate 29 (S. Hrg. 108-542, 108th Cong., 2d Sess., May 4, 2004) (statement of David Fortney).
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An Invidious Agricultural Comparison

The granting of discretionary powers to a board...is...a very serious matter, and when that discretionary power is coupled with legislative power...we have a bureaucratic control with despotic power over not only the definition of agricultural laborer, but over all industry.61

Whatever doubt attaches to the meaning of the congressional silence on the scope and purpose of the white-collar exclusions, there is absolutely no doubt that Congress was quite capable of furnishing detailed and broad definitions of categories of workers it intended to exclude.62 In the same section that excluded white-collar workers Congress included a subsection pithily excluding “any employee employed in agriculture.”63 However, unlike the situation regarding the white-collar definitions, Congress chose not to empower the Wage and Hour Administrator to promulgate regulations with the force of law to define “agriculture.” Instead, it wrote the detailed definition itself directly into the definitions section of the FLSA: “Agriculture’ includes farming in all its branches and among other things includes the cultivation and tillage of the soil, dairying, the production, cultivation, growing, and harvesting of any agricultural or horticultural commodities (including commodities defined as agricultural commodities in section 15 (g) of the Agricultural Marketing Act, as amended), the raising of livestock, bees, fur-bearing animals, or poultry, and any practices (including any forestry or lumbering operations) performed by a farmer or on a farm as an incident to or in conjunction with such farming operations, including preparation for market,


62 Although Congress’s action regarding the definition of “agriculture” seems to strengthen the view that Congress “punted” on the white-collar exclusions by delegating the power to define the occupational groups to the Wage and Hour Administrator, there is no direct evidence that anyone in Congress, let alone Congress as a whole, believed that it was ridding itself of a politically controversial decision. The aforementioned view was expressed by John Fraser, Acting Assistant Secretary for Employment Standards and Deputy Wage and Hour Administrator in the Clinton administration. Telephone interview (July 11, 2004).

delivery to storage or to market or to carriers for transportation to market.\textsuperscript{64}

How this provision came to be adopted is even more instructive than its presence in the law. This definition was the direct and palpable result of agricultural employer protests at the FLSA congressional hearings in 1937 against the Roosevelt administration’s bill, whose definitions section had provided that an “\textquoteleft;[e]mployee\textquoteright;...shall not include any person employed in an executive, administrative, supervisory, or professional capacity or as an agricultural laborer as such terms are defined and delimited by regulation of the [Labor Standards] Board.”\textsuperscript{65}

Samuel Fraser, the assistant secretary of the International Apple Association, testified that “we emphatically object” to leaving it to the board to define and delimit “agricultural labor” because:

\begin{itemize}
  \item Unless Congress writes its own definition, you can be very sure that any board will so define and so delimit that the growers, packers, processors, conservors, and distributors of these perishable crops will not receive the protection to which they are entitled. This is conclusively illustrated in the action of the Bureau of Internal Revenue in its interpretation of agricultural labor under the Social Security Act.... Based on experience, we feel we can be absolutely certain that any such Board will delimit it to the last notch and unless Congress specifically writes into the act what they mean by agricultural labor, then the producers of perishable commodities in the country are going to be up against a very difficult situation.\textsuperscript{66}
\end{itemize}

Fraser was not at all reticent about furnishing Congress with precise language:

I want you to define agricultural labor in the bill as I have presented it so that all those operations named may be carried on during any number of hours found necessary; in other words, exempt these operations specifically from the bill, [do] not leave it to a board to determine whether to exempt or not and I repeat the proposed amendment—

For the purposes of this act, the term “agricultural laborer” includes all employees engaged in the planting, growing, spraying, harvesting, preparing for market, packing, conserving, processing, transporting, and marketing of fresh fruits and vegetables, and their delivery to storage or to a carrier for transportation to market, no matter by whom employed.\textsuperscript{67}

\textsuperscript{64}Fair Labor Standards Act of 1938, § 3(f), 52 Stat. at 1060.
\textsuperscript{66}Fair Labor Standards Act of 1937: Joint Hearings Before the Committee on Education and Labor United States Senate and the Committee on Labor House of Representatives, Part 3 at 1084-85.
\textsuperscript{67}Fair Labor Standards Act of 1937: Joint Hearings Before the Committee on Education and Labor United States Senate and the Committee on Labor House of Representatives, Part 3 at 1104. A virtually identical proposal was offered by the secretary of the
This presentation was in fact an encore because a few minutes earlier Fraser had already offered this definition followed by the admonition that "the safe thing to do is to leave the whole of agriculture out of the bill and write a bill, short, concise, and affecting certain lines of manufacture and industry—make it clear, throw the Board out of the window...and let the farm-workers’ wages be carried up by the general upturn this bill is supposed to bring." First-term Texas Democratic Representative Albert Thomas praised Fraser for his "very wonderful suggestion" and requested that he "prepare the type of bill you want" in order to assist the committee. When Fraser demurred—"Who is going to pay me when I do it? I am a farmer and I have got to earn a living"—Thomas reminded him that he did "not want this bill enacted in its present shape, because it may prevent you from earning a living, according to you," and appealed to his self-interest: "After all, we are asking you to do a very patriotic thing, from a very selfish point of view."

Barely more than two weeks later Senator Black's Education and Labor Committee reported out an amended bill that continued to empower the Board to define the excluded white-collar groups, but withdrew, as Fraser had wanted, its power to define "agriculture." Instead, the revised bill excluded "any person employed in agriculture" and defined "agriculture" very much along the lines proposed by Fraser, to include "farming in all its branches and among other things includ[ing] the cultivation and tillage of the soil, dairying, forestry, horticulture, market-gardening, and the cultivation and growing of fruits, vegetables, nuts, nursery products, ferns, flowers, bulbs, livestock, bees, and poultry, and further includ[ing] the definition contained in subdivision (g) of section 15 of the Agricultural Marketing Act..., or any other agricultural or horticultural commodity, and any practices ordinarily performed by a farmer as an incident to such farming operations." Before both Houses of Congress passed the bill, this language was amended to appear as the text cited earlier, which has remained in the law ever since.

Virginia State Horticulture Society, W. Campfield. Id. at 1120.

Fair Labor Standards Act of 1937: Joint Hearings Before the Committee on Education and Labor United States Senate and the Committee on Labor House of Representatives, Part 3 at 1096.

Fair Labor Standards Act of 1937: Joint Hearings Before the Committee on Education and Labor United States Senate and the Committee on Labor House of Representatives, Part 3 at 1097.


In contrast, Congress did include in the FLSA a delegation of power to the WHA to define "the area of production" within which agricultural processing employers were exempt from the wage and hour provisions. FLSA, § 13(a)(10), 52 Stat. at 1067. On the
In contrast, no employer—apart from Cheney’s aforementioned written submission—testified at the hearings to protest against the discretion that Congress had conferred on the Board to define the scope of the white-collar worker definitions. The reason was not neglect or oversight. For example, Claudius Murchison, the president of the Cotton-Textile Institute, testified in great detail about the bill, but said nothing about the white-collar provisions.\textsuperscript{72} Yet a few months later, while the bill was still pending, he was one of six people who contributed to a point-counterpoint debate in the magazine \textit{Independent Woman} on the question: “Should the Clerical Worker Be Included in Government Wage and Hour Regulation?”\textsuperscript{73} In this non-congressional forum Murchison categorically opposed the regulation of clerical workers’ wages and hours as “a needless exercise of federal power” because “white-collar workers are already above the wage level with which federal regulation would be expected to concern itself. As a class, clerical employees are better educated and originate from higher income groups than do factory workers as a class. They have greater opportunity and greater ability to survive the competitive strains and stresses to which they are subjected.”\textsuperscript{74} Thus, Murchison may not have explained why white-collar workers allegedly could withstand the rigors of long workweeks better than blue-collar workers, but he left not the slightest doubt that the FLSA should not protect them.

Other employers’ representatives who testified at the 1937 congressional hearings could have raised objections to the scope of the white-collar exclusions, but passed over them in silence. For example, George Davis, the president of the Chamber of Commerce of the United States, who testified a few days before Fraser, merely recited the text of the provision: “The definition of employees affected by the bill excludes—in addition to executive and administrative, supervisory, and professional persons—agricultural laborers.” Nevertheless, he also made a statement that flatly contradicted the litigation position that employers later took in claiming that the overtime premium applied only up to the minimum wage\textsuperscript{75}: “The provisions as to maximum hours would seem to affect all workers, skilled and unskilled, in private employment regardless of rates of compensa-

\textsuperscript{72}Fair Labor Standards Act of 1937: Joint Hearings Before the Committee on Education and Labor United States Senate and the Committee on Labor House of Representatives, Part 2 at 807-30.

\textsuperscript{73}“Should the Clerical Worker Be Included in Government Wage and Hour Regulation?” \textit{IW} 19(3):68-70, 90 (Mar. 1938).

\textsuperscript{74}Claudius Murchison, “They Are Independent Individuals,” \textit{IW} 19(3):70 (Mar. 1938).

\textsuperscript{75}Marc Linder, \textit{The Autocratically Flexible Workplace: A History of Overtime Regulation in the United States} 263-78 (2002).
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It was not the case that the Chamber was not sufficiently alarmed about the possible consequences of the FLSA to have been motivated to complain. After all, in the midst of the deepest depression in the history of the United States, Davis called the bill "by any standard...extraordinary. There would seem to be possible justification for consideration of such legislation only in some extraordinary emergency. I know of no such emergency."77

Perhaps the Chamber of Commerce was too rejectionist to engage the Senate and House committees on such details, but James Emery, the general counsel of the National Association of Manufacturers, who announced that it was his "purpose to discuss solely the problem of the delegation of legislative power to the proposed Labor Standards Board,"78 devoted considerable time to various aspects of that delegation without ever mentioning the white-collar definitions. It is possible that employers refrained from protesting because, lacking agricultural employers' familiarity with exclusions from the Social Security Act, they were confident, based on their experience with the exclusions in the NRA codes of fair competition, that administration and enforcement would not be a problem. However, the fact that employers began politically mobilizing against what they perceived as the limitations of the white-collar exemptions almost as soon as the FLSA had been enacted and before it went into effect79 suggests the presence of an unresolved historical puzzle.

Conflicting Light on the Overtime Provision

Mr. [C. Parker] Holt [executive vice president, Caterpillar Tractor Co.]: [W]e permitted our men to work as much overtime as they pleased, and we are working many of our men overtime today. In fact, out of some 8,500 or 8,700 men in our shops at the present time, I imagine that close to one-third of them are working overtime, and they are very glad to work overtime. If any man does not want to work overtime, he tells his


77Fair Labor Standards Act of 1937: Joint Hearings Before the Committee on Education and Labor United States Senate and the Committee on Labor House of Representatives, Part 2 at 940.

78Fair Labor Standards Act of 1937: Joint Hearings Before the Committee on Education and Labor United States Senate and the Committee on Labor House of Representatives, Part 2 at 628.

79See below ch. 10.
foreman about it, and that is perfectly all right with our company. ... Mr. [Representative William] Connery: I was wondering why all of those men wanted to work overtime. Perhaps the wages were so low they had to work overtime. 

Section 3(d)E...provides that the maximum number of hours per week imposed may be exceeded, where the [NRA] code so provides, by paying one and one-half times the regular rate for all time over the fixed maximum. While this may give the appearance of flexibility, in actual practice it will operate as a fixed maximum. In order to keep production costs down, of necessity, the manufacturers will avoid overtime during the peak season and hire temporary employees instead.

The financial condition of most producers will force them to follow this course. Of the 17 companies whose published income statements are available since 1929, only 3 had any net earnings. ...

It is also certain that any material use of overtime would add measurably to the sales price of the product. ... Experience of the industry clearly shows that even very slight increases in cost and price result in lowered sales and consequently in employment. The automobile industry's life depends upon flexibility in working hours without penalties.

Work-sharing in a period of enormous unemployment was doubtless one of the purposes of the FLSA's overtime provision. However, spreading employment was, as shown elsewhere, not only not its only purpose, but may not even have been its primary purpose, and, in any event, was only weakly and perhaps irrationally subserved by the time-and-a-half mandate. That the Roosevelt


81 Investigation of the National Recovery Administration: Hearings Before the Committee on Finance United States Senate, Part 6, 74th Cong., 1st Sess. 2719-20 (Apr. 13-18, 1935) (statement of the Automobile Manufacturers Association). The statutory reference was to S. 2445 (74th Cong., 1st Sess., Mar. 29, 1935) and H.R. 7121 (74th Cong., 1st Sess., Mar. 29, 1935), which would have reenacted and amended the NIRA.

82 When Manufacturers Trust and Central Hanover Bank and Trust acknowledged in 1940 that they were covered by the FLSA and voluntarily made restitution for overtime pay owed since Oct. 24, 1938, the WHD regional director adduced as evidence of the law's effectiveness in creating additional employment opportunities the fact that the former bank had informed the WHD that 300 new jobs had been established since the law went into effect to bring working hours down to the maximum prescribed by the FLSA and to eliminate overtime work. “2 Large Banks Here Accept Wage Law,” NYT, May 2, 1940 (20:5).

83 Linder, Autocratically Flexible Workplace at 245-62. That the WHD believed that
administration included an overtime penalty/premium in the FLSA not exclusively, in continuation of the NRA codes, to spread employment, can be documented by numerous official government sources as well as by reference to public debates.\textsuperscript{84} For example, immediately before the first FLSA bills began to be drafted, Secretary Perkins wrote to Senator Black, who in February 1937 had requested her views on the latest iteration of his 30-hour bill, S. 175,\textsuperscript{85} expressing her belief in "the necessity and wisdom of a reduction in the work week now obtaining in most industries not only for the health and leisure of the workers, but also for the spread of work and purchasing power to the many unemployed."\textsuperscript{86}

To be sure, by 1937 the unprecedented extent and depth of mass unemployment of 1933 had abated somewhat, but not sufficiently to eliminate unemployment as one basis for limiting work hours; and in any event, the depression within a depression of 1937-38, "[t]he steepest economic descent in the history of the

the overtime provision served more than one purpose emerged from the debate over the meaning of § 18 of the FLSA, which provides that the Act does not "justify any employer in reducing a wage paid by him which is in excess of the applicable minimum wage" and was ultimately held to be without legal force. Linder, "Moments Are the Elements of Profit" at 47-48, 56-58, 61-63, 65, 76. In 1939, George McNulty, general counsel for the WHD, said in response to a statement by a state enforcer that he had told an employer that he could not reduce an employee’s monthly pay by figuring out how much it came to per hour: "I am sorry to say we think you are wrong. We do not think that the employer has to pay the same total wage. ... We feel that, as the act was written, the employer would only have to pay him so much for each hour worked. By the same token, since at least one purpose of Congress in providing an overtime penalty was to spread work, we feel that it must have been the intent of Congress to permit a man to reduce the total weekly or monthly pay, provided he did not reduce the amount paid per hour. That is our opinion, for what it is worth; the question is in doubt." U.S. DOL, DLS, Proceedings of the Sixth National Conference on Labor Legislation: Washington, D.C. November 13, 14, 15, 1939, at 50-51 (Bull. No. 35, 1940).

\textsuperscript{84}Deborah Malamud, "Engineering the Middle Classes: Class Line-Drawing in the New Deal Hours Legislation," \textit{Michigan LR} 96(8):2212-2321 at 2236, 2318, 2223 (Aug. 1998), impermissibly lumped together the Roosevelt administration’s rationale for the NIRA (Perkins “endorsed work-spreading as the theory behind hours regulation”) and the FLSA to arrive at the conclusion that “the theory behind the overtime premium was work-spreading,” whereas improving workers’ health drove the pre-New Deal shorter-hours movement and increasing workers’ leisure time to facilitate education and full participation as citizens was never embraced by the federal government as a reason to shorten the working day.

\textsuperscript{85}See above ch. 6.

\textsuperscript{86}Letter to Hugo L. Black (Feb. 16, 1937), in Francis Perkins, Papers, Columbia University Rare Book and Manuscript Library.
United States...proved that the economic recovery...had been built on illusion."87 Unemployment remained at the forefront of labor politics88 as annual unemployment peaked at 12,830,000 in 1933, when 25.2 percent of the civilian labor force and 37.6 percent of nonfarm employees were unemployed; it then declined to 7,700,000 in 1937, when the unemployment rates dropped to 14.3 and 21.3 percent, respectively, before rising again to 10,390,000 in 1938, while the rates increased to 19.1 and 27.9 percent.89 Alternative retrospective monthly estimates show that after having peaked at 28.3 percent in March 1933, the unemployment rate fell to 12.3 percent in May 1937, the month in which the FLSA bills were introduced, but then reversed trend again, reaching 20.6 percent in June 1938, when the FLSA was finally enacted.90

From the outset, public reaction to the bill revealed its multi-purpose structure. The day after Black and Connery had introduced it, the Wall Street Journal, for example, commented: "Absorption of many of the unemployed is promised by many friends of the measure as one of its certain results. But employment for idle men would in fact be incidental to the accomplishment of the major purpose, the shortening of oppressively long working hours. If the creation of more jobs went beyond this incidental character, the law would become a statutory share-the-work scheme. ... At this preliminary stage the project must be discussed as being primarily one to outlaw what we vaguely describe as sweatshop conditions."91

The bill itself as reported out by Black’s committee on July 8, 1937, noting that the workers who “work the longest hours have been unable and now are unable to obtain...decent working hours by individual or collective bargaining,” and establishing it as “the policy of this Act to maintain, so far as and as rapidly as is economically feasible, minimum-wage and maximum-hours standards, at levels consistent with health, efficiency, and general well-being of workers and the maxi-

87Charles Kindleberger, The World in Depression 1929-1939, at 272 (1975 [1973]). See also Basil Rauch, A History of the New Deal 1933-1938, at 294-97 (quote at 294) (1944), on the Roosevelt administration’s fear in late 1936 that “a runaway boom of the 1928-1929 variety was beginning” that, if left unchecked, “would end in another disastrous crash.”

88E.g., Lawrence Connery (who was elected to fill the vacancy in the House of Representatives created by the death on June 15, 1937 of his brother William) stated unequivocally: “Labor unanimously seeks a shorter workweek in order to relieve unemployment.” CR 83:7428 (May 24, 1938).


mum productivity and profitable operation of American business," prohibited the Labor Standards Board from setting the maximum weekly hours at fewer than 40 while declaring it as "the objective of this Act to reduce the maximum working hours of the groups now working excessively long hours, so as to attain the maximum work week of forty hours as rapidly as practicable without curtailing earning power and without reducing production."

That the hours provision of the FLSA could not (rationally) have been geared exclusively toward sharing work and reemploying the unemployed derived from the fact that the average industrial workweek was considerably below 40 hours in the latter part of the 1930s. That the Roosevelt administration was not perturbed by this constraint on work-spreading was highlighted by the president’s statement at a press conference in April 1938, shortly before passage of the FLSA, that "I don’t want a drastic thing that says it cannot be over 40 hours a week...; of course not. That is a thing we have to work up towards gradually over a period of years." The Supreme Court’s nullification of the NIRA in May 1935 did facili-

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93 S. 2475, § 4(c) (75th Cong., 1st Sess., July 8, 1937).
94 Benjamin Hunnicutt, Work Without End: Abandoning Shorter Hours for the Right to Work 247 (1988), overlooks this fact. To be sure, Senator David Walsh argued that the evidence before the Senate Labor Committee had “clearly indicated that while the shortest work week possible was desirable, a large number of industries in various parts of the country are now actually working their employees in excess of 40 hours weekly, and some as high as 56 hours.... Therefore, to suddenly require a 40 hour work week would economically ruin many of these industries and lead to further unemployment.” Walsh opposed “drastic action” that could wipe out many thousands of small businesses, “which actually employ, much to the general public’s surprise, from 50% to 80% of all wage earners. He pointed out that the mistake in legislating on labor conditions was that one was apt to think in terms of the larger industries which have higher standards...rather than the vast army of smaller industries which far outnumber the large industries and which because their employees are few and unorganized have lower labor standards.” In his opinion, larger industries could accept 40 cents an hour for 40 hours, “but the sudden and abrupt application of these minima would result in further entrenching into monopolistic groups the large industries of the country.” Press Release from Honorable David I. Walsh, Massachusetts (July 8, 1937), in David I. Walsh Papers, Dinand Library, Holy Cross College. See also “Revised Work Bill Put Before Senate,” NYT July 9, 1937 (1:3, 4:1-3); see also “Offers Substitute for Bill on Labor,” NYT, July 2, 1937 (26:3); “Move to Cut Scope of Wage-Hours Bill,” NYT, July 4, 1937 (4:8); “Senators Finish Revised Wage Bill,” NYT, July 8, 1937 (6:6). Walsh’s counter-argument hinged on the minimum wage element, since otherwise even small employers could have coped with a reduction in hours from 56 to 40 simply by hiring additional workers.
95 Complete Presidential Press Conference of Franklin D. Roosevelt 11:296 (1972)
tate a rise in weekly manufacturing hours from 35.2 in July 1935 to 41.0 in March 1937. Concretely, employers, freed of any federal governmental curb on lengthening the workweek, dropped overtime pay for hours in excess of the former code maximums, designated overtime work as normal, and lengthened the standard week. As a result, a vastly increased proportion of employees worked hours above the previous code maximums. However, once the Great Depression

(Vacuous Legislative and Puzzling Regulatory History (Apr. 8, 1938). Surprisingly, Senator Black, the one-time staunch advocate of the 30-hour week, in the course of the FLSA debates apparently came to share Roosevelt's gradualist view. On the Senate floor in July 1937, Millard Tydings, a conservative Democrat from Maryland who voted against the NIRA, the Wagner Act, and other important New Deal legislation and against whom Roosevelt unsuccessfully campaigned in 1938, criticized the bill for "passing the buck" to the Labor Standards Board on setting weekly hours, although "no considerable number of workers" were working 12-hour days and seven-day weeks. Black countered that there was "a great misconception about the workweek in the United States. Because the 40-hour workweek has been talked about so much, people believe that we have a 40-hour week. We have not a 40-hour week. My information is that not one-third of the employees or workers of this Nation have a 40-hour week. On the contrary, it is absolutely surprising to find the number of employees who work 12 hours a day. [M]any are working 12 hours a day, and...some are working 13 hours and 14 hours a day, and we want to get away from it; but in doing so, we do not wish to cause an injury that might be greater than the good that would be accomplished." When Tydings, who was manifestly baiting Black, then asked Black to name four or five industries that would be injured if there were an eight-hour day, all Black could come up with was the claim of the lumber industry, a majority of employers in which did not want to "work their men 12 hours a day" because they "have the same humanitarian desires as people engaged in other business, but the ruthless, ever-pressing forces of competition crush in upon them." Trying to back Black into a corner, Tydings asked: "If we make it 8 hours a day universally, would we not remove those crushing forces of competition?" Black agreed, "[b]ut if we were to attempt to change in 1 day the working practices and reduce the daily hours in all large industries——Mr. Tydings: Have it take effect in 6 months hence. Give them 6 months in which to get ready. ... The Senator knows that many of the nations of the world have such laws. I think in most of the countries of Europe there are limitations, with certain exemptions to cover unusual cases, governing the hours of work in industry." CR 81:7868 (July 30, 1937). When Tydings chided Black for mentioning only one industry, the best Black could do was to mention a Virginian in the furniture industry. Id. at 7869.


"Harry Millis and Royal Montgomery, Labor's Progress and Some Basic Labor Problems 485 (1938).

reasserted itself in the second quarter of 1937, average weekly hours fell from 41.0 in March to 33.3 in January 1938, rose only to 34.5 by June, when the FLSA was enacted, and did not reach 40.0 until February 1941, when production was mightily buoyed by rearmament.99

Further light is shed on the Roosevelt administration’s own multi-purpose understanding of the overtime provision by a memorandum from Solicitor of Labor Gerard Reilly to Perkins in August 1937. In the context of demonstrating the fallaciousness of attacks on the FLSA bill, the memo sought, inter alia, to undermine the criticism that the bill empowered the Labor Standards Board to act as an “economic dictator.” To this end, Reilly, apart from pointing out that the law would cover only one-fourth of the 40,000,000 gainfully employed by industry, focused on “the purposes which this bill hopes to achieve”; here he mentioned the eight million who were still unemployed and “[i]n addition, millions of employees [who] are being paid wages insufficient to maintain themselves and their families in decency and comfort and are being forced to work unconscionably long hours. [T]he present bill has as its objectives the alleviation of these blights on the industrial life of this country.” That the unconscionability Reilly had in mind was the direct impact on those working long hours was underscored by his dual claim that “[n]ot only will the six million workers working more than 40 hours a week “be aided, ...but an additional 2,000,000 will find employment as the result of the enactment of this bill.”100 In other words, the life-enhancing effects of shorter hours was a distinct purpose in their own right in addition to making work-spreading possible.101

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99“Hours and Earnings in Manufacturing Industries, 1932 to 1939” at 1467; BLS, Hours and Earnings in the United States, 1932-40, chart 1 at 5, tab. 5-a at 137 (Bull. No. 697, 1942) (written by Alice Olenin and Thomas Corcoran). It is difficult to know whether it is more emblematic of the level of congressional discourse that Wisconsin Democratic Senator Herbert Kohl knew or did not know that the following statement that he made during a floor debate in 2004 on the white-collar exclusions was historically preposterous: “The law governing overtime, the Fair Labor Standards Act, FLSA, was designed in the 1930s to encourage companies to stick to a 40-hour work week. At that time, employers routinely required workers to put in 7 days a week, 10, 12, even 15 hours a day. That left the workers with jobs no time for rest, family, or even their own health.” CR S4749 (May 4, 2004).


101A few weeks after the FLSA went into effect, Rufus Poole, the WHD Assistant General Counsel, who as DOL Assistant Solicitor had assisted in preparing the legislation,
Together with the reality-content of Reilly’s unsubstantiated claim about the extent of reemployment, the empirical basis of the mono-purposive character of the overtime provision was refuted by a report in the *Washington Post* on the eve of the FLSA’s effective date that whereas the NRA by shortening hours and spreading work was estimated to have given jobs to two million people: “The new labor standards act is not expected to have any such immediate job-creating results, but officials estimate that it will give shorter hours to 1,500,000 workers and pay raises to 750,000 in its first year....”

A few weeks later, at the CIO’s first constitutional convention, Chairman John L. Lewis reinforced this skepticism of FLSA’s reemployment potential: “[I]f maximum hour and minimum wage machinery is to seriously affect and aid the unemployment situation the maximum number of hours to be worked must be lowered considerably as against the present provisions of the Wage-Hour legislation. ... It will be essential for organized labor to press for more drastic maximum hour legislation in order to really meet the serious economic problems which confront us in the country today.”

Moreover, as astutely pointed out a year after enactment by a contributor to a scholarly symposium on the FLSA, given the length of the workweek by the 1930s against the background of historical reductions, a mono-purpose statutory approach would have been implausible:

Protection of health has been the underlying reason for a considerable part of American legislation. Certainly the legal reduction of weekly hours from 60 to 50 can be classed in

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stated in an address to employers that “[o]ne of the objectives of Congress was to put more people back to work by limiting the workweek,” but also stressed that: “We know today the effects of a longer workweek. One has but to read the figures compiled on unemployment to know that a man in his forties is no longer able to compete with the youth of 25 in search of a job. Indeed, one does not have to go out of our own Wage and Hour Division. A few courageous employers or their counsel have gone so far as to file with the Administrator applications that employees in their forties be considered handicapped workers compensable at less than the minimum required by the Act.... They seek to make use of what is the fact today, that a worker may be handicapped by years of excessive toil in industry.” To be sure, Poole also conceded that with respect to hours, the FLSA “is moderate in extreme here, as well as in the minimum wage it sets. The Act does not even satisfy that perennial demand of labor—the 8-hour day.” “Address by Rufus G. Poole, Assistant General Counsel Wage and Hour Division, U.S. Department of Labor Scheduled for Delivery at 3:30 P.M., Friday, Nov. 18, 1938, at Syracuse, N.Y., Before the Associated Industries of New York at Its Annual Meeting” at 9, 7.


103 *Proceedings of the First Constitutional Convention of the Congress of Industrial Organizations* 74 (Nov. 14-18, 1938).
no other way. Somewhere in the demand for a downward trend of hours the notion that unemployment can be cured by having everyone work fewer hours has stimulated government action. A 30-hour a week proposal may be thus classified. Between the 30-hour and the 50-hour a week proposals lies the point above which health considerations are paramount and below which curing unemployment is the more important purpose. The third type of hour law envisages an indirect increase in wages. It is not supposed that required work can always be accomplished in the shorter time period; the established hours are the basic hours and extra pay is expected for overtime. In actual practice, depending on the industry, the same law may bring about better health, shared work, or increased pay.  

The first contemporaneous scholarly legislative history of the FLSA agreed that although the primary purpose of the hours provision was to share work, it was also designed to have citizenship effects and create added satisfaction for workers.

Regardless of what Congress’s intent in fact was, the editors of *The New York Times* opined of the “far less objectionable” bill that came out of Black’s committee: “No Federal body should be empowered to move hours up or down for their supposed effect on employment; the sole object should be to legislate against hours that are inhumane from the standpoint of the health and well-being of the individual worker.” From an attitude of empirical denial, the Chamber of Commerce of the United States also assumed that the purpose of reducing the workweek was improvement of individual workers’ lives and not macroeconomic absorption of the unemployed: “‘The specific provisions of the bill are based upon an assumption that abuses of long hours and low wage rates are so prevalent that there is warrant for placing upon all enterprise onerous police provisions. In fact, such abuses are so limited as in no sense to characterize American business enterprise, and to afford no reasonable justification for extremes proposed.’”

Toward the end of 1937, the AFL purported to support the principle of a maximum hours regime without overtime work. At its annual convention in October it declared: “With the purpose of establishing a point...beyond which wage earners could not be employed, the American Federation of Labor is in accord.”

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Reiterating this position in a letter to Mary Norton, chairman of the House Labor Committee, AFL President Green responded to her request for a statement of the AFL’s position on the FLSA by observing that “the serious recession” since Roosevelt’s FLSA message of May 24, 1937 “has assumed the proportions of a serious depression” for Labor. Consequently, if enacted, the bill could not perform the function of reemploying the unemployed: “The Fair Labor Standards Bill, as drafted, was not intended to and does not give effect to possible remedial steps to cope with the unemployment problem now upon us in aggravated form as a result of the present recession in business, and which it was assumed had been substantially met under the industrial improvement which took place during the spring and summer of 1937. For this special reason, the American Federation of Labor believes that the Fair Labor Standards Bill should be amended by incorporation of provisions therein for a shorter work day and a shorter work week.”

Finally, it is worth noting that President Roosevelt himself ascribed more than one purpose to the overtime pay provision during the rearmament period and World War II. Thus at a press conference on May 21, 1940, he made it clear that the government’s policy was very definitely in no way to weaken the social gains that had been made; he wished to maintain the 42- and then 40-hour week “with just as little overtime as possible, because I would like to put just as many unemployed back into employment as possible.” Similarly, on July 2, 1940, the president stated that if the Navy Yards or arsenals wanted a 48-hour week, they

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108A few months later Rufus Poole told Perkins: “What this legislation needs and may require before passage is the vocal support of an intelligent and sympathetic pressure group unconnected with the government. The present spokesmen for labor are concerned principally with organized workers and do not satisfy this need. Human nature being what it is, they are more interested in maintaining their respective positions than in aiding the army of unorganized persons who would be the principle [sic] beneficiaries of this legislation.” Rufus Poole, “Memorandum on Status of Wage and Hour Legislation” at 4 (undated [Mar. 24, 1938]) Frances Perkins, Papers, Rare Book and Manuscript Library, Columbia University, Box # 37: Documents M-P, Folder: Poole, Rufus G., Washington, Mar. 24-Apr. 21, 1938. Poole had, according to Perkins, “a great deal to do with getting the wage-hour law upon the books” by virtue of his resourcefulness in finding out who held which objections to it. Perkins, The Roosevelt I Knew at 261. This memorandum was attached to a cover letter of Mar. 24, 1938, to Perkins’ assistant, Miss LaDame, which she had requested for her files.

109Letter from William Green to Mary Norton at 3 (Nov. 22, 1937), in Frances Perkins Papers, Uncataloged Correspondence, Microfilm Reel 3, Columbia University Library, Special Collections.

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should first assimilate people from unemployment rolls.\textsuperscript{111} Four days after the attack on Pearl Harbor Roosevelt denied any plans to change the 40-hour week or time-and-a-half provisions of the FLSA.\textsuperscript{112} But then on Feb. 27, 1942, one month after his WHA had announced that there were still 5 million registered unemployed workers looking for work,\textsuperscript{113} Roosevelt shifted grounds, now viewing overtime pay as a means of holding workers harmless for inflation:

Q: Mr. President, could you remove the 40-hour week restrictions without Congressional action?
THE PRESIDENT: There isn’t any 40-hour restriction at the present time.
Q: I mean -- abolish time and a half, or ---
THE PRESIDENT: (Interposing) I wouldn’t abolish time and a half. I don’t want to have people get less in their pay envelopes than [sic] they are getting today, especially with the cost of living going up.
Q: Mr. President, does that need to be “background?” [sic] ...
THE PRESIDENT: Yes. Don’t bring me into this thing. It is purely a matter for the House at the present time.\textsuperscript{114}

Employers’ Puzzling Acquiescence in the Original White-Collar Regulations

There is no limit to the number of hours a man may work under our Wage and Hour Law except those limits imposed by his physical strength and endurance. So far as the law is concerned, he can work 168 hours a week, if he is a physical marvel, provided his employer pays him time and [sic] half....\textsuperscript{115}

Exclusion of white-collar workers from statutory protection against overreaching and overwork should have seemed especially out of place during the Great

\textsuperscript{111}Complete Presidential Press Conferences of Franklin D. Roosevelt, Vol. 16: July, 1940—December, 1940, at 3-4 (1972).
\textsuperscript{112}Complete Presidential Press Conferences of Franklin D. Roosevelt, Vol. 18: July 1941-December 1941, at 366 (1972).
\textsuperscript{113}L. Metcalfe Walling, “Misconceptions Need Adjustment to the Wage-Hour Law,” ALLR 32(2):58-61, at 59 (June 1942).
\textsuperscript{115}Walling, “Misconceptions Need Adjustment to the Wage-Hour Law” at 58.
Depression. After all, even Personnel, the magazine of the American Management Association, warned that the Depression had gone a long way toward revealing the "exploitation" of white-collar workers and dismantling barriers that had separated them from wage workers:

Even social distinctions are disappearing with the increased number of high school and college graduates who voluntarily or under necessity have gone into manual labor. With this decline in class distinctions there has begun to grow up a community of interest between wage-earners and salaried employees. In some companies salaried workers have shown a desire for collective bargaining...either through their own organizations or by use of the same agencies that serve wage-earners.

These circumstances have convinced many employers that there is need to restudy the working conditions of salaried employees, if for no other reason than to avoid serious depreciation of the loyalty, efficiency, and morale of this class of workers.... The question of overtime work is being given serious thought in many business organizations, and earnest efforts are being made to eliminate the exploitation of the salaried rank and file.\footnote{Overtime Work by Salaried Employees,} \footnote{Overtime Work by Salaried Employees at 90.}

This "exploitation" was presumably a function of the fact that the salaried employee "is expected to work as many hours in the day and as many days in the week as it takes to finish the job. If the department head says the office will have to work in the evening or on Saturday afternoon, the office works, and that's that." Not only did the salaried worker "in the typical business organization receive[ ] no monetary compensation whatever" for this overtime work, but "by performing more hours of work for the same weekly or monthly sum, [he] actually receives less per hour than if his work were confined to the regular periods."\footnote{Overtime Work by Salaried Employees at 90.}

The provenance of these rather startling remarks is instructive. The unsigned piece in the AMA magazine was in part taken verbatim from the aforementioned unpublished 1937 annual report of the elite big business Special Conference Committee,\footnote{See above ch. 2. That this material was recycled by the AMA was not surprising since it was "a loose affiliate of the SCC..." Colin Gordon, New Deals: Business, Labor, and Politics in America, 1920-1935, at 156 (1994). According to Sanford Jacoby, Employing Bureaucracy: Managers, Unions, and the Transformation of Work in American Industry, 1900-1945, at 183-89 (1985), during the 1920s SCC members took over the AMA’s highest positions; in particular, he mentioned Cyrus Ching of U.S. Rubber Company, who is discussed below and who was at one time president of the AMA. See Personnel 14(2):inside back cover (Nov. 1937) (also listing AMA officials and directors} which is discussed in greater detail below. A need for unionization...
or statutory intervention was also suggested by the SCC’s small-scale survey, which found that only four of 53 companies paid any of their salaried workers any type of premium overtime, while 20 paid some or all of their salaried employees straight-time compensation for overtime. And as Congress was preparing to debate the scope of FLSA coverage for white-collar workers in 1939, an industrialist inadvertently revealed in The New York Times precisely why the purposes of the overtime provision applied to them: employers would use labor-saving bookkeeping and accounting machines to counteract the overtime penalty.

Shortly before the United States entered World War II, another management magazine, Modern Industry, reinforced the insight that white-collar workers had objectively and subjectively been incorporated into the working class:

A few years ago it could be fairly stated that white-collar jobs were preferable to factory jobs because of higher earnings, shorter working hours, modern working conditions, greater stability of employment, better chances of promotion.

Unionization and defense have reversed conditions. Today there is little question that the highest wages are paid to production workers. Working conditions—in terms of air conditioning, better lighting, washrooms, eating facilities, etc.—are better in some new factories than in the general offices of the same companies.... Union agreements assure greater security in employment and regular promotion. With the exception of hours—and for overtime work most production employees receive adequate compensation—there is little choice for the young person weighing his future between a factory job and a white-collar job. Improved working conditions and obvious economic advantages have seriously battered old prejudices against “hard work” as opposed to “soft jobs” in the office force.

Another significant trend is the growing unionization of white-collar workers. Actual mechanization of clerical work, growing realization of a mutuality of interest, “declassing” of white-collar and professional workers during years of depression unemployment, the example of economic gains won by factory workers through unionization, and very genuine dissatisfaction with present wages, hours, and working conditions, all have given impetus to union organization of these employees.

Despite such realistic management appraisals of white-collar workers’ situation from SCC members).

119“Overtime Work by Salaried Employees” at 91. A quarter-century later, it was still the case that fewer than one tenth of firms paid exempt employees time and one-half for overtime. U.S. BLS, Supplementary Compensation for Nonproduction Workers, 1963, tab. 28 at 63 (Bull. No. 1470, 1965).

120NYT, Mar. 6, 1939 (14:6) (letter from Industrialist, Pittsburgh).

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during the years from the enactment of the FLSA to the beginning of World War II, employers pressed hard to secure statutory amendments to exclude even more—and, in some instances, all—office workers from the overtime pay regime. In mid-August 1938, more than two months before the statute went into effect, the Times reported that trade association officials—who were also “studying the possibility that methods already have been worked out for circumventing its [the FLSA’s] purpose” by setting up separate organizations to do manufacturing only, thus remaining in intrastate commerce and evading the law—had said that the chief problem as to procedure was whether it applied to office, clerical, and research workers. Because “[t]he law does not specifically answer this question,” the agency and the courts would have to resolve it. At least one employers’ representative, Reuben Ball, the secretary of the National Association of Hosiery Manufacturers, understood that work-sharing was at stake, arguing that if they were covered, “it may become necessary as a practical matter to employ more workers in such classification. Some of them may be working more than the maximum of forty-four hours...and in such a case their employers would be required to pay them time and a half.... It would be cheaper, he pointed out, to employ additional workers at regular rates....”

The most prominent public dispute over regulation of white-collar workers’ overtime during the four months between enactment of the FLSA on June 25 and the day it went into effect involved the employers and employees who had the greatest capacity for publicizing their conflict—publishers and newspaper re-

122“Wage-Law Evasion Seen in New Plan,” NYT, Aug. 14, 1938 (sect. III: 8:8). In this regard Ball objectively agreed with the WHA, who, on the day the FLSA went into effect, “[p]ointing out that an employe may work as many hours in a week as he and his employer may desire, if the employe is paid time and one-half for all hours over 44,...made a plea for ‘spreading work’ when he said that ‘with unemployment what it is in this country I see little excuse for unreasonable workweeks. If the employe is not worth the time and a half, then it would be wise to give the additional work to some unemployed person.’” “Wage-Hour Act in Effect: Chief ‘Alert’ for Violators,” WP, Oct. 24, 1938 (1:1). During that first week in which the FLSA was in force, a lawyer in Nebraska asked the WHD: “Are large employers, who are able to and do pay large salaries, affected by the 44-hour week? Could not many of the employees in this class stand a substantial reduction in hours which might induce a corresponding increase in the number of employees and thus take up some of the slack in employment?” The WHD replied: “The benefits of this [time and one-half] provision apply not only to the poorly-paid workers receiving the bare minimum of 25 cents an hour, but also to employees in the upper brackets. Congress, although not flatly forbidding employment in excess of 44 hours, evidently hoped that this provision of the law would tend to discourage such excessive employment.” “Some Questions Answered,” WHR 3(9):285 (Oct. 31, 1938).
Porters. Within days of the law's passage, Victor Pasche, the secretary-treasurer of the American Newspaper Guild, reacting to employers' efforts that were already underway "to secure the 'exemption' of newspaper men," wrote WHA Andrews asking for assurance of a hearing if there were any doubt about the inclusion of editorial and other employees. By Labor Day the Guild—whose pre-FLSA model contracts had permitted overtime work to be compensated by extra days off or time and a half—revealed that a "publisher 'putsch' designed to deprive newspaper editorial workers of the benefits of the new Wage-Hour Law was uncovered last week by Washington Guildsmen and aggressive action taken to block it." Word of publishers' move to recycle their NRA-era claim that editorial workers were professionals emerged at a press conference, at which WHA Andrews was asked about developing exemptions for executives and professionals before the law went into effect. Saying that such exemptions would be necessary, he "added that he understood there were 'even some people who do not think newspaper reporters are professionals.'" In this maneuver the Guild recognized "the usual functioning of counsel for the American Newspaper Publishers Association, Elisha Hanson"—who had sat next to Andrews at a luncheon on August 25—and "other publisher lobbyists who infest every new bureau set up to protect labor." The basis of the publishers' claim that editorial workers were professionals "appeared to be that 'reporters sometimes go to college.'" The result of the Guild's intervention was an informal opinion by DOL Solicitor Gerard Reilly that editorial workers were not exempt. Reilly based his opinion in part on the history of the Guild's contracts, including those then in effect limiting and regulating reporters' hours, "which is not true of occupations which can truly be classified as professional."

On October 3, Andrews met with a committee consisting of Hanson and six newspaper publishing officials representing more than 2,000 daily papers, who afterwards insisted that they had made no request for exemption, but would be furnishing him with information. "'After that,,'" said Hanson, "'it's his baby.'" Much later, at the 1940 WHD white-collar overtime hearings, Hanson asserted that

123"Professional' Status for Members Hit," GR, July 12, 1938 (1:2). Oddly, despite this early interest in this question, when the Guild's lawyer, Abraham Isserman (who was a Communist), wrote a lengthy article on the new law in the Guild newspaper the next month, he failed to mention the white-collar exclusions despite detailing "numerous exceptions or relaxations" of no relevance to the union. A. J. Isserman, "How Wages Bill Will Function," GR, Aug. 8, 1938 (8:2-3).


Andrews had informed the committee at the meeting that “it was his expectation to administer the act so as not to interfere with business in its orderly and regular procedure.”127 After publicly complaining to the WHD hearing officer, Harold Stein, that Andrews had not kept his promise to keep in touch with him before issuing the regulation, Hanson threatened: “If you choose to ignore us we have got our own way of taking care of our own business.”128 Within two weeks of the October 3 meeting Andrews was supposed to announce whether reporters were excluded professionals.129 To maintain the pressure, on October 11, three high-ranking Guild officers accompanied by Guild counsel Abraham Isserman and CIO counsel Lee Pressman went to see Andrews to discuss, inter alia, publishers’ efforts to have editorial workers excluded as professionals.130

Employers in other industries were also concerned to secure the maximum number of exclusions. For example, the president of the United States Wholesale Grocers’ Association informed a member in August that it was the organization’s opinion that packing room and warehouse supervisors, managers, buying department heads, credit managers, attorneys, and cashiers were all exempt, but that shipping clerks were very likely not.131

A first public inkling of the WHD’s failure to take seriously the need to protect white-collar workers from employer-imposed overwork came from WHA Andrews on September 29, 1938, in answers to questions posed to him by members and

127 Official Report of the Proceedings Before the Wage and Hour Division of the Department of Labor In the Matter of: Definition of “Executive, Administrative, Professional” Employees and “Outside Salesman” at 282 (Washington, D.C., July 26, 1940), in RG 155--Wage & Hour/Pub. Contracts Div. Location: 530, 47:9:3-4/Boxes 10-14 (“1940 WHD Hearings Transcript”). In 1940 Hanson protested that: “The sending of hordes of inspectors into the field with the equivalent of the notorious writs of assistance so vigorously condemned and universally hated in our colonial period has upset the orderly and regular procedure of business.” Id. at 293. Hanson’s theatrics were on display here, since the writ was an open-ended search warrant, whereas the WHD sought only wage and hour records.

128 “1940 WHD Hearings Transcript” at 321-22 (July 26). Hanson was referring both to the white-collar regulations and to Andrews’ decision that newspaper publishing businesses were not entirely exempt from the FLSA as service establishments pursuant to § 13(a)(2). Id. at 282-86. With regard to the white-collar regulations, Hanson accused Andrews of having “ignored the Committee and sought the advice of an individual who was not a member of it and when he found what it was all about politely declined to sit in on the conference.” Id. at 288-89. It is unclear whom Hanson meant.


guests of the racist, reactionary, and anti-FLSA Southern States Industrial Council at its conference on the FLSA in Birmingham, Alabama. Asked, following his speech whether he had already defined the executive, administrative, and professional “folks” exempt by the Act, Andrews replied:

No. I have had that in mind more than anything else, and we will have that for you within the next week or two. I am very sympathetic toward your problem there, because I know a superintendent is not a clock watcher, nor does he punch a time clock. Certainly if he was the sort of fellow that you would take care of if he is sick or knocked out, if you think enough of him for that, I think that really indicates he is a part of the executive family.

After having expressed his sympathy for the overtime problem of employers opposed to federal labor standards, Andrews reminded himself of “how cautious a fellow who is new on the job must be” by relating the tale of how, when he had just been appointed New York State Deputy Industrial Commissioner, he addressed the Rochester Chamber of Commerce industry committee, where he was

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132 See below ch. 12.

133 The speech itself, which was solicitous of the SSIC, did not even mention the white-collar exclusions. Text of Speech by Elmer F. Andrews, Administrator of the Wage and Hour Division of the U.S. Department of Labor, Before the Southern States Industrial Council at Birmingham, Alabama, September 29, 1938 (copy furnished by the Wirtz Labor Library, US DOL).


135 Transcript of the Record of the Question and Answer Period Following the Speech of Elmer F. Andrews” at 3. The argument by Malamud, “Engineering the Middle Classes” at 2294, that Andrews’ statement that upper-level white-collar workers were not clock watchers or punchers meant that they were “noncommodified” workers whose labor was “total, not divisible into fungible hour-long bursts of energy to be channeled into pre-set processes,” is false in the (unexplained) context from which it presumably derived: in Marx’s conception, categorically such workers sold their commodity labor power just as factory workers did. Later Malamud argued that the DOL’s ban on docking the salaries of exempt white-collar workers who worked less than 40 hours in a week rested on this non-commodified view, but then executed an about-face, conceding that the proliferation of “bureaucratic control on all forms of work means that employers have come to see all of their employees as working subject to the clock.” Id. at 2317.
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asked whether buyers were covered by the new state hours law for women in mercantile establishments. Thinking that buyers went to New York and Paris, he said no, thus prompting one department store to send 90 percent of its saleswomen down the street to report back on what the competition was selling and at what prices and calling them "buyers." The store thought better of the classification after the state began to prosecute, but the upshot of this cautionary tale for Andrews was "the fact that it is very difficult, particularly as new as I am at this game, to say to you tonight, where a worker leaves off and a professional or executive begins."136

Andrews' remarks underscored the fact that the payment of overtime to salaried employees had already become a contentious aspect of the FLSA even before the statute went into effect on October 24, although it was initially overshadowed by threats by some firms to shut down that day to avoid having to comply with the law.137 The Bureau of National Affairs' authoritative Wage and Hour Reporter argued that "[t]he root of the controversy" stemmed from another statement that Andrews had made in Birmingham. It is implausible that Andrews' statement provided anything but a pretext for employers' resistance that would have emerged anyway, especially since the WHD's official Interpretative Bulletin No. 4 ("Maximum Hours and Overtime Compensation"), published on October 21, contradicted Andrews' statement,138 which he himself later disowned ("certain impromptu remarks I made...in reply to random questions asked me at the end of the speech").139 Indisputably, however, Andrews had advanced a grotesquely false misinterpretation of the FLSA in the following colloquy:

- Here is another question: "Many clerical and non-supervisory employees are on a monthly or weekly wage basis. Is it necessary for such wages to be recalculated to an hourly basis and time and one-half paid for hours over forty-four?"

  A. Well, of course, for the sake of answering the question we will assume that the supervisory people we are talking about are truly a part of the executive family. Of course, that answers that, they are out.

  Clerical forces, we all feel, are included in the Act. But I cannot see where there is

136 Transcription of the Record of the Question and Answer Period Following the Speech of Elmer F. Andrews" at 3-4. The mercantile maximum hours law in question did not exclude buyers or any other occupational group (except, in part, newspaper reporters and pharmacists). 1930 NY Laws ch. 867, at 1623-24.


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going to be any practical difficulty there because your clerical force in any plant of any consequence certainly is earning on a basis of more than 25 cents an hour, weekly wages divided by the hours they work. If they are well above 25 cents an hour, it seems to me that there would not be much question about time and a half for overtime, because you could figure in that weekly wage that time and a half over the 44 hours had been given consideration as remuneration for their full week's work.140

That Andrews' blunder was not inadvertent was clear from his answer to a similar question in Birmingham that was not trotted out later in the controversy. In response to a question concerning overtime liability for office employees of steamship companies who were paid more than the statutory minimum wage and worked more than 44 hours a week, Andrews replied: "They still get enough wages, I am sure, that if you want to break it up into so much per hour, so much for time and a half, it would still work out."141

That Andrews chose to make this accommodationist bow to employers before a virulently anti-labor and racist organization like the SSIC142 was noteworthy in its own right. A taste of the SSIC's style can be gleaned from the opening remarks given a few months later by its president, Edward McMillan,143 at its meeting on employer-employee relations: "I think we in the South here have a great deal to be proud of in regard to the character and the kind of people that we have working in our respective plants. This country down here is one of pure Anglo-Saxon blood that we hear spoken of so many times. ... "In my humble opinion, this Southland today and these pure Anglo-Saxon people we have down here are the hope of this nation today...."144

140“Transcript of the Record of the Question and Answer Period Following the Speech of Elmer F. Andrews” at 8. When asked about classifying plant superintendents and department heads as executives, Andrews observed that in many cases it would be necessary to investigate “to see just what the status of that particular employee who is called an executive is.” Id. at 6.

141“Transcript of the Record of the Question and Answer Period Following the Speech of Elmer F. Andrews” at 10.

142For additional information on the SSIC, see below ch. 11-12.

143McMillan, president of Standard Knitting Mills, was also in the course of his career a director of the NAM. “Edward McMillan, a Leader in Textile Field in South,” NYT, Dec. 11, 1964 (39:3).

144E.J. McMillan, “Opening Remarks,” in Addresses on Employer-Employee Relations Delivered at Atlanta Meeting of the Southern States Industrial Council on January 26, 1939, at 5-8, at 5, 7 (n.d.). The SSIC's racism was apparently infectious. J. Raymond Tiffany, a former judge and assistant attorney general in New Jersey and at the time general counsel to the Book Manufacturers Institute and National Small Business
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Although the details of the internal deliberations that generated the original white-collar regulations of 1938 remain elusive, it is known that on October 14, 1938, "[a]gency officials discussed with business and labor interests the proposed definition of professional and administrative persons, executives and outside salesmen," but did not expect to reach a decision until the next week, when in fact the regulations were issued. All that The New York Times report revealed about the meeting was that: "It was indicated that much difficulty was experienced in the effort to fix on those who should be considered in these exempt classes and in the selection of language to make the definitions clear, particularly the definition of professionals...." The front-page piece in the Journal of Commerce noted that deputy administrator Paul Sifton had announced after conferring with management and labor representatives that "‘a rather general agreement’ had been reached on amended definitions of administrative and executive employees." In contrast:

Much of the discussion centered on the problem of defining professional employees, with particular stress placed on the question of whether newspaper reporters are covered by the act. Whether lawyers or doctors might be included under the statute under certain circumstances was also discussed, Mr. Sifton said.

Such meetings were characteristic of the WHD’s approach to the drafting of the whole range of its statutorily required regulations: “[T]he Division made every attempt to confer with representatives of employers and employees.... Whenever possible, drafts of the regulations were submitted to conferences and committees designated by the Business Advisory Counsel of the Department of Commerce, employer organizations, technical associations and labor unions; and the testing of these drafts against the diverse problems of the many industries repre-


145The regulations were “prepared in consultation with the legal branch” of the WHD. US DOL, WHD, Press Release (Oct. 19, 1938) (copy furnished by Wirtz Labor Library, US DOL).


148“Wage Rules Issued on 4 Types of Help” (12:3)
sented in these meetings was extremely helpful in working out the final product."  These accounts are not completely irreconcilable with a release issued by the WHD a year and a half later, on March 18, 1940, in connection with pending agency hearings on the white-collar regulations. Although it confusingly referred to "conferences," "the conference," and "this conference," the release, which interestingly applied one of the statutory terms to some of the WHD's own officials, stated:

As soon as the Wage and Hour Division was created, its executives began to pave the way for prompt promulgation of the definitions required. In October, 1938, before the Act became effective, Wage and Hour staff members held conferences in Washington with representative leaders in various industries and labor organizations, all of whom discussed the subject thoroughly. There was substantial agreement on all the definitions worked out at the conference, and unanimous approval of the definitions of executive and administrative employees in particular. These definitions were then issued by the Wage and Hour Division....

The WHD release then mentioned the names of those who had attended and of their organizations, indicating that a number of large employers had been

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149 Interim Report of the Administrator of the Wage and Hour Division For the Period August 15 to December 31, 1938, at II-6-II-7 (Jan. 1939). The Business Advisory Council of the Department of Commerce was set up by Commerce Secretary Daniel Roper in June 1933, purportedly to foster cooperation between (big) business and the New Deal. The BAC largely staffed the NRA Industrial Advisory Board. From 1937 to 1939 Averell Harriman of Union Pacific Railroad was the chairman of the BAC. Arthur Schlesinger, Jr., The Age of Roosevelt: The Coming of the New Deal 425 (1959); Gordon, New Deals at 154-55; http://www.businesscouncil.com/about/background.asp.

150 The Journal of Commerce had referred to two conferences that Sifton had held with "representatives of the three groups" (including Roy Cheney, C. S. Ching, John, Abt, and William Hushing), although previously it had mentioned only labor and management. "Wage Rules Issued on 4 Types of Help."

151 US DOL, WHD, "Wage-Hour Public Hearings Called to Consider Definitions of Executive and Administrative Employees of Wholesalers" at 2 (R-689, Mar. 18, 1940) (copy furnished by the DOL Wirtz Labor Library). Most of what is quoted from the release in the text was read aloud verbatim at one of the WHD hearings in 1940 by a witness to the hearing officer Harold Stein, who did not contradict it. Official Report of the Proceedings Before the Wage and Hour Division of the Department of Labor In the Matter of: Definition of "Executive, Administrative, Professional" Employees and "Outside Salesman" at 807-808 (Washington, D.C., April 16, 1940), in RG 155--Wage & Hour/Pub. Contracts Div. Location: 530, 47:9:3-4/Boxes 10-14 (statement of Leo Bernstein, United Wholesale & Warehouse Employees of New York, CIO).

Labor representatives included: Robert Watt,154 American Federation of Labor; John Abt,155 Amalgamated Clothing Workers (C.I.O.); Jonathan Eddy,156 Newspaper Guild (C.I.O.); and William C. Hushing, Legislative Representative of the A. F. of L.157

That these high-profile employer representatives gave their “unanimous approval of the definitions of executive and administrative employees in particular” is, in light of the intense campaign for revision that they soon launched, rather puzzling. After all, at least two of these participants were key actors in a tightly-networked big business group that vetted proposed labor legislation. Cyrus Ching of U.S. Rubber and George Kelday of International Harvester represented their firms on the aforementioned “fiercely private”158 peak organization, the Special

152In 1939, William Cronin, on behalf of the Automobile Manufacturers Association, proposed Taft-Hartley-like revisions to the NLRA. “Effects, Not Rules, Spur Trust Cases,” NYT, Sept. 22, 1939 (24:8).

153Whiteside had presided over several NRA code hearings; see above ch. 7.

154A member of the “inner circle” of the AFL, Watt was the U.S. labor representative to the ILO from 1936 until his death in 1947. “Robert Watt Dies, Labor Spokesman,” NYT, July 26, 1947 (13:1).

155Abt, a lawyer and Communist, was the head of the CIO’s wage-hour bureau; he had formerly been in charge of the trial section of the anti-trust division of the DOJ. “Textile Pay Parley Approves Program to Effect New Law,” JC, Aug. 20, 1936 (1:1, at 8:6).

156On Eddy, one of the founders of the Guild, see above ch. 7.


158Gordon, New Deals at 152. On the Special Organizing Committee, which was formed in 1919, see Violations of Free Speech and Rights of Labor: Hearings Before a
Conference Committee of employment managers, personnel directors, and others who dealt with wages, hours, and proposed legislation of 12 of the country’s largest corporations—General Motors, Standard Oil, AT&T, U.S. Steel, du Pont, General Electric, Westinghouse, Bethlehem Steel, Irving Trust, Goodyear Tire and Rubber, U.S. Rubber, and International Harvester—which met monthly to keep abreast of their problems. Moreover, in 1937, the Special Conference Committee’s secretary, Edward Cowdrick, prepared for it the aforementioned report on overtime work and compensation of salaried employees. It is difficult to imagine that such well-informed employer officials could have been so blind to the glaringly obvious fact that the WHD’s joint definition of executive and administrative employees would require employers to pay time and a half to highly compensated white-collar staff who did not supervise anyone that they would not have raised any objections.

Nevertheless, Harold Stein, the hearing officer at the 1940 white-collar hearings, publicly confirmed employers’ acquiescence:

I will say just a word on the conference which preceded the issuance of Part 541 of our regulations. Various representatives of industry and labor were called in about fifteen or twenty all told and sat down with representatives of the administrator to discuss various drafts and I merely will say as a matter of record that Mr. Noyes and Mr. Kaufman [sic] of the Evening Star of this city newspaper...attended the conference and participated in the discussion of the draft regulations that were before them which were in fact substantially the same as the regulations that have been issued.

Subcommittee of the Committee on Education and Labor United States Senate, Part 45: Supplementary Exhibits: The Goodyear Tire & Rubber Co.—The Special Conference Committee 16775-17078 (Jan. 16, 1939); Gordon, New Deals at 152-56; Jacoby, Employing Bureaucracy at 180-82.


Violations of Free Speech and Rights of Labor: Hearings Before a Subcommittee of the Committee on Education and Labor United States Senate, Part 45: Supplementary Exhibits: The Goodyear Tire & Rubber Co.—The Special Conference Committee at 17078 (affidavit of Edward Cowdrick, June 6, 1939). On the report, see above ch. 2 and ch. 9.

See above ch. 9.

Official Report of the Proceedings Before the Wage and Hour Division of the Department of Labor In the Matter of: Definition of “Executive, Administrative,
Perhaps employers' lack of manifested concern was part and parcel of what the *Journal of Commerce* found to be surprisingly little opposition to the FLSA among the great bulk of manufacturers: even long before enactment, employers with much higher standards felt that the 40-cent minimum wage and 40-hour week could "never touch them...." Indeed, as reports began circulating in early May 1937 that the Roosevelt administration was preparing a bill with these provisions, *The New York Times* revealed that northern industrialists, who favored such a measure as a means of eliminating the southern wage differential, believed that after the Supreme Court had upheld the constitutionality of the NLRA, "they would not suffer any disadvantages from Federal control of minimum wages and maximum hours, especially since, under the Wagner Act, there is the everpresent threat of a strike if demands are not met."164

Even more perplexing is the approval by another conference participant, Roy Cheney, the president of the Underwear Institute, who at the June 1937 joint congressional hearings on the FLSA bill had submitted the aforementioned extraordinarily detailed set of objections and proposed that "members of supervisory staffs, including all who direct the activities of others, such as executives, superintendents, foremen, and assistant foremen, also office help, be exempt from the provisions relating to the maximum hours...." Why an employers' agent with such encyclopedic knowledge of the FLSA and especially keen awareness of its inadequacies on this particular point would have joined in the chorus of unanimous approval is a mystery, which only deepens in light of the fact that in June 1940 Cheney requested of the WHA the application to the knitted underwear industry of a new definition of "administrative employee" as any employee whose duties were connected solely with the administration of an industry and embraced clerical employees, such as bookkeepers, stenographers, payroll clerks, auditors, cost accountants, purchasing agents, statisticians, and other office help employed on a straight salary basis and given vacations and paid sick leave.166

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Professional" Employees and "Outside Salesman" at 320-21 (Washington, D.C., July 26, 1940), in RG 155--Wage & Hour/Pub. Contracts Div. Location: 530, 47:9:3-4/Boxes 10-14. It seems plausible that Stein, who began working at the WHD in 1938, was speaking from first-hand knowledge.


165 *Fair Labor Standards Act of 1937: Joint Hearings Before the Committee on Education and Labor United States Senate and the Committee on Labor House of Representatives at 521*.

166 "Cheney Seeks New Wage Law Ruling," *JC*, June 5, 1940 (10:8). Cheney also took the position that a salary requirement was contrary to law.
Similarly, WHA Philip Fleming, who presumably was able to report from second-hand information, wrote to a disgruntled employer in May 1940 that the white-collar regulations had been “promulgated only after lengthy conferences with representatives of various business groups, and there was singular unanimity of opinion that the definitions were so clear that any employer could readily determine therefrom their applicability to his employees.”167 Finally, in October 1940, the WHD added yet another retrospective, noting that “[s]hortly before the effective date of the act the Administrator called a conference of representatives of industry and labor to ascertain their views on an appropriate definition and delimitation” of the statutory terms contained in section 13(a)(1) of the FLSA excluding “any employee employed in a bona fide, executive, administrative, professional...capacity....” According to the WHD: “A draft was discussed and revised after which those present at the conference expressed their decisive approval thereof.”168

The regulations that the WHA issued on October 19, 1938, five days before the FLSA went into effect on October 24169—and which had generated so much interest that The New York Times published them in full beginning above the fold on its front page170—specified in part that:

SECTION 541.1 Executive and Administrative. The term “employee employed in a


169James Prozzi, “Overtime Pay and the Managerial Employee: Still a ‘Twilight Zone of Uncertainty,’” LLJ 41(3):178-82 at 179 (Mar. 1990), erroneously stated that the salary and duties tests were not introduced until 1940.

170b“Andrews Defines Exempt Employes,” NYT, Oct. 20, 1938 (1:4). The introductory paragraph of the article failed to mention the exclusion of administrative employees. In general, Andrews found that the press had done a good job of acquainting the public with the FLSA. “Andrews Praises Press on Pay Law,” NYT, Nov. 9, 1938 (26:2). The quality of the historical and scholarly consciousness of those empowered to administer and revise the regulations is indicated by the fact that WHA Tammy McCutchen in 2002 apparently believed that these regulations were some obscure document requiring highly specialized skills to locate, although the Federal Register is in fact available in hundreds of libraries: “I did bring some show-and-tell with me today. One of my great staff people...—Rick Brennan, who’s just a fantastic career professional at the Department of Labor—dug up the original 1938 541 regulations.” Federalist Society, National Lawyers Convention 2002: “The Fair Labor Standards Act: Keeping Time with the 21st Century?” at 20. Nov. 14, 2002.
bona fide executive [and] administrative...capacity" in section 13 (a) (1) of the act shall mean any employee whose primary duty is the management of the establishment, or a customarily recognized department thereof, in which he is employed, and who customarily and regularly directs the work of other employees therein, and who has the authority to hire and fire other employees or whose suggestions and recommendation as to the hiring and firing and as to the advancement and promotion or any other change of status of other employees will be given particular weight, and who customarily and regularly exercises discretionary powers, and who does no substantial amount of work of the same nature as that performed by nonexempt employees of the employer, and who is compensated for his services at not less than $30 (exclusive of board, lodging, or other facilities) for a workweek.171

The most striking feature of this part of the regulations lay in the WHA’s collapsing the two statutory categories of “executive, administrative” into one by defining them “jointly.”172 The WHA effectuated this regulatory transformation by the crude typographical mechanism of inserting a square-bracketed “and” into the quotation from the statute, thus accomplishing by sheer force of will what congressional syntax seemingly forbade. Regarding this “move” as a species of purposive legerdemain, one scholar has argued that “the regulations departed from the plain language of the statute” by treating “administrative” and “executive” as synonyms: “The decision to write the word ‘Administrative’ out of the statute reflected both a desire to keep the exemptions narrow and a concern with the administrability of the new term ‘Administrative,’ a term with no NRA track record to learn from.”173

Even apart from the fact that, as already discussed in detail, numerous NRA codes did exclude administrative employees from hours regulation,174 this argument ignores the linguistic reality—dwelt on repeatedly and at great length at the 1940 regulatory hearings175—that the words “executive” and “administrative” were then (and continue to be) used overlappingly and synonymously across a broad range of everyday and bureaucratic usage.176 For example, according to the edition of

173Deborah Malamud, “Engineering the Middle Classes” at 2295.
174See above ch. 7.
175See below ch. 12.
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*Webster’s New International Dictionary of the English Language* then current, “administrative” meant “of or pertaining to administration, esp. management; executive,” while “executive” denoted “any person charged with administrative or executive work,” as, for example, a business manager.177 (In 2003, a coalition of employers commenting on the DOL’s proposed revisions of these definitions, observed, presumably unaware of the retrospective confirmation that it was giving to unions, “that the commonly recognized definition of ‘executive’ [w]as ‘a person or group having administrative or managerial authority in an organization.’")178 Similarly, the 1933 edition of the *Oxford English Dictionary* defined “administrative” as “[p]ertaining to, or dealing with, the conduct or management of affairs; executive.”179 The inextricable interwoveness of the terms is further reinforced by the linguistic fact that administrators are also said to “execute” policies made by executives.180 Overall, then, WHA Andrews was hardly guilty of duplicity in reporting to Congress in January 1939 that he had defined “executive,” “administrative,” and “professional” “in a manner which is consistent with common usage....”181

The Functions of the Executive, Chester Barnard’s surpassingly influential book, which appeared in the very same year that the FLSA was enacted, included administration, together with control, management, and supervision, as the executive’s functions.182 In his magisterial four-volume administrative history of the federal government extending from 1789 to 1901, Leonard White used “executive,” “administrative,” and even “management” as virtually synonymous.183

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177 *Webster’s New International Dictionary of the English Language* 34, 892 (1942 [1934]).


181 *Interim Report of the Administrator of the Wage and Hour Division For the Period August 15 to December 31, 1938*, at IV-7-IV-8.

182 Chester Barnard, *The Functions of the Executive* 6 (1968 [1938]).

183 On “business management” and “the wisdom and lore of the management art” as part of “the administrative skills,” see Leonard White, *The Federalists: A Study in Administrative History, 1789-1801*, at 471, 474 (1965 [1948]).
For example, the chief executive George Washington was also an "administrator."\textsuperscript{184} And more generally, White observed that: "Every administrative system is the product of...the executive talent of its generation,"\textsuperscript{185} while certain executive departments "had the greatest need for executive talent."\textsuperscript{186}

Contemporaneous usage confirms a heterogeneous and ambiguous scope of the term. A computerized search of The New York Times from 1900 through 1937 identified literally only three uses of "administrative employees" in reference to private-sector workers in the United States. All designated some segment of white-collardom, but none specified exactly which ones. For example, in 1924 General Electric, in connection with devising an award system, divided its workforce into shop workers, foremen, engineers, and commercial and administrative employees.\textsuperscript{187} In 1930 the same firm proposed an unemployment benefit for its employees classified as commercial, manufacturing, engineering, and administrative.\textsuperscript{188} And at the depth of the depression in 1933 the United States Steel Corporation reported that at its administrative headquarters it had placed as many of the administrative employees as possible on part-time schedules.\textsuperscript{189}

An early NLRB case\textsuperscript{190} from 1936 mentioned that there were 514 "clerical, supervisory and administrative employees" at an International Harvester plant,\textsuperscript{191} thus suggesting that administrative employees were loftier than clerical but lacked supervisory authority. A different meaning was attached to the term by all parties in a case involving a bauxite processing plant. In June 1937 the Aluminum Administrative Workers Union, Local 20661 (AFL), began meeting with the man-

\textsuperscript{184}White, The Federalists at 97.
\textsuperscript{185}Leonard White, The Republican Era: A Study in Administrative History, 1869-1901, at 1 (1965 [1958]). White also spoke of "the conduct of administration by executive departments...." Id. at 84.
\textsuperscript{186}White, The Federalists at 475. White also prominently mentioned as within "the literature of administration...Necker's two-volume work, Du Pouvoir Exécutif...." Id. at 477. In discussing the early nineteenth century, Wilfred Binkley, President and Congress 79 (3d rev. ed. 1962 [1937]), noted that "the executive [department] heads were then thought of as...administrative officials...."
\textsuperscript{187}"Factory Workers Receive Awards for Discoveries," NYT, Mar. 16, 1924 (sect. 9, at 8:7-8).
\textsuperscript{188}"Swope Tells Plan to Stay Job Crises," NYT, July 19, 1930 (17:1).
\textsuperscript{189}"U.S. Steel Reports First Operating Loss," NYT, Mar. 15, 1933 (25:8).
\textsuperscript{190}Before 1939 only two federal or state cases used the term "administrative employees" to refer to private-sector workers. But they were both too unspecific to permit identification of the group.
\textsuperscript{191}International Harvester Co., 2 NLRB 310, 317 (Nov. 12, 1936).
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agement of a plant of a subsidiary of the Aluminum Company of America to obtain recognition as sole bargaining agent for the plant’s “administrative employees.” In July 1938 the union, which admitted to membership “office and clerical workers, chemists, technicians, analysts, and certain foremen and subforemen” in the company’s production and maintenance departments, filed a petition with the NLRB claiming that “office and clerical workers, exclusive of department heads and their assistants; all meter men, exclusive of foremen; all routine chemists, chemists’ assistants; dust, gas and laboratory technicians, exclusive of department heads, shift foremen, and research chemists; all subforemen and those foremen who do not have an assistant in the production and maintenance departments” constituted an appropriate collective bargaining unit. Ultimately the Board certified these classifications, which comprised “the administrative staff of the Company,” as such a unit.192 Thus in this context “administrative” was used very broadly to include virtually all of the plant’s white-collar employees except certain bosses and high-ranking managers. In 1940 the NLRB, in a case involving Fruehauf Trailer Company, used the term differently in certifying as an appropriate bargaining unit “[a]ll production employees of the Company, excluding office employees, timekeeper, watchmen, administrative employees, stock clerk, superintendent’s clerk, chief inspector, chief receiving clerk, assistant receiving clerk, engineer, office janitor, assistant foremen, and any employees occupying higher supervisory positions...”193 Here, “administrative” employees, though undefined, were neither office employees nor higher supervisors. The following year, the Board and the parties used it in a similar fashion in certifying as a bargaining unit at a Bendix Aviation plant “[a]ll plant, production, and maintenance employees...excluding company officials, administrative employees, superintendents, foremen, assistant foremen, stock chasers, timekeepers, watchmen, and clerical and office employees....”194

Even employers that pleaded for and proposed their own separate definitional category of administrative employees at the WHD’s white-collar overtime hearings

192Aluminum Company of America, 9 NLRB 141, 143, 145 (Oct. 11, 1938). The parties had agreed to exclude from the unit certain “confidential employees” including secretaries to department heads and officials, and all cost department employees. Id. at 144.

193Fruehauf Trailer Co. of Kansas, 25 NLRB 766, 770 (July 27, 1940).

194Bendix Aviation Corp., 32 NLRB 256, 257 (June 2, 1941). The first signed exclusive bargaining contract between Bendix and the UAW of Sept. 11, 1939 “covered all employees, excluding “direct representatives of Management such as Superintendents, Foremen, Assistant Foremen, Time Study Men, administrative office and salaried employees.” Bendix Products Division of the Bendix Aviation Corp., 43 NLRB 912, 913 n.2 (Sept. 3, 1942).
in 1940 admitted the existence of considerable overlap inasmuch as “every executive employee would no doubt be in some respects an administrative employee....” This linguistic point was also made with much force by Victor Pasche, the secretary-treasurer of the Newspaper Guild, who charged that to deny the synonymy of “executive” and “administrative” was “to deny English language and usage”:

We all know that the administration of the United States means the President and his Cabinet and assistant secretaries, not the clerical and Civil Service employees; that the administration of any organization, Chamber of Commerce or Union, means the executive entrusted with carrying out the policies laid down by the membership, not the office staff. We know that in any corporation, mercantile enterprise or factory, the administration is the executives who act for the stockholders.

Thus the WHA had not so much written administrative employees out of the statute as interpreted the term to mean ‘administrators,’ who overlapped with “executives.” The OED, for example, defined an “administrator” in 1933 as “[o]ne who administers; one who manages,” while in Webster’s it denoted “one who administers; a manager, esp. one who directs, manages, executes....” The tension between this lexicological fact and the equally undeniable congressional use of commas inconsistent with apposition or synonymy rendered the WHA’s decision to define the terms “jointly” more complex and less obviously an instrumentalist intrigue. After all, a few days before the regulations were published the Journal of Commerce had Deputy WHA Sifton speaking not of “administrative employees,” but of “administrative officers,” a locution that two days later the vice president of the American Bankers Association and chairman of its committee on federal legislation used in a letter advising members to comply with the FLSA until the WHA determined that they were not covered. This plausibility of the synonymous interpretation explains why the WHD, even while revising its regulations and detaching the two categories in 1940, nevertheless insisted that the

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195 *1940 WHD Hearings Transcript* at 197 (June 4) (Clarel Mapes, Mid-Continent Oil and Gas Association).
196 *1940 WHD Hearings Transcript* at 556 (July 29).
197 See above ch. 2.
199 *Webster’s New International Dictionary of the English Language* at 34.
200 *Stein Report* at 1.
joint category had also been entirely in accord with the FLSA.²⁰³ And although it is certainly plausible, albeit undocumented, that the WHD combined the two terms in 1938 precisely in order to insure greater coverage and protection of white-collar workers, why “representatives of industry...expressed their decisive approval” of this merger remains a puzzle—especially since employers almost immediately initiated an ultimately successful campaign challenging the WHA's exclusion from the exclusion of administrative employees who were not bosses.

Overshadowed in complexity by the duties test, the mathematically straightforward salary-test level nevertheless also gave rise to fierce and enduring conflict between capital and labor. At $30 per week, it was 2.73 times greater than the 25-cent statutory hourly minimum wage for the 44-hour non-overtime workweek.²⁰⁴ No one could have known it at the time, but that ratio was larger than it would ever be again.²⁰⁵

Bona fide professional employees, as to whose definition alone the WHD had admitted unity had not prevailed, had to be customarily and regularly engaged in work “[p]redominantly intellectual and varied in character as opposed to routine, mental, manual, mechanical, or physical work,” that required “the consistent exercise of discretion and judgment both as to the manner and time of performance, as opposed to work subject to active direction and supervision” and that was of “such a character that the output produced or the result accomplished cannot be standardized in relation to a given period of time.” Finally, professional employees’ work had to be “[b]ased upon educational training in a specially organized body of knowledge as distinguished from a general academic education and from an apprenticeship and from training in the performance of routine mental, manual, mechanical, or physical processes in accordance with a previously indicated or standardized formula, plan, or procedure....”²⁰⁶ Employers of professional—as opposed to executive-administrative—employees were not required to demonstrate their classificatory bona fides by paying professional employees a salary above some specified threshold.

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²⁰³See below ch. 13.


²⁰⁵See below ch. 15.

²⁰⁶29 CFR § 541.2, in FR 3:2518.
As the Guild’s executive vice president informed the locals, Andrews had given him personal assurances that this definition “definitely excluded any newspaper worker eligible to [sic] Guild membership from exemption,” although Hanson had already filed with Andrews a 50-page brief on behalf of the ANPA denying the applicability of the FLSA to daily newspapers or their employees. Nevertheless, the union’s International Executive Board’s Employer Relations Committee issued a bulletin to the locals categorically declaring not only that no employees within the Guild’s jurisdiction were professionals, but that “[n]one of the persons for whom the Guild customarily bargains comes within” the definition of “executive” either.

Similarly, the Federation of Architects, Engineers, Chemists and Technicians, also a leftist union affiliated with the CIO, reported in December 1938 that, at its request, Lee Pressman, the CIO counsel, had interviewed WHA Andrews, who assured him that the only “technical men” whom the WHD would exclude from the benefits of the Act were those “engaged in a supervisory or consulting capacity.” The FAECT’s International Executive Council, “[r]ecognizing the dangers of a free interpretation by manufacturers of the definition of a ‘bona fide professional,’...instructed all Chapters immediately to write to all manufacturers engaged in interstate commerce, employing technical men” informing them of this legal opinion. Since membership in the FAECT was not open to “executives with authority to employ or discharge, to decide on advancement, or demotion, or to fix compensation,” the exclusion of supervisors from the FLSA should not have been a serious threat. Nevertheless, the union launched this organization-wide enforcement “campaign” because it was “a commonplace that technical employees suffer from long hours of work and from extended overtime periods and receive little protection from such abuses.” The FAECT was one of the few unions that appreciated that although the FLSA “should of course prove a blessing to all...

207 “Andrews Rulings Seen Supporting Guild in Barring Professional Exemptions,” GR, Nov. 1, 1938 (1:2, 6:1-3). Newspaper publishers were the principal force behind employers’ objections to the scope of the professional exclusion. Elisha Hanson, counsel for the ANPA and other publishers organizations, explained that newspapers would have to pay, for example, baseball reporters an additional year and a half’s salary for covering a team for eight months on theory that they would have to work 168 hours a week. Such applications “would greatly restrict the service of the press in gathering and disseminating information to the citizens of this country.” “Press Asks Ruling on Overtime,” NYT, Oct. 30, 1938 (2:1-2).

208 “Policing Wage-Hour Law Is Up to the Guilds,” GR, Nov. 1, 1938 (4:2-5).


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technicians in industry...vigilance and organization for those benefits will have to be the watchwords of employees." In a curious deviation from this position of certitude, the FAECT passed a resolution on the FLSA at its national convention in December 1938 stating that the definitions of exempt executive and professional employees “are not sufficiently clear as to be unmistakable by all employers, and...many employers of technical men are not applying the benefits....” It then opaquely resolved that the union favored “the re-definition of ‘executive’ and ‘professional’ to conform to the true employer-employee relationship rather than on the basis of training” and that all of the union’s chapters “make a concerted drive to have the” FLSA “enforced as it applies to technical employees.”

Another left-wing CIO affiliate, the United Office and Professional Workers of America—which was chartered in June 1937 as a merger of 23 local AFL unions to “organize office and professional workers in industries, other than permanent government agencies, in which such workers predominate or in which they are not claimed by the C.I.O. unions existing in such industries” took a rather cautious stance on the FLSA and its white-collar regulations. Immediately after enactment, the union conceded that the “extent to which white-collar workers will be excluded from the benefits of the measure is not yet known.” Initially it could do no more than inform its members that the law “specifically excludes ‘administrative’ and ‘professional’ employees” and advise them that “[m]ore effective pressure is yet to be mobilized in the next Congress to secure...amendments

213"CIO Charters National Union of Office & Professional Workers," The Ledger, 3(6):1:4-5 (June 1937). One of the principal local unions was Bookkeepers, Stenographers, and Accountants Union, Local 12646, whose six collective bargaining demands at the time of merger included the 35-hour week and time and half for overtime with double time for Sundays. “BS&AU Demands,” The Ledger, 3(6):4:1 (June 1937). A regional meeting in April in New York City of 13 locals, dominated by the BSAU, representing white-collar workers had called on the AFL to help organize them into “one big union” and expressed sympathy with the CIO. “Office Workers Ask A.F. of L. to Aid Them,” NYT, Apr. 26, 1937 (10:6-7). The inability of the New York City-based BSAU to obtain a national charter covering all classes of white-collar workers had prompted it to join with similar groups in other communities to bolt the AFL. By August, when the UOPWA had 22,000 members in 36 locals in 29 cities, the AFL announced its intention to begin a counterattack on CIO organizing efforts with regard to office workers, among whom the AFL had until then had not engaged in national organizing. “A.F.L. to Attack on Two New Lines,” NYT, Aug. 16, 1937 (9:1).
214"Lewis Hails New Union," NYT, June 3, 1937 (16:5).
to liberalize the Wage and Hour Bill which will become apparent when the measure is put into effect."215 Yet by the time the regulations had been promulgated in October, the UOPWA took credit for the coverage of industrial insurance agents, stenographers, typists, bookkeepers, accountants, clerks and general clerical workers216 without explaining how many millions of white-collar workers were excluded or identifying them:

The application of the Act to white collar workers came in for due consideration in Washington. This was primarily due to the vigilance of the International Union which saw real dangers lurking in certain of the exemptions under the act and emphasized the need for clarification. ... There are powerful economic interests in this country that would have excluded millions of office and professional workers from the benefits of the act by construing the terms "administrative," "professional" and "outside salesmen" as exempting them. The definitions finally agreed upon through the efforts of our union assure millions of workers in our jurisdiction the protection of a minimum wage, a maximum work-week and pay for overtime.217

In the months immediately following the FLSA’s effective date, WHD officials insisted that it was the definition of "professional" that had given and continued to give rise to the most difficulties. To exemplify the "troublesome questions...raised by Section 13(a)," Rufus Poole recounted to an employers association in November that:

A newspaper asks whether its boxing columnist and commentator is a professional and therefore exempt... Have you ever tried to define a professional? That is hard enough, but engaged in a "bona fide professional capacity" is even harder. The dictionaries do not

216 Eugene Turner, "Push Unionization as Wage-Hour Law Begins," Ledger, 4(11):1:4-5, at 2:5 (Nov. 1938). The article mentioned that Leo Allen, International Representative, was the UOPWA spokesman "at the hearings to establish a definition of terms," but offered no other information about these hearings. Id. at 2:5. The WHD did not include Allen on the list of those who had attended its aforementioned conference.
217 "The Wage and Hour Law and Our Union," The Ledger, 4(11):4:1 (Nov. 1938) (editorial). The next month the union announced that it would appear before the Textile Industry Committee on December 15 to seek time and a half for overtime, which had not generally been paid heretofore. "Seek Gains for Members Under Wage-Hour Act," The Ledger, 4(12):2:1-2 (Dec. 1938). Since industry committees’ sole statutory and regulatory power was to make recommendations to the WHA as to how much in advance of 1945 the minimum wage should be increased from 30 to 40 cents, it is unclear why the Textile Industry Committee would have had any authority to deal with overtime pay for white-collar workers. FLSA, § 8, 52 Stat. at 1064-65; 29 CFR § 511.9.
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give us the answer. They indicate that sometimes the word “professional” is used to mean a person engaged in one of the learned professions—that is medicine, law and the ministry. Then, the dictionaries talk about education and skill and even about one who engaged in sports for money. We had to define this term so that employers and employees could use it; so that they could know whether any particular employee was entitled to overtime compensation.... This definition and definitions of employees employed in an executive, administrative...capacity were worked out in conference with representatives of employers and employees. The only one that has been seriously questioned to date is our definition of the term professional capacity. Even here, those who did not like our definition did not take the view that they could write a better definition. There is a statutory duty on the Administrator to promulgate a definition. So we put out the best definition we could. ... We tried to be fair to everyone.218

As Poole only vaguely hinted, Congress was at fault for requiring the WHA to issue regulatory definitions without furnishing him any, let alone adequate, background information as to the scope of these occupational categories. Much more disastrous and enduring in its impact (though not even alluded to by Poole), however, was Congress’s total failure to explain why it had exempted employers of these particular workers from wage and hour regulation altogether.

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218 Address by Rufus G. Poole” at 11. Similarly, a few days later a WHD acting area director also conceded that it was hard to define “professional,” which in late 1938 had been the only definition so far seriously questioned, but added that even “those who did not like our definition did not take the view that they could write a better definition.” “The Fair Labor Standards Act of 1938”: Address by Earle W. Dahlberg, Acting Director, Area No. II, Wage-Hour Division, United States Department of Labor, Sixth Annual Meeting, Southern States Industrial Council, Atlanta, Georgia, November 29, 1938, at 10.
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There can be little dispute over this measure. The 40-hour maximum work week and the 40 cent per hour minimum wage are admirably modern. Few industries that can by any stretch of the imagination be called interstate...would have to increase their wage costs materially or revise their operating methods under its terms.¹

As the act took effect, the chief kick in the Northern industrial belt was against paying time and a half to salaried office workers.²

Although the legislative history of the FLSA during the Seventy-Fifth Congress (1937-38) is almost totally barren of explanation of Congress’s intent in excluding “any employee employed in a bona fide executive, administrative, [or] professional...capacity” from the act’s minimum wage and overtime provisions,³ the House debates during the Seventy-Sixth Congress (1939-40) over proposed amendments to this exclusion of white-collar workers shed virtually the only light on congressional intent that has ever emanated from the legislature.⁴ The focus of those proposals was a blanket exclusion of all employees paid a guaranteed (monthly) salary in excess of a certain fixed dollar amount. The targeted group was not definitionally confined to white-collar workers, but the requirement of a salary guarantee practically brought about that result. In any event, for the strata above that salary threshold, the duties tests would have been dispensed with. Thus the only opportunity that Congress ever seized to discuss the need for white-collar workers’ right to governmental protection against overly long workweeks was marked by an exclusive reliance on income level. The representativeness and

³See above ch. 9.
political usefulness of these deliberations may be questioned on the grounds that, despite two years of debate, Congress never enacted any legislation. However, this ineffectualness of the initiative, which fell victim to a complex web of party-political and sectional-geographic circumstances, was more than compensated for by the virtual absence of any congressional or even Roosevelt administration opposition to the shift to a single-criterion identification of exempt-worthiness.5

Employers' Hostility Toward Overtime Regulation in General

[It] is quite true that excessive work even for two completely disassociated employers may also be detrimental to the well-being of workers. Perhaps Congress should have gone further and prohibited any employee from working over 42 hours in any event. This, however, it did not see fit to do. ... True, the detriment to well-being of workers exists as much in a case where overtime is worked and paid for as where it is worked without being paid for. Had it desired to do so, Congress might have absolutely forbidden the employment of any worker beyond a certain number of hours in a workweek. Presumably, however, it felt it more desirable to attempt to achieve the same result by merely imposing a penalty for the overtime hours....6

It was not made clear why a work-week longer than 42 hours with overtime payment is more conducive to "health, efficiency and general well-being of workers" than a workweek of the same length paid for at straight time. [T]he Wage and Hour Division finds that the Act allows an employee to work far longer than 42 hours a week without overtime pay at all. The trick is to hold more than one job, but work no more than 42 hours a week for any employer.7

One controversy that employers successfully unleashed as soon as the FLSA went into effect in 1938 focused on the scope of the overtime penalty in general—did it apply only to minimum wage workers and the minimum wage or also to

5 For this reason the undocumented claim that "[e]xempting a broader range of employees on the basis of income alone...was not politically acceptable" is inexplicable. Deborah Malamud, "Engineering the Middle Classes: Class Line-Drawing in the New Deal Hours Legislation," Michigan LR 96(8):2212-2321, at 2291 (Aug. 1998).


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higher-paid employees?—and its applicability to white-collar workers in particular.\(^8\) While the first Wage and Hour Administrator, Elmer Andrews, was busy advertising the FLSA as "a wonderful piece of legislation" that "might better be called the better business act,"\(^9\) employers seized the upper hand in this struggle by implanting in public discourse the notion of the FLSA as merely "the Magna Charta of marginal workers in America...."\(^{10}\) Even liberal newspapers, such as the *New York Post*, lent credence to this image by characterizing the FLSA’s purpose as "put[ting] a floor under wages in some of the most shockingly underpaid industries...and...fix[ing] a limit to impossibly long hours."\(^{11}\) In contrast, no counter-discourse succeeded in forging an equally compelling image conveying universal coverage. Consequently, the forces advocating broader applicability often fell back on legalisms, which were distinctly second-best rhetorical weapons.

One propagandist who at times rose above legalisms was the second Wage and Hour Administrator, Philip Fleming, a colonel in the Army Corps of Engineers, who succeeded Elmer Andrews in October 1939. The CIO was not favorably impressed with Fleming, who "is best known...to readers of sport pages" as graduate manager of athletics at West Point in 1936 and later president of the Eastern Football Association. More importantly, from the industrial unions’ point of view, "Fleming had an opportunity for contacts with leading industrialists" from 1924 to 1926 as member of War Department board on contracts.\(^{12}\) However, despite these perceived deficiencies, during the brief period until the accelerated military build-up in 1941, Fleming was continually engaged in "Selling Wage-Hour Law to Public" as "one of countless restrictions on free enterprise" and on a "market that always has functioned, and always must function, under a large number of restraints imposed by custom, voluntary organization, and law." In

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\(^10\)Irving Dilliard, "United States Wage and Hour Law," *St. Louis Post-Dispatch*, May 12, 1940, reprinted in *CR* 86:3293-95 (App.).


particular, Fleming sought to justify state intervention in the labor market as merely applying the principle of the "reservation price" to human labor that had guided businesses. In addresses to two employers organizations and a union in June 1940, he observed that during the depression:

The sale of new automobiles would have been greatly stimulated if they had been priced at $10. But such a price would have been far below the cost of the materials used in their manufacture. The result of a $10 price simply would have been the transfer of capital from Henry Ford, General Motors and others who manufacture automobiles, to those who use them.

Similarly, if all restrictions upon the labor market had been removed—if all labor legislation had been repealed and labor unions wiped out—much more labor might have been employed. But it is quite curious, I think, that while no sensible person expects automobile manufacturers to sell their wares at $10, many did advocate, and continue to advocate, that labor should be sold for any price it will bring, even though the result should be slow starvation. The worker's "capital" is his ability to produce, which is directly related to his health. And many people, who seem to think it is all right to destroy the worker's capital, would be horrified at the suggestion that the employer's capital should be wiped out. A seller's "reservation price"—a price below which he will not sell—is wholly acceptable to common sense where material goods are concerned. It is no less sensible where human labor is concerned.

The Wage and Hour Law introduces such a "reservation price" into the labor market. The "reservation price" can be maintained here only by legislation strictly enforced, because in periods of widespread unemployment the worker could be forced to accept a wage below the minimum needed to maintain his "capital"—his health and efficiency—and far less than his requirements as a participant in a democratic order.

To make a reservation price for labor effective, an alternative to starvation must be provided, else many workers will ignore the Act and accept any wage, however low. A socially acceptable alternative to starvation is provided in the form of relief, unemployment insurance and other forms of social security.

The Wage and Hour Law...has the immediate social utility of preventing "capital-destroying" sales of labor, and the long run utility of shifting the employment of labor to economically justifiable enterprises—from those that cannot exist without subsidies provided by the public in the form of charity or relief....

The Wage and Hour Law is a restriction...upon the "free enterprise system as a way of life" for the employer. It is also a restriction upon the "free enterprise system as a way of life" for the employee. It very drastically interferes with his freedom to work for ten cents an hour. It limits his freedom to work 60 hours a week for $5.13

The chief flaw in this reservation-price analysis was the failure by the Wage and Hour Division or Congress to apply it to overtime in the sense that they

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deemed the overtime premium as fair compensation regardless of the length of the
day or week. Consequently, by ignoring the impact of long hours on workers’
physical or mental health (as well as on unemployment as a result of the cessation
of work-spreading) so long as employers paid time and a half, the FLSA rendered
invisible the undermining of the substance of workers’ labor power that higher
income could not prevent.

Even in this diluted and defective form, Fleming’s position could scarcely have
commended itself to many newspapers—which were hardly dispassionate ob-
servers since publishers were themselves challenging coverage of numerous
employees such as reporters and news carriers—\(^{14}\) which zealously agitated on
behalf of employers’ narrow conception of the FLSA’s reach. The *New York
Times*, for example, (erroneously) argued in July 1939 that even most congressmen
who had voted for the FLSA thought it applied “only to submarginal labor. But
by a combination of the so-called hours provisions with a joker inserted at the last
minute by the conference committee the bill lent itself to a possible interpretation
under which it fixed the hourly wages of all employees, no matter how high their
compensation, except a few classes specifically exempted.”\(^{15}\) In April 1940, as
Congress was about to begin debating bills to expand exclusions from the law, the
*Times* propagated a much more radical approach: “the present so-called hour
provisions of the Federal law should be re-examined. In their present form they
are really disguised wage provisions, which apply not merely to marginal or low-
paid labor but to the overwhelming bulk of all labor. They have, moreover, been
interpreted in such a way as in effect to set a different minimum wage for each
employer.” It despaired, however, that on the eve of a presidential campaign it was
unlikely that any changes would be considered except the pressure-group type
embodied in amendments to expand the exclusion of agricultural processing
workers.\(^{16}\) And in October the newspaper was still complaining that the hours
provision “brought under the act the overwhelming mass of all workers.”\(^{17}\) The

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\(^{14}\)See below ch. 12; Marc Linder, “From Street Urchins to Little Merchants: The
Juridical Transvaluation of Child Newspaper Carriers,” *Temple LR* 63:829-64, at 845-49

\(^{15}\)“Mr. Andrews Changes His Mind,” *NYT*, July 22, 1939 (14:2).

\(^{16}\)“Amending the Wage-Hour Bill,” *NYT*, Apr. 12, 1940 (18:2-3) (editorial).

\(^{17}\)“Wage-Hour Rulings,” *NYT*, Oct. 16, 1940 (22: 3). The original FLSA bill reflected
the interpretation favored by the *Times*, but that language failed to survive enactment: “it
shall be the policy of the Board to establish such minimum wage standards as will affect
only those employees in need of legislative protection without interfering with the volun-
tary establishment of appropriate differentials and higher standards for other employees
in the occupation to which such standards relate.” S. 2475, § 12(6) (75th Cong., 1st Sess.,

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New York Herald Tribune agreed that Congress intended to apply the act "only to sweatshop labor incapable of effecting through organization proper standards of its own devising."  

Not coincidentally, the claim that the FLSA was designed to protect only "marginal labor" was coupled with undisguised hostility toward the statute altogether. Thus the Times repeatedly raised the issue of whether minimum wage regulation was the proper province of the federal government and would not be better left to the states. Since the whole point of federal intervention was to avoid a competitive race to the bottom and to act on behalf of workers in (especially southern) states whose legislatures would never enact any minimum wage legislation for men, the newspaper's argument made little sense that devolution to the states would terminate "the effort to force a procrustean uniformity on wage rates throughout the nation regardless of great differences in local conditions."

The Herald Tribune's call for repeal or devolution to the states was more concrete and incendiary and more accurately reflected non-sweatshop employers' impatience with a statute they had not realized would cost them anything. Though designed to "prevent sweatshop conditions in the so-called marginal trades," the law had been interpreted by the WHD in such a "fantastic" manner as to "govern all industry, marginal or other...." The editors illustrated what they viewed as the Division's perverse enforcement policy by reference to a test case it had brought against a commercial building owner in New York City, which paid, pursuant to a union contract, its building service employees an average weekly wage of $29, "far above the minimum required" by the law, for a 48-hour week. Since the FLSA at the time set 42 hours as the threshold for overtime premiums, the WHD demanded back overtime wages: "to blazes with the fact that these toilers are not engaged in a marginal industry, that by collective bargaining they have made their own terms...." As written and administered, the FLSA, in the Herald Tribune's view, would soon rival the NLRA in its destruction of free enterprise.

May 24, 1937).


19"Amending the Wage-Hour Law," NYT, Apr. 12, 1940 (18:2,3). Even the Washington Post, which did not promote devolution to the states, agreed editorially that a "great mistake was made initially in providing for comprehensive coverage of industries in all parts of the country. The establishment of uniform minimum-wage rates and maximum-hour standards was likewise a blunder." It therefore urged revisions aimed at a "more workable and less rigid" law. "The Barden Bill," WP, Apr. 18, 1940, reprinted in CR 86:2202, 2203 (App.) (1940).

20"Wage-Hour Absurdities."
Abortive Statutory Amendments to Exclude Even More White-Collar Workers

Seventy-Sixth Congress First Session: 1939

A major sore point, partly administrative, partly legal in origin, is the illiberality of exemptions from overtime provisions for persons in executive, administrative or professional positions.21

With the law barely in effect and despite the WHA’s “Christmas gift” to the first violators—Andrews had postponed prosecutions until after the holidays22—the Republicans’ “stunning gains” at the November 1938 congressional elections and the strengthened position of anti-New Deal conservative Democrats23 galvanized pro-employer efforts to seek regulatory or statutory changes, which their diluted strength made it more difficult for labor’s supporters to resist.24 By the end of November, Georgia Democratic Representative Robert Ramspeck—a southerner who had supported the FLSA during the Seventy-Fifth Congress—criticized the hours provisions as inflexible and “suggested that it might be advisable to exempt all persons in higher wage brackets.” He recommended that the House Labor Committee review the FLSA to determine where the line should be drawn.25 A week later, Representative Fred Hartley (who in 1947 gained abiding notoriety for his role in radically amending the National Labor Relations Act) told the Toy Manufacturers’ annual convention that he would urge amending the FLSA to “eliminate the provisions on hours...on the ground that the hours regulations have an ‘adverse effect upon salaried employees.”26 A few days later, The New York Times reported that on his cross-country tour Andrews had heard employers frequently refer to the overtime provision and “not understand why men who might be earning as much as $300 a week should receive time-and-a-half pay after forty-four hours of work in a week.... ‘Business men...see no reason why the men in the higher range of income should be classed with those who punch the time clock....

21Kelty, “‘Fair’ Labor Standards in Name Only” at 24.
24Even before the FLSA went into effect, the AFL had declared that it intended to seek perfecting amendments during the 1939 congressional session. “Andrews Sworn in on Wage-Hour Job,” NYT, Aug. 17, 1938 (5:3). It is unclear what the AFL had in mind.
26“Toy Makers Seek Spread in Orders,” NYT, Dec. 9, 1938 (38:1).
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They say that these men can go fishing when they like and have other advantages.’’ The amendment that employers had most frequently proposed to him was that “salaried employees guaranteed $150 a week or more and who have vacations with pay should be excluded from the overtime provisions....” The intensity of employers’ objections sufficed to prompt Andrews to conclude that they “may lead to a suggestion to Congress’ that employees be classified by income.”27 (The following day it was reported that the figure Andrews had heard on his trip was $150 per month, not per week.)28 Andrews also recounted at his first press conference following that trip that businessmen also wondered why “a fellow not actually an executive or a professional, but perhaps engaged to the Boss’ sister” should be treated like time-clock punchers. He went on to state in answer to a question as to whether “this question of executive, professional, etc. needs Congressional clarification” that he “wouldn’t say that,” but that “there may be a certain salaried group—let’s take a man, suppose the Act provided that a man would have a guaranteed monthly income of $150 or $200; it might perhaps be a simplification to say that that class [of] worker might be excluded from the benefits of the Act if it could be written very definitely into the Act that that was a guaranteed monthly sum, and the man would not be docked, would be given a vacation with pay.” Andrews also clarified that he meant “the higher salaried people who still don’t come under executives....”29

With momentum for revision developing, the WHA announced at the end of December that he was “inclined to favor exempting” “permanent and comparatively well-paid workers...earning $300 to $400 a month...if it could be done ‘without causing any harm.’” The harm Andrews had in mind was clear: “‘Certainly no class of workers needs the protection of this law more than the low-paid white-collar group.... But I am talking about the worker with a guaranteed monthly wage of $300 to $400 a month who has a certain amount of discretion and who does not have to punch a time clock.’” Andrews, who expressed the hope that a regulatory rather than a legislative solution could be found, announced that he had asked his legal staff to “determine whether well-paid groups...might be exempted from the overtime provisions by amending the definition of ‘administrative’ and ‘executive’ employees.” If it was found that the definitions were too narrow, excluding many who should have been covered (i.e., by the exclusion), he might hold hearings.30

29“Proposal to Amend FLSA to Exempt Salaried Aides,” WHR 1:410 (Dec. 19, 1938).
30“May Ease Wage Act on Well-Paid Jobs,” NYT, Dec. 23, 1938 (40:4-5). See also the account of Andrews’ speech at the Brookings Institution and a press conference on
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In his statutorily required report to Congress\(^\text{31}\) in mid-January 1939 Andrews reviewed under the heading “Administrative Problems”\(^\text{32}\) a “problem on which sufficient evidence has not yet come to hand to permit a comprehensive discussion but which has been of great interest to employers throughout the country...the application of the statute to certain high-salaried employees who receive, say, $400 a month or more.” Although he professed that he had defined the three white-collar terms, “after careful...consultation with employers and employees, in a manner which is consistent with...definitions of similar terms in State Legislation,” some employers had contended “that certain employees who do not fall within these categories of administrative and executive or professional as defined are, nevertheless, paid rather high salaries and are engaged steadily in work which is of a very responsible nature.”\(^\text{33}\) Because neither the number of such employees nor the extent to which the overtime provision might impose changes on firms’ personnel policies was known, Andrews had asked all interested employers “to furnish a detailed description of the nature of their individual problems and suggestions for action which might be taken for meeting this general situation.” Without ever identifying the “problem” inherent in regulating the overtime work and pay of relatively well-paid non-bosses, Andrews informed Congress that after sufficient material had been submitted to clarify the situation, it might be possible to present a definite recommendation. Nevertheless, he advised the legislature that “all parties” had agreed that, in connection with any contemplated statutory amend-

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\(^{32}\)Interim Report of the Administrator of the Wage and Hour Division For the Period August 15 to December 31, 1938, at IV-1 (Jan. 1939). The cover page of the typed report carried a press embargo date of January 16, 1939.

\(^{33}\)Interim Report of the Administrator of the Wage and Hour Division For the Period August 15 to December 31, 1938, at IV-7-IV-8. Andrews’ contention that his definitions were consistent with those in state legislation was somewhat misleading. Between March 1935 and the introduction of the FLSA bill in May 1937, only Arkansas, Ohio, and Colorado had used “executive” in their hours laws; while the FLSA was being debated, Pennsylvania and South Carolina excluded them and learned professions as well. The language in the Arkansas statute was taken from an NRA interpretation and the Ohio derived either from the same document or the Arkansas law. Their statutory definition of “executive” (“bona fide executive positions where real supervisory and managerial authority are exercised with duties and discretion entirely different from that of regular salaried employees”) was consistent with the WHD’s. See above ch. 6. However, none of the state statutes used, let alone defined, “administrative” employee.
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ments, "any line of demarcation placing these high-salaried employees into a separate category for special treatment would have to be drawn very carefully in order not to diminish the protection which the Act now furnishes to the vast majority of clerical employees."\(^{34}\)

Then in late January 1939 Andrews announced that he would schedule regulatory hearings within a few weeks. However, the momentum receded again in February, when he stated that he was putting off the scheduling because he interpreted a lack of interest in the hearings as an absence of any need for the exemption of high-salaried employees.\(^ {35}\)

In the meantime, employers, and especially the National Association of Manufacturers, which had been campaigning against the applicability of the FLSA's overtime provision to non-minimum-wage workers since the law went into effect,\(^ {36}\) began focusing specifically on white-collar employees. NAM's general counsel, John Gall, argued in an address to the Pennsylvania State Chamber of Commerce on February 16 that if administrative interpretations of the FLSA were sustained by courts, important congressional changes in the act would be needed:

[T]here should be exempt from the overtime provisions of the law all office, clerical, supervisory and technical employees being paid on a full-time salary basis of over a certain amount. Obviously if the purpose of the law is to protect the under-privileged, that can be accomplished without regulating the hours and overtime compensation of those receiving satisfactory compensation on a salary basis. ... Consideration should be given to the averaging of work hours over longer periods. ... It is questionable whether there is any necessity for fixing the maximum work week at less than 44 hours. It has a definite tendency to encourage decreases in employment and the substitution of technological improvements in order to avoid the payment of overtime rates. Impartial studies indicate that even on a 44-hour basis we would not produce the goods necessary to sustain and improve our material standard of living. Certainly there can be no basis from the standpoint of health for reducing the maximum work week below 44 hours.\(^ {37}\)

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\(^{34}\) Interim Report of the Administrator of the Wage and Hour Division For the Period August 15 to December 31, 1938, at IV-8.

\(^{35}\) "Salaried Employees," WHR 2:104 (Feb. 20, 1939).

\(^{36}\) Marc Linder, The Autocratically Flexible Workplace: A History of Overtime Regulation in the United States 263-78 (2002). Similarly, during his first Senate campaign a few months after the FLSA had been passed, Robert Taft supported a minimum wage law, but opposed national regulation of working hours. James Patterson, Mr. Republican: A Biography of Robert A. Taft 175 (1972).

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Based on the initial experience with the FLSA, the NAM also developed a list of grievances pertaining to the economic effects of the white-collar regulations. Its secretary and economist, Noel Sargent, itemized these complaints in an issue of Law and Contemporary Problems, a prestigious scholarly law journal, dedicated to the new wage and hour law:

(1) The Act has resulted in forcing payment of overtime to clerical and office workers who customarily work relatively short hours, and have steady employment, but occasionally must work longer hours, as in getting out reports and audits. Many covered employees should, as a matter of fact, be excluded. ...

(2) The Act has resulted in increased use of time-clocks in industrial offices, a tendency which is both resisted and regretted by many leading personnel experts. ...

(4) The Act has prevented technical workers from working voluntarily weekends or evenings in order to increase their knowledge and efficiency; practically every large company has many cases of this kind.

(5) Many companies who have paid certain groups of workers on a weekly, or even monthly, basis are being compelled to employ them on an hourly basis; this is resented by the employees.

Five days after Gall’s speech, a radical amendatory bill was introduced in the House by Georgia Democrat Edward Eugene Cox, a racist and “bitter foe” of the New Deal who opposed the FLSA and by 1939 was “the real boss of the powerful House Rules Committee.” It would have excluded, regardless of salary level, “any clerical employees, such as bookkeepers, stenographers, pay-roll clerks, auditors, cost accountants, purchasing agents, statisticians, or other office help regularly employed on a straight salary basis and given vacations with pay.” A week later, Texas Democrat Albert Thomas—who opined that “‘[t]he primary purpose of the act is to eliminate the sweat shop and child labor.... When you get away from those objectives your get away from the purpose of the act’”—introduced a bill in the House that would have excluded “clerical employees, such as bookkeepers,

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38N.A.M. Secretary Retiring,” NYT, May 31, 1955 (37:3).
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auditors, statisticians, and all other office help," as well as writers and reporters, “all of whom are employed on an annual salary of $1,200 or more, with paid annual vacations, with no deductions in pay for reasonable sick leave." Then on March 31 Arkansas Democrat John Miller introduced a bill in the Senate containing language virtually identical to Cox’s.

At the beginning of March, Andrews, once again, stated that he favored settling the problem of the FLSA’s application to “high-salaried ‘white collar’ workers” by legislative amendment rather than administratively because Congress could deal with the problem “in a more clean-cut way by amendment of the statute than would be possible for me by administrative amendment of our definitions.” Consequently, instead of the administrative hearing that he had originally contemplated, he was weighing the alternative of proposing to Congress the consideration of an amendment. Despite being garbled in the Times report, Andrews’ concern clearly focused on the WHD’s failure to exclude non-supervisory administrative employees: “The main issue appeared to be whether the ‘white collar’ workers in question had sufficient administrative responsibility to allow the overtime exemptions to apply to them.” Nevertheless, House Labor Committee chairman Mary Norton had no plans for holding a hearing; in the meantime she was waiting to hear from Andrews as to whether he could adjust matters administratively or preferred legislation.

Even at this early stage in the legislative process white-collar workers began expressing intense concern about the WHA’s acquiescence in employers’ demands for more extensive exclusions. On March 13, the General Aniline Employees’ Organization of New Jersey sent a letter, accompanied by a petition signed by 600 members, to their senator, William Barbour, who caused it to be printed in the Congressional Record. The employees, who may have been unaware that Andrews had mentioned salary floors in excess of the one they recommended, wrote:

The Federal wage and hour law was designed to protect all workers, including so-called “white collar” or salaried men, against excessive working hours without adequate compensation and to spread employment.

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45H.R. 4645 (76th Cong., 1st Sess., Mar. 1, 1939). The bill’s unorthodox wording converted the salary clause, which was presumably intended as a condition, into an empirically false description.

46S. 2022 (76th Cong., 1st Sess., Mar. 31, 1939). The white-collar amendment was section 1 of a longer FLSA bill, whereas Cox’s bill consisted only of this section.

47“Andrews Favors Wage-Hour Change,” NYT, Mar. 3, 1939 (19:3). Andrews said that although the American Newspaper Guild and the publishers held opposing views on the inclusion of reporters, since neither had asked for a ruling, there had been no decision.
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It is the announced intention of Administrator Elmer Andrews to ask Congress to amend the law to exempt "white collar" workers from its provisions, and a bill has already been introduced by Representative Thomas of Texas to exempt all "white collar" workers earning $1,200 or more annually and [sic] which is aimed specifically at the exemption of all office workers. This bill would destroy the design and intent of the law.

Therefore, we, the undersigned "white collar" workers (salaried)...and nonmembers of the salaried group of this organization advise you of our firm conviction that any bill to amend the wage-hour law to exempt "white collar" men should specifically apply only to those earning $2,500 or more annually and that no amendments should be adopted to defeat the ultimate object of the law to standardize the workweek at 40 hours.48

Although the workers did not anticipate that their own employer would try to take advantage of any FLSA changes "to extend the regular workweek for salaried workers without compensation," they did recognize that it might "be compelled to do so" if its competitors did.49 (Ironically, General Aniline Works, Inc., was a subsidiary of the powerful German chemical oligopoly, I.G. Farben, which in October 1939 had the subsidiary change its name to General Aniline and Film Corporation, which I.G. Farben then adopted as its U.S. name in order to avoid anti-German "prejudice"; after Germany declared war on the United States, the federal government seized the firm.)50

By mid-March, Andrews was able to rely on a WHD background memorandum on "High Salaried Employees" supporting his proposed legislative amendment.51 The memo, which expressed the belief that the salary level for the

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49CR 84:2803.
50“Chemical Unit Changes Name,” NYT, Oct. 31, 1939 (40:2).
51Memo. on High Salaried Employees, in NA, RG 174--Dept of Labor, Records of Chas. McLaughlin, Location: 530, 48:44:5/Box 9--As Tabbed. The overall memorandum was untitled, but dealt with the proposed legislative amendments, which were also appended in draft bill form. Only the first four and a half pages of the 15-page memo bore the title “High Salaried Employees.” The exact provenance of the memo is unclear. The copy in the National Archives was attached to a note (on DOL letterhead), dated March 17, 1939, from Miss [Mary] LaDame, who was special assistant to Secretary Perkins, to Mr.[Charles V.] McLaughlin, who as Assistant Secretary of Labor was the second-highest ranking DOL official: “As a result of your inquiry yesterday, I telephoned Mr. Andrews for a copy of the proposed amendment to the Fair Labor Standards Act. He had left, but Miss Pope, his assistant, said she would send me down material. The attached has come. If you need other copies, I suggest you contact Miss Pope.” Attached was also “A Bill To amend the ‘Fair Labor Standards Act of 1938,’” which resembled, but was not identical with, the bill that Norton introduced on March 29. In particular, it left blank the salary level in the revision of the white-collar exclusion. § 4 at 3. Andrews promptly passed the
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blanket exclusion of employees with a guaranteed salary "should be not more than $250 and not less than $200," pointed out that the existing exemption applied to employees "who have duties involving a combination of management, direction and discretion" and a salary of at least $30 a week. It then went on to explain why employers were dissatisfied with the scope of that exclusion, although it also seemed to place the WHD's imprimatur on these complaints:

There are...many employees in the higher salaried group, whose functions are not clearly managerial or supervisory, to which this exemption is not applicable. The inclusion under the Act of this class of employee has given rise to many administrative problems and numerous protests from employers. ... In some cases, a few responsible but non-supervisory salaried workers are required to fit their hours of work to the varied requirements of business. During emergencies they may work for very long hours, while during slack periods they may feel free to leave early or be absent altogether without regard to standard working periods. If such responsible workers are guaranteed relatively high earnings, regardless of their exact working hours, the requirement that they be paid at overtime rates during the period of long hours may be an annoyance to all persons concerned, without contributing to any of the purposes which the Act was designed to achieve.52

Having accepted at face value, without any representative and independently gathered evidence, employers' claims that such workers did not systematically work long hours all year round, the WHD was, in effect, condoning the very hours-averaging that the NRA had condemned and finally prohibited in new codes because it drastically impeded transparency and labor standards enforcement.53 Without explaining why levels of responsibility should play any part in determining an entitlement to protection against overwork—after all, it is conceivable that great responsibility was accompanied by debilitating nervous tension—the memo went on to argue that § 13(a)(1) "does not meet the situation of high-salaried workers whose work is responsible and whose hours are flexible,"54 but who were neither managers, supervisors, nor professionals. Unfortunately, a dysfunctional tension and perhaps even contradiction could be discerned as resulting from any attempt to propitiate employers by revising the regulatory definitions, which did

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52Memo. on High Salaried Employees at 1.
53See above ch. 7.
54Memo. on High Salaried Employees at 2.
not appear to offer a satisfactory solution. Among the types of employees as to whom it
is most frequently urged that subjecting them to a time clock is irritating and undesirable
and [sic; must be "are"] private secretaries, executive assistants, cashiers, buyers, and, in
general, higher paid clerical workers. Any form of description, used in an administrative
definition, which would exempt such persons would also probably exempt the great mass
of clerical workers or else the definition would be impossible to interpret in any given
case. Thus, a relaxation of the existing definition might seriously undermine the broad
coverage of the Act intended by the Congress.\(^{55}\)

To be sure, the incumbents of several of the named occupational groups hardly
appeared to be ones who could come and go as they pleased at the workplace. Not
only did work-spreading appear plausibly applicable to them, but the WHD offered
no evidence whatsoever that, unlike other workers, they were not harmed by long
hours.

To undergird empirically the claim of the "importance of retaining the mass
of clerical workers under the Act," the memo referred to results of recent censuses
in Michigan and Pennsylvania: Half of 247,000 male and female clerical workers
in Michigan earned less than $1,000 in 1934; among 150,000 clerical workers in
Pennsylvania, 42 percent earned less than $17.50 per week in February 1934 in
contrast with 56 percent of 73,000 female clerical workers. Since salaries in those
two states were somewhat above the national average, it was "clear that a large
proportion of all clerical workers earn less than the ultimate standard of $16.00 per
week" under the FLSA.\(^{56}\) Against this distributional background, the memo then
sought to justify a monthly salary cut-off in the range of $200 to $250:

It is well known that the hours of work of many thousands of clerical employees are
far in excess of the maximum hours standard set by the Act. Indeed, it may be said that
the benefits of the hours provisions of the Act are as necessary and as beneficial to the
ordinary clerical workers as to almost any other class of employees subject to the Act.
By amending the Act to exempt all regular salaried workers who are guaranteed more
than a stated salary, it should be possible to keep the mass of clerical workers under the
Act while avoiding the unnecessary avoidance of applying the Act to high-salaried persons
with regular income but irregular hours. An exemption on the basis of monthly salary
should also be satisfactory to those who are asking for an exemption of higher-salaried
workers, as such class of employees are generally employed, or can easily be employed,
on a monthly basis.

An amendment to exempt salaried workers who earn more than a stated salary each
month will afford the Administrator more time to concentrate on the problem of raising the
wages and improving the hours and other conditions of exploited workers. The reasons

\(^{55}\)Memo. on High Salaried Employees at 2.
\(^{56}\)Memo. on High Salaried Employees at 2.
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which dictated the enactment of Federal minimum wage and maximum hour standards for lower-paid workers are inapplicable to these higher-salaried employees. Their health and efficiency are seldom jeopardized by poor working conditions and the conditions of their employment do not lead to labor disputes or constitute a burden or obstruction to interstate commerce.57

Ominously, the memorandum thus embraced the basis of employers’ attack on the application of overtime regulation to higher-salaried workers. Why long hours did not impair the health of higher-paid white-collar workers, however, the memo did not explain; it failed even to raise the issue of work-spreading. But it did try to explain how it had calibrated the salary level:

A guaranteed monthly salary of either $200 or $250 would be a satisfactory basis of exemption from the Act. A lower figure than $200 would undoubtedly exempt a considerable number of salaried workers to whom the overtime benefits of the Act should extend. Exemption of all salaried workers who receive $200 or more or $250 or more a month would exclude from the Act...a considerable proportion of those whose work requires flexibility of weekly hours and whose salaries are commensurate with their responsibility.58

Precise data on the proportion of workers who would be excluded by these thresholds were fragmentary, but estimates could be based on the aforementioned data for Pennsylvania, where $200 would have exempted less than 3 percent of non-executive, non-professional clerical workers, while less than 1 percent would have been excluded by a $250 salary. Disaggregated by gender, the $200 cut-off would have applied to 5 percent of male clerical workers, but less than 0.5 percent of females; $250 would have excluded less than 1 percent of males. Broken down by occupation, $200 would have exempted nearly one-third of male secretaries, but less than one-twentieth of male stenographers, less than 2 percent of female secretaries and hardly any female stenographers. Among males, the following proportions would have been exempted at $200/$250: one-fifth/one-tenth of accountants; one-thirtieth/one one-hundredth of bookkeepers; one-fourth/one-seventh of cashiers; one-tenth/one-thirtieth of tellers; one-fourth/one-seventh of editors-authors-reporters; and one-eighth/one-fiftieth of proofreaders.59 The memorandum therefore concluded that the foregoing data appeared “to justify an exemption of salaried workers who regularly earn $200 per month or more.”60

57Memo. on High Salaried Employees at 3.
58Memo. on High Salaried Employees at 3.
59Memo. on High Salaried Employees at 4.
60Memo. on High Salaried Employees at 5.
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The vital point about this exclusively salary-level-oriented approach is that the WHD recognized the exclusionary dangers inherent in the alternative of trying to reconceptualize the category of “administrative” employees. Because the Division and Andrews were acutely aware of the linguistic difficulties, if not impossibility, of surgically segregating out the subgroups that they believed deserved protection, they chose to draw the line according to income alone; this criterion was almost preordained to attain monopoly status since the WHA appeared tacitly to dismiss work-spreading and protection from the harms of long hours as operative concerns for higher-salaried office workers. Whatever the failings of this approach as sociology of work, at least its adherents recognized that once they began excluding non-boss administrative employees, they ran the risk of exposing run-of-the-mill clerical workers to the kind of employer overreaching that they divined Congress had been seeking to suppress. In contrast, when, the following year, the WHD plunged into writing duties tests to identify the administrative employees who could safely be left to their own devices, it abandoned these earlier self-doubts—despite the fact that by also adopting the same $200-a-month salary level, it theoretically made misclassification less probable.61

After an executive session of the House Labor Committee on March 15, Andrews announced that he was prepared to recommend several amendments, including exemption from the overtime provision of all salaried employees with salaries in excess of $200 or $250 per month. House Labor Committee chairman Mary Norton, who regarded the FLSA as one of her greatest achievements and was personally opposed to opening the statute to the amending process, stated that she was drafting an omnibus FLSA amendment bill embodying the proposals offered by Andrews and others to create a basis of discussion; at the same time, she was reluctant to let a bill go to the House floor where she feared that more radical changes might emasculate it.62 However, Norton displayed no reluctance whatever to amend one aspect of the FLSA:

“Take for instance, the inclusion under the hours provisions of the so-called white-

61See below ch. 12.
62“Eight Changes for FLSA,” WHR 2:147, 148 (1939); “House Group Talks Wage Law Change,” NYT, Mar. 16, 1939 (7:4). In spite of Norton’s view of her relationship to the FLSA, just days after she became chairman in the wake of William Connery’s death, “Mrs. Norton indicated that her personal opinion of the matter is that wage and hour legislation is unnecessary....” “Senate Group Due to Take Vote Today on Wage, Hour Bill,” JC, July 8, 1937 (1:6). Based on archival correspondence, Landon Storrs, Civilizing Capitalism: The National Consumers’ League, Women’s Activism, and Labor Standards in the New Deal Era 334 n.26 (2000), also found that in 1937 Norton had “actually opposed the wage-hour bill and only supported it under heavy pressure from FDR.”
collar workers, regardless of the wages or salaries they receive. Who thinks the Congress intended that white-collar workers receiving $2,000 or $2,400 a year be covered into [sic] this law. I don't think so and I know it didn't.

"When an office or other worker commands a salary of $2,000 or $2,400 a year, he should not be compelled to demand overtime at time-and-one-half pay if the exigencies of his work require him to remain on the job more than the allotted 44 hours.... On the contrary, he should expect to have to work overtime sometimes."\(^{63}\)

Norton added that a majority of her committee favored a $2,000 white-collar exemption threshold, while the next day Andrews said that a $200 per month threshold might be too low, declaring his preference for a $3,000 annual threshold for salaried employees, a level familiar from the Social Security Act. Nevertheless, at a press conference on March 16 he said that it was likely that the House Labor Committee would recommend a salary threshold of not less than $200—which he thought might be too low—as well as an amendment permitting employers to average 44-hour workweeks over a month.\(^{64}\)

After meeting with President Roosevelt on March 29, Norton filed the omnibus FLSA amendments bill (H.R. 5435) excluding from the overtime provision "any employee employed in a bona fide executive, administrative, professional...capacity...or on a monthly basis at a guaranteed monthly salary of $200 or more...."\(^{65}\) On the House floor that day Norton briefly explained the purpose of her proposed amendments as rectifying the inevitable "slight defects" in a "well-intentioned" law of tremendous scope: "We wrote and passed a law...so that business would not be disturbed. ... The practical application of the law has disclosed some situations where its rigid application causes undue hardship. This disturbance has tended to create hardships on employers, reduce employment, and in general dislocate the flow of business in a particular industry."\(^{66}\) Continuing in the same vein as with her comments two weeks earlier, Norton revealed an astonishing willingness to preempt the FLSA's opponents by emasculating the applicability of the Act's overtime provision to white-collar workers herself:

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\(^{63}\)"Eight Changes for FLSA" at 148.

\(^{64}\)"Eight Changes for FLSA" at 148; "Wages-Hours Law Due to Be Changed," \textit{NYT}, Mar. 17, 1939 (36:6). The $3,000 taxable limit on employees' compensation under the old-age pension provision of the Social Security Act was not limited to salaries; later in 1939 it was also extended to the federal Unemployment Insurance payroll tax. See above ch. 6.


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A good deal of the objection to the Fair Labor Standards Act comes from its application to so-called “white-collar” workers—men and women engaged in work not of a clearly administrative or executive nature but which frequently requires overtime work. In the case of bookkeepers, private secretaries, and so forth, high salaried office workers in the main, it is felt that the application of the law works great hardship both on the employers and employees. In many instances employees such as those described actually work in a quasi-executive capacity and it is utterly impossible to regulate their hours of work. I feel that a salary of $200 a month should protect a worker against exploitation and therefore I am proposing to exempt all employees receiving that salary or more from the hours provisions of the act by amending section 13 (a) to include all persons on a guaranteed monthly salary of $200 a month or more.67

Manifestly, Norton must have been informed of employers’ displeasure with the DOL’s failure to issue a separate regulation for non-supervisory administrative employees, but she appeared not to have grasped the real thrust of their complaints. Instead (presumably misled by the caricature of the bona fide administrative employee implanted by the aforementioned WHD memorandum), she focused on rather lowly bookkeepers and private secretaries, bizarrely characterizing them as high-salaried, quasi-executive employees, whose working hours could not possibly be regulated and who themselves were burdened by their entitlement to overtime pay. Unable to finesse the duties tests to identify those in need of protection, she, too, decided to rely exclusively on the $200 salary level, thus totally abandoning both the work-spreading and leisure-creating purposes of the FLSA for the newly excluded workers.

The decision by Andrews and Norton to acquiesce in employers’ demands for exclusions of non-executive office workers—an “appeasement’ policy” that the Communist Party in due course attacked as having “opened the way for more sweeping” amendments68—was at odds with the Report of the Committee on State Wage and Hour Legislation that the National Conference on Labor Legislation had adopted just a few months earlier: Taking as its point of departure recognition of “the growing opinion that the benefits derived from labor legislation should be made applicable to all workers without exception, as rapidly as possible,”69 it had submitted as its suggested language for the State Wage and Hour Bill: “Em-

67 CR 84:3499. Inflation-adjusted, $200 in 1940 was the equivalent of $2,700.00 a month or $32,520 a year in August 2004.


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ployee...shall not include any individual employed...in a bona fide executive or professional capacity.... This omission of administrative employees from coverage also characterized the AFL’s model state minimum wage and overtime bill.

Norton’s willingness to downplay work-spreading also demonstrated why labor deemed her lacking stellar pro-labor or, at least, pro-CIO credentials: just a few months earlier, at the CIO’s First Constitutional Convention, its chairman, John L. Lewis, in his report had declared: “[I]f maximum hour and minimum wage machinery is to seriously affect and aid the unemployment situation the maximum number of hours to be worked must be lowered considerably as against the present provisions of the Wage-Hour legislation. ... It will be essential for organized labor to press for more drastic maximum hour legislation in order to really meet the serious economic problems which confront us in the country today.” The convention then adopted a resolution that statutory maximum hours should be reduced.

Even a WHD acting area director had advised the Southern States Industrial Council’s annual convention in November 1938 that, although the FLSA “is moderate in the extreme” in the sense that it “does not even satisfy that perennial demand of labor—the 8-hour day”: “We doubt that Congress intended such a thing as regular overtime work except where the peculiar and unusual nature of the work performed by an employee necessitated a longer workweek. Is there not something of the paradox in ‘regular overtime work’?” Earle Dahlberg warned the SSIC’s members that Congress wanted to put more people back to work, but “if the extra

71“State Wage and Hour Legislation,” AF, 46(1):78-81 at 79 (Jan. 1939). In addition to those employed in a bona fide executive or professional capacity, it also excluded agricultural and domestic workers and federal and state government employees. The model state wage and hour bill adopted by the CIO was practically like that drafted by Secretary of Labor’s committee, the only real difference being that CIO draft did not exclude professional or domestic workers. Louise Stitt, “State Fair Labor Standards Legislation,” LCP 6(3):454-63, at 458 (Summer 1939).
74Proceedings of the First Constitutional Convention of the Congress of Industrial Organizations at 254-56. Another convention resolution covered the subject matter of a resolution submitted by the UOPWA to the effect that unemployment among clerical, professional, and technical employees had increased sharply within the past year and that adequate consideration be given to this fact in allocating WPA projects. Id. at 283-4.

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work is taken up by longer hours rather than spreading the work, I do not believe that Congress will fail to meet the challenge.” He did not rule out the possibility that the ultimate congressional reaction would be enactment of a 30-hour law.75

On March 30, the day after Norton had introduced H.R. 5435, Utah Democrat Elbert Thomas, chairman of the Senate Education and Labor Committee, introduced a bill with identical wording.76 Then on March 31 the WHA endorsed the $200 figure, writing Norton that it would “greatly improve” the law’s administration. However, at the same time he advised against a lower threshold on the grounds that it would affect a considerable number of workers “to whom the overtime provisions should be extended.”77

The new industrial unions’ umbrella organization, the CIO, immediately protested the pro-employer bias of the bill as a whole. The elimination of overtime protection for salaried workers was, in its view, objectionable both because the FLSA already excluded so many of these employees and because even those earning more than $200 monthly needed and deserved legal protection.78 CIO leaders also criticized the Norton-Andrews amendments for the danger to which they exposed the FLSA “of more serious amendments being tacked on to the bill by representatives of the sweat-shoppers.”79

In spite of the House Labor Committee’s approval of the Norton bill, the chief white-collar unions affiliated with the CIO, the American Newspaper Guild, the Federation of Architects, Engineers, Chemists and Technicians, and the United Office and Professional Workers of America80 sought to retain and extend benefits to white-collar workers under the FLSA. A representative of each of these three unions held a special conference with Norton and Andrews to recommend reinforcement of the CIO position on the FLSA amendments. Although the House

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75 "The Fair Labor Standards Act of 1938": Address by Earle W. Dahlberg, Acting Director, Area No. II, Wage-Hour Division, United States Department of Labor, Sixth Annual Meeting, Southern States Industrial Council, Atlanta, Georgia, November 29, 1938, at 7, 8, 9.
80 The FAECT was the first white-collar union to affiliate with the CIO, which a few days later chartered the UOPWA, with which the FAECT merged after World War II. “Technicians Join C.I.O.,” NYT, May 28, 1937 (10:5-6); “FAECT-UOPWA Merger Completed New Technical Division Set Up,” OPN, 13(4).2:1-5 (Apr 1946).
Labor Committee did defeat a number of other proposals, including the Cox and Thomas bills, strongly opposed by the UOPWA and CIO, which would have eliminated all white-collar workers, according to the UOPWA: “One of the factors preventing elimination of the ‘white-collar’ amendment was the contention of the AFL that they were ‘reasonable.’” The Norton bill had the Roosevelt administration’s support, but it contained “many objectionable features which outweigh its advantages,” the provision entirely excluding employees on a guaranteed $200 monthly salary having been “particularly objectionable” to the UOPWA.81

Nevertheless, Andrews, in an address to the Council for Social Progress in Philadelphia on April 5, insisted that the amendatory proposals worked out collaboratively between the WHD and the House Labor Committee would “not weaken the law in any essential particular, but on the contrary will...provide needed flexibility....” Specifically with regard to the exclusion of all employees with a guaranteed monthly salary of $200 or more Andrews explained that: “One of the major complaints of both employers and employees has resulted from the application of the overtime provisions to employees requiring flexibility in working time.”82 Similarly, President Roosevelt, asked about Norton’s amendments at his press conference on April 18, replied that he had not seen them, but that “the general line-up by Elmer Andrews seems to be all right. That is, the objective.”83

Norton’s Labor Committee reported out her bill (H. R. 5435) on April 27 with slightly revised language that appeared to detach the exclusion from white-collar status altogether. It now excluded “any employee employed in a bona fide executive, administrative, professional...capacity...or any employee employed at a guaranteed monthly salary of $200 or more.”84 The report then justified the amendment on the by now familiar grounds that non-supervisory administrative employees should also be excluded (without Norton’s concrete references to bookkeepers and private secretaries):

Section 13 (a) (1) exempts from both the wage-and-hour provisions any employee employed in an bona fide executive or administrative capacity. There are, however, many employees in the higher-salaried group, whose functions are not clearly managerial or supervisory, to whom this exemption is not applicable, and who, further, are not within the exemption applicable to employees engaged in a professional capacity. The inclusion under the act of this class of employee has given rise to many administrative problems and numerous protests from employers.

While the committee was of the opinion that the hour provisions of the act are as necessary and as beneficial to the ordinary clerical workers as to almost any other class of employees subject to the act, it also believed that they should not include those employees whose work generally requires flexibility in working time and whose salaries are comparatively high. A guaranteed monthly salary of $200 was believed to be a satisfactory basis of exemption from the act. A lower figure than $200 would undoubtedly exempt a considerable number of salaried workers to whom the overtime benefits of the act should extend.85

The Committee had, thus, adopted the arguments of the WHD memorandum without explaining what “flexibility in working time” entailed or even whether excluding those whose work required it was consistent or inconsistent with overtime regulation. To be sure, even the weekly salary level of $50, or four and half times the weekly minimum wage, would have been more protective of alleged executive workers than the $30 that Andrews had incorporated into the regulations.

Passage of the FLSA amendments at this juncture was becoming more complicated by the fact that some employers, led by the Chamber of Commerce of the United States, were making what The New York Times’s conservative columnist Arthur Krock called “the politically impossible (whether or not socially desirable)” proposal for repeal of the FLSA. Krock was constrained to point out that the FLSA had been enacted because some workers were unorganized, miserably paid, and “forced to toil beyond right or reason.” Yet it was also “full of absurdities” and “more protective of workers who did not need it than those who did.” The remedy was modification and change, whereas the Chamber’s demand for repeal merely “unite[s] the President’s general forces and divide[s] those who want a new deal of personnel and method in the government.”86 The Roosevelt administration’s rhetorical counterattack featured the declaration on the Senate floor by “arch-New Dealer” and Democratic whip Sherman Minton that the Chamber of Commerce’s demand for repeal of the FLSA and the NLRA87 showed that “big

86Arthur Krock, “In the Nation: Difficulties of Forming the President’s Opposition,” NYT, 5-5-39 (22:5).
87Turner Catledge, “Business and Government Renew Their Fight,” NYT, May 14,
business was on a sitdown strike to compel this Government to change its liberal policy....\textsuperscript{88} Times columnist Turner Catledge suspected that business leaders seemed "quite willing to risk their chances" with what they perceived as an independent Congress and then with the 1940 general elections, thus leaving it unclear whether they "really plan any serious attempt at making New Deal laws" such as the FLSA "more workable....\textsuperscript{89}

Norton's bill was recommitted to the Labor Committee on May 3,\textsuperscript{90} but on May 11, when she announced that on May 15 she would ask the Speaker to suspend the rules to debate H.R. 5435,\textsuperscript{91} she explained the proposed measure, detailing the expansiveness of the amendment excluding employees employed at a guaranteed monthly salary of $200 or more:

The necessity for this exemption has arisen because under the present act only employees engaged in executive or administrative or professional capacities are exempt by virtue of their positions. It has been found that there are many persons whose work is not clearly administrative or executive but who are high-salaried workers with necessarily flexible hours. Their inclusion has created some hard problems for the Administrator and caused real hardship in many cases. Of course you gentlemen realize there is nothing in this act which limits the application of this exemption to clerical or so-called "white collar" workers. If a ditch digger receives $200 a month he would be similarly exempt under this provision.\textsuperscript{92}

This extension of the exclusion to blue-collar workers was still conditioned on a monthly salary guarantee.

Some Republicans expressed dissatisfaction that the Labor Committee had considered the bill "in closed executive session, and no opportunity was afforded those of us interested in this phase to present testimony or argue our case. And now, we are informed, the bill is to be brought before the House for action under suspension of the rules, which precludes the offering of amendments....\textsuperscript{93}

\textsuperscript{88}CR 84:5492 (May 12, 1939).
\textsuperscript{89}Catledge, "Business and Government Renew Their Fight."
\textsuperscript{90}In this version § 5 reverted back to "or on a monthly basis at a guaranteed salary of $200 or more." H.R. 5435 (76th Cong., 1st Sess., May 3, 1939).
\textsuperscript{91}CR 84:5458 (May 11, 1939).
\textsuperscript{92}CR 84:5459 (May 11, 1939). Norton delivered exactly the same explanation the following year. CR 86:5122 (1940).
\textsuperscript{93}CR 84:5475-76 (May 11, 1939) (George Darrow, Rep. PA, who wanted to exempt wholesale employers from paying overtime for hours 40-44 when the overtime trigger was lowered to 42 and 40 hours). Rep. Ramspeck asserted that Darrow must have
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On Saturday May 13, five national farm organizations, including the American Farm Bureau Federation, sent letters to all House members demanding both defeat of the Norton bill’s FLSA amendments on the (wholly bogus) grounds that they “nullify the agricultural exemptions in existing law” and that her bill be opened to amendments. On May 15, Cox stated on the House floor that he had understood that Norton had stated that if her motion to suspend the rules and pass her committee’s bill was voted down, “she will pocket the resolution and...the House would have no opportunity of taking action on the measure this session.” He then reminded the body that if Norton’s motion were defeated, the Rules Committee had the right to grant a rule for consideration of any bill that had been presented to the House, and if any House member offered a resolution, “the probabilities are that the Rules Committee would grant a rule on the bill which would provide for...the offering of amendments of the bill.” In response to this threat to “invoke a seldom-used parliamentary move,” Norton declared that “because of the...extraordinary misstatements” issued over the weekend and “due to the vicious and unreliable propaganda spread by those who in the first place were opposed to the law, and who would now repeal it if they dared to do so, it has been decided not to call the bill up at this time under suspension of the rules.”

Despite the fact that once she reported the bill she lost control of it—the bill, in Cox’s words, was “now the property of the House”—she also told the House that “only ‘over my dead body’ would the bill be brought to the floor unless it could be protected against its enemies,” but the anti-FLSA bloc “decided...to let matters go for a few days and then ask the Rules Committee for an ‘open rule’....”

Then on May 16, when Norton sought unanimous consent to recommit the bill to the Labor Committee for further consideration, Michigan Republican Roy Woodruff objected on the grounds that he was not satisfied that the House would see the bill again if it went back to the committee. Two days later Norton introduced H.R. 6406, a new vehicle for amending the FLSA, which once again

misunderstood Norton because some members of Congress had appeared at the committee sessions. CR 84:5476. See also CR 84:6550 (June 2, 1939) (Robert Rich, Rep. PA, asked whether a closed debate rule was “the proper way to have good, sound legislation”).

96CR 84:5529-30 (May 15, 1939).
97Dorris, “Map Rules Appeal in Wage Act Fight.”
98CR 84:5537 (May 15, 1939).
99Dorris, “Map Rules Appeal in Wage Act Fight.” The Congressional Record lacks such statements attributed to Norton.
100CR 84:5625 (May 16, 1939).
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included the exclusionary language transcending white-collar workers: “or any employee employed at a guaranteed monthly salary of $200 or more.”

However, that vehicle had not traveled far before Norton on June 5 moved to suspend the House rules and pass H.R. 5435—whose § 5(a) would have amended § 13(a)(1) of the FLSA to read: “any employee employed in a bona fide executive, administrative, professional...capacity...or any employee employed at a guaranteed monthly salary of $200 or more”—but the House defeated it 167 to 110, thus refusing for the second time to permit the kind of limited debate that could not generate amendments that would have threatened to dilute the FLSA in ways unacceptable to Norton. Cox, whose principal concern was excluding from the FLSA as many agricultural processing workers as possible, called the bill “a decoy purely” that “ought to fool no Member of this House.” Cox, who both advocated “drastic amendment” of the FLSA and was also a powerful member of the Rules Committee, insisted that the proposal to open the bill to floor amendments was not dead: “It is to be hoped that in time the Committee on Labor will realize that it is the servant and not the master of the House.” He was sure that the Rules Committee would grant an open rule for debate of the bill, which the Labor Committee could not take back, and that “the House would write the legislation.” Although Norton said that “she would fight ‘to the last ditch’ to prevent the big farm groups writing into the act what she considers too broad exemptions for agricultural [processing] labor,” she apparently did not make such a vow on behalf of clerical workers. She denied that she was “grieving,” but admitted now for the first time that she “felt that we went too far even in these amendments.” Waxing histrionic, Norton declared: “My right eye is no dearer to me than this Act,” which had “brought greater relief to the underprivileged than any other law on the books. President Roosevelt will veto any bill that emasculates the law.”

What Norton wished the public to perceive as her attitude toward the exclusion of even more white-collar workers was presumably captured adequately in a column by the widely syndicated and respected political correspondent Raymond Clapper, which she herself had included in the Congressional Record of June 7, and which resembled very closely her own remarks in March:

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102CR 84:6620 (June 5, 1939).
103CR 84:6621.
104CR 84:6622.
105CR 84:6620.
107“Receding Prospect of FLSA Change,” WHR 2:283 (June 12, 1939).
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High-paid specialized employes, professional brain workers who are judged by results, not by the number of hours worked, were being required to turn in overtime schedules. Employers are required to pay such workers time and a half for overtime. A highly paid advertising writer, for instance, or a writer like myself, has to work without much regard for the clock. Some produce their best copy at night. Some are stale one day and hot the next, when they can produce a prodigious amount of copy.

The employer doesn't care how little or how much such an employee works. He wants results. It is much the same with the employee. Sometimes he sits at his paper for hours or stares through the window. Again he grinds out his work almost off-hand. There is no way for these men to measure their working time because their work is pretty much their life. Anyway, they are paid far above the scales which the Wage and Hour Act was intended to protect.

So the Wage and Hour Administration sought to wipe off this layer of impossible administration by proposing an amendment to eliminate from the scope of the act employees receiving $200 or more a month.108

Two days later Andrews launched his own broadside. In a press release designed to absolve himself of any responsibility for the direction that the congressional process had taken, he noted that in February he had informed the House Labor Committee that he “would be glad to support certain clarifying amendments” that were “all of a noncontroversial character and were generally agreed to and believed to be a desirable improvement of the Act.” Without specifying that these noncontroversial improvements included his proposal to exclude from overtime regulation all workers with monthly salaries in excess of $200, Andrews complained that “[p]owerful lobby groups, who have always been unfriendly to labor have transformed the original Bill into an attempted emasculation” of the FLSA. By this point it had become clear to him that no FLSA bill could be passed in Congress “without opening up the Act generally for revision,” which was inappropriate since seven months of operation had hardly made a conclusive evaluation possible. Denouncing H.R. 5435 with the committee’s proposed amendments as “A Bill to Lower Wages and Establish Longer Hours of Work,” the WHA added that he had been advised that labor’s opponents now intended to permit floor amendments that would, inter alia, exempt all clerical workers. Andrews also expressed the fear that if agricultural packing and canning employers could establish the precedent of excluding large numbers of workers from the FLSA by sheer lobbying pressure “without a factual basis...no worker covered by this Act can long expect to receive its benefits. Such a legislative reward is an invitation to other employer pressure groups to secure a similar exemption for their

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workers." Finally, the Wage and Hour Administrator argued that codifying "intolerably long hours...would handicap labor unions in securing reasonable hours in their collective bargaining agreements." Andrews concluded by exhorting "[e]very workingman in America" to be concerned that the revisions were "being supported by well-financed lobby groups who are hell-bent on taking from clerical and industrial workers the social gains which have been made during the last year."109

Then on June 19 Andrews warned the public in a radio broadcast that the wage-hour law was "in peril" because if opponents succeeded in defeating the closed debate rule, they would try to amend the H.R. 5435 to exempt all clerical workers and warehouse employees.110 At this point in the legislative process, the momentum in favor of excluding a broad swath of white-collar workers from the overtime provision was halted by the complex forces shaping the 1939 amendments, which focused primarily on vastly expanding the scope of agricultural processing exemptions and were driven by southern congressmen. The FLSA amendments proposed by them were too radical for Norton, Andrews, and the Roosevelt administration.111

Employers injected a new quality into their attack on the FLSA on June 22, when Virginia Congressman Howard Smith submitted a resolution asserting that the law had been enacted on behalf of "those groups of laborers who are unorganized," that "many enterprises have found it uneconomical and unprofitable to continue their operations under its [FLSA's] provisions and numerous enterprises...have closed up, causing additional unemployment," and that those charged with administering the act had construed "interstate commerce" to cover minor and local matters not intended by Congress, and proposing a five-member committee to investigate whether the WHD had been "fair and impartial" and had increased or decreased employer-employee disputes or employment, and what amendments were desirable to effectuate Congress's intent.112 Although the House ultimately did not adopt the resolution—it did establish a committee to investigate the NLRB, which created the momentum for the eventual enactment of the Taft-

109US DOL, WHD, Press Release (R-328, June 7, 1939) (copy furnished by Wirtz Labor Library, US DOL). The text of Andrews' statement was also published in "Receding Prospect of FLSA Change," WHR 2:283, 284 (June 12, 1939). To be sure, Andrews' apprehensions concerning exclusions driven by effective employer lobbying appeared rather late in the day given the extensive list of such exclusions that employers had lobbied directly into the original FLSA. FLSA, § 13, 52 Stat. at 1067.


111Paulsen, A Living Wage for the Forgotten Man at 139-43.

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Hartley amendments—it signaled an intensification of the struggle over the FLSA.

This conflict was heightened still further on July 11, when Graham Barden, an extreme anti-labor North Carolina Democrat (who had, however, voted with the 16 to 2 Labor Committee majority to report out H.R. 5435 because it was better than no bill at all), introduced H.R. 7133, which would have excluded from the Act "any employee employed in a bona fide executive, administrative, professional...capacity..., or at a guaranteed monthly salary of $150 or more, or at a guaranteed yearly salary of $1,800 or more, if such employee is not required by his employer to work any specific minimum number of hours in any workday, workweek, or other period and has been notified by his employer in writing to that effect." This notification requirement would have been met "by the posting of a simple notice to that effect...." (If, as Barden stated on the House floor in 1940, the condition concerning no minimum number of hours meant that such workers "work when they please and keep their own time," the universe of affected workers would presumably have been radically reduced.) Since it had been known for weeks that the House Labor Committee had been trying to reach a compromise, the Times reported, Barden's move meant that "the 'broad exemption' bloc—admittedly powerful—had decided to attempt to force through a bill at this session." While Barden declined to explain how he hoped to get his bill, which was still in the Labor Committee, to the House floor, privately his friends revealed that he intended to "get the measure spread upon the Congressional Record as notice to all the membership, and then to offer it as a substitute for the Norton bill, which, assertedly, will obtain a 'wide-open' rule upon the motion of some member of the Labor Committee."

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117 CR 86:5135 (Apr. 27, 1940). Rep. Clare Hoffman interpreted the provision as making it "possible for an employee to take time off one day, or one week, and make it up the next without demanding that he be paid time and a half for the overtime while making up for time lost...." Id. at 5145.
118 "Wage-Hour Fight Up Again in House," NYT, July 12, 1939 (3:6).
In early July, even before Barden introduced his bill, a coalition of unions and church and women’s groups had formed the Emergency Committee for Preserving the Fair Labor Standards Act. In a statement to Congress it charged that the same powerful lobbyists who had fought the FLSA before it was enacted were now trying to "‘make new alliances...under the guise of “clarifying” amendments, to exclude members of the sweated industries and to destroy the very foundations of the Act.’"119

As early as July 14, according to an Associated Press report, "House leaders" had "agreed to take up compromise wage-hour amendments designed to remove certain farm and white collar workers from operation of the law.” The unnamed leadership’s decision meant that “unless the Labor Committee approves the revisions in a day or two, the Rules Committee would be asked to send them to the floor for debate anyway.”120

In a wide-ranging and trenchant report to Norton on July 15, WHA Andrews opposed the exclusion in Barden’s bill of all employees with a guaranteed monthly salary of $150 or annual salary of $1,800 because:

Our studies indicate that employees in the salary classification from $150 to $200 a month have as much need for protection against long hours as any other class of workers. Furthermore, if this class of workers may be worked an unlimited number of hours without overtime compensation, the purposes of the bill to spread employment in this group will be defeated.

In addition to the hundreds of thousands of clerical workers who would be deprived of their right to overtime compensation, this provision would exempt all craft and skilled workers paid on a piece-rate or hourly scale where it would be to the employer’s advantage to guarantee the employees $150 a month.121

The only flaw in Andrews’ critique was that it was almost as applicable to his own regulations and the FLSA exclusions themselves.122

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121CR 84:A3270, A3273 (July 17, 1939). See also “Status of FLSA Amendments,” WHR 2:343, 344 (July 24, 1939); “Wage Act Endangered, Andrews Says,” CIO News, 2(30), July 24, 1939 (5:1). The WHD was unable to furnish precise estimates on the number of workers who would be excluded from the FLSA depending on which of the various bills was enacted because it had abandoned a study to work up such data after discovering that they were unavailable. “Action on FLSA Changes,” WHR 2:351, 352 (July 31, 1939).
122Malamud, “Engineering the Middle Classes” at 2300, criticizes Andrews for having
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Cox, "the leader of a powerful group whose aim is to revise" the FLSA and the NLRA, sought to ratchet up the attack on July 18 by threatening to tie up further business in the House unless the Rules Committee granted a rule permitting floor consideration of Barden's bill. With much bravado, Cox made the threat to committee chairman Adolph Sabath in the presence of news reporters: "I'd be willing to sidetrack everything.... The Barden bill is of first importance. A terrible thing has been done this country by the administration of that (Wages-Hours) law. It is ruining some of the industries down my way [sic: must be way]." As ranking member of the Rules Committee, he claimed to have "almost solid backing of its members for the Barden rule, and for an investigation of the Labor Board"—an assessment that other members of the committee privately confirmed. 123

Despite his theatrical efforts, Cox was forced to backtrack later that same day after Roosevelt at a press conference had described the Barden bill in such terms as to suggest the possibility of a veto if it passed. Replying to a question, the president said that the Barden amendment "would, in effect, pick out the two million lowest and poorest paid employees of industries who are the principal beneficiaries of the Act, and would lift them out from the Act, and, in effect, would give Congressional sanction to unconscionably low wages for them." 124 The Washington Post regarded the president's response as having "apparently killed" the Barden bill, since Cox, as soon as he had heard of Roosevelt's statement, told the newspaper that "he would no longer press for passage" of Barden's amendments: "I would counsel those pressing for amendments to consult with the President, find out what amendments he will agree to, adopt these and stop the controversy for the time being." The threat of a veto, however, did not mean that the FLSA's opponents had abandoned their struggle. On the contrary: "a bitter fight over less drastic changes" was "still in the offing" since: "Even though the Barden proposals in their entirety may be lost, it is almost certain that the conservative Southern Democrats, allied with the Republicans, will endeavor to obtain more extensive modifications of the present law than the Administration failed to provide a basis on which to conclude that the work of white-collar employees whose monthly salaries exceeded $200 was not susceptible to work-spreading: "None appears, in his speech or in the relevant archives." Although this critique is generally justified, it overlooks the aforementioned WHD memorandum on "High Salaried Employees," which assumed that work-spreading was not applicable insofar as their long and short workweeks cancelled each other out over the course of a year.


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desires.” Since Norton and Andrews had already advocated a large expansion of the number of excluded white-collar workers and Roosevelt had approved of their position, the would-be excluded owed their reprieve to the tenacity with which the more radical pro-employer legislators pursued their goal and short-sightedly forfeited the opportunity to enact somewhat less far-reaching coverage restrictions.

Prospects for passage of the less drastically exclusionary Norton bill appeared dimmer after the Wall Street Journal disclosed that even “Administration Democrats are inclined to blame the Wage and Hour Administration for the difficulties now confronting this law in Congress. These members say that the Administration, in interpreting the act, clearly has gone beyond the intent of Congress and that complaints against the law are really complaints against its administration.” One such alleged ruling by the WHD legal division pointed out by an unnamed “outstanding House member” held that “if an employer took his employees on an outing or a picnic at which time a representative of the management made remarks designed to improve labor relations, the employees would be entitled to overtime wages for the time of the outing.” Apart from the atypicality of the scenario, the hypothetical (“if”) character of the ruling suggests that FLSA opponents were grasping for pretexts.

The editors of The New York Times, though fully aware that the Barden amendments’ main object was to “make a very large number of exemptions,” especially in agricultural processing, could not refrain from meting out harsh criticism to the Roosevelt administration as well, which had both been “so unwise as to name a definite minimum wage in the law” and, through administrative rulings, given the FLSA “a range of application far greater than even most of those who voted for it suspected at the time of its passage.” Recurring to its hobbyhorse, the paper editorialized that: “Designed to help submarginal labor, it has been extended, principally through the so-called hours provision, to apply to the great bulk of labor in the country.” Faulting the law for creating wage inflexibility and “endangering sound recovery,” the Times, without specifying any details—presumably it wanted, like many employers, at the very least a limitation of overtime liability to time and a half on the minimum wage regardless of

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127 “A New Dispute in Congress,” NYT, July 21, 1939 (11:1).
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workers' regular rate—called for a "thorough-going revision." 129

The entire political constellation of forces was disrupted on July 20 when WHA Andrews announced at a news conference that he now opposed exempting white-collar workers earning more than $200 a month. He had originally favored the measure because he had believed that it would make administration of the FLSA easier, but "changed his mind because 'organized labor' opposed the exemption" and since it had "'done such a swell job of fighting my battle for me...I think it would be very unethical for me to press that amendment if they are opposed to it.'" Not bereft of a sense of humor, Andrews added that because the American Newspaper Guild was one of the chief objectors to Norton's amendment, "'now he had changed his mind he felt he could accept the Guild's invitation to address its San Francisco convention on July 31.'" 130

Andrews' special mention of the Guild was noteworthy since the Employer Relations Committee of its International Executive Board had stated at a meeting from May 27 to 29 that the fact that the FLSA amendment exempting workers receiving more than $200 a month had been proposed and backed by the WHA

129 A New Dispute in Congress." Ironically, whereas the Times viewed the FLSA as applying to "submarginal labor," the Chamber of the Commerce of the United States complained that the act was unfair to the marginal worker (such as the handicapped), who was not worth the minimum wage. Edward Cowdrick, "The Plight of the Marginal Worker," NB, 27(2):20-22, 70-71 (Feb. 1939). From 1923 to the late 1930s Cowdrick had been the secretary of the influential Special Conference Committee, a clearinghouse on personnel management and labor relations of a dozen of the biggest corporations. Violations of Free Speech and Rights of Labor: Hearings Before a Subcommittee of the Committee on Education and Labor United States Senate, Part 45: Supplementary Exhibits: The Goodyear Tire & Rubber Co.—The Special Conference Committee 16785 (76th Cong., 1st Sess., Jan. 16, 1939). See above ch. 9.

130 "Andrews Shifts on 'White Collar,'" NYT, July 21, 1939 (5:1). See also Paulsen, A Living Wage at 142. In an article free of editorializing, the Guild took note of Andrews' new position. "Andrews Bars Change of Hours Act," GR, Aug. 1, 1939 (1:3, 2:4). Despite Andrews' change of mind, when he resigned three months later the Times speculated that his administration had not greatly pleased some unions. "Andrews Out, Fleming In," NYT, Oct. 19, 1939 (22:2). The press reported that Andrews had been replaced because both unions and employers that wanted to comply with the law regarded him as "too gentle." "Elmer Out," Time, Oct. 30, 1939, at 11. Although unions opposed his successor, Fleming, because he was an army officer, they did not express their views before he was appointed because they disliked Andrews even more. "Wage-Hour Tightening Due as Army Officer Takes Over, BW, June 10, 1939, at 48, 49. On his death a quarter-century later, AFL-CIO President George Meany lauded him as a "'sincere, loyal and devoted friend of all the working people of this country.'" "Elmer Andrews, Labor Aide, Dies," NYT, Jan. 18, 1964 (23:1).
"was a good reason for lessening the emphasis on the Fair Labor Standards Act in relation to Guild contracts, and made it particularly important that Guild contracts contain no reference in their language to the provisions of the act." ...

"It is of particular interest that the position of the Wage and Hour Administration is already being used by certain publishers as an argument against hour limitations for newspaper employes. Exemptions for higher paid men were asked for by the Scripps-Howard management in the Washington Daily News negotiations recently. While we can probably afford to laugh off this particular maneuver it does emphasize the need of establishing the principle of hour limitations—the five-day, forty-hour week—without exemptions of any kind."131

At his press conference, Andrews, who was to meet the next day with Barden and a special subcommittee of the House Labor Committee, declared that the former’s amendments were "merely a renewal of the “dime-an-hour” bloc’s proposal for wholesale exclusion of needy workers from the act," which was its answer to the "carefully drafted amendments..., which included many concessions," which the WHA had attempted to propose five months earlier. In light of the positions adopted by Barden and "the interests he represents," Andrews could see only "impassable differences...."132 As far as Arthur Krock was concerned, Andrews’ withdrawal of support for the white-collar amendment without “any alteration in the merits of the case,” simply to restore a political front by rejoining organized labor in its opposition to the change, was a “naive example...typical of the administrative attitude which has helped to bring about the new and temporary Congress majority” consisting of nearly all Republicans and upward of one-third of Democrats.133

That the anti-FLSA congressmen had nevertheless not given up their fight became clear on July 21, when the House Rules Committee, after an executive session had revealed that the Labor Committee had been unable to work out a compromise between Barden and Andrews concerning the agricultural and white-collar overtime exclusions, finally granted a hearing for July 25 on the Barden bill—at which Andrews would probably be a witness—under circumstances indicating both that the House would act on it before the end of the session and that there was “[l]ittle doubt...that the House would pass overwhelmingly the amendments....” On the other hand, the immediate purpose of this exercise was unclear since, given the late stage of the session, legislators considered it doubtful that the bill could get through the Senate and probable that Roosevelt would veto it.

132“Andrews Shifts on ‘White Collar.’”
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Barden, in the meantime, stated that he had written the white-collar amendment "after talking with various employees and employers, and declared he felt that it was 'a very reasonable amendment' that would exempt only persons who 'obviously ought to be exempt.'"\textsuperscript{134}

After Representative Ramspeck, who had weighed in on the controversy in November 1938 with a suggestion of excluding all higher-paid employees, introduced a compromise bill on July 24 excluding "any employee employed at a guaranteed monthly salary of $200 or more,"\textsuperscript{135} the Rules Committee held a "boisterous hearing" the next day at which Andrews, Barden, and Norton all put in appearances. In response to "a rapid fire of questions from Cox, Andrews denied that he had adopted a policy of permitting "'pressure groups' to govern his administration" of the FLSA, but noted that workers of the Westinghouse Electric and Manufacturing Company had convinced him that basing exemptions to [sic] white collar workers on a monthly salary limit would work to the disadvantage of the older workers." When asked whether he had been correctly quoted as to his change of view regarding the white-collar exemptions, Andrews replied that he had gone further: "'I said if the decision was going to be left to the pressure groups I was sorry the pressure groups did not get behind the Norton bill when the time was ripe.'"\textsuperscript{136} After having questioned Andrews, Cox allowed as the FLSA was "'meaner'" than "'but not so meanly administered as'" the NLRA. Norton, who announced that she had called a House Labor Committee meeting for July 27 to discuss a wage-hour compromise, told the Rules committee that she had done everything she could to "'compromise her differences with Mr. Barden. With much heat, she declared that Mr. Barden would talk with her and seem agreeable on some matters, and 'then he would go out and meet the lobbyists of powerful concerns who want to wreck this act.'"\textsuperscript{136} Although there was little prospect of success, adoption of the Rules Committee's suggestion that Andrews meet with Norton and Barden to work out a compromise prompted the committee to meet again the next day (July 26) with a presumed agenda of discussing whether to grant rules for floor debate on the FLSA amendments bills.

The Rules Committee did meet on July 26, but a confused and complex political constellation produced only arrangements for a conference of the AFL and CIO with the NAM and Chamber of Commerce of the United States to try to reach compromise on the FLSA amendments. To be sure, the members of the Rules Committee "did not even try to hide their smiles" as they suggested this meeting to Norton, who then summoned the labor and business representatives to appear

\textsuperscript{134}Henry Dorris, "Wages-Hours Fight Is Put to a Hearing," \textit{NYT}, July 22, 1939 (18:1).

\textsuperscript{135}H.R. 7349, § 5(a) (76th Cong., 1st Sess., July 24, 1939).

\textsuperscript{136}Andrews Opposes Wage Act Changes," \textit{NYT}, July 26, 1939 (5:1).
before the Labor Committee on July 27. The call for the conference was a by-product of the efforts by House Majority Leader Sam Rayburn “to clear the decks” to consider the housing expansion and lending bills, which were key to adjournment, by enlisting Cox’s influence to secure a rule to bring them to the floor. However, Cox’s chief interest lay in floor debate on the Barden bill, which the Republican members of the Rules Committee, who were Cox’s allies in a conservative coalition, threatened to block if Cox aided Rayburn in bringing the administration’s bills to the House floor. Consequently, the Rules Committee took no other action than proposing the conference, which was viewed as merely an attempt to “play for time.”

Cox promptly denounced the conference as “just a stall,” and initially sought to force an immediate vote, but was prevailed upon to agree to the delay. Without identifying its nature, Cox justified his move by reference to his desire to avoid a “tactical blunder,” but he continued to insist that “we have the votes to do what we want at any time.”

The Labor Committee special meeting on July 27 proved to be tumultuous. Overshadowing all substantive discussion of the proposed FLSA amendments at the special meeting was the electrifying attack by CIO leader John L. Lewis on Vice President John Garner. Lewis opened his remarks by criticizing Andrews for having appeared before the House Labor Committee to “suggest amendments to the act before he had undertaken the job of administering and enforcing the act.”

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139 There appears to be no extant transcript of the meeting. At the very end of a House Labor Committee hearing on the NLRA the previous day (July 26), Rep. Wood stated: “I understand that a call has been issued for an executive meeting of the committee tomorrow morning.” Proposed Amendment to the National Labor Relations Act: Hearings Before the Committee on Labor of the House of Representatives 2140-41 (76th Cong., 1st Sess., July 26, 1939). According to the condensation of testimony published in the Wage and Hour Reporter, the witnesses were W. T. Ham (U.S. Department of Agriculture), W. D. Johnson (Railway Labor Executives Association), W. C. Hushing (AFL), George McNulty (General Counsel, WHD), John L. Lewis, Francis Kelly (American Road Builders Association), Mary Dublin (National Consumers League), and Nina Collier (League of Women Shoppers). “Testimony on Wage-hour Amendments,” WHR 2:352-53 (July 31, 1939). McNulty opposed the Barden amendments for removing from the protection of the hours provision “nearly two million of the most sweated industrial workers in the country.” Curiously, the condensation included no testimony by representatives of the NAM or Chamber of Commerce. Because news accounts were distracted by Lewis’s fulminations, the other witnesses received scant attention. “Lewis Lashes Garner,” CIO News, 2(31), July 31, 1939 (3:5, 6:1-2).
Although Norton herself had, from the outset, been acutely aware of the dangers of exposing the FLSA to the amendatory process, Lewis underscored the recklessness of enabling “the chiselers...who believe that 25 cents an hour is too much for an American...to cripple this act with amendments....” It was in connection with his castigation of “the Republican minority, aided by a band of 100 or more renegade Democrats” for having “conducted a war dance around the bounden prostate form of labor in the well of that House,” that Lewis then directed his attention to Garner, the “labor-baiting, poker-playing, whisky-drinking, evil old man,” as the genesis of the House campaign against organized labor. He justified what he himself conceded was a personal attack on the grounds that “Gamer’s knife is searching for the quivering, pulsating heart of labor.” The diatribe culminated in the accusation that the vice president was “putting his foot upon the neck of millions of Americans by conducting this intrigue in recent weeks in this Congress on every proposal that protected the rights of labor or sought to give labor increased or additional privilege.”

Since even Norton’s FLSA bill would have reduced rather than expanded coverage (especially for white-collar workers), it is not clear what proposals Lewis had in mind. His acknowledgment that labor had had “no opportunity to become familiar with the application of the vast crop of amendments” in connection with his correct charge that “this is the first public hearing that the committee has had,” suggests that Lewis may have been misinformed, although he did claim at the end of his talk that he “could take up these amendments one by one in great detail....” Regardless of the reality-content of his accusations that the vice president was the ring-leader of the congressional anti-laborites, it was true that Garner had been infuriated by the sit-down strikes of the 1930s and had adamantly opposed enactment of the FLSA. In any event, at the close of his remarks, chairman Norton thanked Lewis for his “very fine contribution to this meeting,” though she later termed his remarks as in “very bad taste” and regretted that he had chosen the forum provided by her committee hearing to make them. Lewis’s ad hominem attack did not prevent W.C. Hushing, the AFL’s legislative agent, and W. D. Johnson of the Association of Railway Labor Executives from echoing his plea to the committee to give the FLSA an opportunity to show its strengths and weaknesses before amending it.

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142“Lewis Speech Naming Garner As Labor ‘Baiter’” (3:5).
143Patterson, *Congressional Conservatives and the New Deal* at 135-37, 154.
144Stark, “Ovation to Gamer in House Follows Attack by Lewis” (3:4).
145Louis Stark, “Ovation to Gamer in House Follows Attack by Lewis,” *NYT*, July 28,
Following this "extraordinary hearing," the House Labor Committee in executive session that same day reported out H.R. 6406 with a committee amendment, which deleted the $200 guaranteed monthly salary, instead excluding "any employee employed at a guaranteed monthly salary in excess of that required by this Act who does not work more than one hundred and sixty hours per month." This blanket exclusion, which was not confined to white-collar workers, was a compromise, sponsored by Representative Ramspeck, presumably designed to offer employers the hours-averaging (over a period of one month) that so many had been demanding. Interestingly, the committee report characterized all of the bill’s provisions as “noncontroversial”; because the proposals for additional exclusions of agricultural processing workers were “highly controversial,” they were omitted from the reported bill. If the committee’s description was accurate, it strongly suggests that employers and their congressional advocates could, at the very least, have passed an amendment expelling large numbers of additional white-collar workers from the regime of overtime regulation if they had refrained from committing the kind of parliamentary “tactical blunder” against which Cox had warned.
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The CIO may have lauded Lewis's diatribe, but otherwise it had the consequence of “stiffen[ing] the backs” of the members of the Rules Committee coalition, “who straightway made up their minds to let the House vote upon legislation which the C.I.O. leader had just denounced...” The Rules Committee rule provided that the House had to vote yes or no on the Norton bill without amendments, although the House was permitted to supplant hers with the Barden or Ramspeck bill. The Rules Committee late on July 27 decided to send the wage-hour issue to the House floor “over the protests” of the Labor Committee and the CIO. The rule was forced out of the committee by the same group of southern Democrats headed by Cox who the previous week had combined with Republicans to bring before the House the Smith resolution for an investigation of the NLRB, marking the first time that session that the committee had “turned on Administration labor policies.” Although it was, according to the Wall Street Journal, “generally conceded that chances for final enactment of wage and hour amendments are non-existent, insofar as this session is concerned, the decision of the rules committee, which is believed to reflect general sentiment in the House, comes as a rather definite indication that some House action will be taken next year.” Whereas debate on the Barden and Ramspeck bills would be limited to four hours and scheduled for the first week in August, it had still not been determined whether the House leadership would permit the Labor Committee to carry out its plan to bring up the modified Norton bill on July 31 under the procedure of suspending the rules, which prohibited amendments but required a two-thirds majority. But even if the Labor Committee had its way, it was “highly unlikely” that the revised Norton bill would be accepted by the House; rather, it was more likely that the Barden bill would be substituted for it.

Presumably because Lewis's attack on Garner had intensified the determination of western and southern representatives to force a vote on the Barden bill,

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154House Rules Group Speeds Wage-Hour Amendments,” WP, July 28, 1939 (1:1). The Rules Committee ignored the bill that the Labor Committee had reported out earlier that day, instead issuing the rule for Ramspeck’s Norton’s earlier bills. Id.
155Wage Hour Bills Go to House Floor But Action Unlikely,” WSJ, July 28, 1939 (1:4, 2:2).
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Alabama Democrat William Bankhead, the Speaker of the House, while stating on July 28 that the FLSA amendments would be considered before adjournment, had made no agreement with Norton to consider her non-controversial bill on July 31 under suspension of the rules.156 As Roosevelt administration leaders began to reconfigure their end-of-session legislative plans “in the hope of stemming the revolt they fear may wreck the program,” Bankhead announced that he would not permit the Labor Committee to bring up its latest FLSA bill under the suspension of rules device that had already failed twice. Indeed, the leadership “obviously” did not want to allow the FLSA bill to be voted on at all before the aforementioned lending and housing bills were considered lest “a majority, having obtained their major aim in passing the Wages and Hours Bill, would want to ‘fold up’ and adjourn.”157

On Sunday, July 30, Norton—who, according to Barden, had told the Labor Committee in the wake of Andrews’ blast of H.R. 5435 that she would take no further steps to bring the bill to the House floor158—gave a radio address defending her original bill. She maintained that all of its amendments had been necessary for proper administration of the FLSA and alleviating unnecessary hardship.159

On July 31, as the House seemed to be finally on the verge of voting on the FLSA amendments, Andrews was at the Guild’s annual convention in San Francisco inveighing in a nationally broadcast speech against the “‘dime-an-hour bloc’” in Congress that was trying to “‘wreck the act.’” Addressing “‘all Americans,’” Andrews stressed that: “‘The Wage and Hour Law is on the statute books because you willed it there. The United States Chamber of Commerce didn’t want it. No clamor for its enactment floated down to Congress from the citadels of big business and high finance.’”160 The country’s premier labor standards enforcer (who had also been Labor Secretary Perkins’ successor as New York State Industrial Commissioner)161 had good reason for imparting this vital lesson: “‘You cannot drowse now...in any confident assumption that industrial justice has been made secure for all time to come by the scratching of a pen on paper. Whether the law stays on the books or not, it will soon cease to have meaning unless you are

157 Henry Dorris, “Roosevelt Chiefs Seek Way to Avert Lending Bill Rout,” NYT, July 31, 1939 (1:8, 2:3).
159 CR 84:3649-50 (July 31, 1939).
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prepared to fight for it.'"162 The chasm between this blunt admonition to the working class to come to the rescue of their statute and the DOL’s indiscriminate transmogrification at the end of the twentieth and beginning of the twenty-first century of both the protected class of workers and the suspect class of violators into “customers”163 is unbridgeable.

In remarks to the ANG convention after completing his nationally broadcast speech, Andrews went on to discuss the specific application of the white-collar regulations to newspaper workers: “If Congress had thought that these reporters, copy readers and other editorial employees were professionals it could very easily have excluded them. It did not do that.” He believed that “many, if not most, of the employees engaged in reporting and editorial work” would fail to satisfy at least one or two of the five regulatory criteria constituting the definition of a professional employee, in part because the WHD’s search of the journalism literature did not reveal “much agreement, even among publishers and editors, on the value of training in a specially organized body of knowledge.” As for the argument that even if they were not professionals, the many types of editors could nevertheless be excluded as executives, Andrews observed that the Guild, in negotiating collective bargaining agreements, had “jealously and wisely...sought to restrict the number of its members to be classified as executives and on that ground excluded from the benefits of the contract. Apparently Guildsmen suspect a tendency on the part of some newspaper proprietors to pay off in the form of titles, as well as in by-lines, in lieu of cash.”164

As late as August 1, Congress still regarded the FLSA amendments as one of three pieces of “‘must’ legislation awaiting action” before adjournment. A large majority of the House, according to the Times, wanted to debate the Barden bill, which was “said to be favored by a large number of the House members.”165 Nevertheless, prospects for a vote dimmed as the House leadership, “stunned” by the defeat that day of the lending bill, now focused its attention on a drive to adjourn, “hoping to get the rebellious Congress out of Washington by Saturday night.”166 By August 2, Speaker Bankhead and Majority Leader Rayburn unsuc-

\[^{162}\text{Andrews Address Broadcast by NBC,} \ GR, \ Aug. \ 15, \ 1939 \ (5:5).\]
\[^{163}\text{The Department of Labor is committed to providing its customers, America’s employers, workers, job seekers and retirees, with clear and easy-to-access information on how to comply with federal employment laws.} \ http://www.dol.gov/esa/regs/compliance/whd/ca_main.htm.\]
\[^{164}\text{Elmer Andrews,} \ "\text{Andrews Finds We Like Cash Above By-Lines,}" \ GR, \ Sept. \ 1, \ 1939 \ (5:1-5).\]
\[^{165}\text{House Leaders Aim at a Quick Ending,} \ NYT, \ Aug. \ 2, \ 1939 \ (1:7).\]
\[^{166}\text{Turner Catledge,} \ "\text{Lending Bill Is Killed in House, 193-166,}" \ NYT, \ Aug. \ 2, \ 1939\]
cessfully sought to negotiate an agreement to shelve the housing and FLSA bills, on which the conservative Democratic-Republican coalition was poised to hand the administration yet another defeat. Bankhead and Rayburn’s plan to adjourn the session before Roosevelt’s legislative program suffered further damage failed because the “ardent New Dealers,” echoing the president, insisted on making a record of the opponents of the housing bill, while the supporters of the Barden amendments persisted in “following up an advantage which they believed they had” to pass the bill. Rayburn refrained from announcing for the time being his plans for calling up the FLSA amendments, but he was “considered somewhat bound to help get them” to the floor to reciprocate for their supporters’ having relented in their opposition to a rule for the housing and lending bills. Yet Rayburn did go so far as literally to take Rules Committee chairman Sabath—an “arch-enemy” of the Barden bill who had declined to follow his committee’s instructions to report a rule for it—by the arm, lead him to “the committee room where the rule was resting in a pigeonhole,” and bring both back to the House floor, where Sabath finally filed the rule, although under parliamentary rules he could have continued to block it for another seven legislative days.167 On August 3, when the anti-New Deal coalition completed its wrecking of the administration’s lending recovery program by voting to kill the housing bill, House leaders “took drastic steps to shut off further controversial measures and end the session quickly.” The denouement came that day when Rayburn finally announced that he would not allow the Barden bill to be debated before adjournment.168

Thus legislative efforts to reach a compromise on amending the FLSA in 1939 broke down and House leaders removed a “remote chance of emasculating changes.” Congress adjourned on August 5 without having resolved the question, and in a post-mortem the Times opined that congressional criticism did not seem to have been directed “to any large extent” against the FLSA’s fundamental objectives, but against “specific and sometimes unforeseen results of its application”—for example, to “well-paid workers employed on a generally permanent basis who receive vacations with pay and similar benefits and still do not come under the exempted classes of executives and professionals.”169

(1:8).

168 “Housing Bill Killed, 191-170, by House Economy Group,” NYT, Aug. 4, 1939 (1:8). Patterson, Congressional Conservatives and the New Deal at 315, completely misconceived the controversy in asserting that “southern Democrats led by Cox forced the House leadership to drop consideration of a bill to extend coverage under” the FLSA.
Adjournment of the first session of the Seventy-Sixth Congress hardly meant that employers had abandoned their efforts to expand the exclusions of white-collar workers. W. Gibson Carey, Jr., the president of the Chamber of Commerce of the United States, stated on national radio that with machinery, we will "not have to work abnormally long hours," but there will definitely "have to be a relaxation of the control of hours." He added that working 48 hours in certain groups did not necessarily reduce employment. As the first anniversary of the FLSA's effective date approached (October 24), at which time the overtime trigger dropped to 42 hours and the minimum wage rose to 30 cents, the Chamber of Commerce reaffirmed that it "is opposed to continuance of the law...." A month later the Times reported that the NAM Employment Relations Committee had taken the position that:

"The law is being used as a mechanism for controlling wages and salaries far above the statutory minimum. This extends to inclusion of high-salaried employees by narrow definition of exempted classes and is being construed in an effort to fix and freeze wage rates far in excess of any minimum standards which the law was designed to establish.

By fixing an inflexible limitation on hours of employment, without the penalty of overtime compensation, the law has ignored many instances in which flexibility is essential and desirable from the standpoint of employees. The law makes no provision for the averaging of hours except where pursuant to collective bargaining agreement.... The law is equally defective in failing to provide exemption from maximum hours standards during periods of emergency affecting an entire community or section."

Little wonder that in an address on December 8 to a celebration of the fortieth anniversary of the National Consumers' League, Norton named the Chamber of Commerce and the NAM as foes of the FLSA together with the Associated Farmers of California and their allies, the packers and canners. Pointing out that

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173 In light of Norton's acquiescence in the amendment to reduce white-collar coverage during the 1939 session of Congress, it is odd that the NCL regarded Norton's talk as the first step in the organization's opposition to any amendment of the FLSA. Anne Petersen, "Drive Forming to Bar Altering Hour Pay Act," *NYT*, Dec. 3, 1939 (sect. 2, 4:1).
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the Barden bill would endanger the hours standards of 250,000 to 400,000 higher-paid clerical and skilled wage earners, Norton added: “The exemptions provided for in the Barden Bill have no economic or social justification.” After underscoring that the overtime penalty was expected to put more people to work, she countered the NAM’s criticism that the FLSA fixed inflexible limits on hours and did not permit hours-averaging: “Many state and foreign laws impose an absolute limitation on hours. In the interest of flexibility, the Act sets no absolute limit on the number of hours that may be worked.... If the standard number of hours must be exceeded to meet some particular situation, in all probability the employer will be sufficiently recompensed therefor to enable him to pay overtime.”

In light of the Republican House leadership’s confirmation in December that the FLSA amendments were still high on its legislative list for the 1940 session, the labor movement remained acutely aware of the need to resist employers’ efforts to dismantle the national regime of overtime regulation. In particular the UOPWA took the initiative, with the transition to the 42-hour overtime trigger, “to make the law work by informing white collar employees of their rights” by undertaking a national leafletting campaign in major cities. On Wall Street alone members distributed 6,000 leaflets in less than two hours. Spreading from the East Coast to Chicago, Milwaukee, Denver, Los Angeles, and San Francisco, the UOPWA leafletting campaign called attention to the union’s dual aim of preventing evasion of the FLSA and eliminating its inadequacies. The UOPWA also sought to link its organizing to these overtime informational operations.

The CIO’s year-end call on Congress not to pass any pending FLSA amendments, which were sponsored by large agricultural commodity processors “merely using the guise of farmers to exclude from the Act industrial workers who are subject to the most severe exploitation,” but then later, after the law had had a chance to operate, to extend its benefits to the millions still deprived of its protection, lacked the resonance to halt the amendatory juggernaut.


179 “CIO’s 1940 Legislative Program for Jobs, Security and Peace,” CIO News, 2(52)
With half the world in the agony of war, and many pressing questions before the Congress, we have taken 5 days to decide whether or not the American worker is worth 30 cents an hour for his labor.180

Nor was it surprising that the new year witnessed the Chamber of Commerce’s committee on manufacture reporting that 15 months’ operation of the FLSA “had proved that the chamber’s opposition at the time of enactment was right and that the chamber should continue to advocate repeal.” The organization therefore asserted that the only valid public regulation of minimum wages and maximum hours could be undertaken by state governments “for the special classes of workers for which legislative protection may be necessary to prevent their oppression and safeguard their health and well-being.”181 In particular, the committee inveighed against the application of the overtime provision to “office employees and other salaried workers, who customarily are granted vacations with pay, are compensated during absence because of illness, and are accorded other privileges....” The Chamber’s members regarded the requirement of overtime compensation to such employees as “inequitable to the employer and as tending to restrict the opportunities of the worker to improve his status.” Indeed, the editorial staff of the Wage and Hour Reporter characterized this criticism as being “[a]t the heart of the Committee’s objections to the Act....”182 To be sure, many employers, perhaps too impatient to await the fruits of the Chamber’s agitation for repeal, took the law into their own hands: a survey conducted by the Women’s Bureau of the DOL throughout 1940 in Houston, Kansas City, Los Angeles, Philadelphia, and Richmond revealed that only 46 percent of office employers paid their employees


180CR 86:5430 (May 2, 1940) (statement of Mary Norton, chairman of the House Labor Committee).

181“Scores Wage-Hour Law,” NYT, Jan. 28, 1940 (29:4). A few days later Senator Taft, in a speech he gave at Swarthmore College in his unsuccessful campaign for the Republican presidential nomination, presented the same view, urging the country to: “Abandon hour regulation, except where it involves injury to health or lack of time for recreation.” “Taft Calls Party to Help Business,” NYT, Feb. 19, 1940 (1:2).

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time and a half for overtime work. 183

A more concrete sense of the typical complaints expressed by employers that were, unlike the Chamber of Commerce, willing to engage mandatory labor standards, can be gleaned from a December 1939 memorandum with recommendations for amending the FLSA that was drafted by a group of businessmen from Duluth, St. Paul, and Minneapolis, organized as a state committee to study the wage and hour law. These employers complained that the FLSA was being used as a mechanism to control wages and salaries far above the statutory minimum and had been extended to include high-salaried employees by a narrow definition of exempted classes, whereas Congress's declared purpose was "to protect the under privileged [sic]." They therefore recommended either amending the law to exempt from the maximum hours provision all employees paid 40 cents or more an hour or $16.80 week or "exempt[ing] from the hours provisions of the Law all office, clerical, supervisory, technical and other employees being paid on a full time salary basis of $30.00 a week or more." In any event, the group preferred that the statute itself definitely define the excluded white-collar groups in order to avoid confusion and uncertainty. Finally, the Minnesota employers criticized the FLSA for its inflexibility in failing to provide for hours-averaging outside of collective bargaining agreements and recommended that it be amended to permit hours-averaging in nonunion firms. 184

183 In addition, 14 percent paid the regular rate, 18 percent provided compensatory time off, 9 percent gave supper money, and 13 percent paid nothing. Calculated according to data in US Women's Bureau, Office Work in Houston: 1940, at 40 (Bull. No. 188-1, 1942); US Women's Bureau, Office Work in Los Angeles: 1940, at 36 (Bull. No. 188-2, 1942); US Women's Bureau, Office Work in Kansas City: 1940, at 48 (Bull. No. 188-3, 1942); US Women's Bureau, Office Work in Richmond: 1940, at 40-41 (Bull. No. 188-4, 1942); US Women's Bureau, Office Work in Philadelphia: 1940, at 74-75 (Bull. No. 188-5, 1942). The data refer only to the those (446) offices in which employees actually worked overtime. In many of the larger offices in Los Angeles, peaks work loads were handled by employing temporary or extra employees.

184 "Recommendations as to Needed Amendments to the Wage and Hour Law" (Dec. 12, 1939), enclosed with letter from Jack Schroeder, General Manager, Associated Industries of Minneapolis, to George McKinnon [sic] (Oct. 31, 1947), in George E. MacKinnon Papers, Location 144.J.19.2F, Box 6: Labor: Fair Labor Standards Act: Correspondence, 1947-1948, Folder 2 (MHS). The original FLSA exempted employers from overtime pay liability if they employed workers beyond the weekly overtime trigger pursuant to a collective bargaining agreement with employee representatives certified as bona fide by the NLRB that provided that no employee shall be employed more than 1,000 hours during any 26 consecutive weeks or 2,000 hours during any 52 consecutive weeks. Fair Labor Standards Act of 1938, ch. 676, Pub. L. No. 718, § 7(b)(1)-(2) 52 Stat. 1060,
If some employers were disgruntled about the scope of their exemptions from overtime pay liability, by January 1940 the left-wing CIO-affiliated UOPWA was profoundly fearful of the consequences for its members and potential members of looming legislative developments. With rumors circulating that crippling amendments to the FLSA would soon be called up by a member of the House Rules Committee and powerful lobbies of the NAM, Chamber of Commerce, and Associated Farmers once again actively campaigning for passage of the Barden and Ramspeck bills: “Over one million white collar workers are today unemployed and those employed are notoriously underpaid. Passage of these amendments, which would permit unlimited overtime, would increase the ranks of the unemployed white collar workers by an estimated 400,000.” The union therefore mandated that national and local campaigns be organized against the Barden, Ramspeck, and Norton amendments.185 A month later the union warned that: “Reports from Washington leave no doubt that a determined attack to destroy the Wage-Hour Law will be made this session of Congress.” Having observed that the exclusion of office and clerical workers was a chief point of many of the amendments already introduced, the UOPWA pointed out that: “Large employers of office and clerical workers such as the utilities have already opened lobbies in Washington to get their

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1063 (June 25, 1938). With modifications the provision is codified at 29 USC § 207(b)(1)-(2) (2000). Because the NLRB was required to certify that the workers representative was bona fide, certification had to be requested by a union rather than an employer, and doubts had been expressed, even before the law went into effect, as to unions’ willingness “to ask for a plan to average working hours over a period of weeks since employees would lose time and a half payment for overtime,” and thus the extent to which the provision would be “invoked may be smaller than has been thought.” “Wage Law Difficulties Discounted,” JC, Oct. 4, 1938 (1:4). From January to mid-August 1939 about 160 certifications were issued by the NLRB of unions entering into agreement exempting employers from overtime pay. Report of Proceedings of the Fifty-Ninth Annual Convention of the American Federation of Labor 177 (Oct. 2-13, 1939) (Report of the Executive Council). In recent years such “1040/2080 plans are rarely used because of the requirement for employee consent through the collective bargaining process. Where such plans are implemented, however, they afford some scheduling flexibility to deal with seasonal manpower peaks and valleys without running up overtime costs.” Gilbert Ginsburg, Daniel Abrahams, and Sandra Boyd, Fair Labor Standards Handbook for States, Local Governments and Schools ¶ 550 (1998).

185“National Legislative Program of the United Office and Professional Workers of America CIO: National Legislative Committee Report” at 1-3 (Jan. 1940), in #6046 Box 281 Folder 7: Office and Professional Workers of America, United. Legislative Dept., Kheel Center, Cornell University.
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employees exempted."186

Before the House187 resumed deliberations at the end of April 1940 on the three bills pending from the first session that excluded, inter alia, higher-paid workers from the FLSA’s premium overtime provision,188 other bills were introduced early in the third session189 that were even more radically exclusionary; although Congress took no further action on them, they suggested the range of interest in constricting overtime pay for white-collar workers. Identical bills were introduced on January 8 in the Senate and February 9 in the House that would have excluded from overtime regulation “any employee employed in a clerical capacity.”190

Although ultimately nothing came of this initiative to exclude clerical workers, the WHD was sufficiently concerned about Senator Wiley’s bill, S. 3047, that it prepared a report detailing the lack of justification for and ramifications of the exclusion.191 The report’s starting point was that the FLSA’s overtime provision applied to “clerical employees just as much as to other workers unless such employees are employed in an executive, administrative, or professional capacity....” The reason for this implicit overlap lay in the fact that, according to the dictionary definition, “clerk” was “an indefinite term of wide application, and may include employees clothed with authority to act in various weighty matters for their employers, such as the teller of a bank or the secretary of a corporation.”192 Indeed,

18644Wage-Hour Law Fights for Life,” OPN, 6(2):4:3-5 (Feb. 1940).
187The Senate, once again, did not debate any bill, but Senator Taft did express the view that there should be more exemptions from the overtime provision. Patterson, Mr. Republican at 235 (citing Taft’s papers). Senator David Worth (Dem. ID) did introduce a bill in April with the same language as the Barden bill, but no action was ever taken on it. S. 3725 (76th Cong., 2d Sess., Apr. 8, 1940).
188“House to Consider Wage Act Changes Early Next Week,” NYT, Apr. 9, 1940 (1:1).
189Following Germany’s invasion of Poland and the beginning of World War II, Roosevelt called Congress into a special second session, which was devoted to revising the Neutrality Act and ran from September to November 1939. Half a year later it was reported that “in the closing days of the special session an attempt...was made to pave the way for consideration of changes [in the FLSA], but was abandoned.” “House Recommits Norton Wage Bill by 205 to 175 Vote,” JC, May 4, 1940 (1:3, at 6:6). The index to the Congressional Record for the second session of the 76th Congress includes no references to any such attempt.
191US DOL, WHD, “Report on Proposal to Exempt Clerical Employees from the Hours Provisions of the Fair Labor Standards Act” (Mar. 1, 1940). The only extant library copy of this 17-page typescript appears to be held by the DOL’s own Wirtz Labor Library.
192US DOL, WHD, “Report on Proposal to Exempt Clerical Employees from the
since the Census of Occupations listed several clerical occupations that were
carried on in factories rather than offices, the WHD concluded that Wiley’s bill
would exclude such factory workers as shipping and stock clerks and timekeepers,
as well as telephone and telegraph operators, newspaper editorial employees, and
inside sales people. All told, the number of newly excluded might reach as high
as 1.75 million workers—or about one-seventh of all those then cov­
ered—including 350,000 clerks, 225,000 bookkeepers and cashiers, and 200,000
stenographers and typists.193

Uncharacteristically, the WHD also emphasized that the existence of as many
as one and a half million unemployed clerical workers was an important factor “in
considering the limitation of hours of those employed at present.” Contrary to
claims that clerical duties were such that reduced hours neither were necessary nor
would create additional employment, the WHD noted that the routine nature of
many clerical occupations made “the problem of taking on additional em­
ployees...little different from that of adding factory employees.” To be sure, the
Division itself asserted without evidence that: “Exemption of workers whose duties
are not routine...and therefore cannot be subdivided” and who “need greater
flexibility in working time” was already provided by the white-collar exclusions.194
The WHD then elaborated on the multidimensional convergence and fusion of
white- and blue-collar workers:

The WHD therefore easily concluded that if they were not covered by the FLSA,
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"the clerical workers most in need of protection will be required to work overtime without adequate compensation." How time-and-a-half pay would protect clerical workers' health the WHD did not explain.

Of especial interest was the bill introduced in late February by Representative Charles Kramer, a California Democrat. H.R. 8624 would have added three new subsections to the FLSA's definitions section defining an employee employed in a bona fide executive, administrative, and professional capacity. Kramer adopted verbatim most of the DOL's original regulations from 1938, but also inserted new provisions that, intriguingly, anticipated some of the most important and contentious revisions that the DOL made eight months later. In addition to raising the executive salary-level test to $50 a week, the bill would have accorded bona fide executive status to any employee "whose primary duty was to assist" an executive. Kramer also advocated the separation of the executive and administrative categories. He then defined the latter to encompass an employee whose primary duty was: (1) to "manage, direct, or superintend any group of employees," which presumably represented a lower managerial status than the management of an establishment or department required of executives; (2) to assist any employee who satisfied the definition under (1); and (3) (the vaguest and most expansive subgroup) to "execute the instructions of his superiors as to results to be accomplished by the exercise of discretionary powers as to the means by which such results are accomplished." The administrative employees' threshold salary Kramer kept at $30. Kramer also anticipated the WHD's addition of an artistic subgroup of excluded professional employees "customarily or regularly engaged in work which is largely original and creative in character and of which the result depends upon the conception, invention, imagination or genius of the employee." Like the original regulations, H.R. 8624 imposed no salary-level test for this professional subgroup. For good measure, Kramer also excluded from the FLSA any employee paid at least $200 a month, $50 a week, or even $1.25 an hour who was guaranteed at least 40 hours' employment a week. If further evidence were necessary, the bill's tell-tale final section, which—in stereotypical pro-employer fashion for the times—would have rolled back the statute of limitations for filing FLSA claims to only six months, underscored that Kramer's amendments were not designed to inure to workers' benefit. Kramer confirmed this speculation on the House floor.

197 H.R. 8624 (76th Cong., 3d Sess., Feb. 23, 1940). On the debate over the statute of limitations, see Linder, "Moments Are the Elements of Profit" at 339-48. The discussion of Kramer's bill in Malamud, "Engineering the Middle Classes" at 2301 n.353, is distorted by its mistaken assertion that the Roosevelt administration's $200-a-month proposal would
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in May 1940 when he (unsuccessfully) offered this “short period of limitation” as an amendment to the FLSA bill on the grounds that it was “manifestly unfair for employees who have continued in their employment without objection over a period of years to sue for large amounts of overtime which are alleged to have accumulated.”

Although it is not clear why Kramer undertook this initiative, the attention it paid to the exclusion of artistic professional employees strongly suggests, in combination with the limited range of Kramer’s interest in the FLSA, that he was engaged in constituent service on behalf of the movie industry in his Los Angeles district. This surmise is consistent with the fact that in 1937-38 Kramer had been responsible for the last minute amendment of the bill to make an exception from the prohibition of child labor for children employed as actors in motion pictures. Then in May 1940, on the last day of debate on the FLSA bills, Kramer, in (unsuccessfully) offering as an amendment the aforementioned compensation thresholds, justified weekly and hourly measures on the grounds that in the motion-picture industry even executives receiving some of the highest salaries paid in the United States were paid weekly, while other highly compensated employees were paid on an hourly basis.

One reason that the House took no action on Kramer’s proposal to write the definitions of the excluded white-collar workers directly into the FLSA was that the very next day House supporters of amending the FLSA agreed to give WHA Fleming “an opportunity to modify existing regulations before acting on pending amendments.” In this context Cox disclosed that Fleming planned conferences the following week “with industrial leaders to discuss proposed changes in his interpretation of the exemptions in the act.” To be sure, Cox appeared to hold out little prospect of a successful regulatory process: “If Colonel Fleming were given a free hand I think he would make a good job of administering a bad law.... But I don’t believe he will be permitted to exercise any freedom.” Since a rule was at that moment pending on Speaker Bankhead’s desk to consider the three FLSA bills from the first session, and Cox as a member of the Rules Committee was “entitled to act at any time the House is momentarily clear of other business,” priority for

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198 CR 86:5486 (May 3, 1940).
200 CR 86:5481 (May 3, 1940). See also below ch. 12.
201 “Give Time to Modify the Wage-Hour Rules,” NYT, Feb. 25, 1940 (9:6-7). For an express statement that Kramer’s bill had been preempted, see “Congress May Change
the legislative route seemed probable if not assured.

Of the three principal bills before the House during the second session, both Norton's administration bill (H.R. 5435)—viewed by labor as "the 'least obnoxious'"—and Ramspeck's compromise bill (H.R. 7349) would have excluded all employees employed at a guaranteed monthly salary of at least $200, while Barden's blatantly pro-employer bill (H.R. 7133) would have excluded all employees with salaries of at least $150 monthly or $1,800 a year. The WHD conservatively estimated that alone the salary provision of the Norton and Ramspeck bills would exclude an additional 125,000 workers from the hours provision, while 325,000 would be excluded under Barden's bill. Acting WHA Fleming told Congress in February that he had had a chance to read only the Barden amendments, which he believed went "too far."

As discriminatory as Barden's amendment was, ironically, his paltry salary threshold nevertheless exceeded by 15 percent the $30-a-week executive salary level that remained in the WHD's regulation until 1950. And as blatantly restrictive and antilabor as Barden's white-collar provision was, in the perverse speculation of The New York Times, it might have expanded the law's scope. Since the newspaper asserted an "almost universal agreement" that the FLSA "should not apply to highly paid workers," it feared that by "[r]estricting" the FLSA to workers earning less than $150 monthly, Barden's bill had "the incidental effect of extending the application to all persons getting up to that amount. Instead of applying merely to the lowest paid workers, the act would then definitely cover much the greater part of our whole working population." "The most important needed amendment," according to the Times, was "removal...of the mandatory blanket 'maximum hour' provisions" because then, from the unique perspective of its exquisite editorial logic, Barden's exemptions would become superfluous.

Wage-Hour Law," ENR, 124(9):295 (Feb. 29, 1940).

"Wage Law Revision Nears House Test," NYT, Apr. 22, 1940 (1:5).

The WHA's useful section-by-section comparison of the bills was published by Representative Norton in CR 86:2260-64 (App.). The estimates are explained at id., 2264 n.g. Without mentioning a source or methodology, a news magazine stated that the Ramspeck and Norton bills would exclude 212,000 and 464,000 additional workers, respectively, from the overtime provision. "Hurdle for Labor Law Change," USN, May 3, 1940, at 28.


"Wage-Hour Amendments," NYT, Apr. 25, 1940 (22:3) (editorial).

Wage-Hour Amendments," NYT, Apr. 29, 1940 (14:2) (editorial).
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Barden himself had been swept into a complex political dynamic that was tightly interwoven with competing amendatory processes. The well-informed *Journal of Commerce*, which covered the congressional debates and WHD hearings more thoroughly than any other business publication, reported in early March that “[i]mportant concessions to the employer viewpoint in the administration” of the FLSA might be made early in 1940 by the WHD “to head off a drive for drastic amendment of the act by Congress....” The newspaper observed that although the Roosevelt administration controlled the labor committees in both houses, “official circles would dislike having amendments come up because of the hostility of Western agricultural interests and Southern industrial groups. These could effect drastic changes if given the opportunity.”207 Such “an understanding between administrative leaders and anti-New Deal forces” that involved pro-employer concessions by the WHD making congressional intervention unnecessary would, according to the American Newspaper Guild, in addition “take some of the anti-New Dealers off of a difficult spot on to which they maneuvered themselves through over-enthusiasm for their attack on the law.” In particular Barden, who had felt himself safe from attack by the AFL because he had sponsored amendments to the Wagner Act that it had favored in opposition to the CIO, “must have received a severe shock” when the North Carolina State Federation of Labor adopted a resolution at its 1939 convention to prevent his reelection because he had led the fight to wreck the wage-hour law by excluding two million low-paid workers. However, according to the Guild: “If the Administration meets enough of Barden’s proposals to pacify his employer backers, he will at least be spared the necessity of again placing himself on record in the eyes of his AFL constituents.”208

Considerable publicity attended the run-up to the House debates. For example, in a radio address Barden misleadingly declared that in the FLSA there was “no such thing as a white-collar workers’ exemption, except” § 13(a)(1). He began by focusing on atypical cases presumably involving highly paid non-supervisory “administrative” employees: “As absurd as it may sound, it is nevertheless true that the Administrator is now confronted with men drawing as much as $7,000 per year and more who are under this act, and apparently there is no way to take them out without an amendment.” Then, without warning, Barden switched categories to complain that under the FLSA “columnists, newspaper reporters, and others who have responsible jobs, and sometimes like to go to a baseball game, play golf, or take an afternoon out for fishing, either must forego [sic] this pleasure or violate

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the act.” After calling his listeners’ attention to these trivial and/or misrepresented matters—employees cannot violate the overtime or minimum wage provisions of the FLSA—Barden finally focused on his most important point, an unveiled threat of *Realpolitik*, which, oddly, he never reiterated on the House floor in the course of his numerous speeches during the seven days of debate. Praising Fleming and his assistants as “high-type intelligent gentlemen,” he acknowledged that they were striving as best as they can to administer a law full of ambiguities and terms almost impossible of interpretation, construction, or application, and I am firmly of the opinion that unless the amendments included in the Barden bill or amendments of similar purport are adopted the act will pull its own house down, and industrial labor will lose the protection and benefits which it has heretofore and is now receiving.

Although Barden also found these ambiguities in the area of the agricultural processing exclusions, he included the quoted passage in the section on “White-collar exemptions.” His complaint about administrative agencies’ promulgation of regulations at odds with congressional intent was, in the abstract, common among opponents of the New Deal and became Representative Cox’s special province during the debates:

[I]s Congress to further tolerate administrative agents nullifying what Congress does through the substitution of what they think Congress ought to have done? [D]o you wish to prostate the people of America and Congress at the feet of these administrative tyrants who, through the substitution of their judgment for that of the Congress, set up regulations having the force and effect of law?

Barden, a member in good standing of the antilabor coalition dubbed “Cox’s army,” was part of this larger movement, but the particular substantive point

209 “Radio Address by Hon. Graham A. Barden, of North Carolina,” *CR* 86:2101 (App.) (Apr. 15, 1940). Barden merely stated that he had “recently” delivered this radio address without dating it. This part of the address he included in remarks he made on the House floor several days before the debate on his bill began. *CR* 86:4925 (Apr. 23, 1940).

210 *CR* 86:2102 (App.).

211 *CR* 86:2102 (App.).

212 *CR* 86:2101 (App.).

213 *CR* 86:5202 (Apr. 29, 1940).


215 It found expression in the Walter-Logan bill, which Congress passed in 1940 but Roosevelt’s veto of which it was unable to override. “The Walter-Logan Bill Dies,” *NYT*, 491
he was making about the ambiguities of the FLSA’s white-collar provision was both distinct from his pro-employer ideology and as irrebuttable then as it has remained ever since, although no participant in the early-twenty-first-century debates acknowledges or, perhaps, has even reflected on those ambiguities. As a member of the House Labor Committee in 1937-38 that helped enact the FLSA, Barden must have been aware that the entire responsibility for the ambiguity—which no WHA, confronted with what Barden accurately described as the “almost impossible” task of penetrating, ever publicly admitted—lay with the Seventy-Fifth Congress, because it had furnished absolutely no legislative intent as to what it meant by the “bona fide” “executive,” “administrative,” and “professional” employees it excluded from the wage and hour provisions. Nevertheless, the only after-the-fact light that he or chairman Norton ever shed on that intent by way of proposing their exclusive salary-level criterion for exclusion was indirect and unfocused: instead of explaining that the purpose of the overtime-pay provision was, for example, to spread employment and that because no appreciable number of workers with salaries in excess of $150 or $200 a month performed jobs that could be shared with the unemployed by eliminating overtime work, it would have been irrational to penalize their employers for working them long hours, they (and WHA Andrews), in effect, merely transmitted employers’ expressions of displeasure over being required to pay overtime to non-bosses paid far higher salaries.

This same attitude was shared even by that part of the press that in 1940 supported the FLSA in principle, such as the Washington Star, which editorialized that “the basic purpose of the act would not suffer if white-collar workers, earning $150 or $200 a month, were exempted....” Similarly, the St. Louis Post-Dispatch, which also opposed “emasculatory amendments,” agreed that the law unfairly penalized “employers who pay their employees well over the minimum scale, perhaps as much as several times the minimum” by requiring them to pay overtime to boot. ... [P]ersons earning approximately $2,000 a year are not those for whom Federal wage-hour legislation was intended. They may not be in the


216 However, Barden voted to recommit the bill in 1937 and against the conference report in 1938. CR 81:1835 (Dec. 17, 1937); CR 83:9267 (June 14, 1938).

217 New York Republican Bruce Barton, one of the world’s most celebrated advertising executives, continued this tradition by asserting on the House floor that “it was never intended under this act that the $5,000 or $10,000 or the $20,000 a year executive should be punching a time clock.” CR 86:5134 (Apr. 26, 1940).

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upper brackets, but they are not the bottom-rung workers in whose behalf the law was passed." 219 Editorial opinion on this issue was, to be sure, almost always shaped by publishers' own struggles as employers vehemently opposed to paying overtime to reporters. 220

In mid-April, Barden debated the FLSA amendments on the radio with New Deal Senator James Murray. 221 A week before the House debate reopened, Lewis Merrill, the president of the Union of Office and Professional Workers of America, appeared before the congressional Temporary National Economic Committee investigating the concentration of economic power and testified that in 1937 143,766 professional employees were totally unemployed. Pointing out that a business magazine survey of 287 firms' overtime compensation policies found that only eight paid time and a half to office workers, Merrill declared, with a view to the pending resumption of debate, that: "The relatively poor bargaining position of the white-collar employee in the labor market is clear.... Yet, an act designed to improve that position, the Fair Labor Standards Act, is one whose applicability to white-collar employees is in hourly doubt, and only preserved because of the unremitting efforts of the white-collar unions and the Congress of Industrial Organizations." 222

The renewed legislative wrangling in April 1940 augured success for the anti-labor southern congressional coalition, which "seemed able to dictate terms to the New Dealers...." 223 If, as the Roosevelt administration admitted, its opponents

219 "The Wage-Hour Battle," St. Louis Post-Dispatch, May 2, 1940, reprinted in CR 86:2721, 2722 (App.). The figure mentioned by the paper was the equivalent of about $27,000 in 2004—a salary that scarcely provoked such a reaction among employers in the latter year. See below chs. 16-17.

220 See above ch. 9 and below ch. 12.

221 "Wage-Hour Revisions Demanded by Barden," NYT, Apr. 15, 1940 (8:4). Because this account focused on the agricultural processing exclusions and did not mention the white-collar exclusions, it is assumed that this debate differs from the radio address that Barden had printed in the Congressional Record.


223 Henry Dorris, "House Opens Way to Wide Changing of Wage-Hour Act," NYT, Apr. 26, 1940 (1:3). On the complex agricultural-sectional forces behind congressional alignments, see Henry Dorris, "Rural-Urban Split Looming in House in Wage Act Fight," NYT, Apr. 27, 1940 (1:1). Some rural representatives were reluctant to vote for the Barden bill lest their urban colleagues retaliate by voting against the upcoming farm bill. "Administration Leads Attack on Wage Law," DW, May 2, 1940 (1:2, at 4:1). See
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probably had the votes to pass the Barden bill, the question remained as to whether the majority was sufficiently large to constrain the Senate, whose Education and Labor Committee solidly supported the New Deal, to take up the bill too.\textsuperscript{224} Two weeks before the debate resumed, the \textit{Journal of Commerce} had reported that the Roosevelt administration was not likely to mount more than a "perfunctory fight" to defeat the Barden amendments because indications were that it could stop the bill in the Senate, although this strategy was complicated by discussions by several senators of broader FLSA amendments, to be accompanied by hearings, which would have delayed final action during the Seventy-Sixth Congress.\textsuperscript{225} The House offered solid evidence of where it stood on the FLSA amendments when, on April 18, it voted by an overwhelming 279 to 97 in favor of the Walter-Logan bill, which proposed to subject federal agencies' rulings and regulations to judicial review. Denounced by Roosevelt and regarded by New Dealers as "a vicious thing,"\textsuperscript{226} the bill applied to the WHD, whose rulings in particular had brought about widespread demands in the House for clarification of various sections of the FLSA, especially with regard to white-collar workers: "The demand for the Logan-Walter bill arose more out of alleged arbitrary rulings of the Labor Board and the Wages and Hours Administration than from any other reason."\textsuperscript{227}

Then several days before the House debate resumed, John L. Lewis renewed his attacks on the House bloc consisting of "Garner Democrats" and Republicans.\textsuperscript{228} On April 23, Morris Watson, the chairman of the legislative committee of the Guild's International Executive Board, sent a circular to all its locals pointing out that the $150 and $200 coverage cut-offs in the Barden and Norton bills would harm the union's members and urging each local and member to telegraph their congressmen to oppose any amendments.\textsuperscript{229}

The House debate opened on April 25, just nine days after the conclusion of the first set of WHD white-collar regulatory hearings (on the wholesale distributive trades), of which Congress was well aware.\textsuperscript{230} President Roosevelt's flagging

\textsuperscript{224} Dorris, "Wage Law Revision Nears House Test" (9:4).
\textsuperscript{225} "The Washington Situation," \textit{JC}, Apr. 11, 1940 (1:2).
\textsuperscript{226} Henry Dorris, "House Votes 279-97 to Curb Agencies by Court Review," \textit{NYT}, Apr. 19, 1940 (1:1).
\textsuperscript{227} Henry Dorris, "House Vote on Agencies Signalizes a New Trend," \textit{NYT}, Apr. 21, 1940 (E7:1-2).
\textsuperscript{228} Henry Dorris, "Wage Law Revision Nears House Test," \textit{NYT}, Apr. 22, 1940 (1:5).
\textsuperscript{229} NLRB and Wage Hour Fights On," \textit{GR}, May 1, 1940 (5:1-3).
\textsuperscript{230} For example, New York Republican Representative Bruce Barton (founder of one
influence on Congress was impressively on display the very first day of debate, when, in spite of a letter from him stating that "it would be a great mistake to adopt the Barden amendments" that chairman Norton made public, the House voted 233 to 141 to permit floor debate on the Barden bill even though the Labor Committee had never considered, let alone reported it. This outcome, the result of "perhaps the bitterest debate of this session," was widely interpreted as signaling "the relative strength of the Cox-Barden and New Deal factions...."

The vast majority of the marathon debate—which took up about 200 double-columned pages in the Congressional Record and the senselessness of which, in view of the certainty that the Senate would not follow suit and/or that Roosevelt would issue an unoverridable veto, numerous representatives repeatedly emphasized—was focused on the issue of which agricultural processing workers would be excluded from the FLSA and whether they would be deprived only of hours protection (as under Norton's bill) or also of the 30-cent hourly minimum wage. The fact that the House devoted so little attention to the proposed exclusion of all workers (but realistically, by and large, of white-collar workers) with a guaranteed salary above a certain amount, which even the Fleming-Norton administration bill embodied, strongly suggested that it was not controversial—or, at the very least, that labor realized that overtime pay for non-minimum wage workers was an issue on which employers were so insistently demanding a rollback that failure to acquiesce in the concession might trigger much more destructive amendments.

Hardly had the seven-day debate (lasting from April 25 to May 3) begun when the country's largest and most famous advertising agencies) stated that hearings were being held on the application of the definitions of executive, administrative, and professional employees, which the previous WHA had "made unnecessarily tight," to the wholesale industry, "with every promise of a sensible and satisfactory agreement by all parties concerned." CR 86:5134 (Apr. 26, 1940). In fact, labor unions' testimony at those hearings gave the lie to this claim. See below ch. 12.

231Henry Dorris, "House Opens Way to Wide Changing of Wage-Hour Act," NYT, Apr. 26, 1940 (1:3); "Roosevelt Protest on Pay Act Changes Rejected by House," JC, Apr. 26, 1940 (1:7). Although both of these contemporaneous newspaper accounts have Norton reading the letter on April 25, according to the Congressional Record, she did not do so until April 26. The letter, which was sent to Norton by Stephen Early, Roosevelt's secretary, was taken from a letter by Roosevelt to an unnamed friend. CR 86:5122-23 (Apr. 26, 1940).


233Dorris, "House Opens Way to Wide Changing of Wage-Hour Act."


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a weary Labor Committee chairman Mary Norton was constrained to “come to the inescapable conclusion that my job to protect the working men and women of this country only began with the passage of the Fair Labor Standards Act. It is far more difficult to defend the law against attack than to secure its enactment.” She found it consistent with this mission to advocate the exclusion of all employees paid a guaranteed monthly salary of at least $200 on the grounds—which she had already advanced a year earlier—that it had been found that there are many persons whose work is not clearly administrative or executive but who are high-salaried workers with necessarily flexible hours. Their inclusion has created some hard problems for the Administrator and caused real hardship in many cases. Of course, you realize that there is nothing in the act which limits the application of this exemption to clerical or so-called “white-collar” workers. If a ditch digger received $200 a month he would be similarly exempt... Norton’s explanation was curious in the sense that apparently not even she believed that the work of the employees whom employers wanted excluded, although clearly not executive because they were not bosses—it was for this very reason that employers wanted the statutorily separate category of administrative employees that was ultimately vindicated in the WHD’s regulations later that year—was “administrative.” To be sure, achieving clarity on this point would have required Congress to divine what it had meant by that term. Although Norton’s bill overcame this interpretive obstacle by applying the salary threshold to salaried employees regardless of whether their work was encompassed by the trinitarian formula, the failure to enact her (or Barden’s) approach continued to leave the WHA without any guidance whatsoever as to the scope of the administrative workers whom Congress intended to exclude. In addition, Norton failed to explain whether by “flexible hours” she merely meant long hours or to identify the “real hardship” imposed on employers that had been compelled by the overtime provision to hire another worker to avoid the overtime penalty. The fact that virtually no member of the House asked these or any related questions or contested this expansion of the group of excluded workers strongly suggested that it was acceptable to virtually everyone who indignantly rejected Barden’s $150 threshold.

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239 See below chs. 11-13.
240 AFL president William Green wrote a letter to Barden rejecting the $150 cut-off as “economically unsound because at the present time most thinking people agree that the
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The sole challenge on the floor came from Missouri Democrat, Reuben Wood, who had been president of the Missouri State Federation of Labor from 1912 until his election to Congress in 1932 and then resumed that post from 1941 to 1953 after losing his seat. In the midst of his attack on Barden’s agricultural processing exclusions, he was engaged by Massachusetts Democrat Arthur Healey—the eponymous sponsor of the 1936 Walsh-Healey Act, which created an overtime regime for workers under government contracts— in the following carefully scripted colloquy:

Mr. Healey. Does the gentleman think that white-collar workers receiving $150 a month ought to be exempted from the hour provisions of the act?

Mr. Wood. I do not think the so-called white-collar workers, just because they are called white-collar workers, should be exempted, whether they receive $150 or $200 a month. The bank clerks and many other so-called white-collar workers are among the most sweated people in some instances. There is no industry that requires its employees to work longer hours than some bankers require their bank clerks to work. They should be privileged to be protected by this Fair Labor Standards Act.

Mr. Healey. And such an exemption would defeat one of the purposes of the act, namely, the spread of employment, would it not?

Mr. Wood. Of course, it would. I am glad the gentleman contributed that. The main purpose of the Wage and Hour Act is to spread employment.

In the welter of hostile amendments adopted, Ramspeck soon disowned his own bill on the grounds that he did not want his name on a bill containing exemptions from the 30-cent-an-hour minimum wage. On April 29, Barden explained the famous “white collar” situation. As the situation is now, you have under the wage-hour law men drawing as high as $7,000 a year. If they go back to work after hours, to attend to their business or sign their mail, then the employer has to pay them overtime at the rate of $7,000 a year divided by the hours. This is perfectly absurd. The act was never intended to cover that type of employee. Therefore I wrote into this bill provisions for exemption of those drawing a guaranteed salary of $150 a month, or $1,800 a year, where the employee is not required to work any minimum number of hours; in other words, he

number of hours worked per week must be lessened if we are to overcome widespread unemployment. We must distribute the amount of work available among a larger number of people.” CR 86:5135 (Apr. 26, 1940).

241See above ch. 6.
is the keeper of his own time....

That no one challenged Barden's lapse in logic in using "Therefore" to generate a rule based on $1,800 from an example based on $7,000 may have been a function of the fact that by this time, as New Dealer Raymond McKeough put it, "the advocates of revision were so strong they were likely to go 'hog wild' and load the bill with numerous exemptions. 'I hope they do.... It will give us more support for a move to recommit....'" By April 30, an "unexpected and entirely informal coalition" of "New Deal Democrats and a small group of Republicans...jockeyed Barden into repudiating his own bill by tentatively writing into it a series of revisions." Barden announced that he expected to vote against his own bill because it was loaded down with amendments (offered largely by Republicans), and in fact it was promptly defeated 156 to 66. These Republicans "privately explained their votes" as a response to having been put "'on the spot'" by the Democratic leadership, which conveyed Senate hints that the measure would receive "'a proper burial'"; the Republicans' votes on several amendments, according to the Times, "went further toward courting the friendship of labor than perhaps any proposals ever offered by the New Deal." Other Republicans traded their votes against the Barden bill for the New Dealers' openly offered votes for about $350 million for farm programs.

With the Barden bill was also lost an amendment offered by Michigan Republican Clare Hoffman— noted for having "opposed all New Deal programs for city workers"—and agreed to on a vote of 74 to 38 the previous day, which would have created hours-averaging for white-collar workers. Specifically, it would have permitted employers to work employees more than 42 hours a week without having to pay overtime during a period of 26 consecutive weeks if the employee was paid on a salary basis and had been in the employer's employ at least six months and the average workweek over that period did not exceed 42 hours. Anticipating the kind of misleading advertising that employers and their

244CR 86:5198 (Apr. 29, 1940).
245"Wage Law Changes by House Expected," NYT, Apr. 28, 1940 (9:4). McKeough was an Illinois Democrat.
246"Barden Legislation to Ease Wage Law Rejected by House," JC, May 1, 1940 (1:1, 3:7).
249Henry Dorris, "Wage Bill Beaten; Republicans Join with New Dealers," NYT, May 1, 1940 (1:1).
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congressional supporters would deploy half a century later in support of the FLSA amendments allegedly empowering workers to control their own flexible schedules, Hoffman touted his proposal as enabling a worker "who wants to get off 1 week to make up his time the next week."251 The Roosevelt administration’s spokespersons did not oppose the amendment, Ramspeck, for example, arguing that its sweeping character "will help us defeat the Barden bill...."252

Lost, too, with the defeat of the Barden bill was an amendment offered by Iowa Democrat Vincent Harrington that would have exempted from minimum wage and overtime liability all banks and trust companies the greater part of whose selling or servicing was in intrastate commerce.253 In vain Barden pleaded with Harrington to withdraw the amendment. Harrington’s admission that “the ordinary bank teller or clerk gets between $75 and $110 a month” in Iowa prompted California Democrat Lee Geyer to accuse him of first exempting such low-paid workers and then working them “from daylight to dark.” The tone of the proceedings at this point was nicely captured by Geyer’s exasperation qua strategy: “Let us adopt it and maybe we will kill the whole thing.” And adopt it the House did, albeit by the minuscule vote of 37 to 33.254

Some opponents of the FLSA, such as Georgia Democrat Malcolm Tarver, were acutely aware that the result of “the adoption of drastic amendments” would be nothing, since “the Senate will not consider them, and if they are...passed by the Senate, they will not be signed by the President.” But his “half a loaf is better than no bread”255 admonition failed to carry the day. Since the yeas and nays were not recorded on these various amendments, it is unclear whether their adoption was driven by dizzy-with-success anti-FLSA forces or by Democrats whose strategy consisted in loading the Barden bill up with enough radical amendments to make

251 CR 5225-26 (Apr. 29, 1940). On similar proposals beginning in the 1990s, see Linder, Autocratically Flexible Workplace at 13-15. Hoffman was quite atypical for the time in holding the view that: “The purpose of this law was not to put more men to work. The purpose was to increase wages by paying time and a half for overtime.” CR 86:5478 (May 3, 1940). Hoffman was the only member of Congress who made an appearance (by proxy) at the 1940 WHD white-collar hearings in support of an employer. Official Report of the Proceedings Before the Wage and Hour Division of the Department of Labor In the Matter of: Definition of “Executive, Administrative, Professional” Employees and “Outside Salesman” at 383 (Washington, D.C., April 12, 1940), in RG 155--Wage & Hour/Pub. Contracts Div. Location: 530, 47:9:3-4/Boxes 10-14.


it impassable.\textsuperscript{256}

In spite of the Barden bill’s defeat, of the general belief on May 1 that the aforementioned log-rolling over farm program appropriations together with “the apparent Republican determination to make its bid for the labor vote on the record” had made legislation unlikely,\textsuperscript{257} and of word from CIO vice president Sidney Hillman that at a conference with him Roosevelt had “seemed sympathetic to labor’s opposition to any proposals tending to ‘emasculate’ the statute,”\textsuperscript{258} FLSA opponents resumed their temporarily successful amendatory assaults on May 2—the same day on which the Chamber of Commerce of the United States, also meeting in Washington, adopted a resolution at the closing session of its annual convention demanding repeal of the FLSA.\textsuperscript{259} Of special interest was the amendment that South Dakota Republican Francis Case offered seeking to initiate a race to the bottom with Barden by exempting employers who paid employees a guaranteed annual salary of only $1,500. To the applause of the House, Case explained that his amendment was designed to encourage employers to provide “security for a great many workers who get close to” that annual salary because “[y]early job security is distinctly a step forward in social progress.” Since the House agreed to the amendment without any discussion whatsoever, no one asked Case to describe the social progress associated with privileging employers to require $30-a-week employees to work overtime without any penalty or premium pay\textsuperscript{260} (although the following day Representative Healey did observe that Case’s amendment took 1,750,000 workers out of the act).\textsuperscript{261} Nevertheless, even this Congress had its limits. When, immediately after adoption of the Case amendment, Harrington offered yet another monthly hours-averaging amendment that would have excluded any worker paid a guaranteed monthly salary merely in excess of the minimum wage, provided that he did not work more than 175 hours

\textsuperscript{256}Despite saying that Hoffman’s proposal was “‘an amendment to the Barden bill, and we don’t care what they do to the Barden bill,’” Norton voted against it. Henry Dorris, “House for ‘Leveling Off’ Overtime of the Worker Who Is on Salary,” \textit{NYT}, Apr. 30, 1940 (1:2-3, at 15:1).

\textsuperscript{257}Dorris, “Wage Bill Beaten.”

\textsuperscript{258}“Pay Act Exemption for Farm Workers Expanded by House,” \textit{JC}, May 2, 1940 (1:3, 19:4).


\textsuperscript{260}\textit{CR} 86:5455 (May 2, 1940).

\textsuperscript{261}\textit{CR} 86:5492 (May 3, 1940).
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per month, it was voted down 29 to 11.\textsuperscript{262} When the House agreed to amendments to the Norton bill excluding an additional two million workers from the FLSA, Norton joined Ramspeck and Barden in disowning her own bill. Norton herself conceded that the inclusion of so many amendments would probably lead to its passage because each would attract congressmen whose constituencies might benefit,\textsuperscript{263} but the \textit{Washington Post} drew the opposite conclusion on the grounds that “[m]ost urban Representatives are now dead set against the measure; and the farm group has not forgotten that it needs city votes for parity payments next week.”\textsuperscript{264}

By the seventh and last day of debate, May 3, with the knowledge that Congress would be unable to override a certain presidential veto of the drastic Barden amendments and that neither side would be able to muster a majority,\textsuperscript{265} the intensity of the rancor suggested that it had transcended orchestration. When Cox took the floor to express approval of an amendment to exempt wholesalers because they needed relaxation of the hours provision, only to be told by Representative Healey that it would exclude yet another 800,000 workers, Cox, finally revealing the real agenda, shot back: “As far as I am concerned, I would exempt them all. I would take off the people of America this kind of regimentation that you are undertaking to impose. I believe we have gone far enough in this direction, and I think we have reached the point where we should begin to turn back. [Applause.]”\textsuperscript{266}

For their part, the FLSA’s supporters had largely lost their patience with the proceedings, which Majority Leader John McCormack called “the most disgraceful spectacle this Congress has engaged in during my 12 years.... It is not a Congress; it is simply a chaotic group of individuals.”\textsuperscript{267} And Norton, for good measure,

\textsuperscript{262}\textit{CR} 86:5455-56. Also rejected was an amendment offered by Wade Kitchens (Dem. AR) that would have excluded foremen having the right to hire or fire, service, maintenance, and other non-production workers; its purported justification was that, in order to give production workers a full workweek, certain other employees had to be available a few extra hours per week. \textit{Id.} at 5457.

\textsuperscript{263}“Exemptions Passed for 2,000,000 More in House Wage Bill,” \textit{JC}, May 3, 1940 (1:3).


\textsuperscript{265}Several additional amendments excluding various white-collar workers (e.g., in wholesale establishments and banks) from the overtime provision failed of passage. \textit{CR} 86:5474-82.

\textsuperscript{266}\textit{CR} 86:5476 (May 3, 1940).

\textsuperscript{267}\textit{CR} 86:5487 (May 3, 1940).
added that the corresponding work product was a "monstrosity." After the New Dealers were able to defeat the substitute for H.R. 5435 by 211 to 171 and a majority of 205 to 175 voted to recommit the original Norton bill, "[t]here was a rush for the doors, many hastening to catch trains for Louisville to see the Kentucky Derby." The Roosevelt administration’s victory was attributed by the Washington Post to “a strange coalition of New Dealers opposed to any change in the law and conservatives who thought the pending bill...did not go far enough.” Norton—who voted against recommittal because her promise the previous day to vote to recommit had been conditioned on the House’s adoption of the amendments—had the last word, defending to the end her original bill as containing “very many fine exemptions.... None of the amendments in the original act would have destroyed the principle of the act. On the contrary, they would have strengthened it.”

Even though the week of debate had ended in an “important victory for labor,” the Daily Worker, in a front-page article directly above an announcement of Karl Marx’s 122nd birthday, lambasted the proceedings as “one of the most disgraceful exhibitions of rough-house and rowdyism ever put on by the House....”

Congress’s failure to act did not leave the editors of the Journal of Commerce in despair, since the Roosevelt administration’s “willingness...to accept several mild changes in the statute...does not by any means spell the end of efforts to modify this revolutionary Federal statute.” One of at least three amendments in which employers continued to be interested was, according to the editorial, the exemption of white-collar workers receiving monthly salaries of at least $200, who “were clearly not meant to be subject to the law by Congress.” The newspaper ascribed the defeat of the amendments to the fact that “the more bitter opponents of the act appended quite drastic revisions to the pending amendments.” However with “even enthusiastic supporters of the law” recognizing “the need for at least

268 CR 86:5490.
269 CR 86:5499-5501 (May 3, 1940).
272 CR 86:5501. After the 211-171 vote to reject all previously adopted amendments, Norton’s bill, as it stood when the House voted to recommit, “was in exactly the same form in which the bill was introduced...on March 29, 1939.” “House Recommits Norton Wage Bill by 205 to 175 Vote,” JC, May 4, 1940 (1:3, 6:6).
273 Jittery House Blocks Tory Wage Act Amendments,” DW, May 4, 1940 (1:1).
mild changes,” the editors were hopeful that the latter would be “enacted as soon as possible, while more drastic revision is left for future debate.” The United States News also laid great stress on the fact that President Roosevelt, Wage and Hour Administrator Fleming, and House Labor Committee chairman Norton had all favored the exclusion of all workers with a guaranteed monthly income of at least $200. And the Journal of Commerce offered employers even greater hope by pointing out that: “In some quarters the House vote killing the bill was interpreted as a vote of confidence in the Administration [sic] of the law by Col. Phillip B. Fleming,” who, despite having expressed a “desire that Congress clarify the law on some points, has undertaken to ameliorate some of the protests against enforcement through revision of the rules, believing this can be done without legislation.” Fleming, at least with regard to white-collar workers, did not disappoint.

A few months later, at its annual convention, the UOPWA rather immodestly took much of the credit for the anti-labor congressional coalition’s failure to revise the FLSA: “The UOPWA has carried on an active campaign against the Barden, Cox and Thomas amendments to the Fair Labor Standards Act, which would have excluded salaried employees earning over $100 to $150 a month. Effective lobbying against these amendments by the CIO and by our union helped to defeat these amendments at least temporarily.”

The FLSA amendments failed in 1939 and 1940, but they underscored the importance that the House of Representatives attached to “comparatively high” market-generated salaries as the single most important criterion rendering legislated protection against (unpaid) long hours unnecessary. Unfortunately, the House Labor Committee was unable to explain why “the hours provisions of the act...should not include” white-collar workers receiving salaries in excess of such a threshold. To be sure, it mentioned as a second criterion work that “generally requires flexibility in working time,” but it never distinguished such flexibility

274 "Wages and Hours Law Amendments,” *JC*, May 8, 1940 (2:2) (editorial).
276 “House Recommits Norton Wage Bill by 205 to 175 Vote” (6:6).
277 See below ch. 11-13.
278 *A Summary of the Proceedings of the Third Constitutional Convention of the United Office and Professional Workers of America* 79 (Aug. 31-Sept. 6, 1940).
279 *Amendments to the Fair Labor Standards Act of 1938*, at 8-9 (H. Rep. No. 522, 76th Cong., 1st Sess., Apr. 27, 1939). The Minimum Wage Study Commission thus erred in asserting: “The current salary test as a basic criterion used to identify exempt workers implicitly introduces a minimum wage type concept in the administration of this provision which is counter to the original intent of the exemption.” The Commission immediately
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from mere long hours. Nor, more importantly, did it even broach the fundamental question as to why such workers should be exposed to the multifarious pernicious consequences of systematic overtime work and why their work did not lend itself to spreading to their unemployed colleagues.

World War II

Senator [Elbert] THOMAS [Dem. Utah]. My point is simply this: There was tremendous agitation, the minute labor became scarce, for repeal of the Fair Labor Standards Act.

Mr. [William] DAVIS [chairman NWLB]. On the hours part of it.  

For Alfred P. Sloan, top man in General Motors, to call himself a white-collar man, just like that, may savor a bit of understatement.

No sooner had the amendments to the FLSA been defeated in May 1940 and the new white-collar overtime regulations gone into effect in October 1940 than the swift militarization of the U.S. economy in 1941—which brought in its wake sharply increased production, absorption of the unemployed, conversion of part of the workforce into soldiers, and the reappearance of the 48-hour week—over-shadowed disputes over the rules for determining which white-collar workers were contradicted its own position by conceding that Congress excluded these workers because “they were believed to be typically earning salaries well above the minimum wage level” and that “[a] relatively low salary test...defeats the ‘good faith’ aspects of the test.” Conrad Fritsch & Kathy Vandell, “Exemptions from the Fair Labor Standards Act: Outside Salesworkers and Executive, Administrative, and Professional Employees,” in Report of the Minimum Wage Study Commission 4:235, 240, 244 (1981). See also below ch. 15.


282 See below chs. 11-13.

283 From July 1940 to December 1941 the number of unemployed fell from 9.3 million to 3.8 million. “Unemployment in May 1942,” MLR 54(6):1451 (June 1942).

not entitled to time and a half pay. At this point the center of attention shifted to employers’ general demand for a 48-hour week with no overtime liability for any workers. Like employers, which had never dropped their hostility to hours regulation, the editors of *The New York Times* discovered, six weeks before the FLSA’s 40-hour premium overtime-pay trigger went into effect on October 24, 1940, a new reason for taking up the cudgels for this cause again. The occasion for the newspaper’s reinvigorated interest was President Roosevelt’s talk to the Teamsters Union on September 12, in the course of which, after praising his administration’s having set “decent maximum hours and days of labor...to bring about the objective of an American standard of living and recreation,” he called attention to those “who would even repeal what has been enacted ruing the past seven years on the plea that an adequate national defense requires the repeal.” In rebuttal, Roosevelt declared that “the employment of additional workers and provisions for overtime payments will insure adequate working hours at decent wages to do all that is now necessary in physical defense.” In contrast, the *Times*, which took a jaundiced view of what it perceived as the president’s “blanket approval of all existing laws and provisions” and “stubborn defense at all points of whatever our labor legislation happens to be,” asserted that the “defense emergency...should very properly...cause a reconsideration of bargaining arrangements and of rigid laws which cause an undue restriction of hours either directly or by such onerous wage provisions that the restriction is made all but inevitable.”

Coming to the defense of the president and the FLSA, Labor Secretary Perkins stressed that because the FLSA and Walsh-Healey Act permitted “unlimited hours of work...without special permission from anyone,” provided that time and a half was paid, they were “flexible and seem to meet any emergency needs of industry.” (To be sure, the *Times* editors purported to criticize the FLSA for being primarily directed at creating jobs rather than protecting workers against overwork: “So far as this law is concerned, employees could be worked 100 hours a week if they were only paid overtime.”) Praising the United States for having “perhaps the best and most complete mechanization of industry that the world has ever known,” she reminded the *Times* editors that in recommending a shorter workweek, the Roosevelt administration had attended to the untoward human consequences of the capitalist business cycle in a top-down manner circumventing working-class agency. In particular, the New Deal had adopted reduced hours

286 “Text of President Roosevelt’s Address on Labor,” *NYT*, Sept. 12, 1940 (14:3-6).
in a period of high productivity as a method of giving more general employment in the face of the natural decline in employment which tends to follow complete use of labor-saving machinery.

In other words, the forty-hour week was not introduced in American industry at the implacable demand of labor as a method of righting long-suffered wrongs in a period of declining productivity, but rather by a government seeking economic improvement and recovery as a method of increasing the opportunities for employment in a period of high technical perfection and productivity of machines.  

The *Times*, which once the United States had entered World War II, took glee in pointing out that the government continued to enforce an overtime law designed to spread employment at a time when there was no longer any unemployment, lectured Perkins for ignoring the fact that the 50-percent overtime penalty “at the least must seriously discourage—as it was intended to—working hours of more than forty a week; and in many cases it has the practical effect of a flat prohibition.” The editors also noted that WHA Fleming was defending the overtime provision on precisely the opposite basis: whereas for Perkins the FLSA’s virtue lay in its alleged promotion of employment opportunities, Fleming argued for it on the grounds of production. But as far as the *Times* was concerned, the Roosevelt administration itself had demonstrated that it did not believe that 40 hours secured the maximum production of which U.S. industry was capable by permitting government arsenals to increase their hours from 40 to 48.  

Fleming, who had told a national radio audience on the eve of the advent of the 40-hour overtime trigger in October 1940 that the FLSA was not impeding defense production, issued a New Year’s statement that the FLSA “is now functioning as it was intended.... The forty-hour overtime penalty is hastening employment. It is causing the training of new workers instead of exhaustion of the present work force. It is causing multiple shifts on production machines which otherwise would slow down or stop when fatigue overtakes the worker.” Nevertheless, although the labor movement also “preferred to have employers add extra shifts when they found themselves compelled to work their forces beyond the normal forty hours a week...so long as there are large numbers of men idle” to whom the work could be spread, “in defense industries labor spokesmen have been willing to have union

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290Perkins, Letter to Editor, *NYT*, Oct. 9, 1940 (24:6-7). Perkins rejected the *Times*’s comparison between the FLSA and the French 40-hour law, but her analysis of the latter was flawed; see Linder, *Autocratically Flexible Workplace* at 246.


men work longer than the forty hours a week provided the overtime payments were made.295

Surprisingly, a deviant administration view was voiced by Perkins’ subordinate, Verne Zimmer, the director of the Division of Labor Standards of the DOL, who at a conference of the Society for the Advancement of Management in December was apparently willing to resolve the dispute empirically. Since in his view “the primary purpose” of the FLSA was “the greater distribution of jobs...the question now is whether there is sufficient unemployment to justify retention of the act.” Since the four million workers whom defense production would absorb would in no way end unemployment, Zimmer supported the FLSA’s retention without venturing a definitive statement in favor of repeal if unemployment were ever abolished.296

The outset of 1941 also witnessed a brief controversy between Fleming and the chairman of General Motors, Alfred Sloan, Jr., who in 1933 had been centrally responsible for initiating the tradition of excluding administrative employees from federal hours regulation.297 On November 13, Sloan had addressed the sixtieth annual meeting of the Academy of Political Science in New York, calling for a six-day week as soon as the slack of unemployment had been taken up. In a part of his prepared manuscript that he did not deliver orally, Sloan also advocated cancelling the overtime penalty during the emergency to encourage a longer workweek.298 At its annual convention two weeks later, the AFL rejected Sloan’s proposal,299 which had been widely reported.300 In another radio address on January 8, 1941, Fleming quoted from a letter from Sloan: “[I]f we increase the work week and pay a penalty, the result is to increase wages about 8 per cent. We get nothing for this 8 per cent because efficiency, manifestly, is not increased, therefore the result is a step toward inflation. That, in part, is why I think the penalty should be waived during the emergency period. Frankly, I do not believe in “something for nothing”....” Fleming pointed out to his national radio audience that GM’s most recent annual statement showed a $183,000,000 profit against a payroll of $386,000,000: “Which is the more inflationary, an 8 per cent increase for the workers or profits almost half as large as total payroll?” Moreover, William

295“OPM Expected Soon to Ask 6-Day Week,” NYT, Jan. 12, 1941 (28:1).
297See above ch. 6.
Knudsen, the director of the Office of Production Management for Defense, who had been president of General Motors until June 1940, had informed Fleming that what the National Defense Commission wanted was "'more machine hours. Machines if properly cared for can work 168 hours a week. Man can't. I know from my own experience that ten hours a day is too much. The man who works at a machine ten hours a day is good for about eight and one-half hours normal production.'" Fleming therefore concluded that what the government wanted was an additional workweek of machine performance, not an additional eight hours of workers' performance.301

Yet two days later it was reported that Knudsen had decided to urge industry to overcome its reluctance to pay time and a half and go to a six-day week "to enable the nation to speed up its defense program...." Interestingly, one of the chief obstacles to the introduction of three-shift schedules was employers' discovery that "they would have to spread their supervisory forces thinly over their entire operations."302 Then, in a bizarre ending to the dispute two weeks later, Fleming "'publicly and ungrudgingly'" apologized to Sloan for having misunderstood him to have favored lengthening the straight-time workweek. What in fact Sloan wanted, Fleming reported, was to "'waive the overtime premium and expand the work hours per week, as part of the emergency, to forty-eight hours.'" In a mystifying non-sequitur, Fleming concluded that he was "'glad that Mr. Sloan is not one of those advocating repeal of the statute requiring time and a half for overtime at this point....'"303

As 48-hour workweeks became customary in the wake of the shrinkage of the reserve army of the unemployed, the Times once again seized the opportunity to propagandize on behalf of finally doing away with mandatory time-and-a-half pay (especially for those whose wages exceeded the statutory minimum). Turning back to the congressional debates in 1937-38, the editors asserted in early 1942 that most congressmen who voted for the FLSA had thought that overtime provisions were "genuine restrictions on hours" that "prohibited' employment for more than" 44, 42, and 40 hours. The underlying theory was to solve the problem of unemployment by forcing the employment of more men to do the same amount of work. When unemployment gave way to a shortage of labor, the Roosevelt administration devised the new theory that work beyond 40 hours would actually decrease production. The newspaper conceded that fatigue and a decline in hourly productivity set in at some point, but argued that total output did not begin to decline until even later and that therefore the 40-hour week restrained production.

301Fleming Defends Overtime Pay Rate," NYT, Jan. 9, 1941 (17:7).
302"OPM Expected Soon to Ask 6-Day Week." "
Finally, according to the *Times*, Perkins had adopted the “utterly unrealistic” defense that the FLSA did not really restrict hours because the employer could simply pay for additional hours; yet this view ignored the FLSA’s “very purpose,” which was to make it “prohibitively costly” for employers to work their employees more than 40 hours. To the *Times* it was an absurdity that the government was now urging employers to work their employees extended hours and to pay them 50 percent more for hours 40 to 48 “no matter how high the regular rate of pay of the particular worker concerned already happens to be.” Consequently, the editors advocated passage of a “moderate bill” raising the overtime pay threshold to 48 hours—a measure that Congress never enacted.

Even as the Bureau of Labor Statistics reported that office workers were only infrequently paid overtime premiums and longer hours were paid approximately at straight-time rates, the principal wartime overtime issue involving white-collar workers was driven by the narrowing compensation differentials between supervisors and supervisees, against the background of overall government-enforced compulsory salary stabilization, as the latter’s wages were fortified by time and half for overtime, while the former were excluded from that regime. Although this problem had been “plaguing management since the beginning of the war,...surprisingly little” had been done about it until mid-1943. A National Industrial Conference Board survey earlier that year had revealed that only 40 percent of firms had instituted plans for dealing with it, whereas some believed that no solution existed. In July 1943, a manager who anticipated “growing dissatisfaction among the supervisory staff on that score” asked a management magazine what the prevailing practice was. According to a survey of automotive parts and equipment manufacturers from May of that year, 54 percent of salaried foremen were paid time and a half and 19 percent straight time after 40 hours.

The federal government intervened in this area through the Commissioner of Internal Revenue, whose jurisdiction, under the Stabilization Act of 1942 and

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305Linder, *Autocratically Flexible Workplace* at 300.
309To Amend the Emergency Price Control Act of 1942, Pub. L. No. 729, ch. 578, 56 Stat. 765 (Oct. 2, 1942). The statute authorized the president to correct gross inequalities and permitted private employers to reduce their employees’ salaries to below $5,000. *Id.* §§ 4, 5(b) at 766, 767.
the Office of Economic Stabilization regulation\textsuperscript{310} and the executive order issued pursuant to it,\textsuperscript{311} extended to salaried employees with salaries in excess of $5,000 and bona fide executive, administrative, and professional employees whose salaries did not exceed $5,000 and who were not represented by a union. This latter group of white-collar workers were subject to the same salary and duties tests embodied in the October 1940 Stein-Fleming FLSA regulations.\textsuperscript{312} The commissioner’s starting point was that although employers were not required by the FLSA to pay supervisors on the same basis as wage earners, “it is customary for employers to maintain reasonable pay differentials between the wage earners and their supervisors and between the several levels of supervision.” As a result of overtime pay to wage earners, in many cases they were receiving greater total compensation not only than their immediate supervisors, but in some cases than second and third level supervisors during a given pay period. The Commissioner therefore instructed the Salary Stabilization Unit that the maximum amounts allowed were such as necessary to maintain the minimum differentials between interrelated job classifications “required for the maintenance of productive efficiency.” Those amounts were supposed to be “proportionately less in the higher levels.” The operating pay principle permitted compensation to all employees at the same overtime rates for actual scheduled hours beyond 40 as “paid to the highest hourly-paid employee” subject to the FLSA if the former’s pay for the 40-hour week did not exceed the latter’s. Because the amount allowable was to be “progressively reduced...in such a manner that each succeeding higher level receives a proportionately lesser amount,”\textsuperscript{313} it was clear that the Commissioner was not proposing “in many cases to permit payment to supervisors of the full amount they would receive on a regular time-and-one-half basis.”\textsuperscript{314}

Two months after the Commissioner of Internal Revenue had announced the new salary policy, the Controllers Institute of America, whose members included controllers of 2,000 of the country’s largest firms, released a study revealing that the introduction of the 48-hour workweek had created serious new problems regarding wage relationships between factory workers and “so-called white-collar workers.” Management found itself in a “quandary”: If it paid them time and a

\textsuperscript{310}Part 4001.4, in \textit{FR} 7:8748, 8749 (Oct. 29, 1942) (issued Oct. 27, 1942).
\textsuperscript{311}EO No. 9328, in \textit{FR} 8:4681 (Apr. 10, 1943).
\textsuperscript{312}Treasury Dept. Regulations Part 1002.3-.5, -.10 (Dec. 2, 1942), \textit{FR} 7:10550, 10551 (Dec. 3, 1942); on the FLSA regulations, see below ch. 13.
\textsuperscript{313}Bureau of Internal Revenue, Release No. 3731 (July 1, 1943), in BNA, \textit{Wage and Hour Manual} 624 (1943 ed.). For a brief account, see “Revises Overtime Ruling,” \textit{NYT}, July 2, 1943 (24:7).
\textsuperscript{314}“Overtime for Supervisors.”
half, it was violating the law by increasing their compensation, but if it asked them to work 48 hours without paying them extra, it was violating the law by cutting their compensation. When office workers of one firm complained that the factory workers were getting more money, the firm offered them transfers to the factory, but: "So far...not one office worker has accepted the invitation to don respiratory mask and overalls when they realize their rate is higher and that the only reason more money is made by the factory workers is because of the longer hours." Nevertheless, a number of the firms surveyed disclosed "a strong feeling that the salary group of workers were the 'forgotten men' in the present situation." In this respect they agreed with the white-collar workers themselves who met in 1943 to set up a permanent committee to represent the interests of "the 'forgotten man' of the war" in the national economy.

The same wartime issue of maintaining differentials between hourly production workers entitled to premium overtime pay under the FLSA and salaried white-collar workers who were not played itself out in collective bargaining. Illustrative is a dispute involving professional employees. Salaried engineers, represented by chapter 13 of the Federation of Architects, Engineers, Chemists and Technicians (CIO), at the General Electric Company's Philadelphia and Darby plants, which produced switch gear equipment, had requested that all employees receiving $5,000 or less receive time and a half for all work in excess of 8 hours a day or 40 a week because this proposal would eliminate an inequity that had been created by the fact that engineers who might receive lower weekly salaries than some draftsmen in the bargaining unit were arbitrarily exempt from overtime pay, whereas the draftsmen received it. The FAECT also pointed to the practice in five firms, including General Motors, to pay overtime to "technically 'exempt' employees...." To be sure, the union distinguished its request from a mere demand for more money by also pointing out that: "Normally overtime compensation serves as a brake for possible employer abuse and as a means for spreading employment."

In turn, General Electric argued that engineering department employees were an exempt classification under the FLSA and that awarding time and a half to 135 of the company's 16,000 exempt employees would create other inequalities. Before the war, this group's overtime work was "casual," and, as employers were and are wont to asset, "considered as covered by the salary for the job." Beginning in 1942, GE did initiate the practice of paying exempt employees straight time for

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315"Overtime Pay Stirs Dissatisfaction Among Those Who Cannot Get It," NYT, Sept. 8, 1943 (44:4-5).


planned overtime hours, which the Treasury Department approved and was still in effect in 1945. In addition, GE contended that it was “contrary to industry practice to pay time and one-half to exempt employees.” FLSA-exempt employees at the Bell Telephone Company and E. I. du Pont de Nemours and Company did not receive overtime pay; GM did pay it, but that practice had been established before stabilization.318

The War Labor Board—which had jurisdiction over the adjustment of salaries up to $5,000 annually except for nonunion bona fide executive, administrative, and professional employees319—found that the union’s request affected 135 FLSA-exempt engineers who were also not subject to the overtime provisions under the Walsh-Healey Act by interpretation. Since the 345 draftsmen did receive overtime pay under the latter law, there was an inequity within the bargaining unit that had to be eliminated, especially since both groups did related work.320 The Board ordered that GE pay engineers with monthly salaries of $350 or less time and a half after 8 hours a day and 40 a week; with regard to those with salaries between $350 and $500, the WLB ordered the parties to negotiate a plan for overtime pay after eight and/or 40 hours at rates based on a formula similar to the aforementioned tapered plan used by the Salary Stabilization Unit of the Treasury Department.321

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318 General Electric Co., WLR 28:89.
Employers Switch Strategies: From Relying on an Anti-Labor Congress to Capturing a Pro-Labor Wage and Hour Division

Amendments to the Wage-Hour Act which were before Congress this spring were understood to have been dropped on the understanding that administration of the act would be modified.¹

Strict definition of what an executive is should, and probably will, be relaxed by the Wage and Hour Division.²

Employers’ failure to secure by legislative amendment from the 76th Congress in 1939-40 any, let alone a significant, expansion of the universe of white-collar employees excluded from overtime regulation³ prompted numerous firms and employer associations to seek to achieve a similar, if not equivalent, exemption from liability from the Wage and Hour Division, the regulatory agency entrusted with administering the FLSA in general and defining the excluded categories of executive, administrative, and professional employees in particular. If some employers’ highest priority was elimination of overtime regulation for all but minimum-wage workers and their second-best approach was a Bardenesque low ($150) monthly salary ceiling for overtime eligibility, then regulatory revision was a third-best strategy. In creating the Department of Labor in 1913, Congress may have declared that its purpose “shall be to foster, promote, and develop the welfare of the wage earners of the United States,”⁴ but once employers realized by July 1939 that amending the FLSA was, despite the growing power of the southern Democrat-Republican conservative coalition, by no means a foregone conclusion, they began turning their attention to persuading the WHD to accommodate their

¹“Professional Employees [sic] Status to Be Studied,” ENR 125:73 (July 18, 1940).
³See above ch. 10.
⁴An Act to Create a Department of Labor, ch. 141, § 1, 37 Stat. 736 (1913) (codified at 29 USC § 551 (2000)).

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demands for broader white-collar exemptions by expanding the scope of the components of the trinitarian formula.

This chapter first analyzes the background behind the WHD's decision in 1940 to hold hearings on the white-collar overtime regulations and then provides a biographical account of the heretofore obscure but crucial decisionmaker, Harold Stein, who presided over them, while the Chapter 12 scrutinizes the voluminous hearing testimony and Chapter 13 examines Stein's report and the new set of regulations that adopted it.

The Road to Regulatory Revision

Mr. [Harry] SHEPPARD [Dem. CA]. ...Colonel: Isn't it consistent, isn't it easy, that whenever an administrator is confronted with a question in his mind as to what the intent of the Congress may be, to hold a hearing and invite Members of the Congress to attend and find out exactly what the situation was and what they may have had in mind at the time that the enactment was passed? ...

Colonel FLEMING. Would that mean inviting all of Congress down there, Congressman? Each one may have a different idea.

Mr. SHEPPARD. No. Not inviting all of them. They won't all come. 5

In spite of the fact that employer and labor representatives had discussed a draft of and expressed their approval of the original regulations of October 1938, 6 during the following year and a half the WHD engaged in "much correspondence and many conferences" with employers, trade associations, unions, and workers about the regulations. 7 Nevertheless, following publication of the regulations, the WHD received no petitions for changes for more than a year: "From time to time some dissatisfaction with the regulations was indicated by various groups, but none of them definitely requested amendments and hearing." 8 In the final days of 1939,


6See above ch. 9.

7U.S. DOL, WHD, "Executive, Administrative, Professional...Outside Salesman" Redefined: Effective October 24, 1940: Report and Recommendations of the Presiding Officer at Hearings Preliminary to Redefinition 1[(Oct. 10,] 1940) (Stein Report).

8US DOL, WHD, "Wage-Hour Public Hearings Called to Consider Definitions of Executive and Administrative Employees of Wholesalers" at 3-4 (R-689, Mar. 18, 1940)
WHA Philip Fleming announced at a news conference that, because the American Retail Federation, newspaper publishers, and wholesalers had asked for a re-definition of the white-collar categories, the exemption might be dealt with at new public hearings. The Council of National Wholesale Associations encompassed all the wholesale distributive trades, while the ARF was "particularly concerned with the problem of assistant buyers who buy for wholesale chain stores." In addition, the Southern States Industrial Council was "interested in various types of employees in many different industries...."

After these employer organizations, making use of the regulatory mechanism for requesting amendments, had formally applied for hearings, Fleming scheduled them. In mid-March 1940 he announced the first such hearing, to take place April 10, with respect to the wholesale distributive trades. The hearings, of which he appointed Harold Stein the presiding officer, were to deal with the question of what amendments, if any, should be made to §§ 541.1, 541.2, and 541.4, which encompassed the definitions of executive, administrative, and professional employees and outside salesmen. These first hearings were confined to the wholesale distributive trades because only they had filed petitions, but even if other "business groups" did in the future apply, Fleming decided to hold separate hearings for different industries in order to focus on each one's special problems.

The fear that revisions based on the testimony at this first round of hearings would establish a precedent that would "have a tremendous weight in other industries" prompted Abraham Isserman, counsel for the American Newspaper Guild, to write to Fleming on March 22 to complain that the scope and impact of the hearings would "necessarily...be much broader than the actual notice of hearing (copy furnished by the DOL Wirtz Labor Library).


US DOL, WHD, "Wage-Hour Public Hearings Called to Consider Definitions of Executive and Administrative Employees of Wholesalers" at 1-2.

§541.5: "Any person wishing a revision of the terms of the foregoing regulations may submit in writing to the Administrator a petition setting forth the changes desired and the reasons for proposing them. If, upon inspection of the petition, the Administrator believes that reasonable cause for amendment of the regulation is set forth, the Administrator will either schedule a hearing with due notice to interested parties, or will make other provisions for affording interested parties an opportunity to present their views...."


Apparently, publishers failed to file a formal application for a hearing, since in mid-March the WHD stated that it had promptly granted hearings to "all pending petitions." US DOL, WHD, "Wage-Hour Public Hearings Called to Consider Definitions of Executive and Administrative Employees of Wholesalers" at 1, 2, 4.
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indicates by its express terms.” Because many trade unionists “interested in maintaining the status quo” had “erroneously” concluded that the wholesale distributive trades hearings would not affect them, they were not planning to attend the hearings and might therefore later “be faced with a fait accompli....” Subsequent hearings would not remedy this situation since “the precedent of newly established definitions would carry great weight.” In addition, the Guild was especially concerned because it had indirectly heard that “the question of linking up one or more of these definitions with monthly earnings of employees will be on the agenda,” a linkage to which the Guild and other unions objected in principle. Isserman therefore requested that Fleming open the hearing to all interested parties to submit evidence.14

In his reply a week later Fleming pointed out that after having considered the issue of holding a general hearing for all industries or separate hearings for major industries, he had concluded that there was “such a wide variation in the work and functions performed by executive, administrative and professional employees in different industries, especially in the administrative and professional classes, that it appeared more practicable to hold separate industry hearings.” He therefore rejected Isserman’s contention that a definition in one industry was “necessarily to be treated as a precedent in others.” Although Fleming recognized that “certain standards of definition” might be applicable to other industries, he nevertheless feared that the record of a general hearing “would contain a confusion of testimony....” Thus while adhering to his plan for industry-by-industry hearings, he saw no reason why representatives of other industries should not attend as observers and file legal briefs. Fleming also specifically invited the Guild to be “heard” on behalf of its own views if oral argument was heard. In any event, he advised Isserman that definitions would not necessarily be issued immediately after the first hearing because further hearings might be desirable.15

Shortly after this exchange the WHD announced on April 2 that representatives of groups that might be affected would be permitted to participate in the hearing on April 10.16


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The Council of National Wholesale Associations had early on taken an aggressive stance on revision of the white-collar regulations. Organized in 1937, it had a twofold purpose of refuting "propaganda based on the 'elimination of the middleman'" and developing uniform policies concerning legislation. In March 1939 wholesalers prevailed on Pennsylvania Republican George Darrow to introduce a bill in the House that would have permitted them to continue to employ all of their employees 44 hours a week without being required to pay overtime even after the statutory overtime trigger was lowered to 42 and 40 hours. Darrow, a former wholesaler himself, used many of the same tropes to justify this special treatment that wholesalers afterwards deployed in 1940 in their regulatory campaign.

Under the CNWA's auspices, 24 national wholesalers associations held a special meeting on December 6, 1939, to appeal to government officials to "exempt them from the hours provision" of the FLSA on the grounds that operating costs had risen so rapidly since its enactment that "hardship ha[d] been worked on all types of wholesaling...." The nub of their complaint was the claim that they were "essentially a service industry" whose customers (retailers, charitable institutions, hospitals, railroads, and steamship lines) were "exempted from the regulation on hours, with which wholesalers must comply." To accommodate these customers, the wholesalers themselves were "compelled to keep open for long hours...." The exact nature of the alleged hardship was difficult to discern because their argument was apparently not that their profits were being narrowed since they passed these increased costs on to the retailers, thus "'materially increasing distribution costs.'" It was presumably in this sense that the wholesalers adopted a resolution appointing a committee "'to wait on the officials of the Wage and Hour Division'" to state their conviction that it was "'in the best public interest, that the wholesale trades be exempted from the maximum-hours provisions of the act.'" In a subsidiary argument that ignored those provisions' purpose, they contended that because the wholesale sector's wages were "well above" the statutory minimum and those of their customers, "the burden of overtime

19CR 84:6633-34 (June 5, 1939).
20H.R. 4631 (76th Cong., 1st Sess., Mar. 1, 1939); CR 84:5474-75 (May 11, 1939). In 1940 Massachusetts Democratic Representative Joseph Casey advocated that wholesalers be relieved of overtime pay liability with the understanding that they had to continue to pay already high hourly wage scales for each hour worked so that there would always be a check on them to avoid unnecessary long hours. CR 86:2672-73 (App.) (May 3, 1940).
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payments necessitated by the law is excessive.”

In mid-January 1940 the committee then met with WHD officials to discuss “the prospects for action on their drive for changes in the Wages and Hours Law substituting straight hourly wages for time-and-half for overtime work in the wholesale trades.” Fleming reportedly told the committee that “any action would have to come through Congressional legislation.”

In January and February at least four bills were introduced in both houses of Congress, by Democrats and Republicans, excluding all wholesale employees from the overtime (but not the minimum wage) provision of the FLSA.

That WHA Fleming was considering regulatory action to preempt more radical congressional measures was known, at least in well-informed circles, as early as January 16, 1940, when Leo Cherne, the executive secretary of the Research Institute of America, delivered an address to the annual convention of the Wholesale Dry Goods Institute in which he stated:

The possibility is...that rather than risk emasculation of the Act, rather than risk controversy, the Wage & Hour Administrator may, within the next thirty or sixty days, change the definition of administrative, executive and professional employees, so that an employee in an office capacity earning more than, let us say, $150 a month, will, by virtue of these earnings, prima facie be an executive or administrative employee.

The administrator can not create exemptions not now in the Act, but he can...say what the exemptions...mean, so if he can square this change with his conscience, there is a good chance that the Wage & Hour Act will not be up before this session of Congress.

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22“Wholesalers in Capital,” NYT, Jan. 17, 1940 (34:2).


24On the Wholesale Dry Goods Institute’s radical proposal for excluding white-collar workers from overtime regulation, see below ch. 12.

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That agency intercession might confer on employers benefits that a politically paralyzed Congress could not soon become a possibility. On March 4, 1940, two weeks after the Senate had officially confirmed him as WHA,26 Philip Fleming declared that with regard to the administrator’s discretionary determinations, it was his “‘clear duty’ to ‘make such interpretations and definitions within the normal channels of trade and interstate commerce as will create the least uncertainty within the industry....’” In accordance with his duty to “grant a hearing and the right of appeal to ‘every employe and employer whose interests are affected,’” Fleming also announced his plans to hold two hearings within a month on applications for reviews of administrative rulings. One of them sought a “redefinition, separately of administrative and executive employees,” and although The New York Times failed to identify the requester, it added, portentously, that the change “would serve to exempt large groups of white collar workers”—without commenting on the dissonant juxtaposition of this outcome to the headline, “Fleming Pledges Wage Act Justice.” Alluding to the third category of the trinitarian formula, Fleming also mentioned that “he had an ‘old brief’ by the American Newspaper Publishers Association urging changes in the definition of ‘professional’ employees and a memorandum by the American Newspaper Guild opposing them, but no plans for a hearing were indicated.”27 The ANPA was presumably dissatisfied with administrative rulings that some reporters and editorial writers were professional employees and others not—a classification that would remain unchanged even if there were no regulatory requirement that their work be “based upon educational training in a specially organized body of knowledge....”28

Events, however, quickly overtook Fleming’s hesitation, and soon the ANPA would have its hearing too.29 The ANPA and other publisher groups had filed a

quotation marks; Bernstein did not indicate the source.

26a“The Day in Washington,” NYT, Feb. 20, 1940 (11:2). Although Elmer Andrews, the first WHA, had resigned in October 1939 and Roosevelt had named Fleming as his successor, official confirmation was delayed as a result of a legal dispute over whether an army officer—Fleming was a colonel in the Army Corps of Engineers—could serve in a civilian post. “Shifts in Chiefs Seen in Wage-Hour Post,” NYT, Sept. 16, 1939 (16:2); “Andrews Resigns, Col. Fleming Gets His Post, with No Explanation of Wages-Hours Shift,” NYT, Oct. 18, 1939 (1:2-3).

27aFleming Pledges Wage Act Justice,” NYT, Mar. 5, 1940 (12:6). The article did identify the National Retail Federation as having filed the other request dealing with reclassification of purchasing agents as engaged in wholesale rather than retail occupations.


29See below.
memorandum arguing both that the newspaper industry should be exempted entirely from coverage on the grounds that it was a service establishment engaged in intrastate commerce and that virtually all workers in departments represented by the Guild should be excluded as professional or administrative employees. To meet publishers' attempt to apply pressure on Congress and the WHA, the Guild filed its own hundred-page counter-memorandum.\textsuperscript{30} In refutation of the publishers' assertion that the union's members did not need and were not entitled to FLSA protection, the Guild's counsel, A. J. Isserman, emphasized that "'[t]oday newspaper men do not come and go as they please.... Hours are regulated, some times [sic] by time clocks....'"\textsuperscript{31} Despite the fact that the Guild's contracts established working conditions superior to those required by the FLSA, the union advanced several reasons for defending the statute. In addition to the fact that some of its members did not yet work under collective bargaining agreements, the wording in some contracts tied hours and overtime to the FLSA. Excluding newspaper workers from the act would therefore create another hurdle to be overcome in negotiations. Moreover, the Guild viewed the attack on the wage-hour law as "part of a general campaign against social legislation, more important to us, such as the Wagner Act, that is coming to a head in Washington." Finally, in the context of an economy still deeply mired in depression, the ANG argued that: "The act helps to spread employment. This is important not only because more jobs are needed for our unemployed but unemployment is an ever-present menace to the salary and hour standards of the employed."\textsuperscript{32}

That the WHA was considering expanding the exclusions must have been percolating through business circles: already at the end of February the leading construction industry trade magazine hopefully reported that although there would probably be no change in the definition of "professional," the definitions of "administrative" and "executive" "may be so broadened—perhaps by including all above a certain wage level—as to exempt most engineering employees."\textsuperscript{33} Because of such "persistent reports in Congressional circles that the national administration had worked out a plan of peace with opponents of the Fair Labor Standards Act, under which the Wage and Hour Division would issue a series of revised rulings drastically reducing the application of the act, and proposed amendments to that effect by Congress would be dropped," the Guild had sought assurances from Fleming—which he gave the union—that if any changes in rulings or definitions

\textsuperscript{31}"Guild Meets Attack on Wage-Hour Law" (5:3-4).
\textsuperscript{32}"The Wage-Hour Fight," \textit{GR}, Mar. 1, 1940 (8:1) (editorial).
\textsuperscript{33}"Congress May Change Wage-Hour Law," \textit{ENR} 124(9):295 (Feb. 29, 1940).
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were contemplated, public hearings would be held.³⁴

By March, the WHD's preliminary arrangements had alarmed the UOPWA, the left-wing white-collar union:

An enveloping movement planned in Congressional and Administrative halls of government to cut off several categories of workers, including white collar employees, from the provisions of the Wage Hour Law has evoked a mighty wave of protest from organized labor. ... A rearguard action by none other than Administrator Fleming is scheduled to take place on April 10, at which time hearings have been announced on possible reinterpretations of the definition now covering administrative, executive, and professional employees, and consideration of exclusion of employees earning more than $135-$150 monthly. [A]ny relaxation in enforcement or change in interpretation...are [sic] merely a prelude to the destruction of the entire act...³⁵

The union announced that it would present a brief at the hearings identifying the motives of those who wanted to amend the FLSA.³⁶

Some sense of the grudging treatment that the WHD had been according alleged exempt administrative employees can be gleaned from the pertinent opinions of its general counsel:

Purchasing agents with a staff of only one person cannot be entitled to an exemption from provisions of Act under terms of Section 541.1...unless he takes part in the management of establishment as a whole.

It is also doubtful whether a purchasing agent with two clerks or stenographers satisfies another requirement of the definition—"whose primary duty is management of establishment, or a customarily recognized department thereof."³⁷

Confidential secretaries to executives are not exempt merely because the persons they are secretaries for are exempt executives.³⁸

Secretaries to executives who, because of the nature of their duties, must delegate certain of their duties to secretaries might be held to be exempt...if secretaries satisfy all

³⁴"Wage-Hour Act Hearings Pledged."
³⁵"Fight Barring of Salaried Worker from Wage Law," OPN, 6(3):1:2, 3:3 (Mar-Apr 1940).
³⁶"Fight Barring of Salaried Worker from Wage Law" (3:3).
³⁸12-12-1938-Washington Gas Light Co.-317, in Opinion Manual of the General Counsel Wage and Hour Division Department of Labor, 1:28

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Vice president of bank who is member of board of directors and of loan and discount committee, but who also performs any other work around bank that needs to be done, cannot claim exemption from benefits of Act as an executive, if extra work may be said to be of a “substantial amount.”

The regulations that Fleming issued in October 1940 revamped such rulings, resolving all of these classification disputes in employers’ favor.

In the meantime, even more aggressive employers organizations took precedence: although the March 19 hearing notice in the Federal Register failed to identify the wholesale organizations other than the CNWA requesting a hearing, the Times reported that they were the “National [sic] Retail Federation” and the Southern States Industrial Council on behalf of its wholesale distributor members. The newspaper also added that discussion of the “exemptions” of administrative, executive, and professional employees had “led to demands in Congress for exemption of ‘white collar’ workers within certain wage limits from the effects of the statute.” (Triggered by a separate application filed by the SSIC with respect to the manufacturing and extractive industries, Fleming scheduled another hearing on this sector for June 3.)

The SSIC, which had filed a petition for revision of the regulations on February 26, 1940, had nurtured and propagandized on behalf of an especially antagonistic position toward the FLSA. Founded as “a child of the N.R.A.” in 1933 to demand wage differentials in codes of fair competition favoring the South, the organization, whose members at the time operated 10,000 plants, testified at the original FLSA congressional hearings in June 1937 through its

requirements of Regulations.


41“Knitters’ Pay Rise Backed by Fleming,” NYT, Mar. 19, 1940 (18:1).

42FR 5:1685 (May 11, 1940).

43“1940 WHD Hearings Transcript” at 11 (June 3) (J. Ballew).

44Investigation of the National Recovery Administration: Hearings Before the Committee on Finance United States Senate, Part 5, at 1592 (74th Cong., 1st Sess. Apr. 5-12, 1935) (testimony of John Edgerton, president, SSIC).

45“Wage Differentials Urged for the South,” NYT, Dec. 20, 1933 (8:2).

president, John Edgerton, that regional wage differentials, were, in the favored racist code of the period, “established by the natural operation of natural laws.”47 Edgerton, a Tennessee textile manufacturer who had been president of the National Association of Manufacturers from 1921 to 1931 and had a preference for “‘racial purity,’”48 proudly confirmed that he was “one of the leaders in the South speaking against any and all State or national laws that would provide a minimum wage or maximum hours in industry....”49 Three months later the SSIC’s directors adopted a resolution denouncing the FLSA bill as “‘economically unsound’” and designed to “‘throttle industry’”50—a rejectionist position to which the organization still adhered in 1970, when it testified before Congress that it opposed “the entire concept” of a federal establishment of a minimum wage.51 In a pamphlet published while the Senate FLSA bill was being held up in the House Rules Committee, the SSIC insisted that “the South cannot willingly submit to any law whose administration is placed in the hands of a Board in Washington that inevitably would be dominated by majority interests of other sections.”52 Unable to separate itself from its deepest commitment, the SSIC declared that among the factors contributing to lower wage rates in South was “the presence of a large percentage of sub-normal workers as represented by the southern negro....”53

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47*Fair Labor Standards Act of 1937: Joint Hearings Before the Committee on Education and Labor United States Senate and the Committee on Labor House of Representatives* at 794.


49*Fair Labor Standards Act of 1937: Joint Hearings Before the Committee on Education and Labor United States Senate and the Committee on Labor House of Representatives* at 802.


53Southern States Industrial Council, *Chief Dangers to the South of Uniform Wage and Hour Legislation* (n.p. [6]).
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The Presiding Officer: Harold Stein

[W]e, in administering this law [FLSA], have taken some cognizance of what we conceive to be the successes and failures of the N. R. A which in some way resembled the Act...and according to the information we have received, there was a considerable question in some industries about the abuse of the exemption for executive and administrative, using the words in their broad sense.

It has been reported to us that under the N. R. A. in some industries, a good many people who should not have been so described, were so described and were given titles on paper which bore no relation to their actual duties and were worked for very long hours without adequate compensation.54

Harold Stein...was a part of Franklin D. Roosevelt’s New Deal from its inception, served at one time or another in a dozen of its agencies and brought to each of them a combination of patient pragmatism and unquenchable idealism. Quiet, modest, indefatigable, he understood better, perhaps, than any of his contemporaries the arcane pathways through the jungle of bureaucracy. He was a specialist in getting things done.55

Before examining the substance of the white-collar hearings, it is necessary to devote some attention to the presiding officer to whom WHA Fleming had entrusted their conduct. Harold Stein was manifestly responsible for the roads taken and not taken by the testimony he developed by his questioning; but, since Fleming adopted his recommendations as the new regulations and a decade later another WHA adopted much of his report (still known today as the Stein Report in preference to its long-winded full title)56 as the basis for the WHD’s non-binding interpretive regulations,57 more than any other single person, Stein in large part also bears responsibility for having determined from 1940 to the present which of the tens of millions of white-collar workers have and have not been entitled to overtime pay.

Stein, who ultimately held an astonishingly diversified variety of important civilian governmental positions during the New Deal and World War II and was eulogized as “a foremost civilian administrator of his generation,”58 was, by back-

54“1940 WHD Hearings Transcript” at 344 (June 5) (Harold Stein).
56E.g., In Re Farmers Insurance Exchange Claims Representatives’ Overtime Pay Litigation, 300 F.Supp.2d 1020 at *20 (D. Or. 2003) (Lexis).
57See below ch. 14.
58Rowland Egger, in “Harold Stein In Memoriam” 13 (n.d. [1966]) (copy furnished
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ground and education, a most improbable candidate for enduringly revamping the white-collar overtime regulations. Born into a wealthy business family\(^{59}\) in New York City in 1902, he received a bachelor’s degree from Yale in 1922, taught, inter alia, Greek and Latin\(^{60}\) at a private school in Connecticut for two years, was an English instructor from 1928 to 1932 at the University of Wisconsin\(^{61}\)—where he was a “teacher...of legendary proportions”\(^{62}\)—obtaining a doctorate in English from Yale in 1932 upon submitting his dissertation on the sixteenth-century poet Edmund Spenser.\(^{63}\) Yale’s failure, despite Stein’s having been “the most brilliant of an outstanding group of graduate students during his years in the English Department at Yale,” to have given him a faculty appointment was “a cause célèbre of those days”\(^{64}\) and has been ascribed to anti-semitism.\(^{65}\) Nevertheless, Yale did award him a prestigious Sterling Fellowship to do research at the Bodleian Library at Oxford at the nadir of the Depression in 1933-34,\(^{66}\) and Oxford University Press published a revised version of his dissertation in 1934\(^{67}\)—a work to which one of his children many years later heard him refer as “turgid crap.”\(^{68}\)

Stein himself reportedly said that he had been unable to get an academic job in America because of the Depression\(^{69}\); in any event, at the exact mid-point of his life, at age 32, he entered into the vortex of New Deal agencies, irrevocably altering the course of his life. In 1934-35 he worked for the Federal Emergency Relief Administration, where one of his most significant assignments was supervision of federally sponsored self-help cooperatives, which were, in his words, “one of the more ingenious though ultimately unsuccessful of the devices to avoid the full impact of depression.”\(^{70}\)

\(^{59}\) Telephone interview with Stein’s daughter Lucia S. Hatch, Belfast, ME (Mar. 18, 2004).
\(^{60}\) Email from Adam Stein (Stein’s son) to Marc Linder (Mar. 30, 2004).
\(^{62}\) Eugene Rostow, in “Harold Stein In Memoriam” at 18.
\(^{64}\) Eugene Rostow, in “Harold Stein In Memoriam” at 18.
\(^{65}\) Dan Oren, *Joining the Club: A History of Jews at Yale* 358 n.35 (1985) (without a source); telephone interview with Lucia S. Hatch.
\(^{66}\) “Graduate Awards Are Given at Yale,” *NYT*, May 1, 1933 (13:6-8).
\(^{68}\) Telephone interview with John H. Stein, Newberg, OR (Mar. 18, 2004).
\(^{69}\) Oren, *Joining the Club* at 358 n.35 (no source).
\(^{70}\) Harold Stein’s resume (undated [ca. 1946]) (copy furnished by Lucia S. Hatch).
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His prominence or notoriety as a New Deal bureaucrat began during his tenure at the Works Progress Administration from 1935 to 1938. Most of his WPA activity related to the art, theater, writers, music, and historical records survey projects. In the field and then in Washington, D.C., he was Assistant Director of the Division of Professional and Service Projects, playing, again in his own words, "a major role in the general planning, organization and supervision of these activities." Much of his time was devoted to "bridging the gap and curing the recurrent disturbances between the professional personnel and the regular WPA staff, particularly the State WPA Administrators. Effective artistic production within the legal, administrative and political restrictions of a large government agency was made possible only by a continuous series of adjustments and resolutions of problems which in general the artists did not understand and for which the harassed State Administrators had little sympathy." Toward the end of his time at the WPA he took active charge of the New York arts, writers, music and historical records project—the largest in the country—and "led them through and out of a period of reduction in force, strikes and reorganization necessitated by long years of confusion and uncertain control." 71

This self-description, taken from his 1946 resume, scarcely does justice to his tumultuous tenure at the WPA in New York City in the summer of 1937, which brought him front-page headlines in The New York Times. While his children observed that his interest and background in literature, theater, and art made him believe "himself perfectly well qualified to handle the Artists and Writers Project for the WPA" 72 and, in turn, induced the agency to regard him as bringing qualifications to the job, 73 it is also conceivable that his WPA experience with proletarian artists, writers, and musicians helped shape his decision three years later to classify them as professional employees and thus deprive them of overtime protection. Stein's relegation to the sensitive and onerous mission of head of the largest local WPA arts project was, according to his older son, a bureaucratic intrigue:

71 Stein's resume. On the arts program (Federal Program No. 1), see Barbara Blumberg, The New Deal and the Unemployed: The View from New York City 183-220 (1979).
72 Email from Lucia S. Hatch to Marc Linder (Mar. 22, 2004). Stein's parents' apartment was "filled with French and American impressionist paintings, and the children were practically raised in art museums." His mother also sponsored a once well-known French painter, with whom his sister studied. His daughter noted that his interest in music and theater was "high and well-informed, but probably not at the level of expert," and that he "always kept up his interest in literature and poetry." Id. Stein's mother also supported Ralph Ellison for a year and Stein himself was for a time engaged to Robert Frost's daughter. Email from Adam Stein to Marc Linder (Mar. 30, 2004).
73 Email from John H. Stein to Marc Linder (Mar. 22, 2004).
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What was most important in family history about...the assignment to New York to close down the arts project was that it was punishment. His good friend Marquis Childs wrote a column in the Washington Post about these “cynical New Dealers” describing Father who, in fact, was a committed New Dealer, but enjoyed pointing out things he found ludicrous and people he found stupid. Eleanor Roosevelt was furious and demanded that the person be found and fired. He was found. His bosses did not want to fire him, so this was the compromise, send him to a career ending job. His friends always thought that he never rose above being a career Deputy Director in one agency or another because of this. Childs had no animus towards him nor did he think Father was really cynical. It just seemed like a good column.74

Stein’s travails began at the end of May 1937,75 when, in the face of a sit-down strike at the offices of the writers’ project in Manhattan, he, the administrative officer of the music, art and writers’ projects, assured strikers that reductions in personnel were unlikely before the end of June and promised to give workers as much notice as possible. The left-wing or Communist unions sponsoring the stoppage included several that would testify before him three years later at the white-collar hearings: the New York Newspaper Guild, the Federation of Architects, Engineers, Chemists and Technicians, and the Bookkeepers, Accountants, and Stenographers Union.76 Two weeks later, on June 12, Stein announced that he had received the order that cuts had to be made by July 15 terminating 25 percent of the 4,500 workers then employed on the projects. Organized relief workers in the

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74Email from Adam Stein to Marc Linder (Mar. 30, 2004). Adam Stein may have misremembered at least one aspect of the intrigue: Childs, who was the Washington correspondent of the St. Louis Post-Dispatch, appears not to have been syndicated in the Washington Post at the time in question.

75Stein was appointed to the position of assistant administrator of the arts projects in New York City in March 1937. William McDonald, Federal Relief Administration and the Arts 517 (1969). Reductions in the WPA rolls and high-profile strikes and sit-ins to protest them in New York antedated Stein’s advent. E.g., “WPA Artists Fight Police,” NYT, Dec. 2, 1936 (1:2-3).

76“10,000 Stop Work on WPA Projects,” NYT, May 28, 1937 (1:7, 12:2-3). At the time of the FAECT’s organization in 1933, industrial and medical and dental practice technicians, chemists, and construction draftsmen predominated among its members; it had 6,000 members by 1936, joined the CIO in 1937, was expelled for communist subversion after World War II, and merged in 1946 with the UOPWA, which was also expelled for the same reason in 1949 and disappeared. Jürgen Kocka, Angestellte zwischen Faschismus und Demokratie: Zur politischen Sozialgeschichte der Angestellten: USA 1890-1940 im internationalen Vergleich 264-66 (1977). According to Herbert Northrup, Unionization of Professional Engineers and Chemists 10-11 (1946), probably not more than 10 percent of FAECT’s 10,000 claimed members were professional engineers.
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Workers Alliance of Greater New York immediately countered that they would “fight like hell” against the cuts and were already planning sit-in strikes to pressure Congress to appropriate more funds. (The number of relief workers to be cut on construction and white-collar projects in New York numbering 170,000 had not yet been announced.)

Then, on June 25—the same day on which the WPA announced that 34,000 of those 170,000 workers would be dismissed, white-collar educational, health, and recreation projects being especially hard hit, and Leon Henderson, the WPA’s economic adviser, declared that the maximum hours provisions in the FLSA bill, the joint congressional hearings on which had just concluded, afforded the first real opportunity to adjust the workweek to compensate for greater productivity— Stein was catapulted into national consciousness when, in the words of the headline of the front-page, above-the-fold article in the Times: “WPA Official Held Captive in Strike.” The Communist Party did not deem the event worthy of the front page of the Daily Worker, but Stein did merit a sub-headline in an inside-page article accusing him of having “turned a deaf ear to all appeals that the pink dismissal slips” of 17 dancers who were in a sitdown hunger strike” be rescinded. With two weeks’ lag, a weary-looking Stein appeared in a Life photograph sitting, “chin on hand,” at the head of a large table: “Held captive for 15 hours in his Manhattan office by 600 protesters, WPA Business Administrator Harold Stein...won freedom by granting captors’ demands.”

According to the Times account: “Six hundred WPA artists, writers and musicians imprisoned the executive head of their projects...after they had taken full control of central offices of the Federal Arts Projects....” The sit-down strikers warned Stein “that he would be forcibly restrained if he attempted to leave before the strikers had won their demand that an appeals board be set up to review the dismissal slips given to 2,848 workers....” Even after two of Stein’s superiors in Washington had dismissed this demand on the phone, “the strikers remained obdurate in their determination to hold the project official captive.” Despite the “stifling” air, by which two women were “overcome,” Stein was apparently able to retain his bureaucratic equanimity (unlike the regional chief of the historical records survey, who agreed to go to the office from his home in New Jersey only

77“WPA Art Projects to Drop 1,100 Here,” NYT, June 13, 1937 (sect. 2, 39:8).
78“WPA to Cut 34,000 from Rolls Oct. 15,” NYT, June 26, 1937 (3:5).
81“1,200 Arts Project Workers in Sit-ins,” DW, July 26, 1937 (5:5) (“700 Camp in Administration Offices While 500 Sit-in at Office of Stein Awaiting Word from Capital”).
82Life, 3(2):28 (July 12, 1937)
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on the condition that the strikers would permit him to leave again when he wished): “Informed by a WPA safety engineer that the floor of the building could support the weight of 600 persons only while there was no commotion, Mr. Stein declined a police offer to escort him to the street for fear that such a move on his part would provoke a riot.” The situation inched toward the surreal as “Mr. Stein’s position was little more than that of a puppet in the hands of his captors. At their direction he made calls to Washington, repeating the conversation for the information of those who crowded through the door of Mr. Stein’s private office and even sat on his desk. Every inch of the floor outside was covered with demonstrators....” Finally, just before midnight, the strikers were able to obtain from Stein both an agreement to call a conference of federal arts project regional directors to seek a more equitable basis for dismissals and a promise to rescind the severance notices of five WPA dancers pending an investigation. As if Stein did not have enough on his hands, 40 workers in the payroll division had already been sitting down there when the artists arrived. On “‘orders’ from the committee,” Stein also telephoned Ellen Woodward, the assistant administrator in charge of women’s and professionals’ projects in Washington, to relay the demand that no needy workers be dismissed, but her rejection, on the grounds of insufficient funds, merely prompted the chairman of the strike strategy committee to announce that they would hold Stein until they got “‘satisfaction’”—if necessary, from President Roosevelt himself.

Stein’s “imprisonment” did not end until eight o’clock the next morning when, as the Times again reported on its front page, he “purchased his freedom...from 600 sit-down strikers, who had held him captive in his own office for fifteen hours, by granting all of the strikers’ demands to the limit of his authority.” Included among the terms of the agreement that he signed to “win his release” was his immediately informing Washington that he did not wish to carry out dismissals according to the then prevailing methods, which he considered unsound; he also strongly recommended that a neutral review board be empowered to “order all needy employables to be retained” on the four arts projects. Although Deputy WPA Administrator Aubrey Williams stated that he would set up a review board with advisory powers, he also warned a delegation of WPA artists, that “‘a few more things like’” Stein’s imprisonment and they “‘might as well kiss WPA out of a window....’”

Stein’s temporizing achieved the results that he and his superiors had pre-

83 “WPA Official Held Captive in Strike” (1:2, 4:7).
84 “WPA Captive Yields to Strike Demands,” NYT, June 27, 1937 (1:6, 4:2-4). The Daily Worker reported that Williams had refused to agree to the concessions that Stein had made because they had been obtained “under pressure.” “Ask WPA Head to Set Up Appeals Board in Firings,” DW, June 28, 1937 (3:1).
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sumably been seeking. Three days later, on June 29, Stein returned to New York from Washington to inform the relief workers’ organizations that their plea for an appeals board had been rejected. He added that “I have not used force and I have no desire to use force…[b]ut my job is to see that the projects run efficiently. If they cannot run efficiently they will have to close.” Workers may have made it clear that Stein’s warnings “would not deter them from further protests,”85 but the WPA’s use that very day of the police to arrest stand-up strikers from another WPA office signaled that the agency “was determined to carry out its full dismissal program” in New York and “would not temporize with ‘extreme’ expressions of protests....”86 In fact, on June 30 Roosevelt signed the Relief Bill, which cut the WPA’s funds by half a billion dollars, thus requiring it to dismiss thousands of relief workers,87 and in mid-July, the WPA did proceed with the dismissal of almost 2,500 workers in the five arts projects and without the deferrals that the protesters had demanded.88

One of Stein’s sons, who, like the whole family, was familiar with the sit-ins, speculated that Stein had known that the WPA had hired him to get rid of communist artists and that after this episode he was probably known in the federal government as a can-do person.89 To be sure, in July, when Ralph Easley, chairman of the executive council of the National Civic Federation made public a letter to Roosevelt urging him to investigate Communist control of the theater and writers’

85 “500 WPA Pickets Fight with Police,” NYT, June 30, 1937 (1:7, at 4:3-4).
86 “500 WPA Pickets Fight with Police” at 1:7.
88 “WPA to Drop 2,487 in 5 Arts groups,” NYT, July 15, 1937 (8:4-5).
89 Telephone interview with John H. Stein, Newberg, OR (Mar. 18, 2004). On alleged Communist control of the arts programs, see John Millett, The Works Progress Administration in New York City 217 (1938). When asked about the discrepancy between this account and Adam Stein’s aforementioned account, the latter replied: “I think my view is different from John’s. I think Father was not at all happy with the assignment. He did the job to survive. The budget was cut and artists needed to be laid off. If he later described his assignment as getting a bunch of commies off the rolls, I am quite sure that was his characterization of his employer’s view. I can’t believe that he saw it that way. Although he was later a fairly conventionally anti-communist liberal, he opposed discrimination against communists except when there was a strong need to do so for reasons of internal security. (This was a big well debated issue in the 50’s.) As I recall, his position on that was nuanced. I know that he wrote about it. An indication of his view was the fact that he resigned from the ACLU when it banned communists from holding office.” Email from Adam Stein to Marc Linder (Mar. 31, 2004).
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projects, Stein stated that since the communication had been addressed to the president, he would not be commenting.\textsuperscript{90} That Stein’s superiors appreciated his services became clear exactly one month after his imprisonment when WPA assistant administrator Ellen Woodward announced the consolidation of the Federal Theater Project and the Four-Arts Project, of which Stein had been administrative assistant, and his assignment “to make a nation-wide survey of the Federal art project....”\textsuperscript{91}

After leaving the WPA, Stein worked as an NLRB per diem trial examiner from January to July 1938; jobless for three months, he was rehired and detailed by the WPA to the Wage and Hour Division in November (becoming WHD’s employee in May 1939), remaining there until September 27, 1941. In his 1946 resume, Stein recorded that he had been Assistant Director of the Hearings Branch, which was “responsible for the administration of the discretionary features” of the FLSA, “including the issuance and revision of regulations, the issuance of certificates for learners and handicapped workers, and likewise the definitions of executive and administrative employees, of seasonal industries, and of ‘area of production’, excluding various classes of agricultural processing workers from the benefits of the Act.”\textsuperscript{92} Without singling out for special mention his best known and most enduring accomplishment at the WHD—his single-handed re-creation of the white-collar overtime regulations—Stein modestly summarized his work there:

As with any new law, the policies were hammered out in conferences and hearings, in memoranda, letters and reports. The final policy determinations were made with one eye on the practical effect on industry and labor, and the other on the Supreme Court where in fact some of the decisions were finally affirmed and in one case reversed on a split decision. In all of the foregoing I acted as one of the chief responsible officials. Both as a regular part of this work and on special assignment from the Administrator, I held the great bulk of the hearings conducted by the Wage and Hour Division (except for Wage

\textsuperscript{90}“Easley Views Stir WPA Resentment,” \textit{NYT}, July 20, 1937 (8:5).

\textsuperscript{91}“Shake-Up Ordered on WPA Theatres,” \textit{NYT}, July 26, 1937 (15:1).

\textsuperscript{92}Stein’s personnel papers; Stein’s resume. Stein presided, for example, at the hearings for a seasonal exemption of the lumber industry in January 1939. \textit{BNA, Wage and Hour Manual} 623-24 (1944-45 ed.). Stein’s direct supervisor as Chief of the Hearings and Exemptions Section was Merle Vincent, who had been Washington legislative representative of the ILGWU and was, at the time of his appointment to the WHD, president of the Washington chapter of the left-wing National Lawyers Guild. “Merle D. Vincent, Chief of Exemptions,” \textit{WHR} 1:290 (Nov. 7, 1938). For Vincent’s testimony at the FLSA hearings in 1937 on behalf of the ILGWU, see \textit{Fair Labor Standards Act of 1937: Joint Hearings Before the Committee on Education and Labor United States Senate and the Committee on Labor House of Representatives} 262-69 (75th Cong. 1st Sess., June 2-22, 1937).
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Order Hearings) during the first three years of its existence.93

Among his more prominent assignments was his role as the WHD’s examiner in its investigation of the question as to how to calculate hours worked in underground metal mines. Stein’s conclusion that the workday “starts when the miner reports for duty as required at or near the collar of the mine, and ends when he reaches the collar at the end of the shift” was approved by the WHA on March 23, 1941. To be sure, Stein’s other portal-to-portal recommendation—that the workday did not include fixed lunch periods of one-half hour or more “during which the miner is relieved of all duties, even though the lunch period is spent underground”94—closed one possibility that the WHA had left open in September 1940. At that time Fleming was not yet prepared to take a position on a problem rendered “very difficult” by the fact that the miner “is required to eat under very unfavorable conditions and is subject to many of the hazards of his job while eating,” although he did have the time off.95

A remarkable snapshot of Stein in action early on at the WHD was provided by Joseph Rauh, who, between stints as Supreme Court Justice Benjamin Cardozo’s last law clerk in 1938 and Felix Frankfurter’s first in 1939, worked briefly at the WHD. One afternoon in late 1938 the question before a meeting of the Wage and Hour Staff was how to get around the exemption in the law for agricultural processing employees in the area of production. Some wanted to follow the literal language and intent of Congress and were prepared to acquiesce in the denial of the 25-cent minimum wage and overtime pay to the exploited workers in the factories in the field; others like myself were prepared to ride roughshod over the law in the interest of equity for those oppressed workers. Harold stood out above the group; feeling as deeply as anyone in the room for the needs of the exploited, he nevertheless saw the self-defeating folly of unreasoned efforts in their behalf. Giving only a very little here and even less there, he soon accomplished our ends without giving offense with our means. With his almost paradoxically modest self-assurance, Harold called up reason that afternoon to fortify his idealism; and so it was for his three years of service there. The more complex the problem, the more likely the response would be: “Ask Harold.”96

93Stein’s resume.
95"Overtime and Records for Miners,” WHR, 3:466, at 467 (Oct. 21, 1940) (address of Sept. 18, 1940, before the American Mining Congress at Colorado Springs).
96Joseph L. Rauh, Jr., in “Harold Stein in Memoriam” at 9.
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What is fascinating about this vignette is that Rauh, valedictorian of Harvard Law School, class of 1935,97 clerk to two Supreme Court justices, an attorney who had spent a year at the Securities and Exchange Commission defending the Holding Company Act, and, who, on his death in 1992, was dubbed “the foremost civil rights and civil liberties lawyer of our time,”98 portrayed himself as having deferred to the legal strategizing of Stein, who had had no legal or economic training and, despite his family background, no understanding of business.99

Rauh’s deference to Stein—who described himself at the 1940 white-collar hearings as “an innocent layman” whose opinion on constitutional issues “wouldn’t be worth very much”100—becomes especially ironic in light of contemporaneous congressional skepticism of Rauh on account of his inexperience. In February 1940, less than two months before Stein’s hearings began, the Subcommittee on Labor Department and Federal Security Appropriations of the House Appropriations Committee held a hearing on the appropriations bill for the Labor Department for 1941, at which the ranking Republican member, Albert Engel of Michigan, interrogated George McNulty, the general counsel of the WHD, about Rauh, who at the time was assistant general counsel in charge of the Opinion Section of the Legal Division. Engel, who knew Rauh and considered him “a bright and brilliant young man,” nevertheless adamantly insisted that a 29-year-old, who with only four years of legal experience had never tried a lawsuit, had “assume[d] a responsibility which is beyond his age and beyond his immature judgment” in being “put

99Telephone interview with John H. Stein (Newberg, OR, Mar. 18, 2004). The only anecdote that Stein’s son John (himself a lawyer) knew of his father’s tenure at the WHD was that after he had decided a portal-to-portal case in favor of workers, the rule was changed that had permitted non-lawyers to hand down decisions in such cases. Only at one point during the white-collar overtime hearings did Stein refer to his family business background. When a witness complained that the WHD had determined that an elected company officer was not exempt, Stein responded that being an elected officer was not a very good gauge of executive status: “Well my mind happened to think back of [sic] an executive officer of the company of which my father was one of the principal officers and I don’t know why he was elected but his job was fourth assistant bookkeeper.” “1940 WHD Hearings Transcript” at 313 (June 4).
in charge of writing the legal opinions affecting every industry in America...."\textsuperscript{101} Easily imaginable are the epithets that Engel might have cast at Stein, who, totally bereft of legal training or experience, was responsible for writing not only the white-collar regulations, but also those governing exclusions of agricultural processing workers, which were of much more intense interest to Engel and scores of his colleagues.

Equally noteworthy is that whereas Rauh at Stein’s memorial service observed that “Harold’s life in Washington was devoted to getting things done on behalf of the impoverished and the oppressed,”\textsuperscript{102} one of Stein’s sons stressed that he would not have expected his father, who was “a liberal but not a knee-jerk liberal,” to have “leaned over backwards to help the underdogs” get all they could or should have gotten at the white-collar hearings.\textsuperscript{103} This latter judgment was consistent with the Stein Report.

Stein left the WHD in 1941 to support the war effort, holding a series of important posts with the Office of Production Management, the War Production Board, the Office of Civilian Supply, and the Lend-Lease and Foreign Economic Administration (including a stay in Algiers). Toward the end of the war he was Deputy Chief of United Nations Relief and Rehabilitation Administration’s Polish Mission and was loaned by that organization to the French government as a special consultant. After the war he was Planning Advisor to the Director of the Office of War Mobilization and Reconversion, who in May 1945 appointed him special


\textsuperscript{102}Rauh, in “Harold Stein in Memoriam” at 10.

\textsuperscript{103}Telephone interview with John Stein. Reinforcing this point, John Stein added that his father had been one of Adlai Stevenson brain-trusters in 1952, but by 1956 disagreed with Stevenson; John Stein also reported that he had heard speculation that one reason his father, who taught at the Woodrow Wilson School at Princeton University, had not been appointed to a position in the Politics Department was that he was not liberal enough politically. Ironically, although John Stein was very well informed about the debate over the white-collar overtime regulations in 2003-2004 (calling it yet another reason to get rid of President Bush), he had known nothing of his father’s role in creating the regulations. Nor had his sister, who speculated that as a New Dealer, his “tilt” would have been in favor of workers’ getting overtime. Telephone interview with Lucia S. Hatch. Prompted, Stein’s other son observed: “I do not know about ‘bent over backwards’, but [he] would work to help the underdog as best he could (and he was good at making things happen).” Email from Adam Stein to Marc Linder (Apr. 5, 2004).
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advisor regarding surplus property problems, in which capacity Stein played a part in the controversy over the question of whether any government-built aluminum plants should be disposed of to the monopolist Aluminum Company of America. At that point he left the employ of the federal government and worked for the Committee for the Marshall Plan during 1947-48, before becoming staff director of the Inter-University Case Program, joining the Twentieth Century Fund and ultimately becoming a professor of public and international affairs at the Woodrow Wilson School at Princeton University.104

The power to define is the power to exclude.¹

We must recognize the fact that it would have been impossible at that time [October 1938] for a regulation or definition to be issued which was in conflict with the actual intent of the legislators.

Passage of time, however, renders a certain plausibility to arguments which would not have been effective if raised at that time.²

The hearings on the regulation of white-collar overtime that the Wage and Hour Division held in Washington, D.C. on 14 separate days between April 10 and July 29, 1940, remain the single most enlightening extant source of information on the underlying policies and debates concerning the exclusions. Overlapping chronologically and intertwined substantively and politically with the House floor debates on the FLSA amendments at the end of April and beginning of May,³ the regulatory hearings were understood by participants, once the FLSA bills had been definitively defeated, to be employers’ best chance to achieve what a majority in the House would have been willing to grant them had insuperable political-economic and party-political splits not doomed the amendment process altogether.

The Wage and Hour Administrator was not able to bestow all the advantages that Congress could have conferred on employers because the legislature had not empowered him to exclude white-collar workers other than executive, adminis-

¹Twenty-Eighth Annual Report of the Secretary of Labor for the Fiscal Year Ended June 30 1940, at 236 (1940) (WHA Philip Fleming discussing the definition of executive employees under the FLSA).


³See above ch. 10.
trative, and professional employees, let alone blue-collar workers; moreover, the WHA, by general understanding, also lacked the authority to issue a blanket exclusion even of these three categories based on salary level alone. Finally, employers' recourse to regulatory revision in the form of redefinitions of the three statutorily specified occupations was a less than optimal strategy because managers' perception of industry- or perhaps even firm-specific needs with regard to proposals for reformulating the duties tests virtually precluded the formation of a united front, which was much more easily achievable in terms of a legislatively enacted flat wage or salary level triggering an across-the-board exclusion.

Because they took place at a time when the regulations were both rudimentary and largely untested by experience, yet close enough in time to the enactment of the FLSA that witnesses could not easily bluff about the purposes of the overtime provision that had been 'in the air,' the hearings permitted a textual and contextual openness that would never again be possible. The unique richness of the testimony and dialog makes it possible to scrutinize in great detail employers' arguments in favor of shrinking the universe of covered workers. Contrasting the relative volume of conceivably plausible reasons, on the one hand, and incoherence or sheer unwillingness to pay additional compensation, on the other, provides a basis for evaluating the solidity of the hearing officer's report and recommendations, which the WHA adopted virtually intact. Secondarily, exploring labor unions' arguments sheds light on the extent to which they adopted, from the beginning, a critical, oppositional stance on Congress's and the WHD's creation of a potentially huge wedge of exceptions to a national hours standard or merely acquiesced in the 1938 law and regulations in the (false) hopes of warding off revisions embodying even worse conditions.

Setting the Stage

"We aren't going to hire a convention hall so as to have a lot of crackpots sound off," the Administrator said. "What we are going to do is get sound, constructive advice from those familiar with problems of the industry."5

4Not coincidentally, where employers came closest to such unity—namely, with respect to the expansion of the category of administrative employees to encompass non-bosses—they also achieved their most significant success in terms of the ultimate revised regulation.

5"Wage Hearings Set Next Week on Scope of Textile Industry," JC, Aug. 27, 1938 (1:6, at 5:2).
1940 White-Collar Overtime Regulatory Hearings

[T]his hearing is made to do as scientific a job as we can when we must deal with such imponderables in determining the definitions that will most effectively carry out the intention of Congress....

The 2,216-page transcript of the crucial white-collar regulatory hearings held by the WHD in the spring and summer of 1940 has, contrary to erroneous scholarly opinion, been preserved—in multiple copies—at the National Archives, although officials there could not locate the approximately 180 briefs, written statements, memoranda, and exhibits submitted to supplement the oral testimony. The latter itself represented 127 appearances on behalf of employers and employer associations, 34 by labor groups, three by deans of journalism schools (on behalf of newspaper publishers), and one by the League of Women Shoppers. Hearings were held separately for industrial sectors and publicly announced seriatim:

6"1940 WHD Hearings Transcript" at 353 (April 11) (Harold Stein).
7"The briefs and hearing transcripts [of the Stein hearings] seem no longer to exist: neither the relevant collections in the National Archives or [sic] the Department of Labor has them, nor do the majority [sic] business and labor archives I contacted." Deborah Malamud, "Engineering the Middle Classes: Class Line-Drawing in the New Deal Hours Legislation." Michigan LR 96(8):2212-2321, at 2304 n.363 (Aug. 1998).
9US DOL, WHD, "Executive, Administrative, Professional...Outside Salesman" Redefined: Effective October 24, 1940: Report and Recommendations of the Presiding Officer at Hearings Preliminary to Redefinition at 2 ([Oct. 10,] 1940) (Stein Report).
10"Thank you for your message of July 1 concerning the exhibits and written statements to the hearings you previously ordered (RG 155).... The records do not include the exhibits or submitted comments of witnesses or others." Email from Tab Lewis, Archivist, Civilian Records, NA, to Marc Linder (July 23, 2003).
11U.S. DOL, WHD, "Executive, Administrative, Professional...Outside Salesman" Redefined at 2 n.4. A complete witness list was compiled at id at 55-59.
12The DOL's section 541 regulations authorized the WHA in holding hearings for determining future regulations to give consideration to "separate treatment for different industries and for different classes of employees...." § 541.5. For the dates, see U.S. DOL, WHD, "Executive, Administrative, Professional...Outside Salesman" Redefined at 1. According to the ANG, Fleming had considered the possibility of a broad hearing on the definitions as applied to all industries, but decided to confine each hearing to a certain industry for which specific request for redefinition had been made. "Fleming Bids Guild to Hearing." GR, Apr 1, 1940 (3:5).
wholesale distributive trades (April 10-16); manufacturing and extractive industries (June 3-5); banking, brokerage, insurance, financial, and related institutions (July 9-10); and publication, communication, public utility, and transportation, and miscellaneous industries (July 25-29). It was not until May 11 that Fleming declared, in connection with the announcement of the hearings on manufacturing, that there would be a total of four separate hearings. He also stated that no changes were planned in the existing regulation until the whole series of hearings had been completed. This procedure was “in accord with the recommendations made by many representatives of industry and all labor representatives” who had appeared at the wholesale distributive hearings. Since those hearings had made it clear that definitional problems cut across industries, his final decision on proposed changes was withheld until after all the hearings had taken place.

Almost as a prelude to the hearings that Stein opened that very day, his boss, WHA Fleming, told the New York Board of Trade on April 10 that the administration of the FLSA was “not going to be on a hard and fast rule basis but rather through a policy which permits elasticity.” More specifically, he added that if the law’s definitions could be made “more elastic without working an injustice upon poorly-paid workers,” he would “like to see it done.” The Wall Street Journal editorially lauded him for this approach, which did not augur well for non-poorly-paid white-collar workers.

In addition to the presiding officer, Harold Stein, the assistant director of the WHD’s Hearings Branch, five other WHD officials were also present at the first hearing on April 10, including the director of the WHD Research and Statistics

1940 White-Collar Overtime Regulatory Hearings

14FR 5:1685 (May 11, 1940).
15FR 5:2325 (June 21, 1940) (application by the American Bankers Association).
16FR 5:2326 (June 21, 1940) (application by the United States Independent Telephone Association and SSIC). The WHA appended the same request for additional information as for the banking hearings. See also US DOL, WHD, Press Release: Final Hearing to Redefine Executive, Administrative, Professional Employees, Outside Salesman, to Start Thursday, July 25 (R-929, July 25, 1940), in NA, RG 155.
181940 WHD Hearings Transcript” at 4-5 (June 3) (Harold Stein).
21For a very brief account, which mentioned the suggestion of universal exemption for all employees earning $1,500 or more, see “Urge Wage-Hour Change,” NYT, Apr. 11,
Branch, Harry Weiss, who in 1947-48 would preside over similar white-collar regulatory hearings and issue his own report, which would prompt further revisions. Stein announced at the outset that in 1938 the Part 541 regulations had been "issued after conferences with various representatives of industry and labor and represented, what seemed at that time, at least, to be the most satisfactory definitions that could be worked out. That did not mean, of course, that they might not be...improved...after we had some experience with it." Having received during the previous year and a half both favorable and adverse comments, the WHA wanted to crystallize "all this somewhat inchoate mass of statements," but it was inadvisable to hold one meeting for all of U.S. industry and since wholesalers had actually come forward with certain concrete proposals and labor representatives had said that they were ready to speak in behalf of their own feelings, this hearing had been announced and the WHA had also announced his willingness to hold others if and when representatives of other industries came forward with concrete proposals.

Procedurally, Stein explained that: "I expect to ask quite a number of questions. I have a fairly inquisitive nature and I will give myself full play in that." He then added—fully confirming his son's remark that Stein was very self-confident and did not suffer fools gladly—that after he had finished asking questions, it was "conceivable, although not highly probable, that there will still be some questions which should have been asked to illuminate the record"; if so, he would entertain questions from anybody who was interested. Ironically, Stein managed, in exemplary fashion, to conduct the hearings on white-collar workers' hours within the scope of 'bankers' hours: the five-day hearings on the wholesale trades, which began at 10 a.m., consumed 27 hours and 55 minutes, the longest workday lasting 7 hours and 5 minutes, the shortest—a Friday—a mere 3 hours

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1940 (48:6). "Seek Pay Definition in Wholesale Lines," JC, Apr. 11, 1940 (4:6), stated that the WHD had announced that any decisions based on the wholesale hearings would be confined to the wholesale trade—an approach that the WHD abandoned.

22"1940 WHD Hearings Transcript" at 1, 8 (Apr. 10).
23"1940 WHD Hearings Transcript" at 3-5 (Apr. 10).
24"1940 WHD Hearings Transcript" at 7.
25Telephone interview with John Stein.
26"1940 WHD Hearings Transcript" at 7. It is unclear whether these character traits fell within the range that WHA Andrews had had in mind when he wrote that a special hearings section had been established "so that these specialized functions might be concentrated in the hands of officers especially qualified by experience and temperament for this exacting type of work." Interim Report of the Administrator of the Wage and Hour Division for the Period August 15 to December 31, 1938, at II-27 (Jan. 1939).
and 15 minutes. These times were exclusive of lunch breaks, which ranged from one hour to two hours and 15 minutes.\textsuperscript{27} Similarly, the three days devoted to manufacturing industries took a total of 14 hours and 30 minutes, the longest day lasting only 5 hours and 35 minutes,\textsuperscript{28} while the two-day hearings on banking and brokerage lasted only 8 hours and 40 minutes.\textsuperscript{29}

\section*{Wholesale Distributive Trades}

This watering down process was accepted in good part by the unions at first on the theory that such modification was necessary to forestall complete mutilation of the wage-hour law by Congress.\textsuperscript{30}

The proceedings then began with the original petitioners—the Council of National Wholesale Associations, Southern States Industrial Council, and American Retail Federation.\textsuperscript{31} The wholesale employers, who testified at the first set of hearings, had, as already noted, done considerable advance work lobbying both Congress and the WHA for special exemptions.\textsuperscript{32} Stein himself observed that a bill was pending before Congress that would, inter alia, exempt wholesalers from the FLSA.\textsuperscript{33}

The first witness on April 10—the day after Nazi Germany’s occupation of

\textsuperscript{27}“1940 WHD Hearings Transcript” at 1, 90-91, 189 (Apr. 10); “1940 WHD Hearings Transcript” at 190, 288-89, 380 (Apr. 11); “1940 WHD Hearings Transcript” at 381, 421-22, 465 (Apr. 12); “1940 WHD Hearings Transcript” at 466, 549-50, 630 (Apr. 15); “1940 WHD Hearings Transcript” at 631, 694-95, 830 (Apr. 16).

\textsuperscript{28}“1940 WHD Hearings Transcript” at 1, 58-59, 134 (June 3); “1940 WHD Hearings Transcript” at 135, 238-39, 331 (June 4); “1940 WHD Hearings Transcript” at 332, 434, 478 (June 5).

\textsuperscript{29}“1940 WHD Hearings Transcript” at 3, 174 (July 9), 177, 243 (July 10). Because the recess times were not always recorded for the hearings on the communications industries, it is not possible to specify their length, but the times that were recorded suggest that they were comparable to the others.


\textsuperscript{31}“1940 WHD Hearings Transcript” at 6 (Apr. 10).

\textsuperscript{32}See above this chapter.

\textsuperscript{33}“1940 WHD Hearings Transcript” at 9 (Apr. 10)
Denmark and invasion of Norway—was M. L. Toulme, chairman of the Council of National Wholesale Associations, who also appeared on behalf of the National Wholesale Grocers Association. He disclosed that for a sample payroll week ending March 19, 1938, the typical office worker in the wholesale grocery trade was on duty 45 hours and the median employee for the whole industry worked 48 hours, while 68 percent worked 45 hours or more. He also pointed out that overtime premiums had not been widely prevalent before October 1938: 50 percent of reporting plants made no additional payment and 25 percent more than the usual hourly rate. Toulme then launched into an ideological assault on the FLSA, which "was not enacted solely to 'put a floor under unconscionably low wages and a ceiling over unconscionably long hours' as it has been so many times described. As currently interpreted, the law, by fiat, automatically raises all wages except those paid specifically exempted employees and at the same time exacts a time and a half penalty for all hours worked over the maxima" of 42 and 40 after October 24, 1940. This interpretation, he charged, would either be very costly to wholesaling or prevent it from "operating the proper number of hours prescribed by custom as well as competitive necessities."

Joe Timberlake, the president of the National Wholesale Grocers Association complained that the prohibition on performing any substantial amount of non-exempt work and the $30 salary requirement prevented many employees from qualifying for the exemption. He therefore proposed a $25 threshold, although he admitted that he did not know how many employees would gain exemption as a result. In response to Stein's question as to whether the association was opposed to the five-day week on general social grounds, Toulme inadvertently explained why universal coverage was needed to avoid a race to the bottom: "Everybody, of course, would like to work a five-day week, but we think it is a bad business policy, inasmuch as our customers are all exempt. Many of them work seven days a week. We are simply shackled under the five-day week from giving those customers the normal service they desire." Ironically, however, Toulme asserted that the elaborate service that competition forced them into giving "might represent a waste, inefficiency, perhaps, but it does what the Wage & Hour law wants—it gives jobs, creates jobs."

The Cooperative Food Distributors of America, represented by its executive

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34"1940 WHD Hearings Transcript" at 10 (Apr. 10).
35"1940 WHD Hearings Transcript" at 13-14 (Apr. 10).
36"1940 WHD Hearings Transcript" at 16-17.
37"1940 WHD Hearings Transcript" at 29-31, 37-38.
38"1940 WHD Hearings Transcript" at 48.

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vice president Hector Lazo, told a familiar tale of "decidedly liberal employers" who were "rather proud that we were among the first large business groups to actively favor" FLSA when it was introduced, but then "[t]o our astonishment, we discovered that what had been intended merely as a floor to wages in industries where deplorable wages were the general rule—which assuredly was not the case in our branch of the industry—had become a distinct burden upon independent businesses...." In other words, these employers had supported the FLSA until they realized that they would have to pay time and a half to non-minimum wage employees.

In conformity with this position, Lazo welcomed a minimum wage level of $1,500 a year as the line dividing exempt and nonexempt workers. He then wanted to go "even...one step further and give substance and expression to the ultimate aim of such social legislation" by proposing a 44- or 48-hour week for white-collar and commercial establishments as opposed to 40 for industry. As if he were engaged in a negotiation, he offered as his final concession that the WHD could "leave the time and a half overtime even for these people if you must for real overtime above those hours...."

The influential and reactionary Southern States Industrial Council presented the most important employer testimony on the first day of the hearings. Its representative, J.H. Ballew, had been the Tennessee Adjutant General from 1933 to 1937 and was a partner in a Nashville law firm one of whose clients was the SSIC. The SSIC’s petition, which Ballew admitted had been filed primarily on

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39"1940 WHD Hearings Transcript" at 70.
40"1940 WHD Hearings Transcript" at 69.
41"1940 WHD Hearings Transcript" at 71.
43"1940 WHD Hearings Transcript" at 73-74. It is unclear what Lazo meant when he said to Stein that “[i]n the official invitation to the hearings, it would appear that you are at least considering” that $1,500 dividing line.
44"1940 WHD Hearings Transcript" at 77. Lazo appended this confused and confusing statement: “Of course, this still does not disturb the exemption for executives, who can and should be restricted in working hours.”
45"1940 WHD Hearings Transcript" at 79.
46*Martindale-Hubbell Law Directory* 1: 1543 (biographical section) (72d ed. 1940). Ballew, born in 1886, had studied law privately. *Martindale-Hubbell Law Directory* 1:2008 (85th ed. 1953) mentioned him for the first time as (apparently) employed by the SSIC. He was last mentioned in *Martindale-Hubbell Law Directory* 3:2951 (94th ed. 1962), still (apparently) employed by the SSIC. Ballew was a Tennessee delegate to the
behalf of manufacturing industries, was based on the theory that Congress had never meant to give the Wage and Hour Administrator the power to issue a regulation coupling executives and administrators. The SSIC’s proposal was an exact copy of the 1939 Cox amendment. Ballew agreed with Stein that the SSIC’s proposal would exempt all or practically all nonmanual workers, but added that it did not touch the definition of “executive,” but only that of “administrative”: Ballew had no particular complaint regarding the former “except that we cannot see what salary has to do with it. We think that an executive is an executive, whether he gets one dollar a year or $10,000 a year.”47 In reply to Stein’s question as to whether, if adopted, his “executive” definition would be purely of academic interest, Ballew offered contradictory responses and then shifted to administrative employees, conceding that the SSIC had suggested no salary, but that $25 or $30 might be worked out.48

Democratic national convention in 1948 who attended the Birmingham segregationist rump convention at which speakers denounced Truman and his civil rights program as “‘threats to make Southerners into a mongrel, inferior race by forced intermingling with Negroes.’” Strom Thurmond’s running mate, Mississippi Governor Fielding Wright, had started the states rights revolt and on May 8 had delivered a statewide address to blacks in which he told them that “if they envisioned social equality with whites in schools and restaurants it would be better for them to leave the state.” John Popham, “Southerners Name Thurmond to Lead Anti-Truman Fight,” *NYT* July 18, 1948 (1:1, 3:1-4).

47“1940 WHD Hearings Transcript” at 91-93 (quote at 93) (Apr. 10). Presumably Ballew was referring to H.R. 4363, which would have excluded all office workers on straight salary who received a paid vacation. See above ch. 10. The text of the SSIC’s proposal was not read into the hearing testimony, but was reprinted in a memorandum submitted by another witness: “The term ‘employee employed in a bona fide...administrative...capacity...shall mean any employee whose duties are connected solely with the administration of an industry, and shall embrace clerical employees, such as bookkeepers, stenographers, payroll clerks, auditors, cost accountants, purchasing agents, statisticians, and/or other office help regularly employed on a straight salary basis and given vacations and sick leave with pay.’” Lewis Merrill, “Wage-Hour Legislation and the White Collar Worker: Memorandum submitted to the Wage and Hour Division United States Department of Labor in Opposition to Proposed Amendments to Part 541, Title 29, Chapter V, Code of Federal Regulations pursuant to Section 13(a)(1) of the Fair Labor Standards Act of 1938, at a Special Hearing Held April 10, 1940” at 15 n.*. Two days later, when AFL economist Boris Shishkin pointed out that the price of a one-week vacation was working “unlimited hours the rest of the year,” Stein, uncharacteristically, chimed in that one day’s vacation would also comply with the wording. “1940 WHD Hearings Transcript” at 431 (Apr. 12). The National Wholesale Hardware Association testified that the SSIC definition would “most acceptable” to it. “1940 WHD Hearings Transcript” at 20 (Apr. 10).

48“1940 WHD Hearings Transcript” at 93-94.
At this point, Dr. Lazare Teper of the ILGWU intervened to ask Ballew how a file clerk could be employed in a bona fide “administrative or executive” capacity. Ballew then used the opportunity to point out that the fact that Congress had not inserted an “and” or “or” between those two terms “clearly show[ed] that Congress meant two very distinct types and classes of employees.” Stein, who at first thought that he had caught Ballew misreading the text and then seemed to believe that Ballew was trying to evade Teper’s question by playing word games, apparently did not grasp that in fact Ballew was raising the vital question as to the justification for the WHD’s having combined the two categories. Having thus shut off this discussion, Stein suggested that Teper rephrase his question to ask only about administrative employees, prompting this potentially illuminating but ultimately inconclusive exchange49:

Mr. Ballew: Our idea with reference to that is by the use of the term administrative, Congress clearly meant that the employees engaged in the administration of the business, not manual employees but employees - in other words, the so-called white collar workers. ... That is our theory upon which the petition was filed. And upon that theory I say that file clerk is well within that scope.

Dr. Teper: Why do you think Congress inserted the term “bona fide” in there?

Mr. Ballew: Well, I don’t know unless they thought probably some of the employers might list a person as a stenographer when as a matter of fact he was operating the spindle or something of that kind. And they didn’t want them to get away with that.

Presiding Officer Stein: I think we would agree on that.

Dr. Teper: That is all.50

Teper’s initial question, which could have become a vehicle to ferret out what Congress might have meant by the oblique term “administrative,” was dropped by him and Stein. Even the subsidiary question as to the scope of the meaning of “bona fide” could and should have been explored further to achieve the same end as the principal question, but the interrogators cut off the discussion as soon as they had elicited a narrow and crude hypothetical response that described a gross misclassification of a manual production worker as white-collar office worker, but failed to deal with the much more subtle issue of the distinctions between excluded administrative employees and protected clerical workers. Although it is possible that Stein may have wanted to avoid discussion of the legitimacy of the WHD’s fusion of the executive and administrative categories, Teper’s reason for abandoning this fundamental question is unclear.

Henry Matter, the executive secretary of the Wholesale Dry Goods Institute,

49"1940 WHD Hearings Transcript" at 94-95.

50"1940 WHD Hearings Transcript" at 95-96.
raised the more general and far-reaching point on which even many factory employers had been focused since the FLSA’s enactment—namely, the contention that it could not have been Congress’s intent in enacting the FLSA “to penalize a concern already liberal in the treatment of its employees. Yet, by requiring the payment of time and one-half for hours in excess of the established workweek, the liberal employer is subjected to drastic penalties.”51 From the competitive perspective, the Institute found it difficult to believe that Congress had intended to create a situation in which firms paying higher salaries would also have to pay more in overtime. Coming to the specifics of the wholesale industry, Matter rehearsed the widespread but implausible empirical claims that the FLSA could not increase employment because wholesaling was seasonal and during increased-demand periods experienced help was needed and it was not practical to engage additional help since experienced help was not available and the seasons were not long enough to train new workers.52 The dry goods wholesalers suggested a $35 salary test for executives and $25 for administrative employees, who would be defined by reference to the same criteria as executives but who did not need to have management as a primary duty or the power to hire or fire.53 Just how expansively the Institute meant the exclusion can be gleaned from Matter’s response to Stein’s question as to whether the term “administrative employee” had been used before the FLSA’s passage: “You might call them office workers. It is a matter of personal preference. It wasn’t a common term at all.”54

The American Retail Federation, one of the original petitioners, scored a major coup by retaining Charles Wyzanski, Jr.—the former Solicitor of Labor himself, who, after having worked at the Justice Department, engaged in private corporate practice until he became a federal judge in 194155—to represent it. Wyzanski put in a cameo appearance to alert Stein to the one particular case in which the ARF was interested—that of an assistant buyer of a purchasing office—before introducing the ARF’s real witnesses.56 In this regard, Wyzanski seemed almost pre-

51“1940 WHD Hearings Transcript” at 97.
52“1940 WHD Hearings Transcript” at 98.
53“1940 WHD Hearings Transcript” at 101.
54“1940 WHD Hearings Transcript” at 108.
55Eric Pace, “Charles E. Wyzanski, 80, Is Dead,” NYT, Sept. 5, 1986 (A20:1-3). Wyzanski in 1940 was a partner in the Boston corporate law firm Ropes, Gray. Another name that would one day be famous was Jacob Javits, the future liberal New York Republican senator, who submitted a statement for the National Paper Trade Association without appear in person. “1940 WHD Hearings Transcript” at 143-44.
56“1940 WHD Hearings Transcript” at 109-10. The ARF took the position that as retailers its members were generally exempt under § 13(a)(2). Wyzanski did interrupt
destined to represent this employer since at the end of 1938 he had criticized the model state wage and hour statute for not exempting employees in higher salaries who were not in executive or administrative posts such as an $8,000-a-year steel purchaser whose only assistant was a secretary whom only the personnel office could hire and fire; and more generally, he had opined that the overtime provision should apply only to the those with lower salaries.\textsuperscript{57}

David Craig, the president of the ARF, whose members accounted for 200,000 stores, explained that the organization was interested in the executive-administrative exempt status of assistant buyers employed in physically separate units, who: exercised much discretion and individual initiative; were not closely supervised; were judged by their results and not by their methods; had very little control of the managing of other persons; “really” did not have the right to hire or fire; whose pay varied from $1,800 to $7,500 a year with a median at $2,200-2,300; were not unionized; and, finally, had steady year-round employment and paid vacations and sick leave. As to their numbers nationally, he could do no better than guess that there were between 1,000 and 10,000 of them.\textsuperscript{58} “None of them,” Craig concluded, seemed to be “within the purposes” of the FLSA. It was, moreover, impractical to keep records of their time, since they had no regular office hours; in addition, while they worked considerable overtime during the peak

several times during the questioning of his clients to object to disclosure of information. E.g., \textit{id.} at 133, 139.

\textsuperscript{57}\textsuperscript{57}Malamud, “Engineering the Middle Classes” at 2290-91. On Wyzanski’s rather conservative advice to Perkins before the FLSA was drafted, see above ch. 9. More than four decades later, Judge Wyzanski, sitting by designation, was a member of a circuit court panel that issued a decision that had an enduring impact in expanding the universe of low-level supervisors from whom employers could lawfully extract unlimited unpaid overtime as bona fide executives. Donovan v. Burger King Corp., 672 F.2d 221 (1st Cir., Feb. 22, 1982).

\textsuperscript{58}\textsuperscript{58}\textit{1940 WHD Hearings Transcript} at 111-12, 142. Later in the hearings, Solomon Lischinsky of the Amalgamated Clothing Workers, characterized the ARF’s proposal as “obviously designed to exploit a natural doubt as to coverage in the case of a $4500 a year assistant buyer in order to clothe with reasonableness a definition admittedly designed to exempt employees earning as little as $1800 and averaging $2300 and which will in effect exempt any employee who has acquired any familiarity with the trade. The duties of a $4500 a year assistant buyer may be such as to exempt him from the protection of the law which apparently he does not need, but obviously a description of his duties does not throw much light on the case of a $2000 a year employee, who is in the vast majority.” \textit{id.} at 771 (Apr. 16). Interestingly, Lischinsky, despite his critical dissection of the subterfuge, was even quicker than the employers to stamp the higher-paid assistant buyer as unworthy of state protection—without any explanation.
buying season, at other times they were encouraged to take a day off to go to a ball game. The current executive-administrative definitions were unsatisfactory "because they insist that the individual have managerial functions, and insist that they have the authority to hire and fire. Our proposal is simply that their executive or administrative capacity definition should be revived." Whereas the SSIC's proposal went further than was necessary for the ARF's purpose, the Council of National Wholesale Association's proposal did not go far enough because of its stress on managerial functions and the power to hire and fire.59

Specifics about assistant buyers' job were furnished by H. C. Hangen, the assistant merchandise manager for J. C. Penney Company, which employed a total of 60 assistant buyers (0.2 percent of the company's total workforce), who were all nonunion. An assistant buyer's principal duty was to build the line of merchandise he handled, select materials, develop styling, make purchase commitments, go to manufacturers to see samples, and travel to conventions of Penney managers. The assistant buyer was an important part of the organization who was able to commit the company for large sums of money. Showing signs of thorough coaching, Hangen conclusorily allowed as how their work was, for the most part, more important than that of many clerical or operating department heads "who definitely are exempt according to the regulations." Pointing up the inadequacy of the executive-administrative definitions for Penney, Hangen observed that assistant buyers did not hire any employees; they did direct the work of three or four clerical assistants, but lacked managerial supervision over them.60

Although Hangen considered it doubtful whether they came under the regulations, "we want any doubt removed." It was important for the regulation to be changed because an assistant buyer's performance of his duties could not be viewed in terms of "the number of hours they sat at a desk, in fact every part of their whole time may be devoted to their work. They have to do such things as

59"1940 WHD Hearings Transcript" at 112-13. The ARF's expansive proposed definition was not included in the hearing testimony transcript, but was reprinted in a memorandum submitted by another witness: "The term 'employee...employed in a bona fide executive...capacity...shall mean any employee who is entrusted with responsibility as to the method by which and the time during which he executes his work, and who determines important policy questions, or who requires special financial, merchandising or other technical and non-manual skill to execute his work and who receives compensation at a rate not less than $30 a week." Lewis Merrill, "Wage-Hour Legislation and the White Collar Worker" at 16 n.***. The CNWA's proposed definition of executive employee was like that in the October 1938 regulation except that it deleted the requirement that the employee do no substantial amount of non-exempt work and raised the salary threshold to $35. ld. at 16 n.**.

60"1940 WHD Hearings Transcript" at 113-16 (quote at 115).
read ads in newspapers, read trade publications, style magazines, see what competition is doing in store windows, and so forth. They can’t very well keep a record of the hours they work. For example, they might spend several hours with an out of town salesman or manufacturer at his hotel, or at lunch, at which time part of their discussion might be social and part of it might be on business affairs.” Building up to an artistic analogy he was about to make, Hangen insisted that it was “difficult satisfactorily to employ additional assistant buyers on some lines as one man should know an entire line.”

Hangen’s concluding remarks then culminated in an absurd analogy between assistant buyers and creative artists or learned professionals that failed to provoke a challenge or even a question from Stein: “The results of their work cannot be measured by the hours they work or on any kind of a piece-work basis but they are judged by...what they accomplish, by the exercise of discretion, judgment, and good taste, much like a portrait painter or a lawyer.” Without offering any data, Hangen asserted that assistant buyers probably did not average during a year more than 40 hours a week, but that it was important for them to work long hours during peak weeks, whereas during the hollows their hours were unimportant.

One of the Penney assistant buyers, R. B. Fox, then testified in behalf of the Penney assistant buyers. The purpose of his testimony was to demonstrate the infeasability of recording their working hours. For example, when meeting with manufacturers at a hotel or lunch: “Part of the time we are discussing business and part of the time we might not be discussing business, it might be pleasure.... Naturally, we can’t pull out a book and show one hour for business and one hour for monkey business....” What Fox in fact demonstrated was that he had so fully internalized his employer’s profit-driven demands that he was willing to subordinate his life outside to them, to merge them, or even to abandon his independent judgment as to where working time ended and his own free time began: “I might consider that all of the time I am away from home that I am doing work whether I am riding the cushions, going through the factory, nevertheless I

61“1940 WHD Hearings Transcript” at 116-17.
62“1940 WHD Hearings Transcript” at 117.
63“1940 WHD Hearings Transcript” at 117. In spite of Fox’s own self-description, later, when a union representative asked Fox whether he was basing his opinions (especially that he would rather not be subject to the FLSA) on his own personal opinions or whether they were common among the assistant buyers, Wyzanski objected that “[w]e didn’t offer Mr. Fox as a representative of anybody but himself and the J. C. Penney Company” and added that “there were no unions in this association....” Stein himself prompted Fox to state that he would not know whether others agreed with him. Id. at 139.
64“1940 WHD Hearings Transcript” at 119.
am working for the J. C. Penney Company and I am spending my time. I wouldn’t
know where to draw that line. I might be sitting on the train and instead of reading
Life magazine, I may be reading some ads so I would charge that up to the office.
It is difficult to say whether it is business again or the other thing. That J. C.
Penney had selected a picture-perfect self-abnegating and/or corporate hierarchy-
climbing white-collar employee to testify was clear from Fox’s admission that:

[T]here are certain times when you just can’t hang up your hat or drop the hammer and run
home. If you do you have a guilty conscience. And that is our part of the job.
We have enough feeling of the responsibility to want to stay there on the job until the
thing is done. I am just selfish enough to think that that might be a feather in my cap,
too.

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65 "1940 WHD Hearings Transcript" at 120 (Apr. 11). An example of an employer’s
praising employees for similar behavior was furnished later in the hearings when a repre­
sentative of Kraft Cheese Company testified that its union contracts, which did not limit
daily or weekly hours, provided that routes were to be laid out so that outside salesmen
could complete them by 5 p.m.; nevertheless, on 90 percent of the routes they did not
return by then “[b]ecause they are salesmen and they do have that fire burning inside of
them which we are looking for when we hire them.” Id. at 523 (Apr. 15) (testimony of
John Wolf). Self-contradictorily, the same company opposed time and a half because “if
the salesman who, after all is human, knew that he was to draw time and a half for over­
time,...he would always linger over lunch; he would always have his hair cut and a shave
on the employer’s time, probably making money by doing it.” Id. at 487 (statement of
Richard Keck). Kraft’s representative, asked by Stein whether a 60-hour week was
“socially desirable,” replied that it was “all right for a salesman.” Id. at 494. That the
demand for excluding outside salesmen rested on employers’ preference that employees
waste their time on their own time was revealed by a firm: “[W]e all know that a lot of
time is wasted in selling merchandise. We all know that it requires a certain amount of
visiting and conversation that is absolutely outside of business. ... If you and I were work­
ing under the Wage and Hour setup, we naturally would have to chalk up the hours while
we were visiting at his [a customer’s] home.” Id. at 106-107 (June 3) (statement of E.
Heaton, Institute of American Poultry Industries, quoting member’s letter). Even where
a firm conceded that outside salesmen could be depended on to perform their duties with­
out constant personal supervision, it felt constrained to concoct a metaphysical claim to
justify non-payment of overtime: Because they represented to many customers the only
contact between the company and the dealer, “salesmen assume a sort of supervisory
capacity or managerial position, in that they are responsible for the activities of the com­
pany they represent....” Id. at 62 (June 3) (statement of Frank Will, vice president
Consolidated Cigar Corp.).

66 "1940 WHD Hearings Transcript” at 121.
Stein sought to puncture this picture by asking Fox whether he would “feel the same keen sense of responsibility...if you got $25 a week”—a figure proposed by some employers as the salary threshold for administrative employees—but Fox parried swiftly: “Yes. I think I would. I will take the ‘think’ out. I would.”

Fox closed by alleging that he could not “always delegate [his] duties to somebody else” on account of their “exacting nature” and especially during rush periods. But when such peaks were over, he could be “missing from the office at the beginning of the World Series some afternoon and there wouldn’t be an awful lot said about it because they know that the job would be taken care of any way [sic].” Why he could sometimes delegate his duties Fox did not explain, nor did Stein ask him, although this question went directly to the fundamental matter of the feasibility of work-sharing and -spreading. As to his total weekly hours, Fox was not forthcoming. At one point he remarked that sometimes “we might work possibly 60 hours in one week. However, I believe over the long pull, it wouldn’t average over 40 or 45 hours a week.” Later, when Stein asked him directly how the problem of his hours had been handled since the FLSA went into effect, Wyzanski interrupted, and they had a discussion off the record. When Stein then accommodatingly instructed Wyzanski: “Tell him not to answer if you think he shouldn’t,” Wyzanski, whom Harvard Law School Professor Felix Frankfurter had lauded as “one of the most brilliant students I ever had” and The New York Times later celebrated as “a profound legal thinker,” humbly replied: “I am not the corporation counsel and I don’t know. Refuse to answer on the basis of --.” Stein, taking command, but also turning extraordinarily deferential to Penney’s interests, peremptorily declared: “Mr. Wyzanski advises that the witness not answer the question. I would certainly not press it over such learned advice.”

It is not clear what line of questioning Stein had wanted to develop, but one reason that the failure to pursue Fox’s hours was unfortunate is that the opportunity was forfeited to discover whether in fact he worked long hours over the whole year and/or only seasonally. (Stein took one last sly stab at this issue by asking Fox whether he had in fact gone to the last (1939) World Series, but Fox’s response that he had gone in 1938 ended the foray.) If his hours in fact were extended only

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67"1940 WHD Hearings Transcript” at 125.
68"1940 WHD Hearings Transcript” at 123.
69"1940 WHD Hearings Transcript” at 121.
70Pace, “Charles E. Wyzanski.”
71"1940 WHD Hearings Transcript” at 132. The dashes marked the end Wyzanski’s statement; perhaps Stein cut him off.
72"1940 WHD Hearings Transcript” at 125. Stein was shrewd enough to ask whether Fox had been an assistant buyer at the time, but did not ask whether he had gone on a
seasonally, then it might have been possible to propose dealing with this specific problem by means of a seasonality or hours-averaging exception rather than permitting such an occupation to compel a radical expansion of the category of excluded administrative employees. If, on the other hand, the assistant buyers’ hours were long virtually throughout the year, the need for ‘flexible’ hours that employers stressed as the basis for the exemption would have been severely undermined.73

Wyzanski was much more interested in insuring that the record reflected that the assistant buyers did not meet the managerial criteria of the joint executive-administrative definition by putting into Fox’s mouth that he was merely a “straw boss” who did not manage a department.74

The United States Wholesale Grocers Association, represented by its executive vice president, R. H. Rowe, solemnly declared at the outset that “the minimum wage act, maximum hour act...is here to stay and I hope it will.”75 To be sure, Rowe may have meant this hope in the literal sense that the organization never wanted the minimum wage increased: in any event, eight years later, when Congress was considering an increase made long overdue by wartime inflation, he announced that one of the Wholesale Grocers Association’s highest political priorities was opposing any increase.76 Rowe opened his testimony on the executive-administrative issue on a promising note by suggesting that the first order of business was “some dictionary home work,” after which it would be necessary to determine whether that definition “fits the actual employee in practice or if it doesn’t fit and if it fits on him so bad that it makes him look ridiculous.”77 Unfortunately, however, he never did his homework, and proceeded to offer his personal, arbitrary linguistic preferences without any dictionary or empirical support. Conceding that “we didn’t use...administrative employee” in the NRA wholesale grocery code, he pointed out that it was necessary to “carry out the will of Congress,” although he offered no explanation as to what that will might be. Rowe’s principal point was that: “[E]xecutive and administrative are different.

weekend.

73None of the three union representatives who questioned Fox asked these or any other fundamental questions, although Leo Bernstein of the United Wholesale and Warehouse Employees’ Union did tell Stein that since the WHA was being asked to create definitions that would have a wide scope, the questioning should have wide latitude. “1940 WHD Hearings Transcript” at 141. On the questioning by Lazare Teper, ILGWU, and Leonard Geiger, United Retail and Wholesale Employees of America, see id. at 134-40.

74“1940 WHD Hearings Transcript” at 124.

75“1940 WHD Hearings Transcript” at 145.


77“1940 WHD Hearings Transcript” at 145.
Though the administrative does project somewhat of the nature of the executive, yet it is of a less [sic] degree. And my suggestion is on the idea that one is the higher degree and the other the lesser degree. Apart from the prohibition on doing any substantial amount of non-exempt work, he was satisfied with the existing executive definition and was even willing to increase the salary level to $35—exactly where the NRA Wholesale Food and Grocery Trade Code of Fair Competition had set it seven years earlier.

Rowe’s proposed new separate exempt administrative employee had as his primary duty management of a customarily recognized department whose employees’ work he customarily directed regardless of how many it had or whether it had any at all. In addition, he initially proposed a mere $20 as the salary level, but then on second thought allowed as $25 would also be “suitable to me....” How such a petty salary, which would work out to less than the minimum wage once this departmental manager worked more than 66 hours a week, could possibly provide the protection against “abuse” that he attributed to the $35 executive salary, he did not bother to explain. Thus despite this minuscule salary, the Wholesale Grocers Association did propose a relatively narrow duties test, adoption of which would presumably have frustrated the vast expansion of the category of excluded administrative employees, most of whose amorphous activities could not have been pressed into this confined definition. In essence, Rowe viewed administrative employees as belonging in the loftier category of administrators—a conclusion corroborated by his express analogy to the Wage and Hour Administrator himself.

The second day of the wholesale and distributive industries hearings brought to the witness stand a much more heterogeneous group of entities espousing a broader array of proposals. Stein heard first from Joseph Klamon, a professor of marketing at Washington University in St. Louis, who purported to be appearing in a “dual capacity” as economic adviser to four St. Louis lumber companies and to “offer expert testimony for the record....” Klamon immediately proclaimed that “we are strongly in favor of” the FLSA and that he personally had “always

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78“1940 WHD Hearings Transcript” at 146.
79“1940 WHD Hearings Transcript” at 146-49.
81“1940 WHD Hearings Transcript” at 149.
82“1940 WHD Hearings Transcript” at 148.
83“1940 WHD Hearings Transcript” at 149-51.
84“1940 WHD Hearings Transcript” at 192-93 (Apr. 11).
been for maximum hour and minimum wage legislation designed to eliminate unconscionably long hours of work and sweatshop wages."

Klamon was hardly an unknown quantity at the WHD and it is not clear what sort of credibility his assurance could generate since he had spent the past few months testifying before the Division on behalf of the St. Louis Manufacturing Association threatening to challenge the validity of a 35-cent minimum wage for the shoe industry that New England manufacturers and the Shoe Industry Committee had recommended. In any event, Klamon argued that

It is one thing...to believe sincerely in a floor for wages and a ceiling for hours, and perhaps quite another to attempt to have the Government, through an administrative agency, perform the bargaining function for labor....

It was my impression that this Act was and is the Fair Labor Standards Act, designed to eliminate as much as possible sweatshop conditions, not primarily the time and a half Act for administrative or executive employees, or perhaps even white-collar employees, receiving, let us say, $125 per month or considerably more. ... I think it well to keep in mind that this hearing is not the place for policy determination which is, of course, a legislative function; nor, perhaps, is this the place for upper bracket or even middle bracket wage and hour negotiation.

Klamon proposed exempting white-collar employees receiving $125 per month—or any other reasonable sum that the WHA felt was appropriate—and paid annual and sick leave. He also suggested monthly hours-averaging by making the time period the month instead of the week “in order to allow them to work at certain short, peak periods, that most firms have during any month, and then provide, in the strongest way, of course, that employees who are not exempt because of the $30 a week provision, shall be given compensatory time off during that month for peak load overtime...."

After tentatively defining exempt administrative employees as being paid $30 per week (or other sum) with the authority either to hire or fire or with the responsibility for employees’ work, Klamon went on to reveal a broader agenda focused on the belief that Congress never intended to include “many administrative

85“1940 WHD Hearings Transcript” at 193 (Apr. 11).
87“1940 WHD Hearings Transcript” at 193-94 (Apr. 11).
88“1940 WHD Hearings Transcript” at 194-95 (Apr. 11).
89“1940 WHD Hearings Transcript” at 195 (Apr. 11). The tentativeness was expressed by the phrase “perhaps should be regarded in an administrative capacity, and exempt.”
employees receiving well over $30 per week” because they did not work under socially harmful or deleterious sweatshop conditions. Covering such workers might “simply create inequitable competitive advantages and possibly make certain phases of the Act unworkable.” In spite of the unspecific definition that he had just offered and that described a supervisor rather than an administrative employee, Klamon objected to the adoption of a “forced or far-fetched or unreal interpretation of administrative employees,” urging instead selection of “a clear, generally accepted, operating concept....” Instead of offering or citing one, Klamon insisted that many members of Congress would be surprised if told that in enacting the FLSA they had had in mind that they were covering administrative employees earning $90 a week.90 He felt that such interpretations were tantamount, “[u]nder the guise of having the Government act against such socially harmful conditions” to “asking the Government to perform the bargaining function for labor, and to serve as an arbitrator whose decision is binding, and an arbitrator, possibly, who has already made up his mind.” Then in a completely unmediated fashion and contradicting his earlier definition, he declared that assistant buyers, finance men, accountants, and similar office employees, as well as other white-collar employees with salaries above the named level should clearly be exempt, adding that it was neither his intention nor that of his principals “to use the term ‘white-collar’ simply as an effort to avoid the purposes of the Act”—as made evident by their acceptance of the salary limitation. Since the $30 salary threshold had been in the regulations since 1938, it was unclear what Klamon was actually proposing other than the blanket exclusion of all white-collar workers without the benefit of any definition whatsoever—his assertion to the contrary notwithstanding that he was not asking that the current definition be “thrown aside or thrown overboard entirely,” but merely that it be “amended to make it very clear and workable....”91

Klamon’s responses to questions—concerning his view of a legislated 40-hour week, on whether the regulation should be a flat prohibition or penalty overtime pay, and even whether the firms he represented had experienced any inequities as a result of the regulation—were as confused and ambiguous as his statements.92 After Stein had elicited from him that he was not opposed to functional descriptions in the definitions, but that “in order to make the thing workable, I would suggest that you copy the words of the Act itself, with an amount,”93 thus confirming the impression of his testimony that he advocated a blanket exclusion, Leo

90“1940 WHD Hearings Transcript” at 199 (Apr. 11).
91“1940 WHD Hearings Transcript” at 200 (Apr. 11).
92“1940 WHD Hearings Transcript” at 204-208 (Apr. 11).
93“1940 WHD Hearings Transcript” at 209 (Apr. 11).
Bernstein of the 7,000-member left-wing United Wholesale and Warehouse Employees asked Klamon whether it was not true that the current definitions were "very clear, but in your opinion...too inclusive...." Evading a straightforward answer, Klamon in effect agreed by asserting that "the inclusive character" of the executive-administrative regulation "indicates that whoever prepared it, was trying to make the act cover a lot of territory which Congress, I think, never intended...." Bernstein tried to pin Klamon down by asking him whether the problem was not lack of clarity but that the definitions did not exclude certain categories he wanted excluded, but Stein prevented further interrogation on this issue by suggesting to Bernstein that instead "later on we expect to have the benefit of your views on this subject." How Bernstein could possibly shed light on unexpressed opinions that were exclusively in the possession of employers or their representatives, Stein did not reveal. Since the scope of the administrative exclusion was the central factual controversy surrounding the regulations, Stein did not promote enlightenment on the roots of this eminently political-economic struggle by cutting off debate. In fact, Bernstein’s and his union’s position was “that the purpose of the Act is not completely served, even by the present definitions, but we are content to observe the further working-out in life of these definitions and reserve requests for changes for a later date.”

Another large corporation to testify was the Pittsburgh Plate Glass Company, represented by its assistant counsel Joseph Owens, who, like many other big business agents, felt that “the present law covers a lot of employees that Congress never intended to cover, and which it is economically and socially undesirable to cover....” PPG submitted two proposals. One would have raised to 50 percent the amount of non-exempt work that bona fide executive and administrative employees were permitted to perform (instead of “no substantial” amount). PPG’s alternative definition of an exempt executive or administrative employee as any employee who did no manual, mechanical or physical labor was, in effect, a blanket white-collar exclusion subject to a $34.69 a week salary requirement. This

94"1940 WHD Hearings Transcript” at 803 (Apr. 16).
95Three weeks after the hearing this CIO affiliate marched in the May Day parade in New York. “Thousands March on May Day Here,” NYT, May 2, 1940 (16:3).
96"1940 WHD Hearings Transcript” at 210-11 (Apr. 11).
97Stein did not adduce lack of time as the reason for his interruption since he both permitted Bernstein to ask a different question and told him that if necessary he would be given a week to rebut all the inaccuracies that he claimed were being presented. “1940 WHD Hearings Transcript” at 211 (Apr. 11).
98"1940 WHD Hearings Transcript” at 809 (Apr. 16).
99"1940 WHD Hearings Transcript” at 231 (Apr. 11).
equivalent of $140 a month could, Owens testified, also be as high as $150, but that sum would be higher than possible or practicable for many other organizations.100

Owens focused on the issue of performing nonexempt work, especially in small warehouses, purportedly because, if the executive-administrative definition meant that the medium-size and small warehouse or department manager was subject to the law and thus effectively restricted from working more than 42 or 40 hours a week, it would have had the very serious detrimental effect of preventing his development, in particular his promotability. Keying PPG’s objection to a statutory purpose, Owens also argued that in small warehouses there was not enough work to justify hiring another employee; consequently, the manager had to do the nonexempt work and therefore the practical reality was that no work-spreading would result because it was not possible to hire one-fourth of an employee, although he failed to explain why part-time employment or payment of the overtime premium was impossible (even if it no longer functioned as a deterrent).101 If, however, the manager could work beyond the overtime trigger of 40 or 42 hours, he would, according to Owens, be able to create business that would result in additional hiring: “It is our belief that the driving force of business, the initiative and energy which makes the American business system go, is found in the activity of these comparatively young and unimportant executive and administrative employees, and that if you do put this brake upon their activities, you definitely retard the ability of the business system to absorb the unemployment...and you are really defeating one of the asserted purposes of the” the FLSA.102

PPG’s warehouses had to remain open long hours because they did a considerable business volume with the construction industry, which was not subject to the FLSA. The company conceded that it could stagger hours with nonexempt employees, but claimed that this practice was not “feasible” with “real executive and administrative employees” because it was “self-evident” that there had to be “continuity in the personnel of the people who are making executive decisions. A man can’t be an executive in charge of a department or in charge of the warehouse on the late shift and know what the executive in charge of the warehouse on the earlier shift has done.” Instead of explaining how, according to his description, three-shift industrial operations of any kind could possibly exist without shift managers, Owens chose to challenge the suggestion that PPG could lower their salaries to the level at which they could work overtime and be paid time and a half on the grounds that this practice was very undesirable because making a manager

100"1940 WHD Hearings Transcript” at 214-15 (Apr. 11).
101"1940 WHD Hearings Transcript” at 220-23 (Apr. 11).
102"1940 WHD Hearings Transcript” at 224 (Apr. 11).
the equivalent of an hourly employee "does much to destroy his usefulness and to lower his efficiency...."  

PPG's intense interest in a 50-percent limit on the amount of non-exempt work that it could require its executive-administrative employees to perform without jeopardizing its exemption from overtime regulation seemed oddly out of all proportion to the extent of the problem that it alleged: after all, the issue arose only in its relatively few "very small" warehouses/wholesale branches, even there the non-exempt work formed only "a minor portion" of the employee's duties, and even before the FLSA had gone into effect the workweek had typically been 48 hours and often only 44 or 46 hours.

Brilliant light was inadvertently shed on the whole question of excluding executives altogether by one of Stein's questions that provoked Owens to respond that only the pure executive, the man that has a couple of private secretaries and a lot of buzzers, can function without doing some amount of non-exempt work. The people that supervise the work of others have to do some amount of non-exempt work, or they lost their contact with that work, and they are not able to do a proper job of supervision.

Neither Stein nor the labor union representatives pursued this matter, but Owens had manifestly, albeit unintentionally, raised the question of how anyone could know that Congress had not meant the exclusion to be confined to "the top-ranking, pure executive," rather than encompassing huge numbers of lower-level, hands-on supervisors, whose work, working conditions, power, and privileges have never entitled them to what in common parlance is the lofty title of "executive."

The testimony of Montgomery Ward's attorney, Marie Manderscheid, provoked an important exploration of the exclusion of administrative employees. Montgomery Ward's appearance was significant in its own right since its chairman

103"1940 WHD Hearings Transcript" at 225-26 (Apr. 11).
104"1940 WHD Hearings Transcript" at 216-19, 220 (quote), 243 (Apr. 11).
105"1940 WHD Hearings Transcript" at 248-49 (Apr. 11).
106Later, Stein did pick up on Owens's terminology, but the context shows that he did not mean it in the same strict sense: he suggested that the duties test be overhauled, if necessary, "to make sure it is aimed at the pure executive, and/or administrative employee, not the comptometer operator or a whole group I could name...." "1940 WHD Hearings Transcript" at 251 (Apr. 11).
107"1940 WHD Hearings Transcript" at 249 (Apr. 11).
108Her name was spelled "Mary" in the hearing transcript, but according to her listing in Martindale-Hubbell it was "Marie."
of the board, Sewell Avery, was an "arch foe of the New Deal," especially of its labor regulation.\textsuperscript{109} In 1935 he had declared the NRA's retail code illegal,\textsuperscript{110} and then welcomed the NIRA's judicial demise with the words: "These efforts to manage immutable economic laws, as the NRA tried, are always futile."\textsuperscript{111} On the grounds that the WHA lacked reasonable grounds to believe that Montgomery Ward had violated the FLSA, in August 1939 his firm resisted the WHA's subpoena to produce the wage and hour records that the Act required it to keep.\textsuperscript{112} When WHA Andrews took the company to court, a federal district judge also rejected Montgomery Ward's defense that the FLSA was unconstitutional.\textsuperscript{113} This litigation was pending during the hearings, the appeals court affirming the lower court's decision in July 1940 and the Supreme Court refusing to take the case.\textsuperscript{114}

Manderscheid testified that Montgomery Ward's mail order houses employed 13,700 employees, 900 of whom it considered to be executive or administrative employees.\textsuperscript{115} In addition to echoing PPG's proposal of a 50-percent ceiling on non-exempt work for executives and proposing the elimination of the $30 salary level,\textsuperscript{116} Manderscheid proposed that an administrative employee be defined as any employee

"1. upon whom responsibility is placed to perform his work without detailed supervision, and who is required to exercise discretion in its performance; and

2. who has the right directly or indirectly to supervise the work of other employees or the operation of some function of the business of the employer, or who has the right to require other employees or departments to do such work as he may deem necessary to assist him in the performance of his work, or who has the right to prescribe the procedure to be followed or the work to be performed by other employees or by a department of the employer's business."\textsuperscript{117}

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\textsuperscript{109}"Sewell Avery Dead," \textit{NYT}, Nov. 11, 1960 (1:6, at 39:2).
\textsuperscript{110}"Mail Order House Accepts NRA Ban," \textit{NYT}, Apr. 9, 1935 (10:5).
\textsuperscript{111}Avery Hails NRA Decision," \textit{NYT}, May 28, 1935 (18:5).
\textsuperscript{112}Ward Denies Wage Act Violation," \textit{NYT}, Aug. 24, 1939 (10:1).
\textsuperscript{113}Andrews v. Montgomery Ward & Co., 30 F. Supp. 380 (N.D. Ill., Nov. 22, 1939). In upholding Congress's exercise of the police power, the judge cited Adam Smith's \textit{Wealth of Nations} for the proposition that wages, especially of unskilled labor, tended toward the lowest point at which the laborer can subsist. \textit{Id.} at 384.
\textsuperscript{115}1940 WHD Hearings Transcript" at 262 (Apr. 11).
\textsuperscript{116}1940 WHD Hearings Transcript" at 263-64 (Apr. 11).
\textsuperscript{117}1940 WHD Hearings Transcript" at 264-65 (Apr. 11) (quoting from letter of Apr. 2 to the WHA).
Montgomery Ward argued that the existing regulation did not make the congressionally intended distinction between executive and administrative employees and applied only to the former. Whatever plausibility this claim possessed was jeopardized by its attachment to the baseless claim that Congress did not contemplate the use of a minimum salary-level test, which was “not inherent” in “executive” or “administrative” employee. Arguing circularly, Manderscheid contended that this position was supported by the fact that the firm had employees who met the other criteria, but whose pay fell below $30.118 To buttress its proposed definition, Montgomery Ward noted that it was necessary for it to delegate to many employees “considerable responsibilities” for making decisions and indirect control over business operations, although they were not executive employees and did not manage a department or have anything to do with hiring, firing, or promoting; nevertheless, they were often given more responsibility than employees who did manage a department and were clearly within the scope of the definition of “administrative” employee as intended by Congress.119 As an example Manderscheid mentioned certain buying department employees who had “no management responsibility over any other employees except the right to call upon clerical and stenographic employees for assistance,” were often paid as much as $375 a month, and were “important cogs in the administrative machinery of the company....”120

An incredulous Stein was not sure that he had heard correctly: “Does Montgomery Ward & Company, with over 13,000 employees, seriously contend that it has executives who get $30 a week?” Manderscheid admitted that there were a very few, but dismissed Stein’s concern on the grounds that their salary was irrelevant. She was, moreover, unable to answer Stein’s follow-up question as to what their “$27 a week executive” did.121 Having revealed his suspicions, Stein proceeded to lay a trap for the unwary lawyer: “I got the impression that anybody who could qualify for the executive redefinition would inevitably and invariably also qualify under the redefinition of administrative?” Manderscheid’s admission that it was true of Montgomery Ward’s and others’ submissions prompted him to engage her in the following colloquy:

Q In other words, you could throw the executive redefinition out of the window and it wouldn’t affect one single employee if you had your proposed redefinition of administrative?

118-1940 WHD Hearings Transcript” at 266-67 (Apr. 11).
119-1940 WHD Hearings Transcript” at 267 (Apr. 11).
120-1940 WHD Hearings Transcript” at 268-69 (Apr. 11).
121-1940 WHD Hearings Transcript” at 269 (Apr. 11).

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A That is right.
Q And...Montgomery Ward & Company urge that that carries out what it claims to be the congressional intent, that two separate definitions are necessary if one of them is simply words on a piece of paper?
A You can combine your executive and administrative and make them the same, if you wish.
Q I thought Montgomery Ward & Company said you couldn’t combine them?
A I think it was the congressional intent that they not be combined. The comma between executive and administrative in the law, as I recall it, indicates that.
Q Then, if that’s true, I am afraid we cannot accept Montgomery Ward & Company’s proposal.122

In spite of the lethal blow that Stein had administered to Montgomery Ward’s proposal, Leo Bernstein, the left-wing unionist, pursued the matter further, asking Manderscheid what exactly she meant by administrative work. Her response—that it involved “a person who has responsibility of accomplishing a certain result without detailed supervision” and “is able to exercise discretion in how he is going to carry out that job”—led him to ask whether a dictaphone operator did not have “discretion as to manner” in which she will turn out records and whether even most merchandising department employees who performed such tasks as picking orders or even checking that the correct number of cartons were received did not have discretion and responsibility. Manderscheid rejected this surmise both because their discretion and responsibility was “very small” and “we have tied it up with these other qualifications.”123 Yet these latter were in the disjunctive and could be satisfied so long as any of the people mentioned by Bernstein had—to repeat the company’s proposed test—“the right to require other employees or departments to do such work as he may deem necessary to assist him in the performance of his work.” Thus if they had the right to require as few as two other people to give them supplies (even pencils), they would literally meet the duties test, although Manderscheid insisted in response to a question by a UOPWA official that “all stenographers, all purely clerical help, your comptometer operators, probably, secretaries, except those that are considered executive secretaries...to one of the highest officials in the company who carr[y] out executive duties without necessarily being subject to detailed supervision” would not be administrative employees.124

Demonstrating the diversity of employers’ approaches to extricating themselves from national hours regulation, John Harrington, associate counsel of the

122"1940 WHD Hearings Transcript" at 270-71 (Apr. 11).
123"1940 WHD Hearings Transcript" at 276-77 (Apr. 11).
124"1940 WHD Hearings Transcript" at 286 (Apr. 11).
Illinois Manufacturers Association, proposed a “pure salary test” for executives ($40 a week): “We feel that whether it is $40, $45, or $50, it is exempting people who were not intended to come under the Act.”\(^{125}\) And if that suggestion was not accepted, then he and his client wanted “to join the general clamor against ‘substantial amount’ of time devoted to” non-exempt work and for 40 or 50 percent. They were satisfied with the executive employee definition, but could not meet the five requirements for administrative employees—such as those in one-man departments—whose definitional merger with executives “was not contemplated by Congress” and worked “a severe hardship on industry,”\(^{126}\) although Harrington was constrained to admit under questioning by Leo Bernstein that he did not know of a single one of his association’s 3,000 members that had stated to him that the regulations had worked undue hardship on it.\(^{127}\) Since the manufacturers’ proposed “administrative” definition was also based on a “straight salary qualification $40 or $50 or whatever is wanted,” if that proposal was not accepted, the “administrative” definition would have to be revised to exclude the employees covered under the old “executive” definition. The Illinois Manufacturers also wanted to broaden the professional exclusion by adding that training could be acquired by experience as well as by school.\(^{128}\)

Prodded by Stein, Harrington admitted that if the $40 or $50 salary test—which he regarded as a simplification for workers, employers, and the WHD “so that you didn’t have to bother above a certain point beyond which the Act wasn’t, in our opinion, intended to apply”—were adopted for executives, there would probably not be people who wouldn’t qualify under the administrative definition, but as the salary went down, they should meet certain tests.\(^{129}\) Then in a rare moment of epistemological humility, of which employers quickly repented and against the recrudescence of which they immunized themselves, Harrington conceded:

I realize that the problems of employees that we consider to be in administrative capacity who don’t have departments, as supervisors, under them, it is easier for us to point out that your definition is wrong than it is for us to draft one that will cover what we want and not open the doors.\(^{130}\)

\(^{125}\)“1940 WHD Hearings Transcript” at 290 (Apr. 11).

\(^{126}\)“1940 WHD Hearings Transcript” at 291-92 (Apr. 11).

\(^{127}\)“1940 WHD Hearings Transcript” at 296 (Apr. 11).

\(^{128}\)“1940 WHD Hearings Transcript” at 292 (Apr. 11).

\(^{129}\)“1940 WHD Hearings Transcript” at 293 (Apr. 11).

\(^{130}\)“1940 WHD Hearings Transcript” at 294-95 (Apr. 11).
One of the categories of workers that the Illinois Manufacturers proposed excluding encompassed administrative employees performing "work requiring the regular exercise of discretionary powers." Without accusing Harrington of intending to exclude all such workers, Solomon Lischinsky (representing the Amalgamated Clothing Workers and the Textile Workers Union), asked whether using exercise of discretion as a definition, when almost all operations outside "purely manual labor" involved it to some extent, would permit the argument that all these workers were excluded. Harrington called it a "rather forced argument," but Stein, having apparently dealt with more than enough lawyers, admonished him: "[I]n our work I am afraid we do have to meet a great many forced arguments, and it would be enormously advantageous...to have a definition which was as little susceptible as possible of even forced arguments."

At this point Lischinsky—who, like most union representatives, opposed any changes in the regulations—and Harrington entered into one of the hearings' least ideological and most cooperative dialogs between labor and capital in which they really seemed to be groping for an answer to the question as to what "administrative employee" meant. This turn of events was especially surprising since Harrington, in testifying on behalf of the Illinois Manufacturers' Association at the FLSA congressional hearings in 1937, had argued in the manner of a thoroughly unreconstructed knee-jerk reactionary.

Mr. Lischinsky: What do we usually mean by the terms "administrative", "administrator"? We usually think of a person as administrator who allots work to other people to be done, do we not?

Mr. Harrington: No, I don't think that that is—I think that administrative is part of the

131"1940 WHD Hearings Transcript" at 293 (Apr. 11). Because the National Archives was unable to locate the written submissions for the hearings, this proposal is known only from references in the testimony. It appears that the administrative exclusion was tripartite, with the first part excluding all those who supervised employees and earned over $30 a week. Id. at 295. The second part was not sufficiently described.

132Later Lischinsky was accused, together with economists Victor Perlo and Harry Magdoff, of being a Communist spy. "Fitzgerald Loses Contempt Appeal," NYT, July 7, 1956 (7:1).

133"1940 WHD Hearings Transcript" at 300 (Apr. 11).

134"1940 WHD Hearings Transcript" at 785 (Apr. 16) and 473 (June 5). See also id. at 789 (statement of Elinor Kahn, American Communications Association); "Wage Redefinition Backed by Labor," JC, Apr. 16, 1940 (3:4).

management of a business. The executive is the head and gives the orders; administrative, they carry out the orders, and those who are not administrative are those who actually perform the work. They go between the executive and the ones who actually do the work.

Mr. Lischinksy: Well, such a person would direct the people under him, would he not?

Mr. Harrington: There are also people that we consider administrative who don’t have anyone under them.

Mr. Lischinsky: That is just what we are after.

Mr. Harrington: Yes.

Mr. Lischinsky: Would you ordinarily think of that person as an administrative person if it wasn’t a question of getting him exempted?

Mr. Harrington: Yes, I think you undoubtedly would. I think there are a lot of people that I think are in administrative capacity that I can’t think up a definition to cover them. I think that administration is very possibly a much broader term than any of these definitions. I don’t think I would go as far as some of the suggestions here, that it covers everyone outside of production, but I do think there are a lot of employees engaged in the administrative functions of the business who don’t necessarily have anyone operating under them. They may be a full one-man department in themselves. ...

Mr. Lischinsky: You can’t have an administrator without an administratee, can you?

Mr. Harrington: I think you could very easily.

Bizarrely, Stein peremptorily cut off the richest discussion of the subject that he had yet heard: “I don’t feel that this is very profitable. After all the term, it would seem to me, would be extremely vague; it overlaps executive....” However, Harrington was not willing to let it go just yet and replied: “Yes, they overlap; but I think administrative goes as far as executive.” Thwarted in his effort to get to the bottom of the mystery of the administrative employee—in fact, he contended that “these two terms...reenforce and explain each other in the description of a single group”—Lischinsky apparently tried to undermine the legitimacy of the white-collar exclusions by scrutinizing the FLSA’s purposes. But when he posed the question, Harrington—seconded by Stein—referred him to the statute’s preamble, and when he then asked whether the Act aimed to raise wages and increase employment, Harrington replied that he could not remember anything about the latter in the preamble and Stein lauded his memory. Stymied again, Lischinsky then posed the same question about the overtime provision, but Harrington demurred at going beyond what Congress had said that it intended, and

136“1940 WHD Hearings Transcript” at 303-304 (Apr. 11).
137“1940 WHD Hearings Transcript” at 304-305 (Apr. 11).
138“1940 WHD Hearings Transcript” at 770 (Apr. 16). This substantively plausible argument has to overcome the syntactical problem that Congress placed a comma and not a hyphen between the terms.
Stein intervened to convey his feeling that Harrington had exhausted his knowledge. Lischinsky then undertook one last attempt to focus on the congressional intent to spread work, but Stein instructed him to save that subject for his own statement later, thus, once again, obstructing exploration of a vital question, resolution of which was absolutely essential to the articulation of rational regulations.\textsuperscript{139}

The Associated Industries of Missouri, including a number of large national firms such as Brown Shoe Company, International Shoe Company, Falstaff Brewing Corporation, Anheuser Busch, Inc., and Ralston Purina Company,\textsuperscript{140} was represented by Cleveland Newton, who in addition to pointing out what he regarded as the anomaly that a $30-a-week foreman might properly be classified as executive-administrative, whereas a $500-a-month purchasing agent with no one under him except a stenographer might not be, was the first witness to assert that the existing regulation “is not appreciated by the employees themselves. They have always been free to exercise discretion as to the manner in which their duties shall be performed. They do not like to be bound to a rigid schedule of hours. They like to be free to work when the occasion demands and have always been granted many compensating privileges when their work schedules are light.”\textsuperscript{141} The kinds of employees who were allegedly joining their employers in urging revision included purchasing agents, welfare employees, claim agents, assistant department heads, statisticians, auditors, and credit men.\textsuperscript{142} The Missouri firms did not request bifurcation of the executive-administrative definition; instead, they proposed an amended joint definition containing an additional exclusion of employees who had a duty of exercising discretionary powers although they were not in charge of a department or other employees. While retaining the $30 salary threshold, it deleted the limitation on performance of non-exempt work.\textsuperscript{143}

Significant political testimony was given by Lewis Merrill\textsuperscript{144} of UOPWA and Marcel Scherer of FAECT, two white-collar unions that merged after World War

\textsuperscript{139}“1940 WHD Hearings Transcript” at 305-306 (Apr. 11). Later, Lischinsky expressly mentioned increasing substandard wages and reducing unemployment by the spread of work as the broad purposes of the FLSA, thus implying that shorter hours was merely an instrumental objective and not a goal in its own right. Id. at 768 (Apr. 16).

\textsuperscript{140}“1940 WHD Hearings Transcript” at 309 (Apr. 11).

\textsuperscript{141}“1940 WHD Hearings Transcript” at 313 (Apr. 11).

\textsuperscript{142}“1940 WHD Hearings Transcript” at 314 (Apr. 11).

\textsuperscript{143}“1940 WHD Hearings Transcript” at 317-18 (Apr. 11).

\textsuperscript{144}“Consider Change in Wage Definition,” JC, Apr. 12, 1940 (2:6), recounted Merrill’s testimony.
II. In September 1939, at a House Special Committee to Investigate Un-American Activities hearing, Benjamin Gitlow, a founder, two-time vice-presidential candidate, and former general secretary of the Communist Party, accused both Scherer and Merrill of being Party members—an accusation that persisted into the post-World War II years. Reputedly Scherer in 1939 recruited Julius Rosenberg to become a member of FAECT, of whose Civil Service Commission he soon became chairman. In any event, Merrill and Scherer were feisty witnesses, who did not shy away from pointing out the class-political interconnections between the hearings and the congressional proceedings. Indeed, Merrill opened his remarks by stating expressly that the employers’ petitions for revising the regulations could not be “separated from the controversy over the Barden Bill...and like amendments” and mentioning predictions of the probable concessions...the Administrator...might make to the point of view incorporated in the various amendments and proposals. The impression has been indelibly created that the Barden Bill, the Cox Bill, and the present proceedings itself are part of a carefully conceived procedure whereby the operation of the Act would be limited either by amendment to law or by administrative ruling. It is being held that these proceedings are an effort to achieve through the Administrator what could not be secured from Congress.

It cannot but be held that the current proposals for redefinition originate in the drive to change the Act itself or repeal it in its entirety. It is viewed as an effort to water down by administration social legislation which has the emphatic approval of the American people. Change along the lines currently advocated will not be construed as a constructive redefinition to improve the administration of the Act along the lines approved by Congress, but will be construed as a victory over the Act.

Following this political analysis, Merrill gave Stein a brief sociological over-
view of white-collar working conditions. Having "called into a being a new army of clerical and professional workers engaged in a multitude of tasks in connection with the administration and servicing of American industry and commerce," business by the 1930s was "developing its own solution for the reduction of administrative costs with all of its accustomed energy, ingenuity, and decisiveness" and thus "rapidly changing the economic and social status of all white collar workers."\[151\] From data showing that clerical and professional employees accounted for a substantial proportion of the unemployed in urban areas and that prior to the FLSA most companies paid their office employees either nothing or only supper money for overtime work,\[152\] as well as from the fact that mechanization accompanied by monotony, speed-up, specialization, and mental and nervous strain had "conquered office as well as factory"\[153\] Merrill concluded that employers' proposed redefinitions "would run rough shod over any of the considerations pertaining to the changing status of white collar employees, or the present high incidence of unemployment, long hours, and so forth."\[154\] Indeed, he went so far as to suggest that the FLSA should protect all white-collar employees: "What Congress did not provide against, if it could, is the fact that the present trend among white collar labor makes all of the provisions of the law a matter of pressing necessity for every category of clerical and professional endeavor."\[155\]

In contrast, Merrill argued that the October 1938 regulatory definitions were "entirely within the intent and spirit and the declared policy of the Act."\[156\] Although he was referring to all the definitions, he was focused on the de facto merger of the executive and administrative categories, which was of particular significance to UOPWA members. Merrill was able to embed his preference for the existing definition in a robust sociological framework and, unlike any of the other witnesses or anyone else in the years since the hearings, to give tangible (albeit speculative) meaning to a widely overlooked statutory term:

The insertion of the word "bona fide" is not accidental. It was inserted consciously and should be read in its natural meaning.

The whole of white collar labor can be said to be engaged primarily in an administrative function in the production and distribution of goods. In order to distinguish between the officers of an enterprise and their direct agents, the word "bona fide" was

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\[151\] "1940 WHD Hearings Transcript" at 337-38 (Apr. 11).
\[152\] "1940 WHD Hearings Transcript" at 338-40 (Apr. 11).
\[153\] "1940 WHD Hearings Transcript" at 342 (Apr. 11).
\[154\] "1940 WHD Hearings Transcript" at 343 (Apr. 11).
\[155\] "1940 WHD Hearings Transcript" at 338 (Apr. 11).
\[156\] "1940 WHD Hearings Transcript" at 344 (Apr. 11).
inserted. At one time before the emergence of corporate enterprise, business was administered directly by the owner. Today...we have developed a group of especially trained executives who are the direct representatives of the owner, employed because of the special qualifications and paid at a rate commensurate with their identification with responsibility for the outcome of policies for which they are primarily responsible. Minor executives in this category are also responsible for some essential phases of policy and are paid at a rate commensurate with their identification with the owners of the enterprise and the initiation of its policy.

If a monetary standard alone were to be substituted for any actual definition describing the role of the employee in a particular enterprise, for the purpose of distinguishing between bona fide executives, administrators and professionals, and those who can be considered as executive and so forth, only in a limited sense, then the amount of that monetary level would have to be set at a rate not less than $5,000 per year, and even if this were done there is no likelihood that a clear, scientific separation would be achieved.157

Merrill concluded by lauding the impact of the FLSA on white-collar workers in terms of job creation and labor market regularization, advocating an expansion of coverage, and warning that employers’ proposals to restrict coverage were dictated by their belief that what the state did not give white-collar workers—“humane, sane, fair and equitable conditions of work”—the latter would be incapable of obtaining through collective bargaining. But employers had, in the UOPWA’s view, “misjudged the situation. Business change itself has made it impossible for the white collar employee to remain supine.” Outdistancing reality for dramatic effect, Merrill declared that white-collar workers had “put forward their champions and taken their place squarely with the labor movement.” Consequently, if the Wage and Hour Administrator decided to deprive them of their statutory gains and thus “to throw the current dispute into the customary arena” of industrial struggle, “these champions will not be found failing.”158

Waiting until the end of Merrill’s prepared statement, Stein reprimanded him for the implication that the WHA, the employer-petitioners, and possibly Stein himself were acting in bad faith; without explaining why, Stein insisted that such an implication would be inappropriate to introduce at a hearing and was better left for the press. Merrill, in turn, took umbrage at Stein’s instructing him in “proper politeness....”159

Interrupting this contretemps, Harry Weiss, the director of the WHD’s Re-

157“1940 WHD Hearings Transcript” at 344-45 (Apr. 11). Lazare Teper referred very briefly to the narrowing effect of the term “bona fide.” “1940 WHD Hearings Transcript” at 389 (Apr. 12).

158“1940 WHD Hearings Transcript” at 349-51 (Apr. 11).

159“1940 WHD Hearings Transcript” at 351-52 (Apr. 11).
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search Statistics Branch, asked Merrill whether a $7,500-a-year assistant to a corporation president met the definition, but the high salary failed to cause the UOPWA president to modify his principled position that "the clerical employees are in a sense assistants to the administrator." Thus in a modern corporation "the end of all clerical labor" is to provide its head with the basis for "analyzing information so he can make a correct decision which will add to the profitability of that enterprise." Rather than engaging this unorthodox argument, Stein closed the colloquy with Merrill by expressing his assumption that, like all the other witnesses, Merrill, too, felt that certain employees should be exempt: "The question is, how many and which."160

Marcel Scherer was a chemist who had already in the 1920s organized engineers and architects in the Union of Technical Men, whose militancy caused it to be expelled from the International Federation of Technical Engineers, Architects, and Draftsmen's Union. The immediate predecessor of the FAECT was the United Committee of Architects, Engineers and Technicians, which was organized in March 1932 and became FAECT in the latter half of 1933 when the NRA codes of fair competition were being considered. Scherer's brother Paul, a wine chemist, filed a brief on behalf of the FAECT in connection with the hearings on the construction code, proposing for technicians a six-hour day, five-day 30-hour week and a ban on overtime "except in cases of extreme emergency," when it would be compensated at double time. Marcel Scherer, who was elected secretary of the FAECT when it was founded in 1933,161 endorsed Merrill's presentation and then discussed the professional and technical workers whom the UOPWA did not represent. Taking as his point of departure that any changes that excluded clerical or professional employees would be "unfair and discriminatory, and in effect, a negation of the law,"162 Scherer sought to fashion a dichotomy that ultimately proved untenable. Technical-professional employees did highly skilled technical, chemical, and engineering work under supervision, but they were, nevertheless, "not, what is commonly called 'professionals,' by which is meant independent agents, who receive fees for their services, maintain their own establishments, or are retained for work on the premises of clients, or who are called in, in a consultant capacity, to solve special problems or perform special research." He agreed that these latter professionals would be engaged in a bona

160 "1940 WHD Hearings Transcript" at 354-55 (Apr. 11).


162 "1940 WHD Hearings Transcript" at 357 (Apr. 11).
fide professional capacity.\textsuperscript{163} It appears not to have occurred to Scherer that, on the contrary, his dichotomous conceptualization would have made a nullity of the category of exempt professionals because the WHD and the courts would probably have classified the independent consultants he was describing as non-employee, self-employed, independent contractors, who were totally excluded from the FLSA anyway.\textsuperscript{164}

Intuiting the same predicament, Stein asked Scherer to describe an engineer, architect, or chemist who was a corporate employee but still exempt. Deviating from his rigid framework, Scherer spontaneously conceded that in almost every drafting room the chief draftsman and in a laboratory the chief chemist would either be an exempt professional “because of his use of independent work, creative work,” or an executive or administrative employee, whom the FAECT did not try to organize. He was also willing to deem exempt at Westinghouse Manufacturing Company in East Pittsburgh: “a few men working on atom-smashing, a very specialized, advanced research work, not subject to supervision....”\textsuperscript{165} In conclusion he accepted Stein’s view that his primary criterion was whether the employee was “on his own responsibility for the whole planning as well as the immediate execution of his work”—or, in Scherer’s own formulation—creative or independent work.\textsuperscript{166} It is noteworthy that Scherer instinctively acquiesced in Stein’s categorization without any explanation as to why workers performing such work should have to forfeit all protection against long hours or why work-spreading did not apply to them. Perhaps the alacrity with which he abandoned them was linked to his aforementioned suspicion that they were supervisors whom the union would not represent in any event.

Among the professional employees whom the FAECT represented even those whose work required “independent thinking” were generally engaged in “detailed work as part of a general policy dictated by the supervisory and administrative

\textsuperscript{163}“1940 WHD Hearings Transcript” at 359 (Apr. 11).

\textsuperscript{164}At the opposite end of the spectrum, the most irrationally capacious “professional” redefinition was submitted by the American Trucking Associations, which proposed that a professional employee be one who by reason of special educational qualification and training was enabled to do work of a kind that “he would be unable to perform without” them, or who “[b]y reason of natural aptitude, continued practice, natural talent, inherent ability, or especial finesse, is enabled to do work of a type...he would be unable to perform but for such special qualification.” “1940 WHD Hearings Transcript” at 456 (July 27) (John Lawrence, general manager).

\textsuperscript{165}“1940 WHD Hearings Transcript” at 367-69 (Apr. 11).

\textsuperscript{166}“1940 WHD Hearings Transcript” at 370 (Apr. 11).
apparatus of the employer.”167 For example, most engineering work was routinized group work in large organizations, and more generally: “In every respect, the technical-professional employee is subject to the same employment conditions, insecurity, supervision, and employment policies as are countless other categories of highly skilled workers.” The technical-professional employees’ work and conditions were in no way different than those of the highly skilled tool and die maker, while in many cases their pay rates were lower than those of machinists and pattern-makers. Cost accounting in most drafting and engineering offices was “based on production on an hourly basis where time clocks are punched and time sheets filled out with drafting and engineering time allocated to each drawing, plan, design, and so forth.” Before the FLSA, they “were required to work unlimited overtime at the same weekly or monthly rate, thus reducing their hourly rate considerably. It was common practice in engineering and drafting offices to employ these technical men many long hours of overtime without any remuneration or at best, paying for the employee’s supper.”168 (Three months later Scherer announced a settlement of the first complaint filed to protect engineers and draftsmen in New York under the FLSA: following a WHD investigation, Lummus Company paid $15,000 in back overtime wages to 150 drafting room employees for as many as 400 hours of overtime.)169 Indeed, under these circumstances, the distinction between manual and mental work was itself “arbitrary,” while proposals, like the SSIC’s, to exempt white-collar workers as administrative employees merely because they received salaries and paid vacations and sick leave was unrealistic since many production workers did too.170

The third day of hearings was given over almost entirely to labor union witnesses,171 the first of whom, Lazare Teper, the founder and director of the research

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167“1940 WHD Hearings Transcript” at 359 (Apr. 11).
168“1940 WHD Hearings Transcript” at 360-61 (Apr. 11).
169“Technicians Hit Move of Pay-Hour Administrator,” DW, July 25, 1940 (3:4-5).
170“1940 WHD Hearings Transcript” at 363-64 (Apr. 12). L. Vansciver, General Executive Board, the FAECT, appearing on behalf of Chapter 27 at Westinghouse, which represented 200 technical, unrelated clerical employees who until the FLSA had had to work overtime without compensation and then were paid time and a half, opposed any changes that would exempt them. “1940 WHD Hearings Transcript” at 801-802 (Apr. 16). See also “Applicability of Wage-Hour Law to Engineering Employees Studied,” ENR 124:549 (Apr. 18, 1940), which pointed out that many definitions proposed by industry witnesses, “though not aimed at engineers, are so broadly drawn that if accepted they would exempt nearly all technical employees.” The FAECT was the only witness specifically concerned with technical employees and opposed to any changes.
171The one major exception was William Peake, secretary of the Association of Stock
department of the ILGWU, did not even seek to establish his expertise by mentioning that he had written his doctoral dissertation on hours of labor. In an effort to defend the WHD’s joint executive-administrative definition, he immediately resorted to *Webster’s International*, reading aloud to Stein that an administrator was defined as one who administers, or a manager, especially one who administers affairs, directs, manages, executes, while an executive was defined as a person charged with administrative or executive work. Because the dictionary’s demarcation line was “very very narrow”—probably only a matter of degree of responsibility—Teper concluded that “to attempt to provide a departmentalized definition which would be mutually exclusive for the terms ‘executive’ and ‘administrative’ employees, would be virtually impossible.” By arguing that administering necessarily entailed managing subordinates (although it might not involve direct hiring and firing), Teper concluded that the existing regulation adequately interpreted the meaning of “administrative” and “executive,” while the testimony had amply confirmed that it was impossible to create a definition of the one that would not also encompass the other.

Unlike other witnesses, Teper took a laudable but not very plausible stab at identifying the policy underlying the exclusion of white-collar workers: “It may be assumed that the reason Congress provided these special exemptions is primarily because certain employees in certain responsible jobs of executive or administrative nature, may not be able to keep track of their hours, and in order not [sic] to prevent hardship, such an exemption was made.”

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173 “1940 WHD Hearings Transcript” at 389 (Apr. 12).

174 “1940 WHD Hearings Transcript” at 391-92 (Apr. 12).

175 “1940 WHD Hearings Transcript” at 390 (Apr. 12). At least one employer’s representative disagreed: “[C]ertainly, Congress was not exempting an executive because
meant to prevent—on the assumption that "not" was a typographical error—was presumably one on the employer of making it liable for hours that were never worked, but such a reason, which might have made more sense in relation to an outside salesman working far from his employer's premises, seems like a very thin reed to support a massive exclusion of executive-administrative employees who might work long but regular hours on the employer's premises, but whose hours might be easily recorded.

While arguing that a salary standard was one indicator, Teper rejected it—for example in the version advocated by the Illinois Manufacturers Association—as a stand-alone conclusive criterion since some ILGWU factory-worker members were paid more than $40 a week for 35 hours and were entitled to time and a half pay.176 This contention prompted Stein to open a line of questioning that could have led to a thorough exploration of the policy foundations of the FLSA's overtime regulation and the possible bases for excluding certain white-collar workers if Stein (and Teper) had pursued it:

Q I suppose you would agree that a figure could be fixed, possibly $100 a week or $125 a week, above which it wouldn't be very practical to be concerned about the employees. I wonder if you think that such a figure could be fixed which would be low enough so as to have any substantial effect on any large group of employees without opening loopholes which would be improper?

A Offhand I know of certain industrial occupations of non-executive character, where compensation probably would be around $100 or so for a full week..., where these workers would be paid time and a half. I am sure that certain experienced tool and die workers are making that particular amount of weekly wage.

Q And do you feel that they are entitled to the benefits of the Act in spite of the fact that they get up to $100 a week?

A They are entitled to time and a half. While the Act specifically doesn't state so, there is no question in my mind that Congress intended to foster the spreading of employment. I think this is our paramount economic problem today; when we have nine million persons unemployed, the major social policy should be directed toward the spreading of employment. While I recognize that there will be certain instances where it is difficult to spread employment, to hire two persons to do the job, or one full-time and one part-time person, nevertheless in a great mass of occupations a requirement of time and a half for overtime means the employment of additional personnel.177

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you could not regulate his hours necessarily," adding: "With numerous executives you know exactly what time they come in and exactly what time they go out." *Id.* at 689 (Apr. 16) (testimony of A. Gilbert, The Best Foods, Inc.).

176"1940 WHD Hearings Transcript" at 402-403 (Apr. 12).
177"1940 WHD Hearings Transcript" at 403-404 (Apr. 12).
Stein’s supposition that Teper would agree that it would not be “very practical to be concerned” with (the overtime work and pay of) employees with weekly salaries ten times greater than the minimum wage (of 30 cents for 42 hours) was never directly confirmed by Teper and its meaning is not entirely clear, but perhaps Stein meant that at that salary level—the equivalent of more than $88,000 in 2004—and differential the terms and conditions of employment were not a significant societal concern or, alternatively, that employers, if required to pay time and a half, would simply adjust base salaries downward. Teper neither answered Stein’s question as to a salary cut-off that would be low enough to exert a “substantial” impact on a large number of workers without depriving deserving workers of overtime protection nor questioned its political assumptions. He could, for example, have asked Stein why he was assuming that Congress intended to exclude large numbers of workers and why he was not seeking to identify a salary threshold high enough to effectuate the purposes of the overtime provision without encompassing employees whose inclusion would provoke counterproductive or dysfunctional results.

Even without articulating these critical perspectives, Teper could have sustained a discussion of first principles if he had simply specified a dollar amount that he knew exceeded any wage that any production worker was paid. Instead, however, Teper merely mentioned an occupation at the $100 level, prompting Stein to ask whether its incumbents were nevertheless “entitled to the benefits of the Act....” Stein’s use of “entitled” embedded the purposes of the FLSA in an individualistic perspective, implying that those (unnamed) benefits would inure to them alone. This personalized logic strongly suggested that the primary benefit was the 50-percent premium pay on an already far above-average hourly wage: after all, since the only other individual benefit to an employed worker was the indirect protection from being overworked by an employer who had been deterred by the 50-percent penalty, it is difficult to discern why highly paid production workers should be less entitled to that protection than their lower-paid co-workers. Interestingly—and presumably inadvertently—Teper, while confirming those workers’ entitlement to time and a half, immediately launched into an eloquent defense of the collective purposes and benefits of the overtime provision in terms of spreading work and reducing unemployment. These considerations marked the

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178 Even before the FLSA had gone into effect employers had detected a “possible loophole in the maximum hours provisions...to avoid time and a half payment for overtime...in the lack of restraint over wage reductions so that long hours could be worked at the same weekly wage as at present.” “Loophole Provides Escape,” JC, Oct. 21, 1938 (1:3). Judges ultimately legalized the loophole. See Linder, Autocratically Flexible Workplace at 267-78.
point at which Teper should have explicitly led the discussion back to the applicability of these statutory purposes to white-collar workers and confronted Stein with the argument that "bona fide" executive, administrative, and professional employees were those not exposed to significant unemployment. And in fact, Teper came very close to making this connection, although he did so only indirectly by conceding that concrete job or workplace configurations made it difficult to split and share certain jobs. But he failed to turn this concession against continued and expanded exclusions by neglecting to propose a revised definition that would have incorporated any kind of empirical indicator of impediments to job sharing or employment spreading such as a catalog of jobs (including, for example, CEO's) that would be prima facie exempt.

Although Stein failed to pursue this logic either, Teper—again, presumably inadvertently—objectively introduced yet another statutory purpose into the discussion by observing that after the ILGWU had succeeded in reducing weekly hours in the needle trades from 60 to 35, the same manufacturers who had opposed the reduction wound up saying: "We didn't realize that we also gained additional leisure and that we also can enjoy life a little bit more now, as well as our workers can." Teper thus demonstrated that the other statutory purpose of shorter hours could be as beneficial to executives as to manual workers.

This vantage point did not excite the curiosity or interest of Stein, who instead channeled the questioning back to the distinction between administrative and executive employees, asking Teper about such occupations as credit and traffic manager or purchasing agent, who were heads of departments with no other employees except possibly a single stenographer. As to these "one-horse departments," Teper argued that where that employee "performs all the routine tasks, to elevate that person to the executive class, I think is mere subterfuge. Usually he can perform his duties within the hours during which the establishment is normally operated and when the greatest majority of employees...are there."

Harry Weiss, hoping to explore the administrative employee category further,

179 "1940 WHD Hearings Transcript" at 404 (Apr. 12).
180 "1940 WHD Hearings Transcript" at 404-405 (Apr. 12).
181 "1940 WHD Hearings Transcript" at 405-406 (Apr. 12). Leo Bernstein later observed that it was not possible to "have a one-man department without the employee in that department being the poobah of it. Besides exercising supervision and discretion of everything else he is also spending his time carrying out his own instructions and his own orders. The actual effect of that would be that if we recognize the number of departments and the fact that the average wholesale establishment has eight employees, would be to exclude the wholesale distributive trades from the operations of the Act." "1940 WHD Hearings Transcript" at 821 (Apr. 16)
conceded that "[m]aybe the word 'executive' is unfortunate," but suggested that Teper had to know of "jobs where a president or large executive has a personal assistant who carries out specialized things for him," but had no line or supervisory authority at all. Teper, apparently insisting on the indivisibility of the executive-administrative category, was willing to discuss the question of whether some particular employee was an "executive," but insisted on a concrete job description, because the business witnesses had failed to furnish the specifics of "what qualifies them to be called executives, instead of a glorified clerk." Struggling for an example, Weiss finally related an "illustration" he had "heard of" involving a man at a large corporation "getting $7500 [who] definitely felt—and I think he was right—that the present regulations did not exempt him; but their cheap [sic; should be "chief"] clerk, who supervised 50 or 100 low grade people, getting $2,000, was exempt. Do you think the concept of indirect control over employees should be recognized?" Without even stating the obvious fact that Weiss had failed to disclose anything whatsoever about this person's work, Teper, declining to take Weiss up on his bizarre request to discuss "a hypothetical individual" stripped of all job duties, replied: "No, I wouldn't go that far."  

Thus this surprising lack of such basic information (or even imagination) on the part of the director of the WHD's Research and Statistics Branch frustrated one of the hearings' few well-intentioned joint efforts to come to grips with the meaning, scope, and purpose of the exclusion of administrative employees. Consequently, Teper was, in good conscience, able to conclude the colloquy by asserting cooperatively that, if offered job descriptions, the WHA "could intelligently say, 'Well, my straitjacket may or may not fit this particular definition, there may be some amendments necessary,' but in their absence, 'I don't see that he can do anything else but leave the present regulations intact.'  

Although AFL economist Boris Shishkin conceded that the white-collar definitions might be "far from perfect," he testified against the employers' proposed revisions and emphasized that it was "indefensible" that such a large and growing occupational group had been singled out for special treatment without any

182 "1940 WHD Hearings Transcript" at 406 (Apr. 12).
183 "1940 WHD Hearings Transcript" at 407 (Apr. 12).
184 "1940 WHD Hearings Transcript" at 408 (Apr. 12).
185 Less than a year earlier Shishkin had written a whole journal article on the FLSA without having even alluded to the exclusion of white-collar workers. He mentioned as the most criticized substantive provisions: the excessively long 44-hour week; the lack of a limit on daily hours; and the lack of an enforcible ban on lowering wages when hours were reduced. Boris Shishkin, "Wage-Hour Law Administration from Labor's Viewpoint," ALLR 29(2):63-72, at 65-66 (June 1939).
explanation as to the special problem it represented for the wholesale industry. Rather, “the definitions are petitioned for because the petitioners want them, there is no further substantiation, there are no facts, there are no facts comprehensive enough which should change an iota of any definition...” Indeed, the AFL was “deeply disturbed” that the WHA had even entertained such petitions unsupported by any such evidence. Shishkin argued that regarding the existence of FLSA-covered establishments whose entire labor force consisted of office employees: “Just how...the employees of the whole establishment could be determined to be in a bona fide administrative capacity, is a question which itself shows plainly how far the proponents of the definition have gone to torture the plain meaning of the language to achieve their ends.”

Victor Pasche, the secretary-treasurer of the American Newspaper Guild, conceptualizing “white collar, office workers...[as] people who deal in abstractions, paper and pencil or typewriter, rather than the actual merchandise,” pointed out that just seven years earlier, before the NRA, it had been generally argued that they were not subject to wage and hour regulations, except at the employer’s will, while union regulation was opposed; in the interim, both the NRA and NLRA proved that regulation and collective bargaining were in fact applicable to them. Although Pasche was not a lawyer and therefore did not “feel competent to go into the question of congressional intent,” he nevertheless believed that the existing regulatory definitions “seem to carry out what the language of the act meant.” Specifically, he meant that “we know perfectly well that ‘executive’ and ‘administrative’ explain each other rather than being different terms.” For example, the executive branch of government was called “the administration,” and in a corporation, union, or chamber of commerce, “the people at the head are called administrative officers or executives...” Consequently, he could “see no point whatever in the attempt to split the definition, except for providing just another method for removing some people from the protection of the Act.” Furthermore, the SSIC’s proposal to exclude all clerical workers as administrative “contradicts Noah Webster” because these clerks and other “office help” were in fact in greater

186“1940 WHD Hearings Transcript” at 423, 425 (Apr. 12).
187“1940 WHD Hearings Transcript” at 427 (Apr. 12).
188“1940 WHD Hearings Transcript” at 436 (Apr. 12).
189“1940 WHD Hearings Transcript” at 432 (Apr. 12).
190On the Guild’s view of his testimony, see “Pasche Warns Against New Hour Law Interpretations,” GR, May 1, 1940 (5:3-4).
191“1940 WHD Hearings Transcript” at 451 (Apr. 12).
192“1940 WHD Hearings Transcript” at 454-55 (Apr. 12).
need of protection since most of them were not organized like factory workers.193

In an interim prognosis after the first three days of testimony on the wholesale industry, the usually well-informed Journal of Commerce predicted that efforts to "ease" white-collar wage-hour requirements were "likely to prove successful." The main change was expected to be a broader definition of executive or administrative employees resulting from eliminating the requirement of the power to hire/fire, thus extending exemptions to a wider group. Astonishingly at variance with the aforementioned testimony was the newspaper's contention that, "[l]abor organizations seem satisfied,"194 which also contradicted its own earlier report of unions' opposition to any broadening of the scope of exclusions.195

On the fifth and final day of the wholesale hearings,196 Joseph Kovner, assistant general counsel of the CIO, put the hearings into context by declaring that they represented "a movement that organized labor is determined to resist. After years of bitter struggle on the picket line, in the legislature and in the courts, labor, in recent times, has been able to secure legislation protecting [sic] its hard won standards. The employers, finding their freedom to lower these standards limited by law, have instituted a counter attack [sic] upon even basic labor legislation...." And since "our greatest contemporary problem" was that millions were unemployed, "[t]he worst possible thing to do for the national economy and the public welfare is to increase the hours of the work week."197 Specifically he emphasized that employers' petitions to expand the scope of exclusions was part and parcel of their efforts to persuade that the FLSA "is only intended to protect that group of workers who are subject to severe exploitation in the form of long hours and low wages, but that workers who receive wages above the statutory minimum...do not need the protection of this law" and that therefore overtime pay for all workers should be based on the statutory minimum wage. Because the FLSA's purpose was not solely to protect workers in "sub-marginal groups against conditions of outrageous exploitation," the courts had been right in rejecting the claim that the law was not intended to protect workers who were paid what employers "are pleased to call good wages."198 Consequently, the CIO, apparently rejecting the principle of means-tested entitlements, objected to proposed exclusions based on

193"1940 WHD Hearings Transcript" at 456-57 (Apr. 12).
194"Broadening White Collar Wage and Hour Exemptions," JC, Apr. 15, 1940 (1:4).
196The fourth day was largely devoted to the subject of outside salesmen, which is not dealt with in depth here; some references to this day's testimony have been included throughout this and other chapters.
197"1940 WHD Hearings Transcript" at 761-62 (Apr. 16).
198"1940 WHD Hearings Transcript" at 751-53 (Apr. 16).
a salary level because their justification was that the FLSA not intended to protect workers receiving more than the statutory minimum, "even though the workers who receive these wages themselves think that they need this protection, who don't know why it is any more desirable for a person earning $25.00 a week to work more than forty-two hours a week than it is for a person receiving less than that."199

Turning to the existing regulatory definition of executive and administrative employees, Kovner characterized it as encompassing only "employees who are directly and intimately connected with management." In defense of the WHA's regulation, he approved of the tests as common-sense rules that have been applied by workers and employers alike to distinguish between workers who depend for a livelihood upon their wages and need the protection of standards in their hours and their working conditions on the one hand and workers who are part of the administrative and executive staffs who fix the working conditions of others and who do not need the protection of this law.200

Although this conceptualization, at first sight, appeared robust in etching a bright line marking off autonomous power-holders to whom the application of compulsory state-enforced labor standards would be superfluous, it assumed that every manager-boss who met the rather minimal regulatory requirements fixed their subordinates' working conditions and for that very reason also fixed their own. Neither assumption was empirically plausible. Neither the six individual sub-tests nor the definition as a whole created any certainty or even likelihood that bona fide executive employees fixed any employee's working conditions. Instead, they merely identified those managers who primarily and with the use of discretion bossed statutorily covered subordinates without doing the kind of work the latter performed; the definition in no way, however, situated these managers on the much higher hierarchical level where executives fixed working conditions—a criterion that was nowhere mentioned in the regulations, although specifying such a function would surely have made for a more stringent and narrow definition.

If most "executives" did not fix anyone else's working conditions, it seems even more implausible that they fixed their own. To be sure, the only working conditions at stake here were their working hours and, perhaps, salary (which, at a $30 regulatory minimum, was less than many skilled production workers' wages and thus scarcely so lofty as to indicate the inapplicability of the CIO's "basic principle that even so-called high-paid workers need the protection of this law"),201

199"1940 WHD Hearings Transcript" at 760 (Apr. 16).
200"1940 WHD Hearings Transcript" at 755 (Apr. 16).
201"1940 WHD Hearings Transcript" at 756 (Apr. 16).
but the regulations neither required nor implied that executive discretion extended to self-determination of the length of the workweek (as contradistinguished from flexibility in scheduling long working hours). And even if some executives did set their own hours, the CIO furnished no support for its implicit assumption that they could be relied on to do so without injuring their own long-term health and welfare, let alone without exacerbating the unemployment of other managers. Thus, whether for propagandistic reasons or on account of inattention, the CIO imputed too much stringency to the joint executive-administrative definition.

Manufacturing

[T]he petitioners do not want to pay overtime to a group of employees who, up until now, they have been paying with the pap that they are practically or about to become members of the firm.

All through these hearings we have been regaled with Horatio Alger stories of from messenger to president. Constant doses of this pap have, up until very recently, been quite efficacious in preventing the organization of white collar workers so that at the present time they, as a class of workers, are those less able to protect themselves and doubly in need of the protection conferred by the Act.

202 Sixty-four years later, one of Kovner’s successors as associate general counsel of the AFL-CIO asserted that “[t]he salary basis requirement embodied the empirical finding that bona fide executive, administrative and professional employees did not punch a clock, but rather had a degree of control over their own working hours. This autonomy compensated for the loss of overtime pay because long hours were less oppressive to an employee who was free to take a break during the day to attend to personal business or for other purposes.” Final Rule on Overtime Pay: Hearing Before the Subcommittee on Labor, Health and Human Services, Education, and Related Agencies of the Committee on Appropriations United States Senate 19 (S. Hrg. 108-542, 108th Cong., 2d Sess., May 4, 2004) (statement of Craig Becker). It is difficult to discern why having the flexibility to stretch out a 60-hour workweek to 70 hours to permit mid-afternoon shopping should suffice to preclude the justification of hours regulation. For an example of a bank permitting a bookkeeper to shop for two hours during a non-busy week “as long as she completes her work at the end of the day,” see “1940 WHD Hearings Transcript” at 67 (July 9) (Johnson). Moreover, such flexibility in no way negates the applicability of employment spreading.

203 1940 WHD Hearings Transcript” at 769 (Apr. 16) (Sol Lischinsky, Amalgamated Clothing Workers of America).
By the time the hearings on manufacturing industries began on June 3, with the definitive defeat of the FLSA amendments in the House of Representatives already a month old, success in the regulatory forum assumed greater urgency for employers. But labor, too, was well aware of the heightened stakes. Literally on the eve of the resumption of the hearings, the FAECT, on the last day of its national convention, discussed the wage and hour law and the hearings called for the following day: "Danger to technical employees stressed with exemptions sought by manufacturers to exclude practically all technical employees." A motion then carried for the convention to "protest to Washington." 204

The first witness to provide oral testimony on the opening day of the hearings was counsel for the Southern States Industrial Council, J. H. Ballew, the only person to testify at all four hearings. 205 The SSIC’s central purpose in petitioning the WHA for revision of the regulations was to separate the administrative from the executive employee category based on the argument that the comma in section 13 clearly indicated that Congress had in mind two distinct classes of employees, which were not synonymous. 206 Unlike other groups, the SSIC at least devoted a section of its brief to the question: "Why the Exemption of Salaried Employees?" As meritorious as raising the issue was, its speculative and sociologically anachronistic answer shed no light on Congress’s intent. Despite dealing with a profoundly heterogeneous group, Ballew maintained that it was well defined because its members received "on an average, a much higher rate of pay than any minimum that could be enforced" under the FLSA in addition to paid vacations and sick leave and "permission to retain their positions and to draw their salaries during the entire year. [S]lack periods do not affect this type of worker." 207 This office workers’ story-book golden age, if it ever existed, had disappeared during the Depression, which brought on widespread white-collar unemployment; at the same time, the gap between salaried and wage workers in terms of paid vacations and sick leave was quickly being effaced. 208 Finally, although it was true, then as now, that many high-ranking executives and professionals received outsized salaries, the

204 Federation of Architects-Engineers-Chemists & Technicians-CIO, Proceedings 5th National Convention 21 (May 31-June 2, 1940).
205 On Ballew’s testimony urging elimination of all white-collar workers from regulation, see “Seek to Exempt ‘White Collar’ Class,” JC, June 4, 1940 (3:2).
207 1940 WHD Hearings Transcript” at 19-20 (June 3).
208 See above “Terminological Prolegomena” and below ch. 13.
wages of significant numbers of blue-collar workers, as a considerable volume of testimony at the hearings demonstrated, far exceeded the WHD’s white-collar salary threshold (which was, in turn, higher than any amount that the SSIC found acceptable). Ironically, then, if employers in the twenty-first century attacked the FLSA’s overtime provision as outdated because it was predicated on a need to spread employment during a historic depression that has never recurred, the SSIC’s empirical justification for excluding white-collar workers from overtime regulation had become outmoded even before it was formulated.

In addition to such tangible (but refutable) bases, Ballew also adduced “the opportunity given this class of employee to familiarize himself with the business of his employer, and thereby to become fitted for advancement when the opportunity is presented.” Asserting that the meteoric careers of “probably 90% or more of the ‘executive’ class...began in minor office positions” before they “worked their way to the top,” the SSIC charged that the existing regulations, by “requir[ing]” such an “employee to limit the hours which he may apply to the business of his employer will...cut off this field of opportunity, and will result in gradual disappearance of trained personnel for advancement.” The FLSA manifestly required no (adult) employees to limit their working hours; Ballew’s accusation simply rested on employers’ unspoken right to force would-be bosses to ‘learn the ropes’ off the clock. Finally, the SSIC was not embarrassed to issue a direct threat: “employers can not be expected to continue gratuities...customarily extended to this class” if they also had to pay for overtime. “This means that these people will be deprived of their summer vacations with pay...[and] of sick leave with pay.”

Impressed with the breadth of the SSIC’s proposal, Stein asked Ballew whether it encompassed “almost anybody who normally wears a white collar and does not have anything to do with the physical handling of the goods.” Ballew agreed that what they “really had in mind was principally the office employee regardless of whether he might be a stenographer, bookkeeper, cost accountant, who is on a regular salary, is not affected by vacation, sick leave, and things of that kind,” adding that the latter component was the only amendment that the SSIC had sponsored to the FLSA in the form of the Cox amendment because the organization had “clearly expressed the attitude...that they were in favor and sympathy with the Act.”

Instead of challenging this preposterous fabrication, Stein reminded Ballew

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209See below chs. 16-17.
210"1940 WHD Hearings Transcript" at 20 (June 3).
211"1940 WHD Hearings Transcript" at 24-25 (June 3).
212On the SSIC's frequently and publicly expressed hostility to the FLSA, see above ch. 11.
that the Civil Service Commission classification system "lump[ed]" both clerical and administrative employees in one category, and asked whether he felt that there was any general understanding outside of the government that clerical and administrative employees were not necessarily identical. Ballew conceded the existence of such a "well defined idea," but insisted that the SSIC's approach was "based largely on the theory that they may be considered one group" apparently because "they all belong to the channel or chain through which the executive carries on the managing of the details of the business." Unenlightened by this assertion, Stein asked whether under the SSIC's redefinition the WHD inspector's whole job would consist in going to the plant office, checking the office force, seeing that they got vacation and sick leave pay, and then saying: "'Very well, they are exempt.'" Grasping the sarcastic point, Ballew replied that while the SSIC had not fixed a salary, it would not argue against a "reasonable salary limitation"—meaning not the $200 of the Norton amendment, which was "certainly carrying the thing entirely too far"—but $20 to 30 a week.

Professor Klamon put in his second appearance, this time characterizing his proposal to exclude any employee compensated on a straight-time salary basis of at least $35 a week with two weeks of paid vacation and two weeks of paid sick leave as "a middle-of-the-road position" between, on the one hand, exempting all white-collar employees doing clerical or ministerial work regardless of pay, which would deprive many of the benefit of the law that Congress had intended to give them, and, on the other, a blanket salary threshold of $200 a month or $2,400 a year, which would make the WHD into a bargaining agent for workers. The fluidity of the public debate and the extent to which it was fraught with risk for maintaining labor standards was evident in the fact that Klamon could praise as a centrist "'friend of the court'" proposal an approach that was even more exclusionary than the Norton amendment, which labor had already decried as "emasculatory." Indeed, the latter had become so anathematized that Klamon would have strongly preferred leaving in place the existing regulations, "unfortunate as that might be...." Klamon touted his proposal as avoiding the "exceedingly difficult, if not impossible" problem of writing a general description of the duties of an administrative-executive employee that would fit an almost infinite

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213 "1940 WHD Hearings Transcript" at 26 (June 3).
214 "1940 WHD Hearings Transcript" at 26-27 (June 3).
215 "1940 WHD Hearings Transcript" at 33 (quote), 36-37, 38 (June 3).
216 "1940 WHD Hearings Transcript" at 41 (June 3).
217 See above ch. 10.
218 "1940 WHD Hearings Transcript" at 41 (June 3).
variety of positions and situations. Although the purely monetary criterion had simplicity to commend it, Klamon's setting the threshold at so low a level was dictated by his failure to understand that the overtime provision was designed to limit hours (whether for the ultimate purpose of spreading employment or increasing leisure)—and not to generate higher incomes for workers through time-and-a-half payments. Consequently, there was nothing unfair or unreasonable about Congress's protecting workers whose monthly compensation exceeded $150 or $200.

The 27 member companies of the Chicago-based National Door Manufacturers Association may have employed only 10,000 workers, of whom about 1,100 were salaried clerical employees, but its secretary-manager, S. O. Hall, provided unconditional support for the SSIC's proposal to exclude as an administrative employee any employee whose duties were solely connected with the administration of an industry and embraced clerical employees such as bookkeepers, stenographers, payroll clerks, auditors, cost accountants, purchasing agents, statisticians, and "other office help regularly employed on a straight salary basis and given vacations and sick leave with pay." The novel reason that Hall offered for this exclusion was that the duties of such employees cannot be regulated to produce a regular flow of work such as is possible in the planning of actual production processes. The work of order clerks, estimators, detailers and billers, and their assistants fluctuates widely according to the inflow of customers' inquiries and orders. The requirements for service are such that their duties must be performed promptly. It is therefore common for such employees to have before them during one or two weeks of a month more work than they can handle within the number of hours to which they are now restricted by the Act. Whereas in the balance of the weeks in the same month their volume of work may be such as to permit its completion in somewhat less than that number of hours. The same irregularity of work volume affects the other clerical employees. ... It is impossible for any employer to anticipate such fluctuations and 'spread out' the work so as to permit its accomplishment in a standard number of hours each week. Furthermore, there is not an available supply of experienced clerical employees for short-time employment during such periods. It is uneconomic and costly for an employer to provide sufficient employees to handle the peak volume period without overtime..., as doing so he burdens his business with a tremendous excess of clerical capacity during the more normal periods.
Continuing in this innovative vein, Hall alleged that "the complete absence of flexibility in the handling of their duties by clerical workers" since the advent of the FLSA had prompted firms to hire new clerical workers on an hourly basis with overtime pay but to lay them off when work was slack. Because they were paid "only for the actual number of hours their duties require[d]," the door manufacturers charged that the act's effect was to "reduce employment of so-called white-collar workers." Despite the fact that Hall could not even say with certainty that all the industry's clerical employees received even $16 a week, he insisted that they had been "accustomed to greater liberties than can be granted to any" hourly employee, a freedom that he described as their having "understood that the duties of their particular positions were their own responsibilities. Except for such as has been necessary to maintain an efficient and coordinated office operation, they have usually been free to exercise their own initiative in the performance of their duties." Skipping over any description of the actual kinds of initiative that self-managed bookkeepers, stenographers, and clerks exercised in these apparently uniquely libertarian offices that spared them the fate of wage workers, who were "paid only for their productive hours" and whose "superiors...determine what work is to be performed," Hall revealed that he was in reality merely repeating the SSIC's claim that the FLSA was putting a damper on the tradition of promoting into managerial ranks those who had shown themselves worthy of such careers by putting in long hours without pay: "Those clerical employees who have availed themselves of these opportunities for the development of initiative have become the administrative directors of our businesses. Such 'extra hours' as employees of this type have devoted to their responsibilities have contributed more largely to the development of their own knowledge of the business and their executive abilities than to the negation of any of the purposes" of the FLSA. Identifying those statutory purposes was, to be sure, made rather difficult by Hall's claim that his proposal to deprive all clerical workers, regardless of salary level, of all protection from employer overreaching regarding hours would "simplify...and clarify administration and enforcement" of the FLSA "without detracting from the accomplishment of its fundamental purposes."

Without confirming that the woodwork manufacturers were really seeking hours-averaging, Hall promised that: "If all clerical employees are exempted, it is

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224E. Tinker, the executive secretary of the American Paper and Pulp Association, whose members employed 138,000 wage earners in mills and 14,000 salaried employees, was unique in conceding that "the problems" of his industry were "not particularly unique." "1940 WHD Hearings Transcript" at 299, 301 (quote) (June 4).

225"1940 WHD Hearings Transcript" at 55 (June 3).

226"1940 WHD Hearings Transcript" at 52-53 (June 3).
extremely improbable that any appreciable number...will be required by their duties to work more than the maximum number of hours provided by the Act when averaged over a period of six months or a year.” Without disclosing what proportion of clerical workers ever rose into managerial ranks or how they could distinguish themselves from their slothful time-serving colleagues if, averaged over a year, they worked no more than 40 hours a week, Hall pledged that the “[f]lexibility provided by their exemption” would “permit orderly, efficient and expeditious discharge of their duties in an atmosphere conducive to the development of executive ability and administrative talent....”227 Perhaps because the fantastic character of his testimony had deprived him of all credibility, none of labor’s advocates responded to Stein’s call for questions of Hall.228

Unsurprisingly, the Southern Pine Industry Committee, representing manufacturers, expressed strong support for the SSIC’s proposal.229 Appearing on its behalf, Phillip Walker argued that the proposed redefinition of “administrative employee” would not militate against the achievement of the FLSA’s objectives of putting a floor under wages and spreading employment because the one was irrelevant and the other inapplicable to the industry: almost all of the employees proposed to be exempted were paid well in excess of the minimum wage and performed work that “cannot be duplicated by persons brought in on a moment’s notice” during peak periods, for example, to file tax returns or prepare payroll. Walker, while admitting that as a lawyer he was “not thoroughly familiar with the conditions in the industry,” nevertheless dogmatically-implausibly insisted that: “It is almost a necessity that those same individuals do the work during those peak periods. It would be almost a physical impossibility to bring somebody in from the outside who is not [sic] familiar with the particular work going forward, so that in those cases the employer has the option of not having the work done, or of working those same individuals longer hours, and of course paying them overtime if they come within the...Act, but our proposition is simply this, that by no stretch of the imagination could that give employment to additional persons....”230 Rather than explore Walker’s presumably inadvertent disclosure that his clients’ regulatory revision program was driven by their preference to work existing employees overtime without pay, Stein asked him hypothetically whether, if a firm at the time the FLSA went into effect employed 10 bookkeepers who consistently worked 54 hours a week, the law could have an employment-spreading effect. Evasively, Walker replied that it might be possible to arrange a system to hire new employees

227441940 WHD Hearings Transcript” at 53-54 (June 3).
228441940 WHD Hearings Transcript” at 57 (June 3).
229441940 WHD Hearings Transcript” at 95 (June 3).
230441940 WHD Hearings Transcript” at 96-97 (June 3).
permanently, but the “proposition, of course, would be that during a large part of that time you wouldn’t need that additional assistance” and it “would be foolish to build up a large staff just on the theory that during a few small periods...extra help” would be required.\textsuperscript{231} Since Stein’s question presupposed that the firm required 540 hours of bookkeeping per week all year round, the 140 hours of overtime beyond 40 were available to be redistributed to hire an additional three full-time and one half-time bookkeeper.

That some employers seemed to believe that their desire to save money was the cause rather than the effect of creating legal categories of excluded workers was revealed by Institute of American Poultry Industries, whose representative, E. B. Heaton, asserted that professional employees “require freedom from time restrictions,”\textsuperscript{232} when he really meant that their employers required freedom from restrictions on not paying them for all their working hours. Offering an illustration by way of taking exceptional semantic liberties, he instanced the head feeder at a poultry feeding station with many years of practical knowledge enabling him to know when chickens were healthy and how to feed them: “it is important that he have unlimited hours because the chickens can take sick in the middle of the night. He has to observe them 24 hours a day, if possible, because he can’t leave it to any of the employees.”\textsuperscript{233} Apart from the question of why two or three employees could not share this aspect of head-feeder professionalism—after all, even the rationale for requiring physician-residents to observe human patients for 24 hours was to enable them to understand the course of a disease, not to prepare them individually to observe sick humans 24 hours a day for the rest of their professional careers—it never occurred to Heaton that paying him for all these hours would in no way constrict his freedom to work unlimited hours. This same mechanism was impressively on display when Heaton blamed the FLSA for the egg plant foreman’s having more physical work to perform because “the employees leave right on the dot and somebody has got to see that things are ready for opening the next morning and it is generally up to him to do it. ... It takes considerable overtime work....”\textsuperscript{234} This account must mean that prior to the FLSA, non-supervisory workers had been required to stay late to perform such work gratis; by permitting employers to remove certain employees from the protection of the law, Congress and the WHA undermined the employment-spreading impact of the overtime regulation regime, since instead of being deterred by the penalty from working existing overtime, employers simply reassigned that work to foremen, who could still be

\textsuperscript{231} “1940 WHD Hearings Transcript” at 98 (June 3).
\textsuperscript{232} “1940 WHD Hearings Transcript” at 103 (June 3).
\textsuperscript{233} “1940 WHD Hearings Transcript” at 108-109 (June 3).
\textsuperscript{234} “1940 WHD Hearings Transcript” at 110-11 (June 3).
The second day of hearings on manufacturing, June 4, featured the increasingly hard-line testimony of witnesses from the oil and gas, clothing, and lumber, pulp, and paper industries as well from several state manufacturers associations, who demonstrated deep-seated antipathy to overtime regulation at all and/or to that of any white-collar employees.

The Mid-Continent Oil and Gas Association, through its representative Clayrel Mapes, took the unusual position that because of the industry’s above-average blue-collar wages, the FLSA “was not aimed at” it. Nevertheless, given its coverage, the Association argued that administrative employees were “entitled to be exempt...because within their respective spheres they carry out the policies and orders of the executives and in so doing are permitted wide discretion. They exercise extensive authority and shoulder great responsibility.” Why the exercise of discretion, authority, and responsibility should serve to deprive employees of all protection against long hours, Mapes failed to explain, but he added that their personal assistants had to be sacrificed as well because they were “necessary to the exempt employees in carrying out their proper functions.” Oil and gas employers were particularly concerned about applying the “maximum hours per week” to executive secretaries because they had to transmit executive instructions to subordinates and gather essential information from them; Mapes asserted that work spreading was irrelevant because “it would be impossible to substitute other employees for them,” but he no more explained why than he did why it would be impossible for the firms to pay time and a half.

That employers’ hostility to overtime regulation extended into the core of unionized manufacturing was impossible to overlook in the testimony of the Clothing Manufacturers Association, which accounted for 85 percent of men’s and boys’ clothing produced in the United States. In 1937 it entered into a three-year agreement covering 135,000 workers with the Amalgamated Clothing Workers of America, whose president, Sidney Hillman, remarked on that occasion that in the midst of industrial strife in the country, union and management had negotiated amicably on all issues. One of the latter’s negotiators was Frank Zurn of the Alco

235 This strategy is identical to fast-food restaurants’ practice of requiring assistant managers to work overtime gratis doing their supervisees’ regular work to avoid “blowing payroll.” See below ch. 15.
236 “1940 WHD Hearings Transcript” at 120-21 (June 3) (A. Nicholson).
237 “1940 WHD Hearings Transcript” at 137 (June 3).
238 “1940 WHD Hearings Transcript” at 144, 145 (June 3).
239 “1940 WHD Hearings Transcript” at 150-51 (June 4).
240 “1940 WHD Hearings Transcript” at 226 (June 4).
Zander Company in Philadelphia, who, as the Association’s executive director, appeared as its witness at the hearings.\(^{241}\) He began his testimony by asserting that the existing regulatory definitions of executive and administrative limited the number of exempt employees “much more narrowly than was the intent of Congress and too narrowly from the point of view of the set-up of industry.”\(^{242}\) The CMA’s aversion to paying overtime even to blue-collar machine maintenance workers provoked Stein at one point to inquire sarcastically: “By the way, Mr. Zum, does your, shall I say, disinclination to pay overtime extend to these temporary shipping employees?”\(^{243}\) When Zum described a comp-time system for maintenance workers, Stein felt obliged to ask: “Of course, you must realize...I am sure you do, that this Act doesn’t in any sense forbid overtime work.” Zum’s reply aligned him with the representatives of a number of other industries that purported to be intentionally organized in such a way that many of its employees much of the time did little or no work:\(^{244}\) “I appreciate that; but the point is we feel it is unfair to industry to penalize us by having to pay time and a half for overtime to a man who is a salaried worker by the year, during dull periods and peak periods, and we have to pay him when there is no work to do. We feel that is unfair to industry.”\(^{245}\)

Returning to the white-collar focus of the hearings, Zum proposed that an “administrative employee” be defined as “any employee who is employed in the administration of an establishment, including such employees as bookkeepers, stenographers, payroll clerks, auditors, cost accountants, purchasing agents, statisticians and other office employees, and who is compensated on a weekly or monthly salary basis...of not less than $25 per week and who receives vacation and sick leave with pay.”\(^{246}\) Perhaps because of the strong similarity to the proposal advanced by the virulently anti-union SSIC, Stein asked whether the industry’s

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\(^{242}\)“1940 WHD Hearings Transcript” at 226 (June 4).

\(^{243}\)“1940 WHD Hearings Transcript” at 232 (June 4).

\(^{244}\)Like their counterparts in other industries, clothing manufacturers also complained that non-production workers, no matter how unskilled, were quasi-non-fungible: “As it is impossible to obtain sufficient trained help for the relatively short shipping period, most manufacturers keep an average number of salaried workers employed steadily in their picking [sic] and shipping departments regardless of the amount of work to be done.” “1940 WHD Hearings Transcript” at 231 (June 4).

\(^{245}\)“1940 WHD Hearings Transcript” at 231 (June 4). Zum mentioned the possibility of extending the limited practice of permitting compensatory time off at the rate of 1.5 hours for every hour of overtime work. *Id.* at 225-26. So long as the time off was within the same pay period, the FLSA did not and does not stand in the way.

\(^{246}\)“1940 WHD Hearings Transcript” at 223 (June 4).
unionization extended to the office workers; Zum’s response that organization prevailed only in certain markets might have led to an interesting exploration, but Stein did not pursue it, instead eliciting from Zum that he had arrived at the $25 salary limit by adopting “a little lower than the average...for general types of office workers in the administrative offices,” although weekly salaries ran from $16 “for the most menial employee” to $70 “for the top employee.”

Reciprocating for Zum’s claim that the WHD had misunderstood Congress’s intent regarding administrative employees, Stein decided to be “equally frank.” His interrogation was tough-minded enough to make Zum abandon, successively, all his claims, but stopped short of pressing him at the end to reveal how many employees satisfied the restrictive definitional criteria for exclusion that Stein had forced him to adopt:

Presiding Officer Stein: ... Do you seriously contend that Congress meant to exempt every single white collar worker in the country getting $25.00 a week?

Mr. Zum: I don’t think so; but I think that Congress perhaps intended that where there were salaried workers who get vacations and sick leave and are employed throughout the year.

Presiding Officer Stein: Then, every white collar worker getting a vacation with pay and sick leave with pay and $25.00 a week should be exempt?

Mr. Zum: No, I don’t say that, because where a white collar worker, as you term it, has steady work, where his functions call for steady employment throughout the year, the same amount of work every day, I would say that that is a different proposition entirely from the white collar worker who perhaps has 10 hours of hard work one day and the next day has two or three, sometimes goes to the ball game in the afternoon and still is paid for it.

Solomon Lischinsky of the ACW, who had been so relentless in interrogating employers’ representatives at the wholesale distributive trades hearings, was mercifully brief with the CMA regarding white-collar workers—perhaps because of the amicability of relations that Hillman had hailed or of the relatively limited interest that the union had in organizing them. Restrained as the questioning was, it sufficed to uncover the incoherence of the clothing manufacturers’ justification for

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247 “1940 WHD Hearings Transcript” at 227-28 (June 4).
248 “1940 WHD Hearings Transcript” at 228-29 (June 4).
249 See above ch. 7. Lischinsky devoted most of his questioning to the use that employers could make of § 7(b) of the FLSA to enter into agreements for the maintenance and shipping department workers with the union permitting hours-averaging over 26 or 52 weeks excusing employers from the time and half requirement unless hours exceeded 12 in a day or 56 in week in exchange for a limitation of total hours to 1,000 over 26 or 2,000 over 52 weeks. “1940 WHD Hearings Transcript” at 234-36 (June 4).
excluding stenographers and clerks:

Mr. Zum: We consider the office force the administrative force of the business. They are, in a measure, assistants to the members of the firm or the top executives of that end of our business....

Mr. Lischinsky: Do you think it is proper to assume that such a clerk is a bona fide administrative employee?

Mr. Zum: It depends entirely on what you would call a clerk.

I would say that all employees in the office have specific functions, and they range from filing clerk on up through to secretary to the president, and so on.250

A committee of the National Lumber Manufacturers Association,251 whose members accounted for 70 percent of national lumber output, had met in February 1940 to discuss “the serious problems the industry was facing” under the FLSA and after “careful deliberation and temperate consideration of inequities and hardships resulting from the law and the present regs...recommended...the exemption of clerical workers paid on a straight salary basis and given vacations with pay, and foremen having the right to hire and fire or recommend hiring or firing.” This employer group proved to be yet another purporting to know what a Congress that had left no trace of the purpose or scope of the white-collar exclusions meant by them. The lumber manufacturers contended, according to their representative, Henry Bahr, that “Congress never intended” that the aforementioned clerical employees “should come within the coverage of the Act. Provision for their exemption was made in section 13(a)(1).” Moving from fiction to theatrical exaggeration, Bahr claimed that: “Unfortunately, the Administrator, in interpreting that provision, wished to be so certain that fullest possible coverage be maintained that he interpreted the exemption so restrictively that, if the regulations are construed literally, they are almost meaningless.” Despite the legislative setback that employers had suffered just one month earlier, the Association threatened to throw its political weight around: “If the exemption intended by Congress is not...made effective in the regulations, there can be little doubt that Congress will...make the exemption which was originally intended...so specific that it cannot be defeated by misinterpretation.” Combining sheer covert speculation with a description of an imaginary workplace, Bahr insisted that: “Congress was clearly attempting to

250 id. 1940 WHD Hearings Transcript” at 237 (June 4). Zum seemed to suggest that stenographers in non-administrative departments might be treated differently, but he failed to make this point clear and Lischinsky did not pursue it. Id at 237-38.

251 It was founded in 1902 and became the National Forest Products Association in 1965 as a result of the increasingly integrated nature of major forest industry firms. http://www.afandpa.org.
exempt employees who do not need the protection of its standards.” The exemption was, rather, “an effort to make the law workable and reasonable” in the sense that: “It is impossible for many employees in these categories to cease work at the end of 40 or 42 hours and for another employee to carry on....”

Concurring in Ballew’s critique of the joint executive-administrative definition and characterizing executive employees as responsible for forming policies and to the owners, Bahr proposed defining an “administrative employee” as either (1) a supervisor or (2) clerical or office employee paid on a straight salary basis with paid vacations, “whose services are closely related to the first group and whose hours must necessarily, in most cases, be the same.” The lumber manufacturers also argued that the WHA had departed from congressional intent in introducing a salary threshold because Congress excluded all the workers mentioned in § 13(a) from the statutory minimum wage. This argument overlooked the fact that, for example, agricultural employees were subject to § 13(a) precisely because their abysmal wages were, especially in the South, far below the minimum and Congress did not want to disrupt the plantation system. In contrast, there is no evidence whatsoever that Congress intended to preserve office sweatshops exploiting low-paid clerical workers.

Stein, who by this time had become well aware that witnesses claiming to have divined congressional intent were merely bluffing, mild-mannered asked Bahr whether he would “be able to give us any help by citing passages in congressional records which indicates that Congress didn’t mean to give any protection to white-collar workers in the manufacturing end....” But even Stein was not prepared for the primitiveness of Bahr’s response: “It isn’t necessary to cite passages, the Act itself manifests that intent.” After having failed to elicit a satisfactory reply to his request for an explanation of this conclusory assertion, Stein engaged him in the

252“1940 WHD Hearings Transcript” at 239-40 (June 4).
253“1940 WHD Hearings Transcript” at 241-42 (June 4).
254“1940 WHD Hearings Transcript” at 243 (June 4).
255“1940 WHD Hearings Transcript” at 244 (June 4).
256Marc Linder, Migrant Workers and Minimum Wages: Regulating the Exploitation of Agricultural Labor in the United States 125-75 (1992). It is noteworthy that when Congress was considering expanding agricultural processing exclusions in 1939-40, Representative John Hinshaw, a California Republican, declared on the House floor that “while in California we are not concerned for ourselves over the minimum-wage provisions of the act, as our workers—agricultural workers in particular—receive the highest wages paid anywhere in America, and for the most part substantially in excess of the minimum-wage provisions of the act; yet we are concerned over the low wages paid to workers who live elsewhere and are in competition with us.” CR 86:5484 (May 3, 1940).
following revelatory dialog:

Presiding Officer Stein: Do you think it would have been clearer if they had said clerical employees instead of executive and administrative?

Mr. Bahr: It probably would have.

Presiding Officer Stein: But you feel for all practical purposes executive and administrative means exactly the same as clerical?

Mr. Bahr: Clerical employees here are executive employees.

Presiding Officer Stein: You remember the Act doesn’t say administrative employees or executive employees. It says employees employed in bona fide administrative capacity.

Mr. Bahr: I would say that such clerical employees are necessary for the particular operation and therefore they are in an administrative capacity.

Presiding Officer Stein: If I heard you correctly you said that these employees don’t need the protection of the Act. Is that right?

Mr. Bahr: I think that’s right.

Presiding Officer Stein: You don’t think a girl who gets $14 a week who is sitting at a typewriter for 54 hours a week needs the protection of the Act? Such things exist.

Mr. Bahr: Such things exist but not as a rule.

Presiding Officer Stein: Do you think she would get higher wages if she had the protection of the Act?

Mr. Bahr: Those employees would undoubtedly get higher wages.257

Stein’s incisive interrogation slackened only when he asked Bahr whether a regular 54-hour workweek for white-collar workers was “conducive to the greatest health and efficiency of these workers....” Bahr’s reply that where manufacturing production workers were on a 40-hour week, “you can’t make the clerical employees” work “a very much longer week” failed to prompt the follow-up question that the war mobilization was already in the process of raising as to what the consequences would be for excluded office workers when factory workers worked long and paid overtime hours.258

The Machinery and Allied Products Institute, while agreeing with many other employer organizations that Congress did not intend to apply the act to salaried, office, clerical, or other administrative and executive workers paid at rates substantially above the minimum and enjoying paid vacations and sick leave, and that $150 a month was an appropriate cut-off, was unique in “conced[ing] that the language of the Act may be read as giving the Administrator authority to define ‘executive’ and ‘administrative’ (and ‘professional’ and ‘outside salesman,’ for

257 See "1940 WHD Hearings Transcript" at 246-47 (June 4).
258 See "1940 WHD Hearings Transcript" at 247-48 (June 4).
that matter) within a single class under a sub-joined definition." Nevertheless, the MAPI’s representative, Alexander Konkle, argued that the commas in the statutory text created a “stronger presumption” of congressional intent to create a separate definition of “administrative employees,” which was “imperatively needed” to “exempt beyond question” the aforementioned salaried office and clerical workers. The MAPI proposed that this group encompass general administrative employees and their assistants receiving at least $30 weekly, including clerks, stenographers, and secretaries as well as purchasing agents, draftsmen, foremen, cost accountants, comptrollers, and statisticians. The air of unreality that surrounded employers’ complaints manifested itself in this group too, a great many of whose members apparently felt totally defenseless against shirkers and incompetents or unable to promote the fastest workers:

“We have found that the rulings under the Fair Labor Standards Act have tied our accounting and clerical work in knots. The trouble is the injustice created when a fast and efficient cost man gets his work done in regular time and therefore draws no overtime, whereas the slower, less accurate cost man must work overtime and draws money for it. This creates a premium on inefficiency. Moreover, all parties feel the injustice. The slow man hates to take the money; the fast man feels he is rooked, or else we have to raise his pay; and we feel that the working of the Act is victimizing our company in an entirely unnecessary way.”

The Indiana Manufacturers Association took the tack of offering verbal support for the FLSA’s objectives of eliminating sweatshops and child labor for the benefit of production workers, but asserted, without the slightest anchor in the statute or legislative history, that “Congress did not...have in mind the typist, bookkeeper etc. of the small industrial organization.... It might well appear that such was a form of class legislation not socially desirable in this country, however Congress probably did not contemplate the office girl appearing for work in blue denim slacks and the bookkeeper in similar overhauls [sic] at her elbow....”

Unlike numerous other employer organizations, the Indiana association did not propose creating a separate administrative employee category; instead it argued for a joint definition with numerous sub-criteria, the meeting of only one of which would have triggered an employee’s exclusion. Thus an employee employed in a

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259"1940 WHD Hearings Transcript” at 250-52 (quote at 252) (June 4).
260"1940 WHD Hearings Transcript” at 252-53 (June 4).
261"1940 WHD Hearings Transcript” at 255 (June 4).
262"1940 WHD Hearings Transcript” at 256 (June 4). The reference was to cost estimators.
263"1940 WHD Hearings Transcript” at 261-62 (June 4).
bona fide executive and administrative capacity would have meant “any so-called
white collar employee who is paid on a straight salary basis, such employee typify-
ing that class of employees who among other things may be found to have...sole
responsibility of a separate clerical or administrative function..., or...limited dis-
cretionary powers, or...a straight salary of not less than $18.00 per week”; an
excluded administrative employee would, moreover, also have included any
assistant to anyone deemed exempt by meeting the foregoing qualifications in
whole or in part (and would therefore have been excluded even with a salary of less
than $18).264

Especially pregnant were a number of members’ letters from which the
Association’s representative Hall Cochrane quoted. One firm boasted that it made
no deductions from the salaries of its “so-called ‘white-collar’ workers” for
absence caused by sickness, but complained that when they returned to work, they
“naturally found that they are behind in executing the responsibilities entrusted to
their care. It means that added time must be worked. For this the company is
required to pay time and one-half,” which expense it claimed was impossible to bill
to customers.265 Of interest here is that this employer, like many others before and
since, regarded the paid sick leave in exactly the same way that employers regard
the privilege bestowed on some white-collar workers to leave the office for limited
periods during the day to run personal errands—namely, merely as an element of
flexibility that did not dispense workers from the obligation of making up the time
at no expense to the employer. (Indeed, the Connecticut Manufacturers Associa-
tion suggested that “this problem of salaried employees could be better taken care
of by an interpretative bulletin...to the effect that time off for overtime might be
used to take up the vacation...or sick leave with pay....”)266 The manager of the
Crawfordsville plant of the large and venerable R. R. Donnelly & Sons printing
company, referring to paid vacations and sick leave, opined:

“[T]here is little doubt but that the authors and sponsors of the bill had no intention
whatever of including office workers among those to whom the overtime provisions of the
act would apply. It is not conceivable that any man, or group of men, would willingly
endanger the desirable features now universally a part of the unwritten contract between
the office worker and his employer. ... My prediction is that continuance of enforcing
overtime pay to office workers will eventually cause the abandonment of the above

264See 1940 WHD Hearings Transcript” at 263-64, 271 (June 4). There were in all six
disjunctive sub-criteria, but since they could be met in part in order to exclude the
assistant, the others have not been mentioned here. On the DOL’s high-salaried test in
2004 that could also be passed by meeting a single criterion, see below chs. 16-17.
265See 1940 WHD Hearings Transcript” at 266 (June 4).
266See 1940 WHD Hearings Transcript” at 275 (June 4) (Paul Adams).
desirable features by far too many employers. Such a development would, indeed, be a calamity for the office worker."

The same manager then continued in the same vein in a letter to Indiana's entire congressional delegation, arrogating to himself knowledge of the legislative history that even he knew he lacked:

"Although I represent an employer [m]y concern is entirely in the interest of the salaried person and his predicament.

Some congressman or senator is going to win renown with every worth-while flatsalaried office worker in the United States if and when he will introduce and secure passage of a bill which will cause the elimination of the salaried office worker from the provisions of the Act.

Opinion is general that authors and sponsors of the Fair Labor Standards Act never intended that salaried office workers would be affected by it. Due to haste only was the bill so drafted that it was not definitely restricted to time-workers."

That Cochrane literally had no idea what he was talking about was brought out under questioning by Lischinsky, who asked him what his authority was for the statement that Congress did not intend to include white-collar workers. Cochrane's reply—"I don't know that I could specifically lay my hand on any permanent record or authoritative source but it is a quite prevalent thought amongst everyone whom I represent"—prompted Lischinsky to ask why, if Congress did not intend to include white-collar workers, it specifically exempted professional and executive employees. Finally struck by a flash of epistemological humility, Cochrane conceded: "I don't think either of us know what was in the mind of Congress."

Numerous representatives of the paper and pulp industry testified, focusing on the high salaries and non-fungibility of white-collar employees who should have been but had not yet been declared outside of the FLSA. Charles Boyce, vice president of North-West Paper Company, complained that among those who turned out to be covered were heads of one-man departments with annual salaries as high as $7,500. In response, the company put them on the clock to keep track of their time and took them off the salary basis to calculate their overtime, with the ideological consequence of "the breaking down of that distinction which every one of these men has worked for to get, out of the hourly pay class into the supervisory class or the monthly salary class. It means...they are apt to lose, if we have got to follow through literally,...the advantages and benefits they are getting that they

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267"1940 WHD Hearings Transcript" at 267 (June 4).
268"1940 WHD Hearings Transcript" at 268-69 (June 4).
269"1940 WHD Hearings Transcript" at 271-73 (June 4).
Another paper company official, E. Stoetzel of Marathon Paper Mills, sought
to persuade Stein that work in the industry’s research and engineering departments
was “comparable to work done in the medical profession”; suggesting that it was
the “technically trained” employees themselves who desired unlimited hours was
facilitated by dragging Einstein’s name in, though the reference to salaries ranging
from $54,000 to $94,000 (in 2004 dollars) reduced the matter to its commercial
core:

Their work isn’t regulated by the clock, but by the progress of the experiment, or
design. Their work isn’t mechanical but of a high mental character that reaches the point
of high efficiency some days creating a desire to continue that day to bring that particular
portion of the problem to a conclusion. It is important that these men not by [sic; should
be “be”] limited to a definite schedule of hours. ...

Besides the points enumerated...comes the cost angle. These men are paid substantial
salaries, from $4,000 to $7,000 a year, making the cost prohibitive if reduced to an hourly
basis and multiplied by 150 percent for any time over a 40-hour week.

In conclusion, if Einstein and Edison and Steinmetz and other outstanding research
men limited their work to hours instead of to actually performing the work itself, I don’t
believe we would have progressed as fast as we have.271

Robert Canfield, counsel for the American Paper and Pulp Association, ex­
pressed the same thought even more starkly: “A man who...wants to do his job
right and the job doesn’t consist of mechanical work but of head work primarily
has got to know that he has got the right to work as much time as is necessary to
do his job right. If he doesn’t he knows he isn’t earning what he is getting paid.”272
In the absence of an overtime rule promoting this precept, Canfield appeared to be
nearly overwrought because it was “absolutely impossible” for the member
companies to know whether they were complying with the FLSA, while he found
it “virtually impossible” to advise them how, especially since the guideline of
“when in doubt comply, just doesn’t make sense if you are talking about people
that are making up to $7500 a year.”273 Unlike many other witnesses, Canfield
admitted that “[n]obody knows what” congressional intent was, though “every­
body knows what it wasn’t.” In any event, Canfield knew that Congress “certainly
didn’t intend to create a perfectly ridiculous situation, and that is what it amounted
to when you are faced with the idea of paying overtime to salaried men whose
salaries are in multiple thousands of dollars a year.” Having mistakenly identified the overtime premium as the purpose of the overtime provision, Canfield insisted that: “Certainly it isn’t necessary to the maintenance of a fair living standard that a man getting $4,000 or $5,000 or $6,000 or $7,000 a year be paid some time and a half…”

Canfield implicitly took the position that an employer could verbally manipulate its way into an exemption by defining a job as off the clock: the 10 percent of the paper industry whose jobs consisted of seeing to it that the machinery was available for the other 90 percent to earn their pay were “hired...to accomplish a job. And the company doesn’t give a darn whether it takes 20 hours [sic] week or 30 or 40 or 50 or 60, it is the job that is requisite. If the job is done they have earned their pay, if it isn’t done they haven’t.” The alternative of putting “one of those men on an hour basis” with time and a half meant either that the job (for reasons Canfield did not bother to explain) was not done right or, “where the job requires more than the usual number of hours per week, he is running up extra expense for the company...a very uncomfortable position to be in.”

Melodramatically and incorrectly, Canfield charged that under the existing “definition strictly construed you can eliminate from the exempt list virtually anybody in any company, if we strictly interpret it. When you string together a dozen requirements with ‘ands’ you have eliminated pretty nearly everyone.” Conjuring up a strict enforcement regime that the WHA in 66 years has yet to bring to bear, Canfield pleaded that: “No company faced with the alternative of criminal prosecution, fine and imprisonment and injunction against interstate shipments...and it therefore means shutting down the mill if one man has been employed in violation of the Act, no company can operate legally with this kind of uncertainty.” Nevertheless, in spite of this nightmarish prospect, paper industry managers, unlike virtually all their counterparts, possessed the epistemological humility to announce that they had tried to work out a redefinition, “but we felt we were quite unqualified...since this hearing has to do with all industry and we don’t any of us know about other industries.” Canfield offered to undertake another effort if the Administrator was willing to proceed on an industry by industry basis—otherwise they would collaborate with other industries. In the interim, and recognizing that it was “hard to draw the line exactly,” he had tentatively...

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274*1940 WHD Hearings Transcript” at 324 (June 4).
275*1940 WHD Hearings Transcript” at 324 (June 4).
276*1940 WHD Hearings Transcript” at 325 (June 4).
277*1940 WHD Hearings Transcript” at 325 (June 4).
278*1940 WHD Hearings Transcript” at 328 (June 4).
279*1940 WHD Hearings Transcript” at 326 (June 4).
concluded that “the proper approach seems to be this, that if a job is such that it makes no difference what particular man is doing it, if it is practical at any time during the performance of that job to substitute one worker for another, that is clearly under the Act. If on the other hand the job is such that it must be, to be done right, performed by one individual, when in the middle of the job you can’t substitute practicably one man for another, then the job should be exempt.”

One of Canfield’s colleagues had been willing to push this approach to the ad absurdum brink of metempsychosis. If, H. Noyes of the Oxford Paper Company testified, management were deemed covered and confined to a 40-hour week and wanted to avoid overtime, it would have to provide adequate replacement: “And then we would be up against a proposition of—I don’t know exactly how to express it but the transfer of thought from one person’s mind say to the mind of the person who replaces him, as to what has gone before.”

Taking seriously Canfield’s proposal to make a position’s non-fungibility the crux of analysis for exclusion of white-collar workers, Stein cautioned him that when he said that “the true test should be the irreplaceability of [the] worker so to speak...I am sure that you don’t mean that that thing in crude form should be placed as a tool in the hands of the inspector.” Canfield acknowledged that he had not intended such an implementation of his approach, but insisted nevertheless that: “What constitutes a management employee, and that really is what is intended to be exempt, is a man who has peculiar qualifications to perform a necessary job. The performance of the job can’t be measured by time. It is a job that has to be done regardless of time....” Though apparently oblivious of the fact that his description was so vague and ambiguous that it could fit millions of non-management employees including, ironically, research scientists, Canfield’s only effort at illustration was an assistant secretary of a corporation, who might normally work 42 hours, but, if the corporation suddenly decided to undertake a major refinancing operation, might have to work 80 hours a week:

His job is to do what is necessary to be done at any given instance. His remuneration is worked out on that basis. It assumes overtime at some times. It is already compensated for. That is why he is paid $4,000 or $5,000 or $6,000 of $7,000 or $10,000 a year.

If you required a payment of time and a half for overtime, you are in effect paying overtime on overtime. The whole purpose of negotiated salaries is to cover a man for the performance of a job regardless of the time involved.
If such overtime stints resulted from rare and unforeseeable extraordinary emergencies that only one person in the world could deal with, then they could perhaps be permitted on the same basis as the exceptional emergencies threatening life or property that authorize production workers to exceed the limit under a maximum-hours regime. However, it seems improbable that annual salaries would be upwardly adjusted by thousands of dollars to compensate already highly paid employees for such rare disruptive intrusions. If 80-hour weeks were not uncommon, then the issues of the affected worker’s mental and physical health and the appropriateness of work-sharing were manifestly implicated. Since the overlap between the kind of work Canfield appeared to have in mind and high salaries—$10,000 in 1940 was the equivalent of almost $135,000 in 2004—was significant, then perhaps he should have proposed a high salary cut-off as the sole exclusionary criterion, which would, to be sure, not have resolved the aforementioned working-hours issues, but could have been set at such a lofty level that not even labor unions would have protested.

The manufacturing hearings on June 5 reached a high point when Stein convened the morning session of the final day in the Bamboo Room of the

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offered by coal mine owners regarding auditors, cashiers, civil engineers, fire bosses, purchasing agents, personnel managers, and weigh bosses, whose salaries ranged from $115 (weigh bosses) to $750 (purchasing agents): “It would seem that there can be, by that exemption, no hardship, no denying of the benefits of the Act to anybody and still by such exemption there would not be an opportunity to prevent the spread of employment” because “[i]n practically all of these instances, the man’s work is peculiar to he, himself. It is a job that he does. It may take him all day; it may take him longer hours than the statutory maximum, but considering the remuneration that they are paid, it is our suggestion that they be exempt as administrative employees.” Id. at 425 (Harry Gandy, Jr., National Coal Association).

284Linder, Autocratically Flexible Workplace at 464-66.

285Before the NAM testified, Claudius Murchison, president of the Cotton Textile Institute, appeared to propose the elimination of the salary limit because in small units of the cotton textile industry in isolated communities $30 would unduly restrict the size of the exempt group. “1940 WHD Hearings Transcript” at 334 (June 5). This plea replicated his request at the 1937 FLSA congressional hearings to preserve the wage differential in favor of southern textile capital. Fair Labor Standards Act of 1937: Joint Hearings Before the Committee on Education and Labor United States Senate and the Committee on Labor House of Representatives on S. 2475 and H. R. 7200, Part 2 at 813 (75th Cong., 1st Sess., June 7 to 15, 1937). Of the original FLSA bill Murchison said that it was difficult for him to believe that it was “indigenous to America. It does not accord with our theory of government. ... It does not match our traditional concept of the dignity and the rights of labor.” Id. at 808.
Willard Hotel (""The Residence of Presidents"") in Washington, D.C., to hear the proposals of the associate counsel and secretary of the National Association of Manufacturers, employers’ "most prominent and vocal peak association during the interwar era." In terms of its impact on Stein and the revision of the regulations, the single most influential testimony of the entire hearings was arguably presented by the NAM, which appears to have offered the critical arguments that prompted Stein and the WHA to create a separate category of excluded administrative employees.

The NAM’s associate counsel, Raymond Smethurst—who later became a law school lecturer and considered himself sufficiently expert to self-publish a casebook on the FLSA—after announcing that a large number of state, local, and industry associations also supported the NAM’s recommendations, noted that the NAM had, after much more extensive study, revised the three general recommendations that it had submitted for the wholesale distributive trade hearing. The NAM’s candid preference was for a regulation or statutory amendment that “would exempt all so-called white collar employees earning a definite minimum regular salary.” But since it was well aware that Congress had authorized exemptions only for employees in certain defined classifications, the NAM had to make do with second best—“a moderate and practical definition.” Smethurst conceded that the legislative history of the FLSA revealed “little of the intent of Congress to extend this law to employees receiving far more in compensation than is required by the minimum standards imposed,” but nevertheless insisted that it

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286 NYT, May 31, 1940 (23:8) (advertisement).
289 Smethurst joined the NAM’s law department in 1934, the year he was graduated from law school, and became its counsel in 1941, retaining that position until 1949, when he entered private practice. At the end of the 1940s he taught labor law at George Washington University Law School. Association of American Law Schools, Directory of Teachers in Member Schools 1948-1949, at 246; Association of American Law Schools, Directory of Teachers in Member Schools 1949-1950, at 270.
291 “1940 WHD Hearings Transcript” at 348-49 (June 5).
292 “1940 WHD Hearings Transcript” at 349-50 (June 5).
293 “1940 WHD Hearings Transcript” at 351 (June 5).
was "obvious from a mere reading of the statute that the law was drafted to cover employees working for a wage rather than a salary."\footnote{1940 WHD Hearings Transcript" at 352 (June 5). Presumably he was referring to provisions such as the 25-cent hourly minimum wage, but if salaried employees were not covered, then as Nathan Weinberg of the ILGWU asked rhetorically, why did executive and administrative employees have to be expressly exempt? Id. at 450-51.} He was also able to quote powerful passages from the Senate and House FLSA reports that clearly declared that it was "only those low-wage and long-working-hour industrial workers, who are the helpless victims of their own bargaining weakness, that this bill seeks to assist to obtain a minimum wage."\footnote{"1940 WHD Hearings Transcript" at 352 (June 5) (quoting but not citing S. Rep. No. 884: Fair Labor Standards Act 3-4 (75th Cong., 1st Sess., July 8, 1937). See also Linder, Autocratically Flexible Workplace at 258.} Fairly refraining from pronouncing such sources as definitive standards for construing the actual enactment, Smethurst did insist that, as indicators of "the atmosphere" in which the FLSA was "conceived," they demonstrated that the law "was not intended to regulate wages and salaries far above the minimum established as a standard of decency." From this construction he derived the argument that the WHA "would be fully justified in giving liberal effect to exemptions which in no way affect the minimum wage standard...."\footnote{"1940 WHD Hearings Transcript" at 355-56 (June 5).}

The NAM freely admitted "that it may be difficult to write a satisfactory definition of the term 'administrative,'" but urged the WHA to consider that Congress itself had distinguished between administrative on the one hand and clerical and executive employees on the other in the Clerical Administrative Fiscal Service of the Civil Service.\footnote{"1940 WHD Hearings Transcript" at 391 (June 5).} These positions bled into or overlapped with one another so that an employee classified as a clerk might perform duties comparable to those performed in an administrative classification and administrative work also included a large part of clerical work.\footnote{"1940 WHD Hearings Transcript" at 352-53 (June 5).} (To be sure, the classifications also revealed synonymous usage of "administrative" and "executive.").\footnote{See above ch. 2.} The NAM's definition of "administrative employee" included those whose primary duty was to manage, direct, or supervise a group of employees, a function found in a CAF junior administrative assistant, administrative assistant, or senior administrative assistant; the NAM's definition also included employees directly assisting an executive employee—a job description that also appeared in various administrative classifications in the CAF service. Finally, individual work of a responsible, specialized, or technical nature requiring special training and experience was also
a function of various CAF administrative classifications. The inclusion within the
NAM’s definition of employees performing “special assignments or tasks” was
designed to overlap with similar work performed by senior administrative assistants
in the CAF service who were called on to help in administrative investigations to
determine compliance with office policies or in perfecting or coordinating office
organization. Such tasks corresponded to the NAM’s definition involving “as­
signments directly related to management polices or general business opera­
tions.”

Unlike the CAF, which lacked a clear demarcation line between clerical and
administrative employees, the NAM’s proposal “purports to draw the line between
employees who perform routine clerical functions and those whose work requires
the exercise of discretion and independent judgment as well as special training or
experience.” Consequently, because its schema was more rigid than the CAF
classification, the NAM did “not foreclose the possibility of exemption for em­
ployees designated as clerks if the nature of their work meets the standards
suggested. It may be that ‘administrative’ does have a broader significance than”
it had suggested. In fact: “The term might be broad enough to include practically
all clerical work connected with the management of a business. It may be,
therefore, that our definition is too narrow.” By the same token, at the other end
of the spectrum, Smethurst admitted “ordinarily, the executive would meet the
requirements of an administrative officer, because he is higher up in the scale and
presumably delegates most of the functions that the administrative officer
performs.”

Noel Sargent, who had been the NAM’s chief economist since joining the
organization in 1920, took over from Smethurst in order to illustrate in detail the
organization’s objections to the existing regulations and to explain the types of
employees who would be exempted under its proposals. The basis for employers’
intense interest in expanding the category of administrative employees became
manifest in Sargent’s succinct declaration that “there are a relatively small number
of true ‘executives’ in any concern but many truly ‘administrative’ employees.”
Whereas “the ‘executive’ is concerned with the formulation of policies or with the
direction of their application,” administrative employees were “usually directly

1940 White-Collar Overtime Regulatory Hearings

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300 “1940 WHD Hearings Transcript” at 362-64 (June 5).
301 “1940 WHD Hearings Transcript” at 364 (June 5).
302 “1940 WHD Hearings Transcript” at 414 (June 5). Questioned by Harry Weiss,
Noel Sargent responded that he would not object to having one definition if the executive
were taken care of in it, but insisted that “you couldn’t really include the definitions that
really make an executive” without “excluding all the administrative employees.” Id.
303 “N.A.M. Secretary Retiring,” NYT, May 31, 1955 (37:3).
concerned with...carry[ing] into practice the policies” formulated by the executives.\textsuperscript{304} As suggested by this guideline, the NAM’s redefinition would have narrowed the scope of “executive employee” and expanded that of “administrative employee” so that, for example, the assistant manager of a fast food restaurant could not be classified as the former, but only as the latter, which would encompass supervisors.

Under the NAM’s proposed definition, an “executive” had to satisfy the following criteria: (1) his primary duties had to be managerial, meaning that he had (a) to make or assist in making or determining company policies or directing their application; (b) ordinarily to direct other employees’ work; and (c) to spend the greater portion of his time engaged in the activities specified in (a) or (b); (2) he had to (a) have authority to hire or fire other employees; or (b) be given particular weight in his recommendations for hiring or firing; and (3) he had to be paid $30 weekly in compensation.\textsuperscript{305} To be sure, despite proposing this salary threshold, the NAM did not believe that it was “strictly part of any definition of administrative or executive function”; rather, Smethurst included it “merely because it was deemed better policy to include or refrain from” recommending deletion, but he did not regard it as contributing anything to the definitions.\textsuperscript{306}

In contrast, an administrative employee had, in addition to receiving $30 weekly pay, to meet any one of three alternative requirements: (1) “primary duty to manage, direct or supervise any group of employees” (e.g., supervisory clerk, but not working foremen, gang leaders, straw bosses, or pushers), or “regularly and directly to assist” an executive employee “if such assistance normally requires the exercise of discretion and independent judgment” (e.g., confidential secretary in answering correspondence); (2) primary duty to “perform, under general supervision, responsible office or technical work, requiring special training, experience, or knowledge of the business, and the exercise of discretion and independent judgment” (e.g., job analyst, rate setter, sales correspondent, auditor, sales research man, chief clerk, dispatch clerk, stockroom manager, purchasing agent, credit analyst, employment interviewer of technical applicants, cost estimator, and recrea-

\begin{footnotes}
\footnote{\textit{1940 WHD Hearings Transcript” at 369 (June 5).}}
\footnote{\textit{1940 WHD Hearings Transcript” at 370-73 (June 5).}}
\footnote{\textit{1940 WHD Hearings Transcript” at 400-401 (June 5).} When Stein asked him whether the salary level had some value “as a working test of bona fides, the good faith of the attribution by the employee” [sic; must be “employer”], Smethurst merely replied: “But as a test, it also creates certain hardships.” Stein’s laconic “Yes” prompted Smethurst to speculate that it might be “desirable to leave the way open for the administrator to relax that part of the regulation upon a showing that the employee in question did actually satisfy all the other requirements.” \textit{Id.} at 401.}
\end{footnotes}
tion director); or (3) “work involv[ing] the execution of special assignments or tasks directly related to management policies or general business operations, involving the exercise of discretion and independent judgment, and...work is performed under circumstances in which direct supervision and control over time or manner of performance or hours of work are impracticable” (e.g., traveling auditor and accountant with special training, special representative making studies of organization operations for and reporting back to management, safety director, employee disability and compensation work, divisional credit man, whose delay in approving credit retarded work of manufacturing divisions, field engineer).\(^{307}\)

Under questioning by Stein as to who would not be encompassed within the NAM’s proposed definition of “administrative employees” Smethurst and Sargent mentioned only pool stenographers and bookkeepers. Nevertheless, pressed by Stein—who failed to ask them what proportion of white-collar workers were excluded under the existing regulations—they offered a non-binding “guess” that of 100 office employees in a manufacturing plant perhaps 20 would be exempt under the proposal. In Sargent’s slippery words: “I don’t think we propose to exempt the bulk of office employees in these regulations.”\(^{308}\)

Astonishingly, unions put hardly any questions at all to the NAM’s representatives. Sol Lischinsky of the Clothing and Textile Workers Unions, who had vigorously interrogated employers at the wholesale distributive trades hearings, was the only unionist to seize the chance to challenge Smethurst or Sargent. In his own presentation at the close of the hearing, Lischinsky brashly asserted that the crux of employers’ complaint was that paying overtime to certain workers was a “hardship,” to which he replied that Congress intended that it be a hardship to employers that did not comply with the maximum hours provision.\(^{309}\) Yet when he directly confronted Sargent, his sole question was at best of marginal importance.\(^{310}\)

\(^{307}\) "1940 WHD Hearings Transcript” at 375-82, 396 (quotes at 375, 378, 380) (June 5).

\(^{308}\) "1940 WHD Hearings Transcript” at 391-92 (June 5). Smethurst added that in a larger office where work could be more routine, a smaller percentage would probably be exempt. \textit{Id.} at 393.

\(^{309}\) "1940 WHD Hearings Transcript” at 473 (June 5).

\(^{310}\) When Lischinsky asked whether a roofer sent out on a “special task” to fix a leaking roof away from the employer’s premises and without supervision would qualify as an administrative employee, Sargent replied that “there might well be very grave doubt as to whether it could properly be interpreted” “as directly related to management policies or general business operation....” Lischinsky advocated a modification to the effect that the result of that employee’s work determined plant policy, to which Sargent counter-proposed that the result assisted in determining the policy. The exchange ended without a resolution,
Overall, the NAM’s presentation was arguably the most technically proficient of all employers’ pleas for separation and expansion of the exclusion of administrative employees. Its most telling defect was the absence of any socio-economic justification for the exclusion. Not only with the aid of hindsight was labor’s failure to engage Smethurst and Sargent a colossal error: both the NAM’s prominence and its carefully thought-out program to broaden significantly the universe of excluded administrative workers should have prompted unions at the very least to develop through questioning strong arguments undermining these recommendations.

Nathan Weinberg, a research assistant in the ILGWU research department—who admitted that shipping clerks were the only white-collar workers it represented whom the proposed redefinitions might exclude from overtime regulation—did not question Smethurst or Sargent, but did provide a detailed refutation of much of their testimony, starting with the claim that office and clerical workers had not suffered as much from low standards as factory workers: “As a matter of fact,” he observed, in the garment industry it was “precisely these workers that have suffered the most. You could walk through the garment district in New York City before the Fair Labor Standards Act went into effect, late at night, and all the factory windows were dark but you would find lights in the office windows and girls working until ten or eleven o’clock at the books kept by the employers”—in large part because they lacked union protection. In this sense, sweatshop conditions, which, according to the NAM, Congress had perceived and sought to eliminate only among industrial wage workers, applied to office workers as much as to factory workers; indeed, they applied to wages as well since it had been “a very common thing” for garment firms to “take girls just out of business

Stein did not adopt any such modification, and it is difficult to discern why Lischinsky believed that his alternative wording would have narrowed the scope of the exclusion. “1940 WHD Hearings Transcript” at 416-18 (June 5).

311ILGWU, Report of the General Executive Board to the 24th Convention 148 (May 27-June 8, 1940). Weinberg testified instead of his boss Teper presumably because the union’s annual convention was taking place in New York City during the hearings.

312“1940 WHD Hearings Transcript” at 446 (June 5). Garment industry shipping clerks in New York City began organizing in 1935, but not until February 1940 did the ILGWU charter the Ladies Garment Clerks’ Union Local 99, whose 1,000 members represented about one-seventh of the workforce. Employers had commonly failed to comply with the overtime provisions of the FLSA with regard to these clerks. ILGWU, Report of the General Executive Board to the 24th Convention at 126-27. Although a resolution at the 1940 ILGWU convention protested the exclusion of “huge occupational categories” from the FLSA, it expressly mentioned only farmers and agricultural workers and not office workers. Id. at 646 (Resolution No. 216).
Although not a lawyer,\footnote{1940 WHD Hearings Transcript" at 448 (June 5).} Weinberg next turned to a discussion of the wording of the white-collar exclusions. Unlike other unionists who had referred to the lexicographic overlap and interchangeability between “executive” and “administrative,”\footnote{1940 WHD Hearings Transcript" at 452 (June 5).} he drew the conciliatory conclusion—based on the notion that an executive was an administrator who also formulated policy\footnote{1940 WHD Hearings Transcript" at 453, 455 (June 5).}—that, “as a practical matter,” it made little or no difference whether “you have two definitions or one, because if you have one relatively loose definition for administrative employees and one slightly tighter definition for executive employees, anyone who filters through the looser definition of administrative employees will never have the other test of executive employees applied to him. He is already exempt.” Thus although the WHA was “perfectly correct in defining these two as one,” the ILGWU would nevertheless “have no objection, of course, to giving the proponents of amendments their legalistic song and dance and set up a separate definition which would include all of the conditions now in the present definition and add one or two others such as determining policy and a high salary.” The union was willing to acquiesce in the bifurcation in order to thwart employers’ efforts to relax the “definition of ‘administrator’...to exempt a far larger group than would be exempted by the present definitions.” Specifically, the ILGWU insisted that “an administrative employee must have something to administer. You might say that a stenographer administers a typewriter or something of that sort, but I don’t think we can go very [far] along that line.” A bona fide administrative employee had to have the power to hire or fire or influence such actions because otherwise he would lack the power to “force” his subordinates “to follow his directions.”\footnote{1940 WHD Hearings Transcript" at 459-60 (June 5).}

Weinberg’s accommodating standpoint\footnote{For example, conceding that the hearing had been fruitful in revealing a couple of places where improvement was possible, Weinberg stated that the union had no objection to substituting 20 to 25 percent for “no substantial amount” of non-exempt work and that it was “fairly reasonable” to classify as a professional employee someone who did not meet the educational requirement, provided that he was operating in the position. “1940 WHD Hearings Transcript” at 459-60 (June 5).} was in part a function of his insight that: “You will never get perfect definitions in the field of Social Sciences.”\footnote{1940 WHD Hearings Transcript" at 457 (June 5).} But
by the same token, that very precept also meant that Weinberg cautioned the WHA against letting borderline cases prompt redefinitions, which would engender yet further redefinitions, "until eventually there will be nothing left of the regulations whatsoever."320 This tactic, characteristic of the NAM and other employers, consisted in taking a few cases already exempt, taking a few borderline cases that might or might not be exempt, and then using them "as a crow bar to open the door so wide anybody can get in."321 Similarly, the proposal to exempt as administrative employees those who assist executive or administrative employees could facilitate a snowball effect so that ultimately a "plant will consist of one executive and 499 administrative employees" who assist other administrative employees.322

Banking and Stock Brokerage

It cannot be contended that there is any especial hardship placed upon employers by...the present definitions in the ordinary conduct of their business. It is true that it does place certain limits. ... For some employers, payment of their telephone bill also spells a hardship, but it is a hardship which they cannot avoid, and one that is necessary if the rights of the telephone company are to be observed and uninterrupted service secured.323

[T]he bank employee who wants to go to a baseball game doesn’t have to wait until his grandmother dies; they are pretty liberal in an informal way.324

I think bank tellers get about the worst break of any group in the entire labor movement. [W]orking a bank teller more than 40 hours a week seems to me to be a crime...against the health and safety of the bank tellers.... The nervous strain that they are under, the terrific fear of paying out money improperly....325

On July 9-10 Stein held the third set of hearings on the largely white-collar

320"1940 WHD Hearings Transcript" at 458 (June 5).
321"1940 WHD Hearings Transcript" at 461 (June 5).
322"1940 WHD Hearings Transcript" at 463 (June 5).
323"1940 WHD Hearings Transcript" at 347 (Apr. 11) (statement of Lewis Merrill, UOPWA).
324"1940 WHD Hearings Transcript" at 33 (July 9) (testimony of Archibald Wiggins).
325"1940 WHD Hearings Transcript" at 524-25 (July 29) (testimony of Sidney Cohn, ACA).
industries of banking and stock brokerage. \textsuperscript{326} By a wide measure the banking industry presented the most elaborately and efficiently choreographed testimony at any of the hearings. This monolithic coordination of witnesses representing a judiciously balanced diverse cross-section of large and small and urban and rural banks was doubtless made possible by the centralizing role of the American Bankers Association, which accounted for 82 percent of all banks and 96 percent of all banking resources in the United States. \textsuperscript{327} The WHA, who had scheduled the hearing in response to the ABA’s application, stated in his hearing notice that testimony would have its usefulness increased if it included information on: the number of employees in the firms represented by the witnesses; the number or percentage of employees exempt under the regulations then in force or “whom it is desired to exempt by the proposed definition”; the duties and salaries of such persons; as well as “the reasons why they should properly be classified” as in an exempt category and “[d]iscussion of the ability of the proposed language to exempt only the employees” desired to be exempt. \textsuperscript{328}

The ABA meticulously complied with this suggestion, setting forth its redefinitions and then introducing a series of well-prepped bankers to spell out the number of before-and-after exemptions. At the center of this stellar performance stood Archibald Lee Manning Wiggins, chairman of the ABA’s Committee on Federal Legislation and president of the Bank of Hartsville in South Carolina. \textsuperscript{329} Wiggins (1891-1980) was not, however, merely some small-town southern banker; he had many business interests, and had already embarked on a steeply rising national career trajectory, which would make him ABA president in 1943, under-secretary of the Treasury during the Truman administration, and director of a number of large corporations, including the American Telephone and Telegraph Company. \textsuperscript{330}

\textsuperscript{326}Official Report of the Proceedings Before the Wage and Hour Division of the Department of Labor In the Matter of a Hearing on Proposed Amendments to Part 541 of Regulations with respect to the Definition of the Terms “Executive, Administrative, Professional...Outside Salesman” as They Affect Employees in Banking, Brokerage, Insurance, Financial and Related Institutions, Washington, D.C., July 9-10, 1940, Pages 1 to 243. The UOPWA charged that although Lewis Merrill had presented a brief at the first hearing on wholesale trades, “[d]ue to extremely short notice of the second [sic] hearing [on banking], the union was not given sufficient time to prepare the necessary information for this brief. The hearing was held in the face of the union’s request for postponement....” “Wage Act Changes Peril 800,000,” \textit{OPN}, 6(5):4:3 (July-Aug. 1940).

\textsuperscript{327}“1940 WHD Hearings Transcript” at 5 (July 9) (statement of Archibald Wiggins).

\textsuperscript{328}FR 5:2325 (June 21, 1940).

\textsuperscript{329}“1940 WHD Hearings Transcript” at 27 (July 9).

\textsuperscript{330}http://www.lib.unc.edu/mss/inv/w/Wiggins, A.L.M.
Wiggins began his presentation disarmingly by stating that the ABA had asked for the hearing “for the very practical purpose of sitting around the table and discussing some of the problems arising out of’ the FLSA and the regulations and their application to banks. Characterizing the ABA’s carefully organized testimony as “a more or less informal presentation,” Wiggins hoped to “reveal the problems in such a way that, without in any way changing the real objective of the law,...it can be made more workable and facilitate the operations of the banks rather than to slow up and make more difficult the actual detailed operation of banking functions.” In fact, the ABA—which had not “employed counsel to make any particular argument”—like many other employers’ organizations, was seeking to transform the FLSA into a mere minimum-wage workers’ law. Wiggins frankly admitted that “in the minds of bankers” the FLSA “seems to have been designed for wage workers, particularly wage workers receiving compensation on an hourly basis, and to protect minimum standards of living.” In any event, bankers “get that very distinct impression” from the congressional preambular policy to eliminate “labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers.” Based on this congressional finding, bankers’ reaction was that the FLSA “was not designed for banks” because their employees were not paid hourly wages, they were “among the better paid employees,” and the problems of subminimum living standards were not “of any particular importance” in banks. Nevertheless, bankers did recognize that under the FLSA’s “wide coverage...it is possible that banks are under the Act.”

Curiously, the bankers’ denial of the existence of such conditions did not prompt Stein to ask Wiggins—as he had at the manufacturing hearings slyly asked Ballew, whose SSIC had not even pushed this point as vigorously as the bankers—whether he regarded working white-collar workers over 60 hours a week month after month, even with paid vacations and sick leave, as “properly describable” as such a detrimental labor condition. The query would have been crucial to demonstrating that employers’ claim that the FLSA overtime provision did not apply to non-minimum wage workers was baseless: after all, even Ballew, counsel to the arch-reactionary SSIC, had been constrained to concede the obvious.

Before taking Stein through the ABA’s proposed regulatory redefinitions,

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331 “1940 WHD Hearings Transcript” at 5 (July 9).
332 “1940 WHD Hearings Transcript” at 12 (July 9).
333 See above ch. 10.
334 “1940 WHD Hearings Transcript” at 6-7 (July 9) (quoting FLSA § 2).
335 “1940 WHD Hearings Transcript” at 7 (July 9).
336 “1940 WHD Hearings Transcript” at 31 (June 3).
Wiggins casually mentioned a few circumstances that he regarded as unique or peculiar to banks and that made the applicability of an “inflexible” FLSA inappropriate. First, banking operations could not be “controlled by a time clock”: often near the closing hour important banking matters arose requiring the presence of employees many hours beyond those contemplated earlier in the day. Consequently, “the fundamental problem confronting banks” regarding the FLSA was whether to reorganize whole system and method of compensation from “monthly salaries with all the attendant benefits” to a fixed hourly wage and time and a half for overtime. The ABA asserted that employees were far more interested in “a reasonable feeling of security” associated with getting guaranteed monthly compensation throughout the year on which they could rely than to have an hourly wage resulting in weekly fluctuating compensation. Wiggins acknowledged that some of the flexibility that bankers desired could come only through legislative amendments—which they had already requested of Congress—such as hours-averaging over several weeks up to three months to deal with peak days, periods, and seasons. Had a bank been willing to enter into a collective bargaining agreement with a union, it could, under certain conditions, also have lawfully engaged in hours-averaging over 26 or 52 weeks.

Finally coming to the bankers’ proposed redefinitions, Wiggins, too, pleaded for severing the “administrative” from the “executive,” although he conceded that there were positions that combined both. In general “administrative” was of a quality inferior to “executive” and was to be used to identify employees given “a substantial degree of sole responsibility in the exercise of their individual duties as distinguished from the exercise of broad discretionary powers in the general management of a business or department.” First, the ABA proposed that any bank employee paid at least $250 a month be considered an executive and any bank employee paid $200 in cities of at least one million population and down to $80 in cities of under 10,000 be classified as an administrative employee—a curiously arbitrary nomenclature in the absence of even the barest job description, but one that was presumably forced on the bankers if they wished to circumvent congressional action.

Next, Wiggins set forth the duties tests for executive employees divorced from

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337"1940 WHD Hearings Transcript" at 9 (July 9).
338"1940 WHD Hearings Transcript" at 10-11 (July 9).
339FLSA § 7(b). By January 1, 1945, one such contract (not in banking) with the UOPWA had been filed with the WHD. BNA, Wage and Hour Manual 754-55 (1944-1945 ed., 1945).
340"1940 WHD Hearings Transcript" at 14-15 (July 9).
341"1940 WHD Hearings Transcript" at 15-16 (July 9).
any salary requirement. Here the bankers merely picked three of the existing regulatory requirements—primary duty of management, power to hire/fire, and exercise of discretion—while dropping that of directing other employees' work and the ban on the performance of any substantial amount of non-exempt work without any justification at all.  

The newly minted definition of "administrative" employees (illustrated by tellers, auditors, bookkeepers, accountants, and investment managers) was extraordinarily capacious since it required meeting only one of three duties tests. The first, taken from the existing joint definition, called for supervisory capacity and customarily and regularly directing the work of other employees. The second required a primary duty performance of which required "direct contact" with customers of the bank. On the cold and old paper transcript of the hearings, at least, Wiggins did not seem to be embarrassed about seeking to justify this breathtakingly outlandish blanket exclusion on the preposterous (and undocumented) grounds that: "The man who represents the application of the policy of the banking institution in its relationship and in its dealing with the public is administering that institution within the generally accepted and we believe the sound and proper designation or definition of an administrative employee." Under questioning, Wiggins admitted that "the reason, one of the reasons, that we break it down as between executive and administrative" was that the teller could not qualify as an executive because he did not exercise discretion in most of his duties. On the other hand: "We think very clearly he is an administrative officer...." Indeed, in a bank with 30 or 40 employees, the only ones who would not be exempt under the ABA's functional definition were bookkeepers, general run of stenographers, maintenance workers, and mechanical machine operators, while teller and private secretaries would be the "principle [sic] additions to the exempt class...." A number of the bankers whom Wiggins introduced reveled in their descriptions of precisely these two groups of public-contact administrators. For example, Francis Addison, the president of Security Savings and Commercial Bank in Washington, D.C., which employed a total of 52 officers and employees, of whom nine were already considered exempt and a further 25 of whom he hoped to exclude by amending the regulations, boasted that the bank's 18 tellers who were, "in most instances, in direct contact with the bank's customers...are certainly justified as being considered administrative employees. Every transaction they

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342 "1940 WHD Hearings Transcript" at 18 (July 9).
343 "1940 WHD Hearings Transcript" at 20 (July 9).
344 "1940 WHD Hearings Transcript" at 34-35 (July 9).
345 "1940 WHD Hearings Transcript" at 40-41 (July 9).
handle is a contact between a customer and administration of the bank’s policies. This is solely in the hands of the tellers. And, the average depositor thinks of the bank in the light of the opinion which he has of that contact man, the teller.”346 Addison then threw in the secretaries, to boot, as public-contact administrators because “when a customer or a client desires to see a busy executive,...his first thought is to consult the secretary to determine whether or not the executive is available and, if not, when.” And the reason that these seven secretaries—whose annual salaries averaged $1,450 and ranged as low as $1,200 (or about $23 a week)—deserved to be removed from overtime regulation was that they saved the bank’s executives “much work” and gave the customer “much satisfaction...in satisfying him by writing the inquiry where it will be most intelligently served in my absence.”347

An official of the very large First National Bank of Chicago found it self-explanatory that its 68 tellers “should be exempted” merely because they met 80 percent of the public coming in and often advised customers about features the bank offered or how to apply for a loan.348 Astonishingly, this kind of statutorily irrelevant justification apparently impressed Stein, whose recommendation to exempt secretaries performing precisely such work was ultimately enshrined in the regulations.349 Yet, even Stein’s credulity had its limits, and when Willard Jones, executive vice president of Farmers National Bank and Trust Company of Rocky Mount, North Carolina, hopefully put forward his $1,000-a-year custodian of the vault as exempt because she “deals with the public as much as anyone else,” having permitted 1,639 customers to enter their boxes in 1939, Stein lost his patience: “In several of the New York banks...there are doormen who in a sense meet every single person who ever goes into the bank. Would you consider that

346“1940 WHD Hearings Transcript” at 48-49 (July 9). Gilding the lily, Addison extolled tellers’ exercise of discretion when confronted with a depositor depositing a check “drawn on another point. That teller must use his discretion as to whether he is, in effect granting credit, by which the depositor may draw against that item before actual collection. He must...advise the depositor why that is not made available to him until collected, notwithstanding the fact that we have a contract on our deposit ticket giving us that right.” Id at 49. Ironically, given the subject matter of the hearings, Addison disclosed that: “A great many of our depositors work on [sic] salary basis. They get hard up two or three days before the end of the month, and they will draw checks and have them cashed knowing full well they are not good.” Id. at 45.

347“1940 WHD Hearings Transcript” at 50-51 (July 9).

348“1940 WHD Hearings Transcript” at 60 (July 9) (C. Edgar Johnson, assistant vice president). In 2004 the Bush administration WHD gave new life to such job duties as a basis for classification as an administrative employee. See below ch. 17.

349See below ch. 13.
contact with the public?” Jones was willing to concede that “[t]hat is stretching it very broadly,” but insisted that “the vault custodian came more under the law than did the doorman.”350

The representative of the largest bank to testify, the First National Bank of Chicago, made clear what was at stake for a large employer in being able to overcome the prohibition on exempting non-boss administrative employees from overtime regulation:351 whereas under the existing regulations only 170 of 2,202 “clerical” employees were exempt, under the proposed redefinition “we would be able to exempt 612 employees, or a total of 28% of our total personnel.”352 Smaller banks might have benefited relatively even more from the administrative redefinition: the bank in Rocky Mount reported that of its 22 “clerks,” none was exempt under the old regulations, while 12 would have been so classified under the proposal.353

The third option for administrative employees was the blanket small-bank exclusion: “in case of an institution, not having more than seven...employees whose duties are so varied that they involve a combination of work of the same character as that performed by all other employees in the institution[ ].”354 Wiggins, maintaining that the average employee in such small banks “is almost everything from the janitor on up to the president,” admitted under Stein’s questioning that this proposal would “exempt practically all employees” in such banks.355

Finally, the professional exclusion—which Wiggins conceded trying to broaden and was illustrated by office counsel, tax consultants, auditors, accountants, private secretaries356—also consisted of three alternative sub-parts. The
first tracked the existing requirement that the employee performed duties requiring “special qualifications based on educational [sic] training or experience in a recognized field of knowledge as opposed to routine, [sic] mental, manual, mechanical or physical work.” Claiming that “many of the most important, most valuable, and most highly paid employees” in banks occupied “a technical position as a secretarial assistant,” Wiggins submitted as the second option a primary duty to act as secretarial assistant to an executive or administrative employee. And the third professional sub-specialty entailed a primary duty to act as consultant, advisor or even executive assistant. Once again, he offered no empirical support for this eccentric terminology, which he called “an interpretation of reason and common sense.”

Wiggins expressed the hope that no one would believe that bankers lacked sympathy for “wage earners who have worked or have had to work the long hours of employment”—as if bank employees never had to do so. Instead, he stressed that it was precisely “the very exemption” that the ABA was seeking that would give bank workers “an opportunity to use their time productively in preparing themselves for advancement....” By this locution Wiggins meant, as was shown by individual bankers’ testimony, that “if that little group or upper middle group of employees are required to operate on an hourly basis...they will be denied many of the opportunities to spend time...learning the operations in other departments of the bank, and that it will handicap their men, hold them down to the dead level of their existing employment....” The banks, in other words, wished to continue training their future executive, administrative, and professional employees, but without paying for overtime work involved.

With his accustomed bluntness, the SSIC’s counsel, J. Ballew, who followed the ABA witnesses with his own presentation on banking, anecdotally conceded this very point: A cashier had told him of “an unusually bright boy who was quite anxious to get forward in the banking business....” One day, “along about four o’clock in the afternoon, after the bank had closed and after this young fellow was supposed to be gone, the cashier went into the Discount Department...and lo and behold there he was working. He asked him, ‘What in the world are you doing here?’ ‘Well, he says, I am just learning something about the Discount Department.’ And he said, ‘It’s just too bad, but you can’t learn it at time and a half.’ So he had to send him home.” To be sure, Ballew undermined his client’s position by letting it slip out that the employee was not just learning, but also “working.”

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357 See “1940 WHD Hearings Transcript” at 22-23 (July 9).
358 See “1940 WHD Hearings Transcript” at 24 (July 9).
359 See “1940 WHD Hearings Transcript” at 24-26 (July 9). See also id. at 47 (Addison).
360 See “1940 WHD Hearings Transcript” at 200 (July 10).
An Ohio banker revealed that the employee's preference for security was being held hostage to the bank's demand for unpaid overtime, while any conversion to an hourly wage rate might possibly "redound to the disadvantage of the employee," as much as the bank did not like to see it happen:

[T]he employee likes to know that his salary is set at so much per year and that he is definitely assured of that much compensation provided he behaves himself and does his work satisfactorily. If he does, it is our practice...to increase salaries in accordance with the employee's willingness, his initiative, his ambition to get ahead.

One more thing...: I happen to be of the old school...and we always felt that we learned more about the banking business after the bank closed than we did while it was open. That being the time when we can learn the job ahead of us, feeling that some time when it was time for promotion, if we worked hard enough and put in enough hours to learn this job that we would have chance in the future. ... We have endeavored to shorten hours as a matter of giving people more time for advancement in other things. Nevertheless, ours is a business.... Unless that employee has the...time to learn that job, in all likelihood when the time for promotion comes, he may not be fitted for it...because of not having the opportunity to apply himself to learn that job.

Stein was fully aware of the impact of the ABA's strategy: he elicited an unembellished "Yes" from Wiggins when he asked whether the effect of his proposals was to exempt so many people under the new administrative definition that the definition of "executive" was "ornamental rather than practical." The bankers' argument, though not expressed as brutally as the newspaper publishers', boiled down to the point that there was a limit to how much profit they were willing to yield to labor and that that limit had already been reached; consequently, if the state imposed additional wage costs in the form of time and a half, banks would eliminate such non-mandatory 'benefits' as paid vacations and sick leave, hospitalization and life insurance, and freedom to "leave early for a baseball game, or a football game, or hunting season, or things like that...without any deduction from pay." As the president of a Ohio bank put it: "If this comes to the point where we have to pay too much overtime, it would add a charge against our

361 "1940 WHD Hearings Transcript" at 137-38 (July 9) (Cook).
362 "1940 WHD Hearings Transcript" at 31 (July 9).
363 See below this chapter.
364 "1940 WHD Hearings Transcript" at 8, 32-33 (July 9) (Wiggins). See also id. at 48 (Addison).
365 "1940 WHD Hearings Transcript" at 132 (July 9) (H. E. Cook, president, Second National Bank of Bucyrus, OH).
earnings which is likely to become burdensome."366 Moreover, bankers contended that when confronted with this alternative, their employees had opposed FLSA coverage. A banker testifying on behalf of the SSIC candidly expressed both the threat and the acquiescence: “The necessity of compliance with the provision of the law effective in October, limiting the hours of work to a maximum of 40, will make it impossible to continue the granting of extra days leave without deduction from annual vacation and the allowance of sick leave with pay. It is the unanimous preference of all bank employees to continue the present merit system under which salaries and bonuses are based upon the value of services rendered and annual earnings.”367

Indeed, even in the absence of such threats, for example, a $4,500-a-year trust assistant, after the First National Bank of Chicago had told him that it had to pay him $21 in overtime for having worked until 11 p.m., “was almost insulted. He did not want to be classed as an hourly employee. We finally compromised...by sending him home early the next day.”368 Indeed, the same bank official testified that “our morale would be shattered” if it put everyone on an hourly basis, whereas employees who would be exempt under the ABA proposal “would be quite happy about it” because an employee earning $2,000 or over “has a little pride and he does not feel that he should be compelled to sign in and out...or use a time clock. He is thinking of his friends on the outside of the bank. He feels that he is just a little bit better than some of the others.”369 One banker—who started out all employees at a monthly salary of $50 (which was below the minimum wage)—went so far as to assert that his employees, who did not like working under the FLSA, had said to him: “‘Mr. Brown, you are going down to Washington to this hearing, and we hope to goodness that something can be done whereby...we will not have to continue working under the Wage and Hour Law.’”370 Nor was Brown the only employer to claim to employ unalienated workers: “Quite a number of our so-called white-collar workers have objected very strenuously to the fact that if they have a job to do and it is going to take another 15 minutes to complete the job, they have to stop at five o’clock. They feel they are being put in the position

366 1940 WHD Hearings Transcript” at 133 (July 9) (H. E. Cook, president, Second National Bank of Bucyrus, OH).
367 1940 WHD Hearings Transcript” at 169 (July 9) (written statement of E. Otey, director for SSIC and president, First National Bank of Bluefield, WVA).
368 1940 WHD Hearings Transcript” at 62 (July 9) (C. Edgar Johnson, assistant vice president, First National Bank of Chicago).
369 1940 WHD Hearings Transcript” at 66, 68 (July 9) (Johnson).
370 1940 WHD Hearings Transcript” at 156, 157 (quote) (July 9) (H. Brown, executive vice president, Shenandoah Valley National Bank, Winchester VA).
of being clock punchers and they object to that very much. They have an interest in their work.\footnote{1940 WHD Hearings Transcript” at 88-89 (July 25) (A. Funke, secretary, Automatic Electric Co.). As a union official pointed out: “Certainly the employee will have no objection if he is permitted to work after five o’clock and be [sic] paid for it.” \textit{Id.} at 94.} 

Nevertheless, several bankers testified that it was not the time-and-a-half pay to which they objected,\footnote{E.g., “1940 WHD Hearings Transcript” at 116 (July 9) (H. Lee Huston, cashier, Columbus Junction State Bank, Iowa); \textit{Id.} at 99 (Foster), 136 (Cook).} but more intangible if not incoherently explained consequences of the overtime law.\footnote{One banker testified that “we are glad to pay” overtime, but that the law was “somewhat of a detriment to us...insofar as the cooperative effort which we have heretofore had and the lack of that which gradually is necessitated under the present operation.” Yet all that he meant was that before the FLSA “each staff member felt free to call upon someone who might be slightly junior to himself to assist him in taking care of additional work and that employee was glad to do it in order to learn that work and be in a position to be recommended for advancement.... At the present time, it is very difficult to do that because the staff members know that they are asking them to do something that they are really not permitted to do, since it is already necessary to put in a considerable amount of overtime.” Since no change took place after the FLSA went into effect except the requirement that overtime be paid, the only sense this statement made was that the bank preferred the pre-FLSA system when after-hours cooperation was free. \textit{“1940 WHD Hearings Transcript” at 72-73 (July 9) (Clay Stafford, cashier, Ames Trust and Savings Bank, Ames, IA).} } In spite of such complaints, however, at least one ABA banker disclosed that his bank had been able to comply with the law and structure its business—and would not have returned to its pre-FLSA schedule even if the law were repealed—so that on an annual payroll of more than $100,000, it had to pay only $95.42 in overtime.\footnote{1940 WHD Hearings Transcript” at 41, 53-54 (July 9) (Addison). Ironically, the First National Bank of Chicago official conceded that on the whole the FLSA had served a useful purpose by “ma[king] us sit up and take notice of our operations and cut a lot of corners. It has enabled us to eliminate help and cut down on help. We have purchased a lot more machinery.” \textit{Id.} at 68 (Johnson).}

The SSIC presented its own position on banking, which while purporting to support the ABA’s position,\footnote{“1940 WHD Hearings Transcript” at 177 (July 10) (Ballew).} was more radical because it both called for the exclusion of all bank employees receiving at least $1,800 a year, regardless of job duties, and openly rejected the ABA’s pretense of sympathy with the “general provisions of the Wage and Hour Law.”\footnote{1940 WHD Hearings Transcript” at 169, 171 (quote) (July 9) (Otey).} Nevertheless, addressing the FLSA’s
purposes, the SSIC asserted that: “Such a liberalization of the law with respect to banking institutions will not affect the number of employees, as additional personnel cannot be carried on a full time basis merely to meet unusual, infrequent and unpredictable peak periods.” Claiming as facts that there was “no available supply of trained persons for employment during peak seasons” and that “[s]pecialized employees can not be relieved by shift workers,” Ballew asserted that the overtime provision was “unreasonable and wholly illogical” as applied to all banks. Generalizing from the complaints voiced by employers at the hearings, Ballew insisted that interpreting the FLSA to cover any salaried employees had imposed an “unauthorized burden” on employer and employee. He then added opaquely: “The more this question is investigated, the more apparent becomes the intent of Congress in exempting administrative employees.”

After the bankers had presented all their testimony, stock brokers had their turn. As was the case under the NRA, they generally tracked the banks’ demands, “subscribing quite thoroughly...to almost everything the A.B.A. said”; indeed, the Association of Stock Exchange Firms’ proposed regulations were virtually identical to the bankers’—including the administrative employee exemption for public contact. The one area in which the brokers pressed harder—as they had seven years earlier too—was hours-averaging. Albert Clear, the chairman of the board of the New York Curb Partners Association and executive partner in Hirsch, Lilienthal & Company insisted that the brokerage business was unlike any other in the extent to which it was subject to unforeseen and extreme fluctuations

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377"1940 WHD Hearings Transcript" at 166-67 (July 9) (Otey). In contrast, the First National Bank of Chicago had claimed that: “We maintain a force to take care of a peak. The other two or three weeks in a month most of our employees are not kept busy.” Id. at 66-67.

378"1940 WHD Hearings Transcript" at 185, 186 (July 10).

379"1940 WHD Hearings Transcript" at 187 (July 10).

380See above ch. 7.

381"1940 WHD Hearings Transcript" at 209 (July 10) (Albert Clear, chairman of the board of the New York Curb Partners Association).

382"1940 WHD Hearings Transcript" at 234-43 (July 10). One difference was limiting the third administrative employee sub-definition to firms with five or fewer employees. Clear also complained that he could not make use of the administrative employee exemption for statisticians who were paid $450 to $750 a month, but who did not have the right to hire and fire: “Obviously, the act never intended that those statisticians were to get time and a half for overtime.” When Stein asked him whether he had examined the possibility they were professional employees, Clear said that he thought that they definitely were, but then added opaquely: “we don’t like to take any broad interpretation.” Id. at 216.
in volume: because each day's business had to be cleaned up entirely that day, it was necessary to maintain complete personnel at all times to cope with peak activity. Under these circumstances Clear deemed it not unreasonable to ask the WHD to consider the possibility of “leveling off the overtime work hours in any one month by allowing employees to take time off the succeeding month.”\textsuperscript{383} The stock brokers took solace from a newspaper article of April 29, 1940 stating that the House of Representatives had considered an amendment permitting “leveling off” during a 26-week period,\textsuperscript{384} although Clear was seemingly unaware of the bill’s definitive demise just a few days later.\textsuperscript{385} Complaining that they were unable to take advantage of “leveling off within the pay period” or even within the month because the rush might come in the last days of the month,\textsuperscript{386} Clear, who thought it “would be grand” if the House bill’s 26-week leveling-off period were acceptable, hoped that “the Board [sic] would consider...leveling off in the succeeding month”\textsuperscript{387}—a concession vis-à-vis the four-month hours-averaging that stock brokers had demanded and obtained under the NRA.\textsuperscript{388}

Like the bankers, “the brokerage fraternity” reported that its employees insisted that “they did not want any overtime” pay.\textsuperscript{389} But the brokers went the bankers one better by claiming that if, during a peak period, “you did walk in at ten or eleven o’clock at night, you would marvel at the esprit de corps. They really enjoy working; they are kidding a little bit. We don’t object to that. They enjoy working. It is hot work; it is nervous, energetic work and they are keyed up to the top.”\textsuperscript{390} Indeed, according to Clear, even their family members pitched in free of charge: “I have one statistician, believe it or not, who comes back to the office with his wife and she sits down and takes the dictation and types it. She is not in our employ, but she is doing it for him and they love it.”\textsuperscript{391}

\textsuperscript{383}“1940 WHD Hearings Transcript” at 203-204 (July 10).
\textsuperscript{384}“1940 WHD Hearings Transcript” at 204-205 (July 10). On the testimony in support of hours-averaging, see “Brokers Propose Labor-Act Change,” \textit{NYT}, July 12, 1940 (23:1).
\textsuperscript{385}See above ch. 10.
\textsuperscript{386}“1940 WHD Hearings Transcript” at 211 (July 10).
\textsuperscript{387}“1940 WHD Hearings Transcript” at 212 (July 10).
\textsuperscript{388}See above ch. 7.
\textsuperscript{389}“1940 WHD Hearings Transcript” at 207, 217 (July 10) (Clear). W. Peake, the secretary, Associated of Stock Exchange Firms, recalled that: “I have had employees call me on the telephone and say, why do I have to take overtime when my boss is losing money?” \textit{Id.} at 225.
\textsuperscript{390}“1940 WHD Hearings Transcript” at 210 (July 10) (Clear).
\textsuperscript{391}“1940 WHD Hearings Transcript” at 216 (July 10). Stein did not advise Clear that
Publication, Communication, Public Utility, and Transportation Industries

[M]any of the engineers bossed men, such as bricklayers and carpenters, who received double the salaries of the civil service men.

"The difference between a white collar and a flannel shirt does not make up for the difference in wages."392

[T]he present definitions are entirely adequate to take care of Clark Gable or anyone like that.... I don't think anyone contends that Clark Gable or any of those people are subject to the act.... After all, they themselves are in control of their bodily functions and that is one of the important things which an actor does.393

I had the case in the movie industry where some of the movie stars thought that they ought to get time and a half for overtime. They were getting fantastic salaries. I was almost inclined to give it to them because I had some doubt in my mind as to whether they were professionals or not. It seems to me that every word they spoke and every movement they made was dictated by somebody who told them how to say it and how to move.394

On July 25, J.H. Ballew of the SSIC, who had testified at the first three hearings as well, was the first witness in the last set of hearings, at the outset of which Stein announced that the WHA was "anxious to reach a determination on this somewhat complex problem at the earliest possible moment" and that it was because his firm was obviously suffering and permitting the employee’s wife to work for its benefit, she was in its employ for purposes of the FLSA.


393 Official Report of the Proceedings Before the Wage and Hour Division of the Department of Labor In the Matter of a Hearing on Proposed Amendments to Part 541 of Regulations with respect to the Definition of the Terms "Executive, Administrative, Professional...Outside Salesman" Issued under Section 13(a)(1) of the Fair Labor Standards Act, as They Affect Employees in Publication, Communication, Public Utility, Transportation, and Miscellaneous Industries, Washington, D.C., July 29, 1940, at 618-19 (George Bodle, lawyer representing movie industry employees) ("1940 WHD Hearings Transcript").

therefore “safe to assume” that such a final determination would be “published within a comparatively few weeks after the conclusion of this hearing.” Ballew immediately returned to the demand for the separation of administrative from executive employees. He insisted that Congress’s use of the term “administrative” clearly intended to exempt salaried office personnel, who formed “the channel through which the ‘executive’ exercises management of a business.” Here Ballew specifically mentioned that newspaper publishers had requested that employees doing non-production work “should collectively be classified as administrative and exempt....” He also disclosed that some employers, including book manufacturers and publishers, had proposed that if office and clerical workers were to be included, their hours should be averaged over 26 weeks or two six-month periods. Curiously, in spite of the SSIC’s long and documented history of intense hostility to the FLSA, Ballew added the organization’s voice to that of industry generally supporting the statute’s purpose of preventing “the chiseler and sweat-shop operator from further exploitation of their employees.”

At this point Stein intervened to ask Ballew whether professional employees were salaried “‘white collar’ persons. When Ballew said yes and mentioned draftsmen and freight experts as examples, Stein asked why, if he felt that executive and administrative employees covered the whole group of salaried white-collar workers, there was any advantage or necessity of having “professional” in section 13. The remarkable epistemological humility that the reactionary Ballew displayed would soon enough become unimaginable among triumphant employers who no longer had to fight for exemptions, the legitimacy of which had become so entrenched that no one questioned them:

Well, I don’t know. ... Now just what may have actuated the Congress in including all those terms I am unable to say. I can appreciate the fact that it probably places a greater burden on the Administrator in trying to find out what all of these varied terms may mean. Probably a simpler term would have embraced them all within one term.

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395 “1940 WHD Hearings Transcript” at 5 (July 25).
396 For a brief wire service account of the first day’s proceedings, see “Asked to Limit Executive,” NYT July 26, 1940 (20:3).
397 “1940 WHD Hearings Transcript” at 9 (July 25).
398 “1940 WHD Hearings Transcript” at 13 (July 25).
399 “1940 WHD Hearings Transcript” at 16 (July 25). See also “1940 WHD Hearings Transcript” at 252 (July 26) (statement of J. Raymond Tiffany, Book Manufacturers Institute).
400 “1940 WHD Hearings Transcript” at 17 (July 25).
401 “1940 WHD Hearings Transcript” at 19 (July 25).
Stein then proceeded to pose several pointed questions to Ballew on positions that he had taken on behalf of the SSIC. Since Ballew had stated that salaried white-collar workers should be excluded if they were paid well above the statutory minimum, Stein wanted to know whether he considered the $14 a week he had seen in advertisements for typists in *The New York Times* to constitute such a minimum. When Ballew said no, Stein was quick to point out that the SSIC’s proposal would nevertheless exempt typists. Trapped, Ballew had to backtrack, conceding that “while we had suggested no salary limit, I think in order to curb certain practices and certain activities which we are all bound to admit do obtain in some quarters, it might be necessary that a provision of that kind be enacted.”

To be sure, the sum that he then mentioned (“something around $100.00”) as “well above the minimum” was also well below the already existing regulatory salary level of $30 a week. Since Ballew had included paid vacations as an indicator of exempt white-collar status, Stein, mentioning that he had also recently read in the newspaper that General Motors Corporation had announced that it would soon give one week of paid vacation to all employees, including production workers, after one year and two weeks after five years (adding that other companies such as United States Rubber did too), asked whether that practice was “any adequate indication of the propriety of including them within the group of executive or administrative employees...” Again, having painted himself into a corner, Ballew was constrained to admit that such a criterion was insufficient as a distinguishing characteristic, thus undermining the integrity of the Cox-SSIC proposal.

Surprisingly, one of the hearings’ most productive discussions centered on the relatively high-paid Hollywood motion picture industry, in which—as Stein pointed out in teasing Ballew, who had proposed monthly salaries as an absolute criterion for white-collar exemptions—both Greta Garbo and the highest-paid producer were paid on a weekly basis. The Motion Picture Producers and Distributors of America, which had been founded in 1922 to deal with the threat of censorship, was represented by Homer Mitchell, an attorney with the oldest Los Angeles law firm of O’Melveny and Myers, who two years earlier had defended Mackay Radio & Telegraph Company in a U.S. Supreme Court case, from which derives the still crucially important labor relations rule that it is lawful for employers permanently to replace striking employees. The producers’ testimony

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402“1940 WHD Hearings Transcript” at 20 (July 25).
403“1940 WHD Hearings Transcript” at 24 (July 25).
404“1940 WHD Hearings Transcript” at 23 (July 25).
405“1940 WHD Hearings Transcript” at 24 (July 25).
was crucial because it was apparently instrumental in persuading Stein to revise the
definition of "professional" employee to provide for the exclusion of non-learned
artists.408

Mitchell reported that of the studios' annual average of 18,541 employees,
13,153 were covered by the overtime provision of the FLSA, 832 were indisput­
able exempt, and 4,556 were considered exempt by the employers, but their status
might be disputed. Among this huge number of employees whom the studios
wanted excluded were actors, directors, writers, camera men, chemists, make-up
artists, electrical, mechanical, and sound engineers, musicians, and interior decor­
ators.409 In seeking to ground Congress's definitions, Mitchell thought it necessary
to "consider the purpose of the Act," which, he agreed with the SSIC, was "to take
care of labor conditions" in the sense of "the maintenance of a minimum standard
of living...." Joining the widespread employer campaign to limit overtime pay to
minimum wage workers and the minimum wage, he reminded the audience that
"[t]hroughout" the congressional debates, "the emphasis was placed upon the
sweated workers or the little fellow who couldn't take care of himself." Against
this background, the movie studios wanted the statutory term "professional"
defined "in such a way that that purpose will be carried out."410 In particular, they

408 The studios proposed adding a sub-category for those whose work was "largely
original or creative in character and of which the result depends upon the conception,
invention, imagination or genius of the employee...." "1940 WHD Hearings Transcript"
at 56-57 (July 25).

409 "1940 WHD Hearings Transcript" at 27-29 (July 25). While the hearings were in
progress the WHD had initiated a study of job classifications in the motion picture
industry, "one of the highest paying industries in America," to determine which jobs fell
within the excluded white-collar categories. US DOL, WHD, Press Release: Wage-Hour
Study of Hollywood Jobs Announced (R-772, May 12, 1940) (copy furnished by Wirtz
Labor Library, US DOL). The survey began on May 8, 1940 and resulted in a report and
a classification: US DOL, WHD, "An Exemptions Survey of the Motion Picture Industry:
A Report of Eldred M. Cocking, Special Survey Analyst" (Jan. 30, 1941); US DOL,
WHD, Manual of Motion Picture Job Classifications (Feb. 1941). The WHD classified
545 occupations: "The classification scheme furnished the basis for a voluntary industry­
After the employers and unions had objected to 29 of them, the WHD held a hearing from
March 25 to 28, 1941 before the Director of Hearings Branch, Merle Vincent (who was
Stein's direct supervisor), who issued findings and recommendations on them. US DOL,
WHD, "Findings and Recommendations of the Presiding Officer on the Objections Filed
to the Survey Analyst's Recommendation of Job Classifications in the Motion Picture
Industry" (May 26, 1941).

410 "1940 WHD Hearings Transcript" at 31 (July 25).
were dissatisfied with the existing definition's requirement that the professional employee's work be based on "educational training in a specially organized body of knowledge." Their dissatisfaction was triggered by potential overtime liability regarding such highly paid employees as actors, writers, directors, sketch artists, and film editors, who typically did not undergo formal school training and thus could not meet the definition, whose scope was, in Mitchell's view, arguably limited to theology, law, medicine, and perhaps engineering.

The movie producers were equally insistent on undoing what they regarded as the WHA's having rendered either "executive" or "administrative" superfluous. Its preference was that the latter be defined to mean ""the staff of an executive"" and to include "all key people. The staff is a body of assistants who carry into effect the plans of a superintendent or management." Mitchell contended that there was "much basis" for this distinction, including the WHD itself, which he said was an administrative board within the executive department of the federal government. As applied to the movie industry, "administrative people" were under and "a lesser kind of person than the executive." Mitchell, arguing that it was "a well recognized use of the term, particularly under modern conditions," was serendipitously able to cite that morning's newspaper account of the Senate Military Affairs Committee's talking about exempting from the impending draft certain "'key workers,'" including executive branch officers, who were "'policy making officials and not those with purely administrative functions.'" Unimpressed by the lesson in current events—which Mitchell had garbled in the re-telling in the studios' favor—Stein deflated Mitchell's lexicographic balloon by slyly pointing to the messy interwovenness of the two statutory terms: "I rather assume that included in the group of executive officials is the person who bears the title of 'Administrator of the Wage and Hour Division'?") Apparently unprepared for this semantic riposte, the Stanford Law School graduate could summon only a temporizing "Perhaps so," following it up with the evasive: "There's a way of differentiating

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411"1940 WHD Hearings Transcript" at 31-36 (July 25).
412"1940 WHD Hearings Transcript" at 39-40 (July 25).
413Mitchell was quoting from John Norris, "Draft to Skip Men with Dependents," WP, July 25, 1940 (1:5), which nowhere used the term "key workers" in the text but only as an editorially inserted sub-head. Moreover, the article did not attribute the sentence that Mitchell quoted to anyone, merely stating that "'it was said.'" Finally, the Senate Military Affairs Committee had completed its hearings on the draft two weeks earlier and the newspaper quoted its chairman, Senator Sheppard, without indicating where or when he had made the comments. When the committee issued its report 10 days later, it contained no such discussion of the distinction between executive and administrative employees. Compulsory Military Training and Service (S. Rep. No. 2002, 76th Cong., 3d Sess., Aug. 5, 1940).
if you qualify executive officials as being policy making people, executives, and administrative people those lesser people, excluding the policy-making people.414

But since Congress had empowered the Wage and Hour Administrator to formulate the very definition and policy that Mitchell’s client was petitioning him to revise, Mitchell failed to deal with the problem for statutory construction of the undeniably considerable overlap between the two terms in everyday usage.

After vainly trying to compensate for this faux pas by administering an irrelevant mini-Latin lesson to Stein (the former Latin teacher), Mitchell proceeded to enumerate and illustrate the many non-boss employees whom the studios wanted classified as administrative. These “key people” were “not workers in the ordinary sense of the word at all, labor workers I mean or white-collar low-paid workers...."415 One sub-category consisted of “first lieutenants”—those whose primary duty was regularly and directly assisting an executive or administrative employee and customarily and regularly exercised discretion and independent judgment and whose weekly salaries ranged between $50 and $500.416 The other sub-category of non-managers executed “special assignments” requiring discretion and judgment, but their manner of performance was not supervised. This heterogeneous group, including location auditors and outside buyers, was paid $74 to $104 a week.417 However, “the most important” sub-category, the one that was peculiar to the movie industry and “exceedingly necessary for us to have exempted,” was the “key employees on the shooting group...that must stay with the troop from the time it starts in the morning until the time is stops at night.”418 These workers, who ranged from script girl at $58 to first camera man at $348, and also included hairdressers and make-up artists, worked six days a week and as many as 60 hours; it was allegedly impossible to interrupt the shooting troop’s work, which could not be stopped after eight or 40 hours, but had to be finished regardless of how long it took, inter alia, because space limitations required sets to be dismantled prompt-

414“1940 WHD Hearings Transcript” at 40 (July 25).
415“1940 WHD Hearings Transcript” at 42-43 (July 25). Although the studios focused on getting excluded “key people, responsible people, who don’t direct other employees, unless you call direction of his secretary as being the direction of others,” ironically it also proposed as a subgroup of administrative employees those “whose primary duty is to manage, direct, or superintend any group of employees,” thus eliminating the requirement of management of an establishment or a customarily recognized department thereof. Id. at 42, 47.
416“1940 WHD Hearings Transcript” at 47-50 (July 25).
417“1940 WHD Hearings Transcript” at 50-52 (July 25). These sums were merely those mentioned by Mitchell and did not necessarily encompass the full range.
418“1940 WHD Hearings Transcript” at 52 (July 25).
Mitchell claimed that it was "simply impractical" in the middle of a scene to replace any of these workers, who in any event knew that their job meant "long hours and pay commensurate with those long hours." Interestingly, however, the employers did not ask to exempt non-key people in the shooting troop, whose much lower pay gave rise to much lower overtime liability.419

The sense that only money was at stake, after all, was reinforced by Mitchell’s comments about $96-a-week executive secretaries: "When we pay people that kind of pay, we do it because they earn that pay; we don’t feel they are subject to the Act. They have really got to stay with the important people and perform their important duties. It would be a hardship to treat them as an ordinary worker. I don’t think Congress intended to require us to treat $96.00-a-week persons who exercise discretion as 40-hour-a-week people."420 If not monetary, the "hardship" could apparently only have been ideological: Mitchell did not know why the more than 5,000 employees the studios wanted excluded from overtime pay were "an awfully large number" since the FLSA was intended to bargain for the non-organized little people who could not bargain for themselves. To be sure, he was constrained to admit that "the language used in the Act exceeds that scope, but that is the thought which Congress had in mind as evidenced by the debates and reports...."421

419"1940 WHD Hearings Transcript" at 53-59 (quotes at 55, 57) (July 25). At the end of his prepared remarks, Mitchell revealed that the studios were also eager to broaden the administrative shooting troop sub-category to encompass manual workers: "If that wage qualification could be sufficiently high so that these people who are obviously responsible people, carrying out the will of the executive in something more than the way of the ordinary worker, whether they be white-collar or not white-collar worker, these key responsible people could be exempt." Id. at 60. Mitchell appeared to be using the term "key-men" differently than the Motion Picture Industry Code of Fair Competition, where it was synonymous with "stand-by." The code excluded from the 40-hour week "employees engaged directly in production work whose working time must necessarily follow that of a production unit, including art directors; assistant directors; cameramen and assistants; company wardrobe men (women) and assistants; costume designers; draftsmen; make-up artists and hairdressers; optical experts; positive cutters and assistants; process projectionists; script clerks; set dressers; ‘stand-by’ or ‘key-men’; sound mixers; sound recorders; wardrobe fitters...." Those among these employees who were employed on an hourly or daily basis with overtime pay "shall at the conclusion of any single production be given a full day off without pay for each...6...hours of work in excess of a...3 6...hour weekly average during the production.” Code No. 124: Motion Picture Industry (Nov. 27, 1933), Art. IV, § 1(d)(2) and (e)(1), in NRA, Codes of Fair Competition, 3:215-257, at 224-25 (1934).

420"1940 WHD Hearings Transcript" at 66 (July 25).

421"1940 WHD Hearings Transcript" at 76-77 (July 25).
long been a nationally important figure in labor law and was the AFL’s chief legal counsel—followed up by asking Mitchell whether Congress intended to eliminate excessive hours by placing a limit on them and eliminate unemployment by making it worthwhile for employers to employ more people rather than paying overtime, Mitchell denied it with respect to professional employees (including make-up artists) and “parts of the management key people....” Whether he was a self-deluded advocate or merely bluffing, he declared in the teeth of a totally barren legislative history: “Congress didn’t intend, I am quite sure by reading the debates, ever to include those people under the Act at all.”

Unwilling to let Mitchell evade the fundamental question, Stein enveloped it in a long preamble and then put it to him bluntly:

Fairly consistently throughout these hearings it has been urged that maximum hours limitations are unsuitable for a large group of higher paid workers whose work is said to be of an administrative nature because they are supposed to do a job and not worry about hours, and the Company is anxious to have them work along when a job happens to open up before them and they happen to have creative ideas about their work and in thinking about the future of the employer, and at other times when the work is light they correspondingly are excused from putting in full time. It is urged that with these workers, the workers themselves in many instances prefer not to have to worry about whether 40 hours has been completed or not. It is urged that they do better work if they can forget that consideration entirely and that, as a matter of fact, payment of overtime tends to make them do worse work, not better. I wonder if the same consideration would apply...to such people as the [$123 a week] second cameraman. Do you think his work would fall off in quality if he were paid overtime for hours above 40?

Cornered, Mitchell had to admit that the only problem was the additional cost: “It is a question of whether Congress intended to put a penalty on us when we employ a key person like that. Of course, it is possible to pay everybody overtime, I suppose, but if you are going to draw a line somewhere, as you are and must under the Act, it seems to me a reasonable place to draw it would be as between workers and administrative or key people.” Ultimately Mitchell confessed to

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422The British-born Padway had been a Progressive and a Socialist in Wisconsin, where he had also served as a state senator; he was the AFL’s general counsel from 1938 until his death in 1947. http://www.uwm.edu/Library/arch/findaids/mss006.htm. On being informed that Hollywood writers’ average wage was over $500 a week, Padway joked that “I might take up writing.” “1940 WHD Hearings Transcript” at 79 (July 25).

423“1940 WHD Hearings Transcript” at 79-80 (July 25).

424“1940 WHD Hearings Transcript” at 83 (July 25).

425“1940 WHD Hearings Transcript” at 83-84 (July 25).
being unable to explain to Stein what exactly "key" meant and eventually Stein dismissed the whole request for the incoherent key group exclusion, which boiled down to the studios' demand to be entitled to buy their way out of hours regulation without having to pay for overtime: "[I]f we are willing to pay people big wages for work that we regard as warranting those big wages and being work of an essential nature. There are projects where we feel that a limitation on hours is impractical." Following this tour of the Hollywood movie industry, Stein was introduced to a wholly different world-view by the testimony of the Federation of Architects, Engineers, Chemists and Technicians, which at the time claimed a dues-paying membership of 8,000 in addition to 7,000 others who regarded the FAECT as its bargaining agency. This radical left-wing union, a forerunner of which had been expelled from the AFL, was formed in 1933 and affiliated in 1937 with the CIO, which enabled it to organize technical workers across industry in cooperation with the CIO's industrial unions. After reporting that the annual earnings of technical workers in the publication and other industries under study at this set of hearings ranged between $1,400 and $4,500, with 70 percent earning an average of $1,800, and that their job tenure was no more secure than that of other production workers, Morris Zeitlin, an architect and chairman of the FAECT legislative committee, bluntly expressed the union's disapproval to the WHD for having called the hearings without sufficient cause. After all, employers, which had failed to show that the law had imposed any undue hardship on them, had proposed redefinitions in an effort "arbitrarily" to exclude hundreds of thousands of technical and other workers. This "convenient method of emasculating the Act...by mere administrative interpretation" was, the FAECT charged a tad melodramatically, "contrary to the principles of a democratic government." Although it was employers' "privilege" to lobby Congress to amend the law, they had already tried and failed to do so: even the 76th Congress, which was "predominantly conservative in its attitude to labor, had, in refusing to pass the

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426U.S. DOL, WHD, "Executive, Administrative, Professional...Outside Salesman" Redefined: Effective October 24, 1940: Report and Recommendations of the Presiding Officer at Hearings Preliminary to Redefinition 29 ([Oct. 10,] 1940) (Stein Report).
427"1940 WHD Hearings Transcript" at 86 (July 25).
430"1940 WHD Hearings Transcript" at 144 (July 25).
Barden and Norton amendments, which would have excluded various categories of workers, "reaffirmed the original intent" of the FLSA. This clear political failure in the legislature had made it even more the case that employers had "no business" trying to change the spirit of the law administratively.\textsuperscript{431}

Echoing the claim made by CIO president John L. Lewis on July 15 that the WHA's apparent intention was to grant exemptions to employers which Congress had recently defeated, thus depriving them of any justification,\textsuperscript{432} and adding the accusation of collusion, Zeitlin demanded an "unequivocal" explanation from the WHD as to whether the construction magazine \textit{Engineering News-Record} had received information from the agency enabling it to state just a week earlier that the FLSA amendments had been understood to have been dropped on the understanding that the law's administration would be modified. Absent a denial, the WHD could not "avoid the charge of partiality and...of deliberately using a government agency for the purpose of devising legal means whereby employers may secure evasion of those specific legislative enactments which" the WHD was "pledged to uphold and enforce...."\textsuperscript{433} Apparently more amused (or mellow) than he had been in April, when he had sharply rebuked Lewis Merritt of the UOPWA for having launched a related attack, Stein waited until Zeitlin had completed his testimony before engaging in an act of Christian humility by loving his enemy: "Not for the first time today I shall refrain from commenting on the alleged crimes and misdemeanors of the Wage and Hour Division. I merely turn my left cheek."\textsuperscript{434}

Turning to the substance of his thesis, Zeitlin called attention to the disparate dictionary definitions of "professional," running the gamut from a lawyer, physician, architect, engineer, or dentist in private practice, to the antonym of "amateur," to any vocation including street-cleaning and juggling. He was, therefore, not meting out special criticism to employers by observing that their proposed definitions "cannot be but arbitrary one-sided, and totally devoid of any virtues of absolute definition." It was not any nefarious political goals that generated this characteristic. On the contrary: "any definition of the term "professional"...must

\textsuperscript{431}"1940 WHD Hearings Transcript" at 145-46 (July 25). The Communist Party newspaper reported FAECT vice president Marcel Scherer as having made exactly the same charges in a letter to WHA Fleming the previous day. "Technicians Hit Move of Pay-Hour Administrator," \textit{DW}, July 25, 1940 (3:4-5).

\textsuperscript{432}"1940 WHD Hearings Transcript" at 154 (July 25). For the text of Lewis's letter calling on all CIO unions to fight the regulatory revisions, see "Guard Against Moves to Scuttle Wage Act--Lewis," \textit{DW}, July 27, 1940 (5:6-8).

\textsuperscript{433}"1940 WHD Hearings Transcript" at 147 (July 25).

\textsuperscript{434}"1940 WHD Hearings Transcript" at 155 (July 25).
be necessarily arbitrary, for there is no absolute definition of this term." Moreover, the union acknowledged that the WHD itself "was and had to be arbitrary when it defined the term 'bona fide professional' in the absence of such definition by the Congress in the Act itself." The only limitation on such interpretive arbitrariness that the FAECT could discern was the necessity of being "guided by the spirit of the Law itself in order not to be abstract or academic." 435

Oddly, however, instead of illuminating the FLSA's spirit—a difficult task in the light of the barren legislative history 436—the FAECT had recourse to a totally different statute that Congress had happened to enact a month before the hearing. Taking its cue from this Act to Expedite Naval Shipbuilding 437 the union contended that the WHD "must be guided by the distinction made by Congress recently between the term 'professional' and the term 'bona fide professional'" in the FLSA. In particular, Zeitlin pointed out that the new law conditioned the employment of "professional and sub-professional employees" beyond eight hours a day or 40 a week on the payment of time and a half. Those terms, in turn, were taken from the Classification Act of 1923 (governing federal civil service employees), under which Congress designated as engaged in the professional and scientific service those classes, with salaries extending from $1,860 to $6,000, whose duties ranged from "the routine application of scientific principles to supervision of large technical projects." The sub-professional group was yet "another example of arbitrary definition" lacking a "clear line of demarcation" because the duties and salaries of its upper grades overlapped with those of professionals' lower grades. Regardless of this definitional arbitrariness, the FAECT drew the conclusion that if government employees were entitled to overtime pay, so should workers in private industry, "where the working conditions, security, wages and hours of the so-called 'professionals' are a great deal below the government's standards." 438 Conveniently, Zeitlin suppressed the crucial fact—of which he could not have been unaware since unions were vigorously lobbying against it and he himself had just attended the FAECT national convention in June, which adopted a resolution on the matter 439—that Congress had granted govern-

435 "1940 WHD Hearings Transcript" at 148-49 (July 25).
436 See above ch. 9.
437 For a full discussion of the law, see below ch. 19.
438 "1940 WHD Hearings Transcript" at 149-51 (July 25). Zeitlin erroneously used the salaries from the 1923 act, which had been superseded by amended enactments in 1928 and 1930, raising the lowest professional-grade salary to $2,000; similarly, the salary of the highest grade amounted to $9,000.
439 The resolution demanded that all overtime work in government service be paid at "one and one half times the actual annual wage (which for annual employees is defined to
ment workers an inferior overtime regulation by calculating their time and a half on the basis of a daily wage depressed by the fiction that they worked 360 days a year.  

The union’s use of the naval shipbuilding law as a model for the FLSA was ironic since the former’s chief sponsor and House floor manager had identified it as patterned after the FLSA. Undeterred by this circularity, Zeitlin made the empirically unfounded and incoherent argument that in using the term “bona fide professional," Congress had gone “out of its way to demonstrate that...it did not mean to use it as it is commonly and variously accepted.” If Zeitlin meant the 75th Congress that enacted the FLSA in 1937-38, the legislative history definitively revealed that if Congress went out of its way to do anything, it was to leave not the slightest trace of what it intended; if he meant the then sitting 76th Congress that passed the naval shipbuilding act, the legislative history at best suggested that Congress thought it was emulating, not surpassing, the FLSA. Untroubled by these facts, Zeitlin asserted that Congress had “definitely made a distinction between the two terms in that what it called ‘professional employees’ in the Classification Act of 1923 it granted an 8-hour day, 40-hour week and overtime pay..., but it exempted ‘bona fide professional’ employees....” From this entirely contrived point of departure, the FAECT concluded that the WHD should interpret “bona fide professional” employees “as professionals other than those listed in the categories of ‘professional and scientific service’ in the Classification Act...when Congress chose to grant benefits similar” to those under the FLSA.

Curiously, when Zeitlin finally proposed an interpretation of the scope of Congress’s exempt “bona fide professional employees,” he chose a definition more suitable to self-employeds rather than employees, virtually all of whom would therefore have been entitled to overtime coverage. It included anyone employed: (1) in a consulting capacity on fee as opposed to a wage or salary basis; (2) as “a

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440See below ch. 19.

441See below ch. 19. Zeitlin also introduced a resolution adopted on July 21 by the FAECT’s National Conference of Civil Service Division declaring that since the naval law provided time-and-a-half pay for professional and sub-professional employees, “thus recognizing the principle of maximum hours and overtime pay for technical workers,” the WHA should maintain the existing FLSA interpretation so as to include already covered technical employees. “1940 WHD Hearings Transcript” at 165 (July 25).

442“1940 WHD Hearings Transcript” at 152-53 (July 25).
specialist engaged on a contract basis for the execution of a specific technical project...as distinguished from one...hired as one of a regular staff to carry on day to day technical work; (3) "[u]nder no supervision by the employer or client as opposed to general supervision or instruction by employer or his agent."443

Surprisingly, despite this radical proposal, the torrent of political criticism that Zeitlin had directed at the WHD, and the lengthy discussion of the problems associated with even politically neutral, but inevitably and inherently arbitrary definitions, he disclosed that the existing definition of “professional” did not exclude any member of or anyone eligible for membership in the FAECT. Consequently, because the definition “lives up to the spirit” of the FLSA by not “discriminat[ing] against the overwhelming majority of wage earners in our occupations,” the union supported and opposed any “tinkering” with it.444 Zeitlin then closed his remarks with what was perhaps the hearings’ most far-reaching plea for extension of coverage—apart from his aforementioned definition excluding only the self-employed—although even he implicitly drew the limit at wages above those of skilled workers:

[I]f amendments are to be made they should be directed toward inclusion of more skilled and higher salaried employees. For they too are wage earners and subject to all the abuses, insecurity, long hours and unemployment as are all other wage earners, and although their hourly or weekly rates may be higher and their talents, knowledge and skill place them in supervisory positions, under general administrative instruction, their annual earnings do not exceed that of the average skilled worker. We maintain that talent, ingenuity and skill of the workers in the technical fields must not be penalized by the arbitrary wishes of the employers and their organizations to whom the expense of technical and professional labor is a mere drop in the bucket compared with their general production costs, especially since the profits derived from the labor of these men far exceeds the compensation and treatment employees themselves receive.445

In terms of intellectual integrity, the hearings arguably descended to their lowest point the following day, July 26,446 when Carl Ackerman, the dean of the

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443"1940 WHD Hearings Transcript” at 152 (July 25). Unfortunately, Zeitlin neglected to indicate whether the three sub-parts were disjunctive or conjunctive.
444"1940 WHD Hearings Transcript” at 153 (July 25).
445"1940 WHD Hearings Transcript” at 153 (July 25).
446Unsurprisingly, the press covered this hearing more extensively than the others; the following pieces were typical in their uncritical reporting of publishers’ outlandish testimony: “Publishers Seek Wage Act Test,” JC, July 27, 1940 (5:2); “Rate Journalism as a Profession,” NYT, July 27, 1940 (7:5); “Ackerman Warns of Control,” NYT, July 27, 1940 (7:5); “Profession’ Class Urged for Press,” WP, July 27, 1940 (3:1). But see “Wage Hour
Columbia Journalism School, secretary of the advisory board administering the Pulitzer Prize, former public relations business owner, former assistant to the president of General Motors, the foremost journalism educator of his day, and a leading opponent of the subjection of the newspaper industry to the NIRA, testified that a narrow interpretation of the regulatory definition of "professional" employee might endanger the development and advancement of the profession of journalism—which he characterized as ""the chief agency of our present civilization for the advancement of human relations""—and thereby affect the independent public service of the press. Indeed, he went so far as to assert that administration of the FLSA might even "possibly destroy the profession of journalism as an intellectual pursuit of free men and women. By a narrow and rigid interpretation and administration the federal government may bring such pressure to bear upon publishers and editors as to prevent the press from performing one of its most essential public services, namely, the exposing of corruption in government."

Because, according to Ackerman, the federal government had had "nothing whatsoever to do with the development of the profession of journalism" since the ratification of the first ten amendments to the constitution, the WHD's regulation governing the status of professional employees under the FLSA marked "the intrusion of the government in the field of liberty inasmuch as the government...seeks to define the status of journalists in such a way as to deny them professional standing." Instead of explaining the basis for this curious claim of unprecedentedness despite the fact that precisely the same struggle had raged under the NRA, the former vice president of the Institute of American Business proceeded to disembody the profession of journalism of its subordination to profit-making firms and to reduce it to "community service." Having shorn reporters of their capitalist employers, Ackerman set out to preserve them from state serfdom and communities from being "enslaved by corrupt officials":

Law Meaning Debated," GR, Aug. 1, 1940 (3:1-5). As part of a broad legal strategy, the next day a newspaper publisher filed suit to test the application of the FLSA to newspaper employees, alleging that regulation of wages and hours was not within Congress's power. "Newspaper Starts Test of Wages, Hours Measure," JC, July 28, 1940 (5:7):
In order to safeguard the community services of journalism the Wage and Hour Act must recognize community conditions, otherwise the journalist will become, in effect, an agent of the federal government, subject to control or possible intimidation. For example, there are many communities in the United States where reporters and editors are literally employed at all hours. They may actually work in an office 8 hours each day but as they walk or ride home they meet citizens with news or they become observers of news events. Like the local physician they are always on the job and their work is essential to the community public service.454

After having listened to much more of these fanciful encomia and panegyrics, even Stein lost his patience, if not his civility, and finally asked Ackerman whether "you could spell out a little more precisely the way in which you feel that an improper definition in Section 541.2 of our regulations might affect that very necessary activity ["exposing corruption in government"] on the part of the press."455 Ackerman—who had earlier shed some indirect light on his poorly hidden agenda of saving publishers from being required to pay time and a half by asserting that “[i]n journalism, as in medicine, the public service must be superior to the economic rewards accompanying such a service”456—had an answer ready to hand: “[I]f the newspapers are, in any way, restricted at the time of an expose in the utilization of their men on assignments, it seems to me that it may interfere with their gathering of evidence.”457

Without informing Ackerman that the Supreme Court had recently decided in an NLRA case that newspaper publishers enjoyed “no special immunity from the application of general laws” and were, like others, required to “pay equitable and nondiscriminatory taxes” on their businesses,458 Stein asked the dean to “take it for a moment from the standpoint of the man himself. Do you feel that it interferes with his efficiency or his zeal in uncovering corruption to be paid for all the hours

454454“1940 WHD Hearings Transcript” at 180 (July 26).
455“1940 WHD Hearings Transcript” at 185 (July 26). The phrase quoted in square brackets appeared on the previous page.
456456“1940 WHD Hearings Transcript” at 181 (July 26).
457457“1940 WHD Hearings Transcript” at 185-86 (July 26).
458 Associated Press v NLRB, 301 US 103, 132-33 (Apr. 12, 1937). The Supreme Court there rejected the claim that the NLRB’s interference with firing a Guild activist interfered with freedom of press. After failing to persuade the WHA that applying the FLSA to newspaper workers was a violation of their First Amendment free-speech rights, publishers unsuccessfully launched the same attack in court. “Says Wage Law Rule Can Curb Free Press,” NYT, Oct. 29, 1940 (51:2); Lowell Sun Co. v. Fleming, 36 F. Supp. 320, 327 (D. Mass. Nov. 22, 1940), vacated on other grounds, 120 F.2d 223 (1st Cir., June 6, 1941), aff’d, sub nom. Holland v. Lowell Sun Co., 315 US 784 (Mar. 2, 1942).
he works and for overtime above forty hours a week?' Ackerman had managed to get as far as, "Well, I think --," when a deus ex machina in the form of ANPA's lawyer Elisha Hanson intervened: "That is an unfair question, Mr. Chairman." Attempting to thwart obviously imminent puppeteering, Stein observed that if Ackerman felt that the question was unfair, he need not answer it, but left it to the dean's judgment to determine whether or not it was unfair. Accommodatingly, Stein then permitted Hanson to make a speech from the floor:

[T]he only change we propose, and I understand the deans of these schools of journalism agree to it, is the elimination of that right that a professional man shall do the most substantial amount of work similar to that performed by a non-exempt employee. You have never defined the words 'no substantial amount of work' in any way that anybody can make any sense out of in our business. Now, then, a newspaper man, according to our view, can no more pick the time of a story when it breaks than a doctor can pick the time when a baby is going to be born, or a lawyer pick the time when his client gets in trouble; and that is the point that I say I think your question is unfair whether they are paid overtime or what have you.459

Presumably unable to grasp the meaning of Hanson's incoherent first sentence or the relevance of the speech as a whole to the question he had put to Ackerman, Stein repeated his request that Ackerman answer his original question if it was not unfair.460 Instead, the dean, who purported to fear that the WHD's definition of "professional" would interfere with journalism educators' freedom to develop their own curriculum,461 obediently deferred to the publishers' lawyer: "Well, I am willing to accept the answer which Mr. Hanson has given." To document his dissatisfaction with this orchestrated non-responsiveness, Stein expressed his puzzlement and asked the court reporter to read back his question and Hanson's answer.462

Ackerman's choreographed testimony in support of newspaper publishers' efforts to evade employers' new obligation to pay time and a half for overtime work was supplemented by that of the deans of two other leading journalism schools, Kenneth Olson of Northwestern University and Frank Martin of the University of Missouri, who appeared on behalf of the American Association of Schools and Departments of Journalism. The extremes to which the deans were willing to go to accommodate the demands of the principal customers for the schools' final products was embarrassingly on display in the contention of the

459a1940 WHD Hearings Transcript" at 186-87 (July 26).
460a1940 WHD Hearings Transcript" at 187 (July 26).
461a1940 WHD Hearings Transcript" at 188 (July 26).
462a1940 WHD Hearings Transcript" at 187 (July 26).
that the work their graduates do as reporters, copyreaders, rewrite men, advertising solicitors, even before they rise to executive positions is professional in character and that the professional classification therefore attaches to all engaged in similar work even though they may not have graduated from professional schools of journalism.

In this contention they are supported by the knowledge that many men now practicing law have not been graduated from law schools but have learned their law in law offices and that in the earlier days, before medical schools were as well developed as they are now, men could become doctors by understudying a local doctor.

This contention is further supported by the knowledge that journalistic work, especially newspaper work is in itself an education.... 463

To prove that the work met the regulatory requirement that it be varied rather than routine manual work, the deans’ report did not shy away from the claim that an assignment to the labor beat or city hall was a “specialization” that “after all is no different from that of the lawyer who specializes in Corporation law or Tax Law or Criminal Law.” 464 No matter how lowly the assignment, the reporter remained a professional. Thus when Stein asked whether selling subscriptions was employment in a professional capacity, Olson replied that it was like “[s]ome of our internes in the smaller hospitals hav[ing] to scrub floors....” 465 After having heard these “learned discourses” of the deans, the Hearst Corporation’s representative decided that “it would be gilding the lily for me to amplify on their statements” and chose not to testify. 466

After the deans had left the stage, their choreographer, New Deal foe Elisha Hanson, 467 counsel to the American Newspaper Publishers Association and also representing other publishers associations accounting for practically all of the more than 2000 daily and Sunday newspapers papers, finally testified. 468 To document how much newspaper publishers had at stake in the outcome of the white-collar overtime regulation revisions, Hanson cited data from the 1937 Census of Manu-

463“1940 WHD Hearings Transcript” at 201-202 (July 26).
464“1940 WHD Hearings Transcript” at 203 (July 26).
465“1940 WHD Hearings Transcript” at 222 (July 26).
466“1940 WHD Hearings Transcript” at 352 (July 26) (Thomas Brennen).
467For a sense of Hanson’s hostility to the New Deal, see Elisha Hanson, “Official Propaganda and the New Deal,” AAAPSS 179:176-86 (May 1935).
468“1940 WHD Hearings Transcript” at 273-74 (July 26). The previous day, the National Editorial Association, representing small-town newspapers, had urged adoption of the ANPA proposals, which would have exempt the whole editorial and reportorial staff. ld. at 138, 140-1 (July 25) (William Daley).
factures showing that the newspaper and periodical publishing and printing indus-
tries employed 142,639 salaried employees and paid them $273,635,371—both being the highest figures of any industry and larger than those for the industry’s wage workers.\(^{469}\)

Making use of his well-honed sense of theatrics, Hanson complained that WHA Andrews had broken a promise he had given Hanson on October 3, 1938 “to administer the Act so as not to interfere with business in its orderly and regular procedure” by virtue of the WHD’s “attempt at universal application of overtime provisions of the law to practically all employees whether or not covered by the law....”\(^{470}\) Continuing in this caricatural vein, he charged that, under the regulations issued, interpreted, and administered by the WHD, “practically no one in the daily newspaper publishing field, except in a few cases a publisher, a general manager, or an editor of a newspaper, may be exempt....”\(^{471}\) Hanson was also able to furnish an innovative basis for employers’ criticism of the WHA’s having “lumped administrative employees into its definition of executive employees.” Turning on its head the traditional canon of construction of labor-protective statutes and associating publishers with employers’ strategy for attacking the overtime provision in general, Hanson insisted that: “The exemption in Section 13 (a) (1) should be construed and applied liberally...in order to be in harmony with the plain purpose and spirit of the Act which is designed to protect low wage groups.” Finally abandoning theatrics for a plausible (albeit unsupported) argument, Hanson contended that Congress had had in mind “the well established distinction between” the executive, who “occupies a position of authority and formulates policies,” and an “administrator,” who “supervises the carrying out of the policies of the executive as they are laid down.”\(^{472}\)

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\(^{469}\)“1940 WHD Hearings Transcript” at 280-81 (July 26).

\(^{470}\)“1940 WHD Hearings Transcript” at 293 (July 26). On this alleged promise, see above ch. 9.

\(^{471}\)“1940 WHD Hearings Transcript” at 296 (July 26).

\(^{472}\)“1940 WHD Hearings Transcript” at 297 (July 26). Hanson offered only ex post facto support for this distinction in the form of a comment two days earlier by the chairman of the Military Affairs Committee in connection with an exemption from a compulsory draft bill for federal executive officers but not administrative employees, distinguishing between policy-making executive officers and administrative officers who were delegated the function of supervising the carrying out of the former’s policies. \textit{Id.} at 298. Although the House Military Affairs Committee did hold a hearing on July 24, 1940 to discuss Representative Wadsworth’s selective compulsory military service bill, neither committee chairman Andrew May nor anyone else made such a comment that day. Moreover, the bill exempted only cabinet officers. \textit{Selective Compulsory Military Training and Service: Hearings Before the Committee on Military Affairs of the House of Representatives on}
Without identifying it as such, Hanson reinforced employer support for the NAM’s proposed redefinition of “administrative” employees by offering virtually the same three-part disjunctive duties test that the NAM had submitted almost two months earlier—with the single exception that Hanson reduced the salary threshold from $30 to $25. Hanson also stated that “utmost confusion” prevailed as to the legal status of more than 16,000 executive or administrative employees on daily newspapers.

After having listened to Hanson’s tirades about “this fantastic legislation and its even more fantastic administration,” Stein confessed that “you have stirred up all my oratorical passions, and make me want to give a speech, but I think I will restrain myself.” Feeling no such restraint, Hanson proceeded to disclose publishing capital’s plan to teach workers and the state a lesson about encroaching on its profits in what it regarded as a zero-sum game:

I can tell you what will come if there are any demands for overtime. If they have to apply this law strictly,...any of the privileges that the employees of that newspaper have had over a period of years are going to be taken away. For instance, they have all had rest periods in every department of the newspaper.... They have never had to punch a time clock when they go out on the corner to get a Coco[sic]-Cola or a package of cigarettes or when a girl goes out to talk to her boy friend or talks to him on the telephone. Those privileges have been abused just as they were abused in your departments in the past but the public hasn’t done anything about them. Now, if this law is going to be literally applied to that newspaper, the time clocks are going in and he will soon notify the employees that all of those privileges are going to be taken out. ... The person who is five or ten minutes late is

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H.R. 10132, at 3 (76th Cong., 2d Sess., July 10-Aug. 14, 1940). In addition to his loaded use of “administrator,” Hanson seemed oblivious of the fact that the use of “supervise” de facto converted the administrative employee back into a boss-executive. The distinction was, moreover, blurred from the other side by virtue of the fact that many executive staff employees might help formulate policies, yet were not bosses; according to Hanson’s definition, then, they would not have been administrative employees either, though some experts might have qualified as professionals. See also above this chapter.

473“1940 WHD Hearings Transcript” at 302 (July 26); see above this chapter. The only change that Hanson proposed to the executive definition was convoluted and obscure: “and who does not perform at straight time rates more work of the same nature as that which may be performed at straight rates by non-exempt employees of the employer....”

Id. at 301.

474“1940 WHD Hearings Transcript” at 304 (July 26).

475“1940 WHD Hearings Transcript” at 310 (July 26).

476“1940 WHD Hearings Transcript” at 319 (July 26).
None of the unionists' "oratorical passions" having been sufficiently stirred by publishers' threatened retaliation, no one responded to Stein's invitation to question Hanson and the hearing was recessed until the next day.

At a short hearing on Saturday, July 27, representatives of several disparate industries testified on the executive-administrative definition. Alexander Maxwell, an electrical engineer at the Edison Electric Institute, which was founded in 1933 to refurbish the public image of private utility companies in the wake of the looting of operating by holding companies most prominently linked to the magnate Samuel Insull and represented most of the industry, proposed a distinctively capacious redefinition of "administrative employee" embracing any employee whose work involved a "responsible assignment for management requiring the exercise of independent judgment and discretion," who was paid at least $30 weekly, and (1) who was part of an executive's immediate staff and whose hours of work therefore depended on his hours; or (2) whose principal duty was direction and supervision of other employees, including the assignment of their individual tasks and of the beginning and quitting times on those tasks; or (3) whose duties were such that direct supervision over or regulation of the time or manner of performance or hours of work was impracticable.

The first sub-category was reminiscent of the broad exclusion of executives' assistants requested and secured by Alfred Sloan from the Black-Connery 30-hour bill in 1933. The second sub-category was clearly designed to exclude supervisors whose sphere of control extended only to individual workers rather than to departments. The third was so capacious it could also apply to blue-collar workers. Without disclosing the factual basis for the claim, Maxwell asserted that the proposal applied to employees who did not perform the kind of work that the FLSA was intended to regulate. Repeating a venerable claim of employers about overtime work and pay, he alleged that the assistants and secretaries on executives' staffs were given compensation and benefits that already took into account "the varying hours which may be imposed" on them by executive office duties. Assuming, once again without evidence, that any supervisor who controlled others' working hours was also in a position to regulate his own and that, in other words,

\footnotesize{\begin{itemize}
\item \textsuperscript{477} "1940 WHD Hearings Transcript" at 350-51 (July 26).
\item \textsuperscript{478} "A. Maxwell, Aide to Electrical Group," \textit{NYT}, Feb. 12, 1948 (23:3).
\item \textsuperscript{479} "Power Chiefs Form National Institute to Purge Industry," \textit{NYT}, Jan. 13, 1933 (1:3).
\item \textsuperscript{480} "1940 WHD Hearings Transcript" at 387 (July 27).
\item \textsuperscript{481} See above ch. 6.
\item \textsuperscript{482} "1940 WHD Hearings Transcript" at 388 (July 27).
\end{itemize}}
employers should be FLSA-free to require payless overtime of anyone who could require others to work overtime—a position that Stein’s questioning forced him to abandon—Maxwell asserted without a rationale that such an employee “should not be subject to overtime provisions of the Act.”

For the third sub-category the utility companies had in mind employees such as right of way men, claim agents, safety engineers, rural agents, and district representatives, who were expected to provide prescribed results without supervision and, if they performed satisfactorily, management was not concerned with how, when, or where. The utility companies’ overreaching was nicely captured by their own job description of the rural or district representative as being the one employee assigned to “furnishing all of the usual services expected by a group” of 500 domestic and rural customers, including meter reading and bill collecting, which non-exempt work typically occupied 25 to 40 percent of his time, and being on call day or night for service work. The employers then self-regardingly concluded that “this occupation should be exempted because of the difficulty of controlling the hours of work both on the part of the individual and by management.” Why a worker who had already suffered the misfortune of working unlimited hours (perhaps because the employer was unwilling to hire a second worker to share the work load) should, in addition, not be paid for those hours, not because they could not be counted and recorded, but because the employer purportedly could not predict them from week to week or exert direct supervisory controls to limit them or insure that the worker had recorded the hours accurately, was not a question within Maxwell’s cognitive framework. Whereas the utility companies tried to place such workers beyond the pale by likening them to outside salesmen, the International Brotherhood of Electrical Workers described most of them in rural areas as “just simply a glorified service man,” over whom the company had “pretty close super-

483"1940 WHD Hearings Transcript" at 398 (July 27).
484When Stein asked him whether it was possible that in some companies authority to authorize overtime work was delegated to someone who otherwise had no managerial function, Maxwell replied that he presumed that the WHD would guard against that possibility. Following up, a skeptical Stein rhetorically asked: “In other words, if that is the sole attribute of management, it would hardly seem adequate in and of itself to make a person eligible for exemption?” Maxwell’s response was obscure: “I think further definition is rather contemplated by anyone who is talking about it.” “1940 WHD Hearings Transcript” at 402 (July 27).
485"1940 WHD Hearings Transcript" at 388 (July 27).
486"1940 WHD Hearings Transcript" at 389 (July 27).
487"1940 WHD Hearings Transcript" at 395-96 (July 27).
488"1940 WHD Hearings Transcript" at 389 (July 27).
After having proposed a mélange of exceptionally broad exclusions implausibly grouped under the rubric “administrative,” Maxwell generously averred that the utility companies were not urging that the regulations be “so broadened as to open the way for exemption of all workers who may benefit in some manner from the law,” adding that “the limitations contained in these suggested amendments assure this.” Without the slightest nod at statistics, he asserted that the changes “affect comparatively few employees”; likewise, without any reference whatsoever to the legislative history, he offered the wholly unsupported claim that they “preserve the spirit of the law as we interpret the desires of those who enacted it.” In keeping, presumably, with the utility companies’ post-Insull public relations aspirations, Maxwell promised that they “quite seriously want to have an authentic kind of compliance” with the FLSA, which extended to the incongruously pious affirmation that “[w]e have tried to keep firmly in mind...the difficulty which the Administrator must obviously be under of not letting too many ‘pigs under the gate’ and our proposals represent an attempt to do that.”

Yet another broad multi-pronged exclusion of administrative employees was proposed by the Mid-Continent Oil and Gas Association, whose general secretary, Clarel Mapes, opened this segment of his testimony by observing, plausibly enough, that an executive was “usually...a person who has the greatest responsibility for the success or failure of a business organization or...department...and is usually accountable only to the Board of Directors and the stockholders....” This rather lofty status may well have captured an important dimension of corporate executives’ functions, although it was so restrictive that would clearly have left outside its scope the vast majority of so-called executive employees who could have satisfied the WHD’s definition. In contrast, an administrative employee, who was not in direct contact with the directors of stockholders and bore “a somewhat lesser responsibility” for the business’s success or failure, principally carried out the executives’ policies “through supervising and directing other employees.” Mapes insisted that these demarcation lines were not only “very well drawn,” but were also realized by “[a]lmost every form of modern day business in the

48941940 WHD Hearings Transcript” at 483, 484 (July 29) (Lawson Wimberly).
49041940 WHD Hearings Transcript” at 391-92 (July 27). Maxwell admitted that the distinction between “administrative” and “executive” was “not particularly important, for our purposes at least”: what the utility companies were “really talking about were the functions of management; and it did not particularly matter whether they were called executive or...administrative....” Id. at 393.
49141940 WHD Hearings Transcript” at 400 (July 27).
organization of their companies and business....\textsuperscript{492}

Curiously, however, Mapes failed to adhere to these guidelines in his proposed administrative redefinition, which was designed to exempt those “managerial employees” who could not “qualify for exemption” under the existing definition,” but who were “entitled to be exempt...because” in carrying out the executives’ policies and orders they exercised “wide discretion and extensive authority and shoulder[ed] great responsibility.”\textsuperscript{493} That these job characteristics “entitled” them to be unprotected against long working hours was axiomatic for Mapes, who did not even try to justify the claim. Of the four administrative sub-categories—common to all of which was only a $30 salary—devised by the Oil and Gas Association, two had been proposed by other employers and two were original. The former two included those whose primary duty was to manager, direct, or superintend any group of employees and the immediate, direct, and regular assistants of executive, professional, or administrative employees. The two innovative sub-categories were ambiguous and capacious: one involved those who had the power to bind their employer or had charge of its property or goods, while the other encompassed anyone who was customarily and regularly engaged in work: from which the employer was interested only in the results obtained, which required the consistent exercise of discretion and judgment, and the time required for the output of which could not be foretold.\textsuperscript{494} This last sub-category, which in no way was tethered to the Mapes’s aforementioned requirement of executing executives’ policies, could literally have embraced skilled piece-rate production workers.

At the last hearing on July 29,\textsuperscript{495} union representatives had an opportunity to criticize employers’ proposals and to rebut their arguments. Lawson Wimberly of the IBEW was one of very few witnesses who took the position that even the existing regulations were “entirely too broad to define and delimit exemption, in accordance with the provisions of the Act.” Consequently, “[m]any workers” were “being denied the protection...that rightfully they should receive because their employers...have been able to classify them as executive or administrative employees.” To illustrate, Wimberly pointed to electrical utility companies’ classification as administrative employees of line foremen (in charge of crews of two or more linemen) who did not manage a department, could not hire or fire, and were often required to do work after regular hours that otherwise non-exempt employees would perform. In order to eliminate the possibility of “twisting and distorting the

\textsuperscript{492}“1940 WHD Hearings Transcript” at 413-14 (July 27).
\textsuperscript{493}“1940 WHD Hearings Transcript” at 418 (July 27).
\textsuperscript{494}“1940 WHD Hearings Transcript” at 416 (July 27).
\textsuperscript{495}See “Guild Fights Move to Shift Wage Law,” NYT, July 30, 1940 (13:2).
true definition of the word administrative," the IBEW proposed a revision of the joint executive-administrative definition that, in addition to raising the salary threshold to $40, specified that the discretionary powers exercised by such workers had to relate to the establishment’s “policies or affairs” (as opposed to the method of performing their work). The point of this new proviso was to insure that an administrative or executive employee was “someone who at least had a voice in what...the policy of the establishment was.” Thus despite the IBEW’s atypical attack on the overly broad scope of the existing regulatory exclusions, the union’s rather modest proposals were designed simply as quick fixes for several very specific abuses and not as an initiative to dismantle the exclusionary regime at large, as evidenced by the alacrity with which Wimberly was willing to classify the next higher-up supervisors, general line foremen (who were apparently not eligible for union membership) as exempt.

In an appearance on behalf of the International Federation of Technical Engineers, Architects, and Draftsmen’s Union—an AFL affiliate, which had combated the FAECT’s militancy—its president, C. L. Rosemund, who had personally sabotaged the FAECT’s effort to merge with his union because of its “subversive connections,” underscored the union’s reasonableness by agreeing that it was “rather far fetched” for consulting engineers for big firms being paid $10,000 to $20,000 a year to get time and a half. In approaching the problem of coverage, “the safest bet is not to attach so much importance on [sic] what the dictionary says but on just what Congress intended to do. This is an emergency measure. It was to raise the living standards and the consumer capacity of our people and at the same time to increase...jobs.” By keying the statutory purpose so tightly to the Depression, Rosemund failed to explain how to identify congressional intent once the “emergency” was over and work-spreading was no longer the highest priority; consequently, such a narrow, contingent position could make it easier for employers to attack the basis of hours regulation in more prosperous periods. Unable, however, to foresee the impending war-driven absorption of unemployment, the union focused on the here and now, where, “if you go ahead

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1940 WHD Hearings Transcript” at 477 (July 29).
1940 WHD Hearings Transcript” at 479 (July 29).
1940 WHD Hearings Transcript” at 485 (July 29).
1940 WHD Hearings Transcript” at 481 (July 29).


Marcel Scherer, “Rosemund Reveals Anti-Unity Bias,” BFAECT, 3(2):3 (Feb. 1937) (quoting from Rosemund’s letter to AFL President William Green).
and have anything passed here which will make it possible to work our men any number of hours without compensation, they are going to work them, and work them plenty. We don’t want to work the men overtime. We want more men employed....

A different viewpoint was offered by Sidney Cohn, a lawyer representing the American Communications Association (as well as 50 AFL and CIO unions), which opposed using a salary threshold as an exclusionary criterion in large part because the top of their members’ wage scales reached $40 to 60 a week. Consequently, they proposed leaving the executive-administrative definition as it was except for eliminating the ($30) salary level altogether. Cohn failed to explain why they did not instead propose setting the salary threshold far above prevailing wage scales as, for example, the UOPWA had suggested. (In contrast, the Western Union Division of the Commercial Telegraphers Union proposed increasing the executive salary threshold to at least $50 because “we feel it is our duty to protect as far as possible all minor executives” and that “junior executives or people in semi-executive positions” benefited from the overtime provisions.) Stein was puzzled by Cohn’s resistance to the salary requirement, especially since it was merely one of seven conjunctive criteria and was designed to settle doubtful cases. Cohn allowed as how he could see the WHD’s logic, but persisted in characterizing $30 as “absurd” in numerous settings where it did “not come within tens of dollars” of the normal union scale. Ultimately he was willing to acquiesce in the salary requirement if eliminating it would cause more trouble, but Stein did not solicit from him an acceptable higher figure.

The ACA’s rejection of any revisions seems to have been driven by its judgment that by 1940 “a great many of the employers have accepted the principles of the Act. By opening the door to these proposed revisions, you are going to get employers in the frame of mind, where they will start litigating all over again on just what and who is covered.... Cohn illustrated this apprehension by reference

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502 "1940 WHD Hearings Transcript" at 489 (July 29). It is well worth noting that in responses to Stein’s questions, Jane Benedict, the executive secretary of the Book and Magazine Guild, a UOPWA local representing publishing employees, observed that, where the law was strictly observed, its effect had been largely overtime pay rather than reduction of hours, and that a majority of members who had formerly gotten time off preferred cash. *Id.* at 469-70 (July 27).

503 "1940 WHD Hearings Transcript" at 509-12 (July 29).

504 "1940 WHD Hearings Transcript" at 546, 547 (July 29) (Hugh McKenny, counsel, and Stein).

505 "1940 WHD Hearings Transcript" at 519-20 (July 29).

506 "1940 WHD Hearings Transcript" at 512-13 (July 29).
to the Radio Marine Corporation of America which had in collective bargaining voluntarily reduced hours from 44 to 40 without going through the intermediate statutory step of 42 because they preferred the settled level that the FLSA established. Then, however, the company did an about-face, requesting exemption for its marine radio inspectors on the grounds that their work was predominantly intellectual and varied in the sense that they rarely knew what would confront them when they left for a job aboard ship.507 This development was especially worrisome in a comparatively law-abiding employer:

Well, I respectfully submit that every plumber’s duty is primarily intellectual if we accept their standard. No man, no electrician, no plumber, no man who goes out on a repair job, knows what confronts him. Yet Radio Marine Corporation which has been one of the large corporations which has gracefully accepted the principle underlying the Wage and Hour Law, now sees an opportunity to muddy the waters and they have got radio repair men in the class of intellectuals. I think that is a fairly absurd contention, but it is going to be inevitable if you start fooling around with your very clear and well thought out present exemptions.508

In other words, creating possible exemptions for covered workers indirectly encouraged “those who do not like the theory behind the Wage and Hour Act, namely the spread of employment. [T]here is no way of satisfying the employers.”509 Moreover, the unions feared that that once employers secured an exemption from the overtime provision, they would seize on it “as gospel and as precedent” to exclude the same occupations from social security, workers compensation, and the NLRA.510

The American Newspaper Guild, which purported to represent 11,500 (or about one-half of all) editorial employees on daily papers,511 testified through its secretary-treasurer, Victor Pasche, whose combative criticism of Hanson and the journalism school deans a tendentious piece in Editor & Publisher characterized as having sounded “the only clashing note.”512 Most employees under Guild con-
tracts received minimum weekly salaries of $40 to $75 (and others considerably more), and before the advent of the FLSA, overtime compensation was equal time off rather than time-and-a-half cash.513

Despite the solicitude expressed by publishers and their "closely allied" journalism schools on behalf of newspaper employees' need for professional status, the "employees themselves have...expressed themselves clearly in favor of obtaining exactly the kind of protection, regardless of descriptive verbiage[,] which is intended by" the FLSA.514 While conceding that the term "professional" was subject to loose usage, Pasche doubted whether the ANPA or the journalism deans "would seriously argue that we should claim professional status on the basis of the usage of the word in the expression ‘the world’s oldest profession.’"515 Choosing to contest merely the application of the definition to reporters rather than to challenge the principle (if there was any) underlying the exclusion of professional employees, the Guild had no compunctions about trading a title for statutory overtime protection: "It is not detracting in any way from our legitimate pride in the craft of news gathering and writing or the technique of advertising solicitation, to recognize frankly that neither one has a professional status and that it is a skilled craft, entitled to the same kind of protection as any other craft."516 Pasche was willing to distance the Guild even further from the lofty title by scornfully observing that the deans’ contention that even those who did not attend journalism school were professionals logically meant that “the professional classification evidently attaches to the former copy boy who never got past grammar school, who has just been assigned to the night police beat, and is doing an excellent workmanlike job covering it.”517 Since the deans were well aware that “the average city editor still looks with a doubtful eye upon the school of journalism graduate and is at least as likely to hire the latest cub from the ranks of the alert copyboys,” Pasche thought

513"1940 WHD Hearings Transcript” at 550 (July 29).
514"1940 WHD Hearings Transcript” at 552 (July 29).
515"1940 WHD Hearings Transcript” at 557 (July 29).
516"1940 WHD Hearings Transcript” at 558 (July 29).
517"1940 WHD Hearings Transcript” at 559 (July 29). On August 8, ten days after the close of the hearings, Hanson filed a supplementary brief asserting that Pasche and other Guild members had “‘vigorously contended’” a few months before FLSA’s enactment that journalism was a profession by sending a letter on Aug. 24, 1938 to ANPA demanding that ANPA guarantee newspapermen’s professional rights and interests. Hanson’s brief also argued that if there was a need to place some limitation on the executive or administrative employee, it should be based on long established practice suggested by “‘and who does not perform at straight time rates more work of the same nature as that which may be performed at straight time rates by non-exempt employees of the employer.’” “ANPA Files Final Brief for Wage Law Redefinition,” EP 73(32):5 (Aug. 10, 1940).

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One of the most important discussions at the hearings took place at their very end because representatives of labor and management in the Hollywood movie industry were by and large willing to engage each other in a relatively open, frank, and lengthy exchange instead of merely trading invective, rhetoric, and preconceived debating points—an achievement all the more surprising in the context of the employers’ aforementioned proposal for excluding from coverage as administrative employees all of the shooting troop’s members. Quite astonishingly for paid advocates in such forums, they even confessed ignorance and implied that they might not be in possession of all the answers. One of the protagonists was George Bodle, an attorney, who appeared on behalf of the Screen Writers Guild and other unions representing 4,700 persons employed by members of the Motion Picture Producers and Distributors of America. Interestingly, of these unions, the members of the Screen Writers Guild, the Screen Publicists Guild, and the Society of Motion Picture Interior Decorators were already considered FLSA-exempt by the guilds and the producers, but they nevertheless opposed all amendments.

Bodle was especially critical of the MPPDA’s proposed redefinition of “administrative employee” as one assisting an executive employee because it failed to define “assist” and in fact every employee in a department could be said to assist its manager. The revision would exempt hundreds of the studios’ office workers because the relatively high salaries could not serve as a marker with 56 percent of their office and clerical employees and virtually all secretaries to executive and administrative employees being paid $30 a week or more. Labor’s concern with these proposals was rooted in statutory purpose: more than 400 members of the Screen Office Employees Guild were unemployed, “most of them victims of recent economy drives in the studios.” Unwilling to countenance yet more discharges, the unions therefore opposed the revisions.

Bodle offered an entirely different view of the work process and the alleged technical constraints on the length of the working day than Mitchell had presented four days earlier. He explained that hundreds of times a year an “emergency” happened, 6 p.m. came, and the set designer had still not completed the drafting

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518 "1940 WHD Hearings Transcript” at 560-61 (July 29).
519 "1940 WHD Hearings Transcript” at 580 (July 29).
520 "1940 WHD Hearings Transcript” at 582 (July 29).
521 "1940 WHD Hearings Transcript” at 586-87 (July 29).
522 "1940 WHD Hearings Transcript” at 590 (July 29).
of a set design, which was to be constructed that night by a crew of craft workers already called in with the shooting set for next morning. "Is this situation," Bodle asked,

sufficient to justify the employment of this set designer for unlimited hours without payment of overtime? Obviously not. After all, the Fair Labor Standards Act does not prohibit the employment of workers after forty-two hours in a week. It simply requires the payment of overtime at one and one-half times the regular rate. If a man’s work is so essential to the production process that a limitation on his hours of work would delay production, his work is sufficiently important to justify the payment of time and one-half for overtime.\(^{523}\)

The unions’ position on “professional” employees was seemingly more radical. The existing definition was “satisfactory” to them,\(^{524}\) yet the whole situation of “professionals” had changed since the time, not long past, when the term had meant a self-employed minister, lawyer, or doctor who set his own working hours:

With the present day tendency toward the employment of professional people by firms, it is difficult to see any substantial reason for distinction being drawn between an employee professionally trained and any other employee. Long hours are just as onerous for the man professionally trained as they are for any other employee, and to make the dividing line between exemption or non-exemption from the Act the professional character or non-professional character of a man’s work, seems to me to carry over into the Act a distinction which no longer possesses much validity.

It is our opinion that every employee who does not exercise supervisory or executive duties should be protected against long and inhuman hours by the Fair Labor Standards Act regardless of whether he is employed in a professional capacity or not. In view of this we are naturally opposed to any broadening of the term “professional” to permit exemption of more employees.\(^ {525}\)

This atypically fundamentalist approach stood in curious contradiction to the fact that unions found the existing regulation “satisfactory” despite the fact that it exposed large numbers of professional workers to “long and inhuman hours....” Here Bodle pointed to the screen set designers, who did highly detailed work that caused considerable eye strain if continued over a long period of hours in any day or week; indeed, one of the primary reasons that they had organized was to limit

\(^{523}\)“1940 WHD Hearings Transcript” at 595 (July 29).

\(^{524}\)“1940 WHD Hearings Transcript” at 595 (July 29).

\(^{525}\)“1940 WHD Hearings Transcript” at 597 (July 29).
To be sure, Bodle did not mention whether time-and-a-half pay diminished eye strain. Be that as it may, if the producers’ redefinition were adopted, the set designers would be exempt and “faced with the problem of protecting the limitation in their hours under the Wage and Hour Act...by their economic strength alone.” If they turned out to be unable to maintain their past gains, unemployment would be further increased: already in 1940, one-third of the members of the Screen Set Designers had been unemployed at all times—especially alarming for a union that had never accepted as a member anyone who did not have a job in the industry. Consequently, Bodle argued, if the screen set designers were to secure their livelihood, the appropriate legal approach was not to exclude even more of them from overtime regulation, but, on the contrary, to require a further decrease in hours until unemployment was eliminated.

The overall impact of the adoption of the producers’ proposed amendments would, according to Bodle, be the exemption from hours limits of more than 30 percent of workers in Hollywood not already exempt. The employers’ “fundamental objective” was to make it lawful for them to work hundreds of studio workers then limited to 42 hours at straight time unlimited hours. Once again rooting his critique in statutory purpose, Bodle concluded by asserting that adoption of the MPPDA’s amendments would be a perversion of the FLSA, making of it an instrument not for alleviating, but creating more unemployment.

At this point, Stein, before questioning Bodle, asked Mitchell, the MPPDA’s lawyer, to remind them of the groups of employees that the producers wanted to exclude as so-called key or shooting-troop administrative employees. In this almost serendipitous way, labor and management wound up in face-to-face discussion, while Stein’s own role receded. When Mitchell discovered that Bodle had not seen the supplementary material that he had filed, he suggested that the unions had unduly alarmed themselves: while admitting that the definitions might be too broad, Mitchell cautioned that they were subject to review in light of their possible impact. Nevertheless, he insisted that the MPPDA’s purpose was “simply to make exempt those people in the executive and administrative class whom we now treat as exempt”—and not anyone else. In this context the producers were focused on the shooting troop: since it was necessary to work them more than 40 hours a week and “impossible to replace” them because they were “keyed into the operation,” the employers had long ago entered into contracts with them or their organizations

526 "1940 WHD Hearings Transcript” at 600 (July 29).
527 "1940 WHD Hearings Transcript” at 601 (July 29).
528 "1940 WHD Hearings Transcript” at 602, 603, 605 (July 29).
529 "1940 WHD Hearings Transcript” at 606-607 (July 29).
providing for higher wages “than the fellow gets when he works around on the lot in other jobs.” Because producers were already paying these workers higher wages to reflect their longer hours, they took the position that “to swing that specialized treatment...over on to a forty-hour week with time and a half overtime...would cause industry a hardship we don’t believe we ought to be required to take.” Mitchell again emphasized that if they had overshot the mark and tried to exclude other workers, that problem had been rectified in the supplementary submission.530

When Bodle countered that, on account of the prevailing unemployment, the blue-collar craft unions representing, for example, standby painters in the shooting troops, preferred putting all employees on a limited workweek, Mitchell contended that the crucial factor of their non-fungibility subverted all such work-spreading schemes:

[I]f you put them on a 40-hour week with time and a half for overtime the standby man will just have to work longer hours and we will have to pay him overtime. It won’t make one hour’s more employment because he is not replaceable while the shooting unit is in operation. You can’t bring in a standby painter for half a day and another man for the other half; it just has to be the same man all day long, and all week long while the set is in operation. So I think that may be their position, but I don’t think it will do them any good on employment.531

Instead of dissecting Mitchell’s non-fungibility claim, Bodle merely pointed to the studios’ tendency to put many non-shooting-troop craft workers on similar flat-salaried, extended workweeks.532

At this point Mitchell, switching subjects, objected to the unions’ making arguments based on the movie industry’s economic conditions, which he deemed immaterial.533 Bodle, however, pointed out that the economic argument was relevant because alleviating unemployment by work spreading was one of Act’s basic purposes, “and if we could consider definitions purely in the light of dictionary definitions and legal decisions it would be one thing, but I presume that matters of

530“1940 WHD Hearings Transcript” at 607-609 (July 29). As Stein astutely pointed out, regardless of what the producers said about not intending to exempt certain employees: “If the definition was so drafted that its practical effect would be exemption, you would at least be within your legal rights...three years from now to say, well, though we didn’t intend to exempt them, they are exempt under the new regulations and we want to bargain accordingly. [S]o we must scrutinize this very carefully to see that it might not have that accidental effect.” Id. at 616-17.
531“1940 WHD Hearings Transcript” at 611 (July 29).
532“1940 WHD Hearings Transcript” at 611-613 (July 29).
533“1940 WHD Hearings Transcript” at 613 (July 29).
policy are going to be considered if and when any redefinitions are made. Certainly, any redefinitions which tend to defeat the purpose of the Act and create instead of alleviate unemployment, depart just that much from the announced intention of Congress...."534

Unwilling to engage Bodle any further on this point, Mitchell turned to the question of professional employees. After Bodle had confirmed that “[i]n theory” the unions objected to any dividing line between professional and non-professional employees and acknowledged that Congress had made such a line, Mitchell rhetorically asked whether the Wage and Hour Administrator was not therefore “bound to make a dividing line between people that are truly professional and those that are not...” Forced to deviate from theoretical principle, Bodle replied: “Well, I think it should be narrowly drawn. Now, that is the only point because I don’t think there is any economic justification for the division that you are certainly attempting to make and I think the division that is ordinarily made.”535

Here Bodle should have felt it incumbent on himself to explain to Stein how his fundamentally irrefutable position that professionally trained employees were no more deserving of “long and inhuman hours” than any other workers could be operationalized under a statute that required the distinction, but failed to offer any guidance whatsoever as to where to draw it. Perhaps Bodle could have constructed a plausible argument on the basis that what made professional employees “bona fide” consisted precisely in the fact that they did not work such unacceptable hours and were also not subject to unemployment. However, if everyone, including presumably Congress, knew that in fact many physician- and attorney-employees did work excessively long hours, thus rendering such reasoning risible, labor’s only option was to advocate legislative revision—a strategy that, in light of the consolidation of the anti-New Deal congressional coalition, must have appeared both hopeless and, given unions’ limited commitment to organizing professional workers, a sub-optimal use of whatever political influence they possessed. Unsurprisingly, under these circumstances, labor preferred sticking with the less obnoxious original regulations. But if their arguments for revision transcended the powers of the administrative agency, using the same arguments to support a stand-pat position to fend off employers’ proposals for expanded classification may have been doomed to fail.

Unlike Bodle, William Smith, general counsel for the Screen Directors Guild, did contest the classification of second assistant directors as exempt key men in the shooting troop, describing them as mere messengers or gofers for the first assistant directors, engaged in routine work without any independent authority. With a

534"1940 WHD Hearings Transcript” at 614 (July 29).
535"1940 WHD Hearings Transcript” at 619-20 (July 29).
starting hourly wage of 90 cents and working up to as many as 100 hours a week, the second assistant directors voted to remain under the FLSA and their collective bargaining agreement confirmed their overtime entitlement. Moreover, many of them were unemployed or only intermittently employed.\textsuperscript{536} Without denying any of these claims, Mitchell nevertheless sought to elicit from Smith the admission that “it would be impractical in the course of shooting a picture to take that particular man off and replace him with another man....” Astonishingly, however, Smith, who was the chief legal adviser of the union representing the second assistant directors, confessed that he was “in the embarrassing position of knowing nothing of the technical operations of a motion picture studio, so I would not attempt to make a statement.” And even more astoundingly, this confession prompted Mitchell, who had repeatedly and insistently made this very claim the basis of the producers’ proposed expansion of the category of excluded administrative employees, to chime in: “All right, I am not either.”\textsuperscript{537}

One final and much more successful effort was undertaken by labor to refute the producers’ proposal to classify shooting-troop members as non-fungible administrative employees. Steve Newman, the international representative of the International Alliance of Theatrical Stage Employees, who opined that those workers were the producers’ sole real concern and that 2,000 of the union’s members would wind up being excluded from FLSA coverage.\textsuperscript{538} The capacious definition that the employers offered would have classified as an administrative employee any worker who was “an essential member of the staff of the head” of any department or unit and “whose service by reason of his special or technical knowledge is pertinent to the particular production process [and] cannot be restricted as to hours without hindering, reducing or delaying production.” Behind this verbiage, which betrayed none of the “usual attributes of administrative employees,” Newman detected the employers’ real purpose: “they would make greater profits if they worked certain employees 60 or 70 hours a week.” Moreover, the distinction—“between excessive hours of skilled and important and unskilled and unimportant workers”—underlying this classification was alien to the FLSA and “introduce[d] a most novel and unique interpretation of the word ‘administrative.’”\textsuperscript{539}

Unlike the other affected unions, the IATSE actually surveyed its locals on the alleged non-fungibility of their members (including first cameramen) who were alleged key persons in shooting troops, discovering that that they could be and

\textsuperscript{536}“1940 WHD Hearings Transcript” at 623-30 (July 29).
\textsuperscript{537}“1940 WHD Hearings Transcript” at 632 (July 29).
\textsuperscript{538}“1940 WHD Hearings Transcript” at 635 (July 29).
\textsuperscript{539}“1940 WHD Hearings Transcript” at 636-37 (July 29).
frequently were replaced after 42 hours without any loss in efficiency. Indeed, one local pointed out that a provision in one collective bargaining agreement requiring an exceptionally high hourly rate after 16 hours and a 10-hour rest period between calls “constantly” impelled studios to call in other first cameramen to avoid running afoul of these provisions.

Faced with actual knowledge, Mitchell, who had just proclaimed his ignorance, wisely called on an experienced studio official for rebuttal, who, however, immediately admitted that he could not refute any of the findings that the IATSE had submitted, but asserted that they were merely “the minority, the emergency, the unfortunate, cases....” Much more damaging to the producers’ case was Pelton’s admission that “it is not physically impossible...to replace anybody except the actor, whose face you are photographing. But it is far from economical and it is not practical....” Having thus revealed the real reason for the employers’ initiative, Pelton further undermined their position by demonstrating that neither he nor they had understood the purpose and functioning of the overtime penalty/premium:

If we were going to have a 40 hour week for those people, you could do it with a terrific penalty of money. At the present time, that has all been negotiated and compensated by money. The mean pay of the first cameraman is $348.00 a week. Some...get as high as $750 a week. I don’t understand if the theory is the $750 man is supposed to work a 40 hour week and his hourly rate would be some $20 an hour and after 40 hours he should be compensated time and a half. ...

There are various deals for different people. In the cameraman’s deal you can hire a cameraman on an eight hour basis and pay him time and a half after eight hours. You can hire him with a guarantee of four weeks, on a 54 hour basis. You can hire him with a guarantee of six months on a 60 hour basis.

This practical exposition of how the real world of “deals” worked in Hollywood before the advent of the FLSA fully corroborated Pelton’s insight that “I don’t understand...the theory”: like many employers in numerous industries, he failed to grasp that nationally mandatory hours regulation, even—or, perversely, perhaps especially—in the attenuated version of an overtime penalty, cannot be lawfully overridden on the grounds that the (allegedly high) wage already reflects the predicted overtime work. Hours regulation as a component of labor standards

540“1940 WHD Hearings Transcript” at 643, 648-49 (July 29).
541“1940 WHD Hearings Transcript” at 649-50 (July 29).
542“1940 WHD Hearings Transcript” at 661 (July 29) (Pelton’s first name along with his job title was inadvertently omitted from the record).
543“1940 WHD Hearings Transcript” at 661-62 (July 29).
is not about money—it is about time, preserving and enlarging a life-sphere separate from and not subordinate to alienated production. For that very reason such time cannot lawfully be bought or traded off for money. Even in the (dysfunctionally) money-driven time-and-a-half overtime regime, the congressional and popular expectation was that the penalty would be severe enough to act as a powerful deterrent. To the extent, however, that the penalty rate was not accurately calibrated to serve that purpose or that the obverse side of the penalty—the premium that, to use the twenty-first-century catch phrase, enables workers “to make ends meet”\(^5\)--self-contradictorily afforded workers an incentive to subvert the hours standard,\(^5\) it is easy to understand why many employers came to the conclusion that the FLSA overtime provision was, on the contrary, only about money: “The wage scale has been negotiated...on a basis that they must work the long hours with the troupe and they are compensated on that basis....”\(^5\)

\(^5\)See below chs. 16-17.

\(^5\)Linder, *Autocratically Flexible Workplace* at 41-55.

\(^5\)“1940 WHD Hearings Transcript” at 662-63 (July 29) (Pelton). Many years later a new deal was worked out excepting the motion picture industry from the salary basis requirement on the grounds that employers for economic reasons, ratified by collective bargaining agreements, did not employ on a continuous weekly basis highly paid employees who otherwise met the salary-level duties tests. Finding the producers’ formal petition reasonable, the WHD promulgated a proposed regulation in 1953; having received no comments, the WHD issued the final rule, which set the salary level at $200, at a time when the short-test salary level was $100. *FR* 18:2881 (May 19, 1953), 3930-31 (July 7, 1953). The amount, however, not raised again until 1975, when it became $250, where it stood until 2004, when it increased to $695. 29 CFR § 541.5a (2003); *FR* 69:22273 (Apr. 23, 2004) (proposed § 541.709).
Office and professional workers are engaged in so many diversified industries that it is difficult to define those who are and who are not covered unless you have the specific situation before you.

Let us put it this way. If you are a stenographer in the office of a business concern which has dealings across state lines...then you are entitled to the benefits of the Act.1

The extensive evidence to which Harold Stein had listened from April to July was so manifestly contradictory that it could have supported a wide range of regulatory reactions, including a reaffirmation of the original definitions. To be sure, Stein in effect confirmed the inconclusiveness of the testimony, but it would be naive to assume that Stein and the WHA had not also been listening to the congressional debates of 1939-40, which, though they failed to result in amendments to the FLSA, nevertheless revealed which way the legislative wind was blowing with regard to the scope of the regulation of white-collar overtime.2 Thus regardless of what the hearings may have taught the WHD about the operation of the exclusions, the deep inroads that employers had achieved both in Congress and in the Roosevelt administration against an expansive development of the scope of white-collar coverage, especially on behalf of workers whose monthly salaries exceeded $150 to $200, underscored the extraordinary political courage that the agency’s denial to firms of some significant concessions would have required.

In his report of October 10, 1940, outlining the statutory basis for the Administrator’s power to issue white-collar regulations, Stein—whose construction of the white-collar regulations the WHA, in an accompanying statement, declared that the WHD would follow in enforcing the FLSA3—asserted that “[i]t is clear from the very terms of the act itself that Congress felt that the mere use of the

2See above ch. 10.
phrase 'employed in a bona fide executive capacity' etc. was adequate as a standard, but inadequate as a detailed rule to guide employers, employees, and the courts. It is not clear, however, why Stein was so sanguine that Congress's mere invocation of three broad occupational titles sufficed to articulate a standard that the WHD could then transform into a "detailed rule" in spite of Congress's failure to offer any reason whatsoever for the exclusion of white-collar workers from the system of national hours regulation. Stein's uncritical optimism led him to claim that: "Both the present and the proposed regulations are...entirely legal. Both are in full accord with the general policy of Congress as expressed in the preamble of the act and both give practical effect to the specific statutory exemption...in section 13(a)(1)."

The Stein Report

"[U]nless more men are encouraged to go into manual callings, there will be fewer openings for office workers. If there are not as many men as formerly doing the manual jobs, there will not be so many needed to keep the records and accounts. The thing is like a pyramid, with the manual workers at the bottom, providing the base, and with the office workers filling the narrow space at the top. If the top of the pyramid gets all the recruits, it will strain to the breaking point."  

Stein devoted an entire section of his report covering four pages to rejecting some proposals, "most notably perhaps" that submitted by the SSIC, that would have had "the effect of exempting all of that very large group of persons known loosely as 'white collar workers'—generally speaking, all employees except laborers, machine operators and tenders, craftsmen, and maintenance workers." As a matter of legal interpretation, if white-collar workers were not entitled to benefit from the FLSA, "the specific statutory exemptions for named groups of typical white collar employees would not be needed...." Without identifying the authors, Stein stated that some had argued in the alternative that Congress had meant the three statutory categories per se to exclude all white-collar workers. Stein dismissed this claim on the grounds that Congress would have adopted "far
more general terms" to achieve that end and would not have empowered the WHA to define the terms if it had intended the exclusion to be so sweeping.7

Stein forcefully and memorably criticized proposals to exempt all clerical workers on the grounds that compliance with the FLSA might lead employers to shift them to hourly pay with lower earnings in slack times. While not gainsaying the desirability of weekly or monthly salaries that enabled workers to "adjust their expenditures on the basis of an assured income" as long, Stein added ironically, as they remained employed,

there is little advantage in salaried employment if it serves merely as a cloak for long hours of work. Further, such salaried employment may well conceal excessively low hourly rates of pay. It also does not appear why there should be a reluctance to make occasional or even frequent overtime payments to salaried workers (other than those...specifically exempted employees). Either the penalty payments will discourage long hours of work, or the worker will receive a reasonable compensation for his additional efforts.8

Importantly, Stein went on to add that "under normal conditions" the payment of overtime to salaried workers was as appropriate as it was for hourly paid workers. Moreover, there might also be salaried workers who were not encompassed by the three statutory categories—and if there were, the WHA would be powerless to exclude them. Equally eloquent was Stein's refutation of the then widespread employer claim that the FLSA's hours provisions "are or should be applicable only" to workers at or close to the minimum wage: "[I]t is a serious misreading of the act to assume that Congress meant to discourage long hours of work only where the wages paid were close to the statutory minimum. Living conditions can be improved and work spread even where wages are comparatively high."9

In the same connection, Stein pointed out that arguments in favor of total exclusion "have as an articulate major premise the assumption that all salaried white collar workers enjoy satisfactory working conditions—that they need no protection against oppressively long hours. The record shows the incorrectness of this assumption." In addition to a government survey disclosing long hours of women office employees and 1930 census data according to which women comprised half of all clerical workers, Stein referred to hearing testimony by the FAECT and the UOPWA for evidence that "vacations with pay are far from

7Stein Report at 6-7.
8Stein Report at 7-8.
universal and that long hours at sedentary occupations are not conducive to health.” From these descriptions Stein concluded that white-collar working conditions “frequently” came within the congressional preambular FLSA findings of those “detrimental to health, efficiency, and general well-being.” However, he did not raise the issue of the rationality of a statute and a regulation that excluded workers enmeshed in such detrimental conditions. Oddly overlooking the much more plausible profit motive, Stein claimed that the “desire to have all white-collar workers exempted is probably also linked with a forgetfulness of the fact that section 13 (a)” excluded them from the minimum wage too “and an unawareness of the low wages that an astonishingly large percentage of these workers have been paid.” Since Stein himself in the footnote to the very next sentence referred to an SSIC exhibit with “statements of individual employers requesting exemption for white-collar employees with salaries as low as $12...a week and $52...a month,” his use of employers’ ignorance as a causal explanation was blatantly inept.

Executive Employees

Just as at first the capitalist is relieved of manual labor as soon as his capital has reached that minimum size at which really capitalist production begins, so now he hands over the work of direct and constant supervision of the individual workers and groups of workers to a special kind of wage-laborer. A mass of workers cooperating under the command of the same capital requires, like a military army, industrial superior officers (directors, managers) and noncommissioned officers (foremen, overlookers, contre-maîtres), who command during the labor process itself in the name of capital. The work of supervision is consolidated as their exclusive function.13

Capitalist production itself has brought things to the point that supervisory labor, completely separated from the ownership of capital, is lying around in the street. It has therefore become useless for this supervisory labor to be performed by the capitalist.14

10Stein Report at 8 (quoting, without indicating ellipsis, FLSA § 2(a)).
12Stein Report at 9 n.32.
The Stein Report and the Revised Regulations

The former “non-commissioned officers of capital” have turned into a good-sized army, which counts in its ranks more and more privates, who are interchangeable with one another.¹⁵

Industrialisation has created vacancies for hundreds of thousands of executives in technical, supervisory, administrative and commercial posts in undertakings. Rationalisation, and particularly the introduction of the “line and staff” system in industrial undertakings and the simultaneous centralisation of responsibility in the office rather than the workshop have led to the appointment of a completely new executive class. [T]here is a thoroughgoing subdivision of the complex duties previously discharged by the executives. Once this subdivision is complete, the jobs done by the lowest grades of salaried employees are often very elementary, and it would be difficult to discover any “intellectual” content in some of these jobs.¹⁶

Following the analysis of these various general and preliminary matters, Stein devoted the bulk of his report to explaining his specific recommendations for the three categories of executive, administrative, and professional employees. He offered the most minimal recommendations for revision of the executive exclusion, presumably because employers had also complained least about it. He did recommend three changes: that executives be required to hire or (not and) fire; that the $30 compensation threshold be “on a salary basis”; and that the “no substantial amount” of nonexempt work permitted to executives be set at 20 percent to reduce ambiguity.¹⁷

Stein’s most important comments were reserved for defending the quantitative calibration of the WHD’s original regulation’s $30 weekly compensation threshold against employers’ complaints that it was too high and unions’ that it was too low. Earlier in his report, Stein had observed that, as far as salary tests in general were concerned, witnesses had widely conceded that the language of the congressional exclusion “implies a status which cannot be attained by those whose pay is close to or below the universal minimum envisaged in the act. It was further pointed out that the good faith specifically required by the act is best shown by the salary paid.” However, he failed to explain how this consensus could be reconciled with the vast range of proposals (from $0 to $5,000).¹⁸ More importantly, Stein never

¹⁵Siegfried Kracauer, Die Angestellten: Aus dem neuesten Deutschland, in idem, Schriften 1:205-304, at 213 (1971 [1930]).
¹⁷Stein Report at 12-14, 23.
¹⁸Stein Report at 5.
justified the leap he made from accommodating employers’ requests for exempting them from time-and-a-half liability for $7,000-a-year purchasing agents to excluding $30-a-week executive assistants and confidential secretaries. On the other hand, Stein did reject outright the proposal of various employers, including the American Bankers Association, that the salary thresholds be graduated according to local population size. In addition to pointing out the proposal’s incompatibility with the nationally uniform statutory minimum wage, Stein argued that, as with most laws of national application, the best way to “make enforcement possible and to provide for equity in competition” in a huge and diverse country was to select a salary limit that would be “reasonable in the light of average conditions for industry as a whole.”

With respect to executives, even employers largely agreed on the need for a salary-level requirement because the “term ‘executive’ implies a certain prestige, status, and importance.” Since executive employees were denied the FLSA’s protection: “It must be assumed that they enjoy compensatory privileges and this assumption will clearly fail if they are not paid a salary substantially higher than” the mere statutory minimum wage. Otherwise there would be no assurance that the exemption would not “invite evasion” of both the minimum wage and overtime pay provisions “for large numbers of workers to whom” they should apply: “[I]f an employer states that a particular employee is of sufficient importance to his firm to be classified as an ‘executive’ employee and thereby exempt from the protection of the act, the best single test of the employer’s good faith in attributing importance to the employee’s services is the amount he pays for them.”

Stein’s reaction to the suggestion made at the hearings by President Lewis Merrill of the UOPWA of a $5,000 annual salary limit was terse yet oddly incomplete: “while in the abstract there is some justification for the suggestion..., it is equally clear that this is an impractical proposal.” Stein no more identified the justification for a threshold more than three times greater than the WHD’s than he explained why it was impractical. After all, the union’s proposal would scarcely have approached the salaries of real executives: that year (1940) the salary of the

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19 Stein Report at 6.
20 Stein Report at 19.
21 Stein Report at 20.
22 Adjusted for the rise in the consumer price index, the $5,000 salary would be $67,750 in August 2004; with the minimum hourly wage of 30 cents having risen 17.166-fold since 1940 to $5.15, by this measure the salary threshold would be $85,833.33 in 2004. Neither amount appears irremediably absurd, especially since the Bush administration’s revised white-collar regulations provided a $100,000 super-short-test salary. See below ch. 17.
highest paid executive in the United States, Louis B. Mayer, the managing director for production at Loew's Inc., amounted to $697,048 or 139.4 times the $5,000 limit, and even the relatively low-paid Charles E. Wilson, acting president and executive vice president of General Motors, received a $100,670 salary or 20 times the threshold. In addition, it should be kept in mind that even the non-boss executives about whose denial of the executive exemption employers had complained were paid salaries in the range of $7,000-$10,000—well above the UOPWA's recommended threshold.

Stein rejected the proposal of the Indiana Manufacturers' Association of an $18 weekly salary on the grounds that it would not adequately differentiate between an executive and a craftsman, but at least he felt constrained to offer a justification, albeit a logically defective one. After noting that in the cloak and suit division of the apparel industry the average hourly earnings of manufacturing employees in New York City was $1.40 an hour or $56 a week, Stein offered this non sequitur:

In such industries the $30 minimum is an exceedingly small protection, indeed no protection at all. In general, the difference between the weekly earnings of a skilled craftsman who does no supervising work and the minimum wage required herein for exemption as an executive is not very great in any industry covered by the act. This disparity will tend to decrease rather than increase as time goes on. Thus it appears that the adoption of a rate lower than $30 per week would not afford adequate protection against abuse in a great variety of instances.

The grotesquely inadequate $30 "executive" salary threshold was underscored by data that Labor Secretary Frances Perkins presented to Congress less than a year and a half later: In war industries average wages with overtime were $32 to $33 a week or $1,600-$1,700 a year, while the minimum maintenance for the average family with three children was $1,540 (only marginally below the WHD's $1,560 annualized executive salary threshold at $30 a week). Why, then, did Stein focus

23"Louis B. Mayer Tops 1940 Salaries List," NYT, May 9, 1941 (18:2). The data derived from compulsory filings with the Securities and Exchange Commission. The salary of W.C. Fields—who, thanks to Stein's innovation, became an exempt artistic-professional employee—the highest paid employee of Universal Pictures, was $255,000

24Stein Report at 20.


26Hearings on H.R. 6790, To Permit the Performance of Essential Labor on Naval Contracts Without Regard to Laws and Contracts Limiting Hours of Employment, to Limit the Profits on Naval Contracts, and for Other Purposes (Mar. 19, 1942), in Hearings Before the Committee on Naval Affairs of the House of Representatives on Sundry
on the inadequacy of a hypothetical salary threshold of less than $30 when he had just affirmed the current (and even greater future) inadequacy of the actual $30 threshold? The question as to whether such a low requirement should be adopted could, according to Stein, be best answered by estimating "(1) the compensating advantages...in the nature of the employment to justify the denial of the benefits of the act and (2) the protection against abuse provided by the entire definition including the salary proviso." Stein tried to bolster the anomalously low executive salary limit by stressing the non- or quasi-monetary perquisites associated with the job: in language that the DOL was still citing (second hand and erroneously attributing it to Congress) 64 years later in defense of its continued low salary thresholds, Stein claimed that the regulatory requirement that an executive direct others implies authority over people, a privilege generally considered desirable to possess. More important, as justification for unlimited hours of work, the opportunities for promotion to higher executive positions are clearly greater for those who already occupy some type of executive position. These intangible advantages are normally, though not always accompanied by more tangible advantages such as paid vacation and sick leave. Still more important is the fact that executives have a greater security of tenure than almost any other group of workers. When a factory retains only a skeleton crew, the foreman is normally a member of that crew; and the other members of the executive hierarchy also tend to retain their positions. Thus even the lower paid executives enjoy certain prerogatives that may be given weight. Self-contradictorily, Stein himself readily admitted that employers could "abuse" the exemption, precisely because "some foremen and supervisors are paid exceedingly low wages." Nevertheless, with an adamancy that lawful and unlawful abuse later mocked, Stein insisted that "a rather low salary requirement will not impose an impossible task on those responsible for the enforcement of the act, because most claims for exemption under this heading can be analysed [sic] without undue difficulty on the basis of the job itself."

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27*Stein Report* at 21.  
28*FR* 69:22123-24 (Apr. 23, 2004); see also below ch. 17. Ironically, the $455 weekly salary threshold that the pro-employer, anti-labor Bush administration DOL set in 2004 exceeded the $406.50 to which the $30 from 1940 was equivalent (in August 2004) after adjustment according to the consumer price index.  
29*Stein Report* at 21-22.  
30*Stein Report* at 22.
Following this rather unpersuasive defense of the low salary limit, Stein undertook his one effort at justification by reference to some purpose of the FLSA. Such objectives as preserving workers' physical and mental health and expanding their free time would not have served Stein's ends because they would have been as applicable to white- as blue-collar workers. In words that continued to resonate with the DOL more than six decades later as pseudo-legislative history justifying the white-collar exclusions altogether, Stein asserted that:

The penalty payment requirement for overtime work in the case of persons truly employed in an executive capacity would not usually have any considerable effect in spreading employment because in many instances the executive's work cannot be shared. In any event, it would produce this effect far less commonly than in the case of administrative and professional employees.... Thus a higher salary requirement for “executive” would not result in spreading employment to any very great extent, and particularly not in comparison with the increased employment to be anticipated from a comparable salary requirement for administrative and professional employees.

Unlike Stein's otherwise massively and carefully documented references to hearing testimony in support of various arguments, no footnotes undergirded this allegedly empirical claim. Consequently, not only is it unclear how Stein purported to know that “executive work cannot be shared,” but earlier, when he had taken pains to reassure employers that more than one assistant department head “should certainly qualify for the exemption,” he had insisted that while a small department was “usually supervised by one person,” it was “incorrect to assume that...in a large department the supervision cannot be distributed among two or three employees, conceivably even more.” And even if were true that nature

31In another context Stein did make a radical purposive argument. After noting both that no witness had proposed it and that while it was absurd to speak of a $12-a-week executive, “it cannot be denied that a man can earn as little as $12 a week and still be an outside salesman,” Stein tentatively suggested that “it might be wise to retain the benefits of the act for the lower paid members of this group and particularly to encourage the spread of employment thereby.” Stein Report at 52. However, Stein did not adopt such an approach in his formal recommendations and the regulations have never included a salary requirement for outside salesmen. It should be kept in mind that the crucial modifier “bona fide” in § 13(a)(1) of the FLSA does not syntactically govern “the capacity of outside salesman.”
32FR 69:22123-34; see also below chs. 15-17.
33Stein Report at 22.
34Stein Report at 11.
35Stein Report at 12.
abhorred two CEOs in one corporation as much as a vacuum, the proliferation of three-shift militarized production virtually while Stein was writing his report revealed that one of the main bottlenecks was firms’ discovery that “they would have to spread their supervisory forces thinly over their entire operations.”36 In other words, increased managerial work loads could be met by absorbing the unemployed to increase the supply of “executives.” Moreover, the weasel words—“usually,” “any considerable,” and “many”—that Stein used to moderate his allegation, while falsely suggesting the existence of quantitative data at his disposal, in fact indicated that even he conceded that some work-spreading was possible. (In addition, the repeated invidious comparisons with administrative and professional employees refute the DOL’s later undifferentiated use of Stein’s statement to justify exclusion of these two groups as well.)37 In the end, then, Stein failed to undermine the case for a higher executive salary threshold.

Stein bestowed special care on setting the salary level for executives because they “are an essential feature of all industry. Many employers employ no administrative employees...; thousands have no occasion to employ professional employees.... But executives—high and low—exist and must exist everywhere.” Because a nationally applicable labor standard, as Stein had observed earlier, was difficult to reconcile with regional salary differentials, and “the salary qualification for ‘executive’ will affect both high and low wage areas, high and low wage industries, and large and small businesses,” he concluded that it was “desirable to retain a comparatively low salary requirement.”38 And although he himself regarded both $30 and $35 as suitable, he opted for the pre-existing $30 salary39—in spite of acknowledging that “a $35 requirement would not be seriously unfair to employers” inasmuch as even an Arkansas statute excluded women managers with salaries above $35 since Arkansas was a “low-wage area and...female employees...are customarily paid lower wages than males—who constitute the great majority of executive employees.”40

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36 "OPM Expected Soon to Ask 6-Day Week,” NYT, Jan. 12, 1941 (28:1). See also above ch. 10.


38 Stein Report at 22.

39 Stein Report at 23.

40 Stein Report at 22 n.78. On the Arkansas law, see above ch. 6.
The Stein Report and the Revised Regulations

The Empirical Untenability of Stein’s Construct of a Dichotomous Pattern of White- and Blue-Collar Working Conditions and Social Wages

[W]hite collar workers are even more in need of protection set by limiting hours of work than industrial workers. No whistle blows for them.41

The weaknesses of these seemingly empirical claims on behalf of a low salary limit, which Stein did not even try to support with citations to the hearing record, are striking. His individual assertions will be analyzed in detail, but anticipatorily it should be recalled that by 1937 even big business had acknowledged that many dimensions of compensation, such as vacations, sick leave with pay, pay for holidays, and dismissal compensation, which had traditionally been withheld from wage-earners, were increasingly no longer the exclusive preserve of salaried employees. Moreover: “In many industrial organizations promotion comes at least as readily to the hourly man as to the salaried employee, especially if the former has some background of technical training.”42

Unconcerned with these more realistic themes, Stein operated within his own rigid framework, which cannot withstand scrutiny. First, just how much of a salary reduction did Stein believe that the privilege of bossing co-workers was worth to neophyte executives when they also had to pay the price of “unlimited hours of work”?43 Second, even if low-level executives were in fact more promotable than non-executives, what “justification for long hours of work” did Stein have for the many low-level executives who would either never be promoted or would be terminated altogether? The empirical accuracy of Stein’s underlying assumption was contested as early as 1927 by Magnus Alexander, the president of the National Industrial Conference Board:

“Office work...by many is held in greater social esteem than is manual labor, but largely for illusory consideration belonging to a past age. Probably the closer association


42E. S. Cowdrick, “Report to Clients, 1937” at 8 (Jan. 25, 1938), in Willis Harrington Papers, Accession 1813, Box, 28, Hagley Museum and Library. On this annual report of the Special Conference Committee, see above ch. 2; see also a modified published version in “Overtime Work by Salaried Employees,” Personnel 14(2):90-93 (Nov. 1937).

43According to one contemporaneous authority, it was unnecessary for managers to pay “to exercise control over others” because employers paid them to do so. Ronald Coase, “The Nature of the Firm,” Economica (n.s.) 4:386-405, at 390 (Nov. 1937).
with management and the appearance of greater opportunities for advancement play an important part in this. But I do not believe that the average industrial worker’s opportunity for promotion is one whit less than that of the office worker.”

Third, regardless of what big business knew, Stein himself knew in detail from hearing testimony—indeed, he himself had stated at the hearings—that paid vacation and sick pay were ceasing to be a marker of executive status not only vis-à-vis non-bona fide white-collar workers, but even vis-à-vis unionized factory workers. For example, Stein himself observed at the hearings that General Motors had announced that it would soon give one week’s paid vacation to all production workers after one year and two weeks after five years, and that U.S. Rubber Company had implemented the same policy. The very first witness at the hearings, M. Toulme, the chairman of the National Wholesale Grocers Association, had stated that while 95 percent of all industry employees worked 41 hours or more and 68 percent 45 hours or more, 75-80 percent received vacations and sick pay. A representative of the oil and gas industry testified that hourly workers in the petroleum refinery industry had begun receiving paid vacations as early as 1920. Boris Shishkin, an AFL economist, had testified that paid vacation and sick leave had become widespread, with between 800,000 and 1,000,000 AFL members receiving them. Jane Benedict of the Book and Magazine Guild, which was affiliated with the UOPWA, told Stein that vacations with pay were usual, with two


45Although Malamud, “Engineering the Middle Classes: Class Line-Drawing in New Deal Hours Legislation,” *Michigan LR*, 96(8):2212-2321, at 2313 (Aug. 1998), was correct in faulting Stein for making an anachronistic point, she was wrong in assuming that he had “failed to see the trend,” let alone that “his cultural antennae were weak.” It should be kept in mind that at the time: “Employers consider that the vacation is a privilege granted to the employee as an earned reward for past service. The purpose of the vacation, however, is to prepare workers for future service; that is, to better fit them for work in the ensuing year.” L. McKenney, “Effect of Shorter Work Week on Vacation Policies for Office Workers in 1934,” in AMA, *Office Management Series* O.M. 65, at 33-44, at 37 (1934).


4741940 WHD Hearings Transcript” at 14 (Apr. 10, 1940).

481940 WHD Hearings Transcript” at 123 (June 3, 1940) (A. Nicholson).

491940 WHD Hearings Transcript” at 433 (Apr. 12, 1940).
weeks the general practice, partly as a result of the union’s collective bargaining agreements.\textsuperscript{50} Marcel Scherer of the Federation of Architects, Engineers, Chemists and Technicians had criticized the SSIC’s proposal to incorporate the receipt of paid vacations and sick leave into the definition of exempt white-collar workers as unrealistic precisely on the grounds that “many production employees now receive these.”\textsuperscript{51} Another representative of FAECT added that the union’s contracts provided for one week of paid vacation after one year and two weeks thereafter.\textsuperscript{52} In contrast, it was uncommon for non-union draftsmen and related workers to receive paid vacations or sick leave.\textsuperscript{53}

As early as 1925, \textit{The New York Times}, under the headline, “Paid Vacation the Lure of White Collar Jobs,” reported that a study of 1,500 factories in New York State revealed that 90 percent gave paid vacations to office workers and 18 percent to production workers (but 39 percent of plants with more than 2,000 workers did so), with an average of two weeks for office and one week for factory workers.\textsuperscript{54} After the enactment of the NLRA, the years from 1935 to 1940 witnessed a steady increase in the number of workers covered by paid vacations (as well as pensions, profit-sharing, and health-insurance plans), as employers undertook expensive efforts to promote worker loyalty and deter unions.\textsuperscript{55} The DOL’s own Bureau of Labor Statistics published a survey study in 1938 revealing that in the previous year 39.3 percent of manufacturing workers had worked in plants with vacation plans for wage earners. Moreover, it had only been since 1935 that paid vacations for manufacturing wage earners had become “general”: almost 40 percent of the plants providing paid vacations for wage-earners reported that 1937 was the first year they had offered them.\textsuperscript{56} And whatever significance differential non-wage benefits as between blue- and white-collar and between high- and low-paid white-collar employees possessed in 1940 was dissipated during the following decades to the degree that it can no longer justify “unlimited hours of work.” Indeed, as early as 1957, the president of the Office Employees International Union had noted

\textsuperscript{50}``1940 WHD Hearings Transcript” at 471 (July 27, 1940).
\textsuperscript{51}``1940 WHD Hearings Transcript” at 364 (Apr. 11, 1940).
\textsuperscript{52}``1940 WHD Hearings Transcript” at 492 (July 27, 1940) (C. Rosemund).
\textsuperscript{53}``1940 WHD Hearings Transcript” at 156-57 (July 25, 1940) (Morris Zeitlin).
\textsuperscript{54}``Paid Vacation the Lure of White Collar Jobs,” \textit{NYT}, July 6, 1925 (15:4-5).
\textsuperscript{56}Frances Jones and Dorothy Smith, “Extent of Vacations with Pay in Industry, 1937,” \textit{MLR} 47(2):269-74, at 269 (quote), tab. 1 at 270 (Aug. 1938). Although 95 percent of salaried employees received paid vacations, one-fifth of establishments reported that they provide them.
that many organized manual workers have fringe benefits exceeding those of unorganized white-collar employees.\textsuperscript{57} Thus, the DOL's continued reliance in the twenty-first century on what has become a canard further underscores just how decayed the policy foundations of the white-collar exclusion are.

And fourth and last, although real executives in 1940 may have also enjoyed greater security of tenure and suffered less unemployment than white-collar workers protected by the FLSA, the widespread insecurity, mass firings, and unemployment among middle-managers in recent years have thoroughly discredited this alleged "compensating advantage[ ]."\textsuperscript{58} Yet even in 1935, Lewis Corey in his well-known book, \textit{The Crisis of the Middle Class}, depicted a process of decomposition and stratification totally absent from Stein's account:

Managerial and supervisory employees are comparatively well paid and secure.... But here, too, there is also a proletarianizing tendency.... \textit{[M]}anagement and supervision are increasingly becoming mere routine tasks, simplified, specialized and mechanized, and displacement is a growing danger because of mechanization.... Large numbers of managerial and supervisory employees earn below $3,000 yearly and are threatened by insecurity.\textsuperscript{59}

Furthermore, in 1940, Stein heard Morris Zeitlin of the FAECT testify that "if amendments are to be made they should be directed toward inclusion of more skilled and higher salaried employees. For they too are wage earners and subject to all the abuses, insecurity, long hours and unemployment as are all other wage earners, and although their hourly or weekly rates may be higher and their talents, knowledge and skill place them in supervisory positions, under general administrative instruction, their annual average earnings do not exceed that of the average skilled worker."\textsuperscript{60}

White-collar unemployment was a long-standing and highly publicized social and economic problem that antedated the Great Depression. In 1930 in his monumental study of real wages in the United States, economist (and later liberal Senator) Paul Douglas pointed to some of the underlying tendencies. In seeking to explain why salaried and clerical workers had gained only 3 percent in real

\textsuperscript{57}Howard Coughlin, "White Collar Progress," \textit{AF} 64(11):10-12, at 10 (Nov. 1957).
\textsuperscript{58}See above ch. 2.
\textsuperscript{59}Lewis Corey, \textit{The Crisis of the Middle Class} 250-51 (1935). However, Corey also stressed that higher-salaried employees and professionals "are a privileged caste whose relation to production and income assures their support of capitalism. They are identified with...the exploiting relation of its [collectivism's] capitalist forms.... This is partially true of the managerial and supervisory employees." \textit{Id} at 270.
\textsuperscript{60}"1940 WHD Hearings Transcript" at 153 (July 25, 1940).
wages since the 1890s compared with 29 percent for manufacturing wage earners, he noted that mechanization of office work had probably proceeded faster than that of the workshop. He also stressed the extraordinary increase in the number of students in high schools, which "have primarily served to recruit juveniles for clerical work, and the vast numbers that have poured out of the high schools have served to keep wages down to a much lower point than would otherwise have been the case." In the 1890s, the clerical class had been a quasi-noncompeting group, which it was somewhat difficult for children of manual workers to penetrate. Conjecturing that the real monetary differences enjoyed by clerical workers were not great—the advantages were primarily social rather than pecuniary—Douglas inferred that "the day seems not far off when all real differences in remuneration between the upper group of hard-handed and the soft-handed groups will disappear...." Indeed, clerical workers’ monetary earnings would have increased much less but for the extraordinary increase in demand for them brought about in part by the fact that the increase in the average size of business units caused the administrative staff to expand more rapidly than the workshop itself, which in turn was caused by the increased necessity for knowing costs and the greater emphasis on marketing which, in turn, had derived from the expansion of the market. Frederick Taylor’s "movement toward more conscious and intelligent direction of production" had also required expanding the office staff to handle details. This expansion of clerical work enabled high school graduates to be absorbed, and, in turn: "This increased need was also one of the reasons why the business interests of the country were willing to have so much of the resources of the country, and incidentally of their own, devoted to furthering secondary education."61

Douglas’s book, which appeared at the beginning of 1930 and stopped its analysis with 1926, did not even reflect the oversupply that was building up during the 1920s and finally burst forth during the Great Depression. Against the background of the explosive increase in the proportion of 14- to 17-year-olds enrolled in high school from 7 percent in 1890 to 73 percent by the time that Stein was writing in 1940,62 it was hardly surprising that the mass production of white-collar workers had already resulted in overcrowding during the Harding-Coolidge-Hoover prosperity years,63 when reports of white-collar unemployment found their way into public consciousness.64

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62C. Wright Mills, White Collar: The American Middle Classes 246 (1967 [1951]).
63Lewis Corey, The Decline of American Capitalism 249 (1934).
64As early as 1865 Marx had foreseen that the labor power of commercial office workers would be devalued as the acquisition of commercial knowledge and languages was cheapened and the capitalist mode of production directed teaching methods toward
As early as 1923 *The New York Times*, under the headline, “White-Collar Men Desert Desks to Be Bricklayers,” reported that: “Parents may be said to have been largely responsible for this surplus of white-collar men.... The ranks of clerical workers have been over-manned because these parents did not want their boys to enter any but socially correct professions.” The following year Labor Secretary James Davis admonished the National Society for Vocational Education: “We are turning out 90 per cent. of our youth equipped only for the so-called white collar occupations, which can provide jobs for only 10 per cent. of them. We cannot keep America in the vanguard of civilization if we permit the American people to become exclusively a ‘white collar’ people.” The *Times*, quoting the observation of a Guaranty Trust Company vice president that “the white-collar army is growing by leaps and bounds,” added that because of overcrowding, it had become necessary to publicize the fact that “many white collars have frayed edges.”

Availing itself of a commonly deployed explanation, the newspaper opined that in large part because “women, with only themselves to provide for, or a husband’s or father’s support to supplement, accept less wages than men demand,” they were “threaten[ing] to drive men out of ‘white-collar’ employment....”

Once production and employment had begun to plummet in the course of the depression, white-collar workers were conspicuously represented in unemployment and bread lines, and “The Plight of the White-Collar Army” became a widespread journalistic and labor union trope. In September 1931, the Association for the Improving the Condition of the Poor stressed the “plight of unemployed thousands of ‘white-collar’ workers” in New York City, depicting multitudes of clerks teachers, engineers, architects, doctors, and lawyers as unable to find work after practical matters in connection with the introduction of universal public education. Marx, *Das Kapital*, 3:311-12.

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65“White-Collar Men Desert Desks to Be Bricklayers,” *NYT*, Mar. 11, 1923 (sect. 9, 16:3-4) (quoting a YMCA education director).


67“Demand for Women in Office Work Now Exceeds the Supply,” *NYT*, Oct. 19, 1924 (sect. 9, 9:5-8). However, neither cost nor efficiency was the sole factor, as many employers demanded that they be sent not “an old maid,” but “a modern girl, full of pep,” while Wall Street in particular wanted “dashing girls....” *Id.*

68“Many Are Hunting ‘White Collar’ Jobs,” *NYT*, Feb. 27, 1930 (43:1); “2 Breadlines Feed 2,000 Daily Here,” *NYT*, May 19, 1930 (14:2).

longed unemployment had exhausted their savings. The deterioration of conditions was most especially marked in New York City, where as early as 1925 most workers had white-collar jobs. Of 2.5 million employed, clerks (excluding those in stores) were the largest group, encompassing 140,000 men and 70,000 women. No other city in the world employed so many stenographers: 75,000 (of whom 5,000 were men); counted were also 80,000 bookkeepers, cashiers, and accountants. At the nadir of the depression in January 1933, 28 percent of family heads seeking assistance at the Emergency Work and Relief Bureau in New York were clerical or professional employees, more than twice as high as the proportion the previous winter. Generally, even employers recognized that: “During the depression...many salaried men found that their supposed security of employment was a delusion; that they were about as likely to be laid off as were their wage earning associates.”

That professionals had felt the full brunt of the depression was revealed by a Columbia University survey that reported phenomenally high unemployment rates of 98 percent for architects, 85 percent for engineers, and 65 percent for chemists. Although reporting much lower absolute figures, the Bureau of Labor Statistics revealed that the unemployment rate in the engineering profession had skyrocketed from the end of 1929 to the end of 1932 from 0.7 percent to 10.9 percent. From 1929 to 1934, the number of persons in or trained for engineering rose by 25.3 percent, while opportunities for employment rose by only 4.4 percent; the result was “a large amount of unemployment and intense pressure to find nonengineering work.” In 1934 14.1 percent of engineers were engaged in nonengineering jobs and 8.5 percent were unemployed: “Had it not been for the large increase in the employment of engineers by public authorities, the effect of the depression on the profession would have been even more disastrous.” Private engineering employment fell 8.2 percent, while public employment rose 46.8 percent. More than 34 percent of engineers reported unemployment at one time or another between 1930 and 1934; by the end of 1934, 5 percent of all (or about one-half of all unem-

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70 "Predicts Dire Need for Private Relief," NYT, Sept. 29, 1931 (27:8).
71 "White-Collar Workers Most Numerous in New York City," NYT, Mar. 15, 1925 (sect. 9, 9:6-8).
ployed) engineers were on work relief.76 By 1935, the well-off were venting intense hostility over relief programs, particularly those tailored to white-collar workers.77 In a special report on government assistance that had been rendered to professional, technical, and other service workers, the Works Progress Administration declared that:

Many people of the favored economic groups seem to regard it as desirable that a destitute person shall be disciplined. The discipline they think of is manual labor. They like the idea of putting a destitute musician down in a sewer or putting a child psychologist at a sewing machine. This brutal attitude of manual discipline which is abroad in the whole Western world is a prime ingredient of atavistic political reaction. Fortunately, it has not thus far controlled our work program.78

It was in this same combative spirit that Corrington Gill, the assistant administrator of the Federal Emergency Relief Administration, called attention to the presence on the relief rolls of more than 750,000 experienced white-collar workers—including all professional groups, former proprietors, clerical employees, and sales people—or 11.75 percent of a total national relief count of 6,400,000: "We can no more afford to lose their trained abilities by allowing them to deteriorate than we can afford to line them up against the wall and shoot them or allow them to starve."79

Data on relief recipiency offer a sense of the absolute and relative extent and the composition of white-collar destitution during the first half of the 1930s. From

76US BLS, Employment and Earnings in the Engineering Profession 1929 to 1934, at 3, 8, 9 (Bull. No. 682, 1941) (by Andrew Fraser, Jr.). Median annual earnings of engineers fell from $3,412 in 1929 to $2,286 in 1934. Id. at 10.


78WPA, Government Aid During the Depression to Professional, Technical and Other Service Workers 9 (n.d. [1936]). Maoist resort to forced manual labor for intellectuals in the 1950s and 1960s suggests that the practice was not the monopoly of one class.

79Corrington Gill, "White-Collar Work in Relief Defended," NYT, Apr. 14, 1935 (E7:1-5). In New York City, white-collar workers accounted for 102,000 or 24.8 percent of all 412,000 relief recipients.
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1929 to 1932, 700,000 or 30 percent of salaried workers in manufacturing, construction, mining, and transportation were disemployed compared to 42 percent of wage earners. The 560,000 white collar or service workers—or 10 percent of all—on relief rolls in March 1935 were categorized under four headings: professional and technical (82,000), including 20,000 teachers, 15,000 musicians, 6,800 nurses, 6,200 engineers, 4,500 draftsmen, and 3,800 actors; nonagricultural proprietors and managers (80,000); office workers (216,000); and sales (181,000). The 1930 census counted 14 million such workers or about 30 percent of the total. From mid-November 1933 until mid-March 1934 (when it was being dismantled) the Civil Works Administration reached a peak employment of 4.5 million workers, of whom more than 450,000 were white collar. The FERA’s employment peaked in January 1935 at 2,512,000, of whom 10 percent were service workers: “White collar projects employed almost one third of all women and about one twelfth of all men.” Between March 1935 and January 1936, the number of white-collar and professional-technical workers on relief increased 12 percent and 25 percent, respectively, while that of the relief rolls in general dropped 2 percent, so that these groups represented one-ninth of all recipients.

In 1936 the Times reported that white-collar workers had begun to come into the relief picture as far back as 1931 when Emergency Unemployment Relief Committee had made the startling discovery that there were more than 50 applicants for every office job that commercial agencies had to offer. During the depression about 30 percent of relief applicants in New York City had been clerical and professional employees. The newspaper then offered this grim picture of “Brain-Workers on Relief”:

If the phrase “white-collar worker” had been used in 1873 or 1893 it would have been listened to with a blank stare. Just between the World War and the boom of the Nineteen

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80WPA, Government Aid During the Depression to Professional, Technical and Other Service Workers at 3-4; Monthly Report of the Federal Emergency Relief Administration December 1 through December 31, 1935, table C-2 at 61.

81WPA, Government Aid During the Depression to Professional, Technical and Other Service Workers at 7. CWA workers, unlike those supported by the FERA, were on the federal payroll: “The agency took half its workers from relief rolls; the other half were people who needed jobs, but who did not have to demonstrate their poverty by submitting to a ‘means’ test.” Leuchtenberg, Franklin D. Roosevelt and the New Deal at 121.

82WPA, Government Aid During the Depression to Professional, Technical and Other Service Workers at 10.

83WPA, Government Aid During the Depression to Professional, Technical and Other Service Workers at 11.

84“Brain-Workers on Relief,” NYT, July 5, 1936 (sect. 9, 9:1-2).
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Twenties it would have suggested a man whose pride led him to prefer a low-paid office position to a job carrying higher pay which would require him to wear overalls.

Now it implies a peculiar problem in the great pool of unemployment—one which has arisen in connection with every relief program since 1930 and proved a puzzler to [Works Progress] Administrator [Harry] Hopkins in Washington....

During the latter half of April 1937—as the Roosevelt administration was drafting the FLSA bill that would exclude so many of them—236,000 people were “employed on WPA white-collar projects,” which were necessary because of adoption of a policy of providing jobs for unemployed along the line of their usual occupations. These white-collar workers on the WPA rolls included artists, musicians, actors, writers, physicians, nurses, teachers, salesmen, stenographers, typists, and other office workers. The (voluntary) census of unemployment in 1938 counted a total of 5,816,975 unemployed males (including emergency workers), including 130,633 professional persons, 90,708 nonfarm proprietors, managers, and officials, and 491,397 clerks and kindred workers. Among the 2,028,041 unemployed females, 95,446 were professionals, 5,429 proprietors, managers, and officials, and 453,222 clerks and kindred employees. By this time, Alba Edwards, who created the Census Bureau’s socio-economic classification system in which white-collar workers occupied a prominent place, wrote that their average salary was “only enough to meet the demands of a very moderate standard of living.” Moreover, the white-collar worker’s “job will support him from day to day while he is at work, but he lives face to face with the hazard of unemployment and face to face with the certainty of old age.”

Early postwar socio-economic developments should also have called into

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85“Brain-Workers on Relief.”
88Alba Edwards, “Growth and Significance of the White-Collar Class,” *AF* 45(1):32-34, at 34 (Jan. 1938). In Britain, too, the impact of unemployment on white-collar workers during the Depression changed their attitude toward the £250 salary ceiling on non-manual workers’ eligibility for unemployment insurance. “Till about 1929, there was general acceptance of the existing exception. ... In the past five years, the attitude of many employees has been changed, no doubt as a direct consequence of the depression. From 1930 onwards insecurity of tenure spread into sections of the population who had felt themselves immune from unemployment; a persistent demand began to be made by various associations of professional and clerical workers in favour of raising the remuneration limit.” *Unemployment Insurance Act, 1935: Report of the Unemployment Insurance Statutory Committee on Remuneration Limit for Insurance of Non-manual Workers* 4 (1936).
question the DOL’s insistence on adhering to Stein’s rigid framework. By 1950, C. Wright Mills confirmed that “manual workers, represented by unions, are demanding and getting precisely the type of privileges once granted only white-collar people.”89 In 1954, the Journal of Business, edited at the University of Chicago Business School, also placed its imprimatur on the convergence thesis by publishing an article that outlined the development. It pointed out that some manual workers had begun getting what is perhaps the most important of white-collar privileges in the 1920s—paid vacations; the much stronger trend that began in the late 1930s was given great impetus during World War II by the War Labor Board policy and received powerful momentum during the postwar high-employment economy:

By now, most manual employees receive paid vacations.... As a group, salaried employees receive somewhat more liberal allowances. There is much overlapping, however, and the trend toward equalization appears to be continuing.

Before World War II, few manual employees received paid holidays, while salaried personnel usually enjoyed six or more holidays with pay. Only a little more than a decade later, a situation of near equality between the two groups has been achieved. ... While few manual employees receive sick leave with pay, the rapid development of group sickness and accident insurance has substantially offset the advantage held by the salaried employees.90

And the same year, Business Week, reporting that only 309,500 of 4,300,000 non-government white-collar workers were in white-collar unions and a further 240,000 in industrial unions, pithily observed that the gap between white- and blue-collar workers’ wages and benefits “May Be Gone Forever.”91

88White Collar at 300.
91“It May Be Gone Forever,” BW, Nov. 6, 1954, at 64-70. As of 1953, these white-collar unions had the following membership: Railway Clerks, 130,000; OEIU, 40,000; Retail, Wholesale, and Department Store Union, 28,000; and National Federation of Salaried Unions, 27,000. These industrial unions had the following white-collar membership: UAW, 80,000; United Steelworkers, 60,000; International Union of Electrical Workers, 20,000; and International Brotherhood of Electrical Workers, 20,000. Of five million retail workers, the Retail Clerks had 250,000, the Meat Cutters 75,000, the RWDSU 60,000, and the Teamsters 40,000 members. Id. at 68.
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Administrative Employees

[If you would redefine the administrative section so as to provide that any white collared employee receiving $150.00 a month should be exempt from the maximum hour privilege, you would unshackle business to an amazing extent.]

Stein’s most pivotal revision—the recommendation that administrative employees be detached from the category of executive employees—potentially created such a vast new exclusion of administrative employees who were not bosses that it is unclear how Stein could have imagined that the 1938 regulations had also been in “full accord” with congressional policy. The only such policy to which Stein referred (or could have referred, since the FLSA contains no other) was embodied in the preamble, which, however, he did not quote. What Congress expressed there was the finding that “the existence...of labor conditions detrimental to the maintenance of the minimum standards of living necessary for health, efficiency, and the general well being of workers (1) causes commerce and the channels and instrumentalities of commerce to be used to spread and perpetuate such labor conditions among the workers of the several States;...(3) constitutes an unfair method of competition in commerce; (4) leads to labor disputes burdening and obstructing commerce and the free flow of goods in commerce....” Stein did, however, quote from a very recent appellate court decision holding that exemptions should be interpreted narrowly because the FLSA’s purpose was to “eradicate...the evils attendant upon...long hours” and “exemption would tend to defeat its purpose.” To draw out this judicial logic: Congress had either already defeated its own purpose by excluding bona fide executive, administrative, and professional employees or avoided such a self-defeating step by laying down a “standard” (to use Stein’s term) designed to enable the WHA to read the unexpressed (and demonstrably vacant) congressional mind and to define the universe of excluded employees.

92"1940 WHD Hearings Transcript” at 252 (July 26, 1940) (statement of J. Raymond Tiffany, Book Manufacturers Institute, accounting for 90 percent of all book manufacturers, employing 12,000 employees, of whom 1,500 are white-collared; id. at 248).


94Stein Report at 2 (quoting Fleming v. Hawkeye Pearl Button Co., 113 F.2d 52, 56 (8th Cir. June 26, 1940). The case did not involve the white-collar exclusions in § 13(a)(1), but those related to fishing in § 13(a)(5). Stein’s typographical error (“exemption”) has been corrected (“exemptions”).

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workers whose long hours would not be detrimental to their own or any covered workers' health, efficiency, or general well-being. However, the only way that the WHA could transform that vague and empty standard into a substantively appropriate detailed rule would have been to determine empirically which workers passed that virtually unpassable test. Yet Stein collected no data that could have demonstrated that long hours neither harmed some white-collar workers nor deprived others of employment.

His recommendation to sever administrative from executive employees and subject them to an expansive definition was the most telling proof that Stein had moved even further from such a realistic methodology than the drafters of the 1938 regulations—who, as a later WHA observed, must be deemed to have been closer to congressional intent than any later regulators\textsuperscript{95}—although it may be true that he was nevertheless more attentive to the congressional use of commas textually setting off administrative employees from their executive and professional co-excludees. Stein observed that criticism of the WHA’s failure to separate the two categories in 1938 had perhaps been more frequently repeated than any other at the hearings.\textsuperscript{96} However, he doubted the validity of the narrower contention that the failure constituted a violation of the WHA’s statutory duty “since ‘executive’ and ‘administrative’ are used synonymously in common speech and court decisions.” Its proponents had undermined it further by submitting definitions of “administrative” so broad that they engulfed and thus rendered superfluous “executive” as an independent term.\textsuperscript{97} Stein was by and large content with the existing joint definition of “executive” and “administrative” insofar as it applied “with particular aptness to persons who are commonly called ‘bosses.’ The range of exemption is broad. It extends from the president of a large and complex corporate structure down to the foreman in charge of a very minor department.” Although Stein must surely have known or sensed that “common speech” definitely did not regard every petty foreman, supervisor, or boss as encompassed by the much loftier term “executive,” he was willing to leave the definition, with “minor modifications,” unchanged because it did “describe and exempt the person who possesses and wields specific executive authority.” In contrast, however, the hearings had re-

\textsuperscript{95}Telephone interview with Tammy McCutchen, Washington, D.C., Sept. 16, 2004. To be sure, proximity to a blank congressional slate or mind may be no more enlightening than distance from the same.

\textsuperscript{96}Stein Report at 3.

\textsuperscript{97}Stein Report at 4 (citing, e.g., the proposals of Montgomery Ward and the American Bankers Association). Conversely, Stein also rejected proposals making “administrative” merely a lower form of “executive” because the terms “must not overlap if effect is to be given to each of the words in an act of Congress.” Id. at 24.
revealed that “in modem business there has been an increasing use of persons whose authority is functional rather than departmental. Primarily they determine or affect policy or carry out major assignments rather than give orders to individuals.” As examples of those “performing a variety of miscellaneous but important functions in business” he repeated those that employers had mentioned at the hearings—personnel managers, credit managers, buyers, claims agents, auditors, wage-rate analysts, supervisors of machine tools, executive assistants, purchasing agents, tax experts, and safety experts. And while many of these employees had mixed responsibilities qualifying them as bosses and thus as exempt under the 1938 definition, there was also a “large group who either do not qualify or whose qualifications are dubious.”

In order to give this “large group” their due by removing them from the regime of national hours limitation, Stein concluded both that “a reasonable interpretation of section 13 (a) (1) can include exemption for certain employees with miscellaneous policy-making or policy-executing responsibilities” and that a separate definition would be the easiest way to create this exemption. Indeed, his assertion that the convenient but “not essential” separate definitions “describe two different groups of employees both of whose duties may warrant exemption” lacked any explanation whatsoever as to why, within white-collardom, the performance of certain kinds of work justified long workweeks and that of others did not. Thus without the slightest nod to the necessity to justify this vast expansion of the universe of unprotected workers by reference to its benign effect on them, but with a massive bow to the NAM, whose proposal he “principally” adopted, Stein hastened to detach the statutory terms, although joint definition was also “entirely legal”.

While the usage of the two terms is so vague and overlapping that there is no generally recognized and precise line of demarcation between them, it does no violence to the common understanding of the words to apply “executive” to the person who is boss over

100 Stein Report at 4 n.14.
102 Stein Report at 4.
103 Stein Report at 24.
104 Stein Report at 25. He added that similar proposals had been submitted by the Illinois Manufacturers Association, MPPDA, and ANPA, “[s]ome of the special wording” of the last-named’s proposal also having been adopted. Id. at 25 n.84.
105 Stein Report at 3.
men and to apply "administrative" to the person who establishes or affects or carries out policy but has little or no authority over the specific actions of other individuals. As expansive as Stein meant the new definition to be in 1940, the example of run-of-the-mill customer service claims adjuster Dorothy Haywood is a constant reminder of how its luxuriant growth has made a mockery of its "policy-making or policy-executing responsibilities" roots, which had themselves been totally bereft of any rational basis for excluding anyone from protection from overwork.

Stein's most lasting achievement, as already noted, was his bifurcation of the executive-administrative exclusion and the creation of an independent categorical exclusion of administrative employees. By confining "executive" to those who exercised "some form of managerial authority," he was able to reserve "administrative" for those performing "a variety of miscellaneous but important functions in business." And while admitting that other dichotomous conceptions of two largely overlapping categories were possible, proposals making "administrative" merely a lower form of "executive" were inappropriate because then "executive" would always qualify under the administrative definition and could just as well have been omitted from the FLSA.

In addition to a monthly salary of $200, his recommended definition meant an employee:

(B)(1) Who regularly and directly assists an employee employed in a bona fide executive or administrative capacity..., where such assistance is nonmanual...and requires the exercise of discretion and independent judgment; or

(B)(2) Who performs under only general supervision, responsible nonmanual office or field work, directly related to management policies or general business operations, along specialized or technical lines requiring special training, experience or knowledge, and which requires the exercise of discretion and independent judgment; or

(B)(3) Whose work involves the execution under only general supervision of special nonmanual assignments and tasks directly related to management policies or general business operations involving the exercise of discretion and independent judgment.

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106 Stein Report at 4-5. According to Ralf Dahrendorf, Class and Class Conflict in Industrial Society 255 (1975 [1959]), staff specialists (whom he defined largely as professionals such as engineers, chemists, physicists, lawyers, and psychologists), were "linked with the line of authority by an intricate system of cross-relations without...having immediate authority except over their secretaries and assistants...."

107 See ch. 2 above.


Stein described the problem of defining an excluded administrative employee as twofold: on the one hand, it had to be broad and general enough to include employees performing a great variety of tasks; on the other hand, it had to “contain such delimiting requirements, principally a salary requirement, as will prevent abuse.”  

It might have been impolitic for Stein and the WHA to admit it, but the central problem in defining the administrative employees whose working hours Congress did not intend to regulate was the legislature’s failure to identify them and the very hazy associations that the word, unlike “executive” and “professional,” conjured up in popular usage. In Stein’s more circumspect language, because administrative employees performed “extremely diverse functions,” which were in many cases difficult to identify—after all, “it is not hard to call a janitor a ‘superintendent’...if some result desirable to the employer will flow therefrom”—it was necessary to evade the duties tests altogether: “the final and most effective check on the validity of the claim for exemption is the payment of a salary commensurate with the importance supposedly accorded the duties in question.” Unlike the situation with executive and professional workers, salary level had to come to the rescue of non-isolatable gradations of administrative responsibility, authority, and prestige. Although neither Congress nor Stein ever articulated a justification for privileging employers to impose unlimited hours on employees with above-average degrees of responsibility, authority, and prestige, Stein himself was at a loss to devise, over a broad range of administrative jobs, an “automatic way of distinguishing between” that segment of workers and “a mere cog in a large industrial wheel.”

Deprived of any “description of duties...which in and of itself can prevent abuse or...differentiate between those...who may reasonably be exempt under the act and those who deserve and require its benefits,” Stein could do no more than append “discretion and independent judgment” as a distinguishing element to each of the three subcategories of administrative employee. To be sure, he never attempted to explain why the exercise of such discretion and judgment should serve to subject these workers to long hours. Where even this criterion proved inadequate, “inclusion or exclusion should be determinable by...a completely objective requirement. This proposed objective requirement is, of course, the payment of a stated salary,” which is “the best and most easily applied test of the employer’s good faith in claiming that the person whose exemption is desired is actually of such importance to the firm that he is properly describable as an employee employed in a bona fide administrative capacity.” Although Stein never explained

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110Stein Report at 24.
111See above chs. 2 and 9.
112Stein Report at 25.
The Stein Report and the Revised Regulations

why “importance to the firm” should trump the employee’s need for free time and society’s need to share work and avoid unemployment, he offered as an additional reason for a salary-level requirement for administrative employees that, whereas the definitions of executive and professional employees had clauses barring them from exemption if they performed a substantial amount of nonexempt work, he did not propose such a clause for administrative employees because their functions were so heterogeneous that it would create a “disproportionately weighty” enforcement problem to identify nonexempt work. Consequently, in the absence of such a “guard against abuse,” the salary level had to be set high enough to prevent abuse. Stein’s problem, in other words, lay in the inability to discern any tangible definitional substance common to administrative jobs. This intellectual difficulty was, to be sure, peculiar to this category, but it merely made transparent what was less visible with regard to the executive and professional categories—namely, that he had failed to articulate any empirical or principled reason for characterizing any white-collar workers as not “deserv[ing]” the benefits of state-enforced hours protection.

Having already admitted that no characteristic (other than the spongy and ungeneralizable notion of performing “important” functions) unified the group of undeserving administrative employees, Stein proceeded to describe the three subgroups set out in his recommended definition. The first comprised assistants to (excluded) executive or administrative employees: modern industrial (and government) practice was making increasing use of such executive, confidential, and administrative assistants, who themselves lacked executive authority. The creation of these jobs was driven by the necessity that in large organizations certain officials, whose duties had attained such scope and required so much attention, delegated the lesser “work of personal scrutiny, correspondence, and interviews....” To frustrate employers’ exemption claims for mere messengers and stenographers, Stein relied on the aforementioned criteria of discretion and independent judgment to identify “the true executive secretary who, although she may take dictation and do some typing, is primarily employed because of her ability to distinguish between callers at the office and carry out other special and important duties.”

114 As Fleming observed after issuing the new regulations: “It is difficult...to find a common denominator for a well-paid executive assistant to a president of a large corporation, a well-paid lease buyer for an oil company, and a well-paid customer’s broker, even though there is no dispute that all three should be exempt.” Letter from Philip Fleming to Elbert Thomas (Nov. 19, 1940), printed in CR 86:6613-15 at 6615 (App.) (Nov. 19, 1940).
115 Stein Report at 27. The Employment Policy Institute’s suggestion that the Bush
(Here Stein perhaps had in mind the secretary in "her capacity as daily confidante to one of the gods" of a firm’s "Olympic council" as portrayed in Sinclair Lewis’s World War I-era office-centered novel *The Job.*)\(^{116}\) It is almost, but not quite, superfluous to note the (unintentionally) comic dimension of Stein’s use of a worker’s experience-based knowledge of which callers her boss would grant an audience to as a sufficient criterion ("discretion and independent judgment") for depriving her of protection against that boss’s overreaching in forcing her to remain at work all the hours he is there (and/or, in the even more absurd case, all the hours he is not there). Instead of imagining that he was engaged in formulating quasi-objective criteria for justifying exclusions from the country’s only nationally mandatory labor standards regime, Stein would have preserved more consistency had he availed himself of the open and blatant pandering to bosses’ prerogatives that Senator Vandenberg had successfully promoted during the debate on Black’s 30-hour bill seven years earlier: "I do not think a man should be expected to have a separate private secretary the last 2 hours in the day, and I do not think it is practicable to expect him to have an extra stenographer the last hour of the day, because that sort of service necessarily is personal and continuous."\(^{117}\)

Stein’s second subgroup of administrative employees—whose definition he took in large part verbatim from the corresponding definition in the Classification Act of 1923 for the civil service\(^{118}\)—comprised staff (as opposed to line) employees administration’s proposed regulation in 2003 excluding executive assistants from overtime regulation if they are "delegated authority to arrange meetings, handle callers, and answer correspondence" could, because such authority was not unusual, cause hundreds of thousands of secretaries and executive assistants to lose their overtime pay rights, overlooked that the WHD had already marked them for exclusion 63 years earlier. Ross Eisenbrey, “The Department of Labor’s False Claims About the Overtime Rule” at 4 (July 26, 2003), on http://www.epinet.org.


\(^{118}\)The act defined the lowest (assistant) administrative grade as including “all classes of positions the duties of which are to perform, under general supervision, responsible office work along specialized and technical lines, requiring specialized training and experience and the exercise of independent judgment....” Classification Act of 1923, Pub. L. No. 516, ch. 265, § 13, 42 Stat. 1488, 1495. In their standard sociological analysis of occupations, which also appeared in 1940, Anderson and Davidson observed that clerical occupations varied greatly, some bordering on business management and others primarily concerned with manual routine. The range of occupations included bookkeepers, cashiers, accountants, clerks, shipping clerks, messengers, office boys and girls, errand boys and girls, stenographers and typists: "These diverse occupations have an element in common in that they are directly related to the management of industry and trade without having
and functional (rather than department) heads. As advisory specialists or quasi-consultants to management, such legal advisors, tax and insurance experts, and investment and foreign exchange consultants overlapped with professional employees. As those in charge of functional (and sometimes one-man) departments, they included credit managers, purchasing agents, and personnel and labor relations directors, who (especially in the "higher brackets"), while establishing procedures that all of the firm's employees had to follow, frequently supervised no employees and were therefore not statutory executives. There is no doubt that these office employees represented the group of relatively well-paid non-bosses that formed the most effective grist for employers' and anti-FLSA congressmen's propaganda mills during the debates of the Seventy-Sixth Congress on amending the white-collar regulations. Nevertheless, as with highly-paid executives and professionals, although time-and-a-half compensation might have been of subordinate financial meaning to them—keeping in mind that the positive purpose of premium overtime payments is of dubious value and self-contradictory for all workers—since Stein did not even try to demonstrate empirically that no significant reserve army of unemployed advisors, consultants, and experts remained to be re-employed, that such jobs were inherently unsusceptible to work-sharing and spreading, and that these workers' well-being was not impaired by long hours, he failed to justify their exclusion.

The third and final subgroup encompassed those performing amorphous and ill-defined "special assignments requiring individual activity and judgment and directly related to management policies or general business operations." Often these tasks were performed away from the employer's place of business by traveling auditors, lease buyers, location managers, and other similarly atypical workers. Stein stressed that this "field...is rife with honorific titles that do not adequately portray the nature of the employee's duties," instancing a witness's testimony that a utility company field representative was "'a glorified serviceman.'" Among those who performed special assignments on the firm's premises he mentioned account

final responsibility for its operations." H. Dewey Anderson and Percy Davidson, Occupational Trends in the United States 584-85 (1940). Oddly, this definition approximated one of Stein's sub-definitions of "administrative employee," although Stein excluded such occupations from it. Later, Anderson and Davidson admitted that: "The relationship between occupations on the clerical level is loose at best, the binding idea being that they serve or promote transactions and report or record such activity." H. Dewey Anderson and Percy Davidson, Recent Occupational Trends in American Labor: A Supplement to Occupational Trends in the United States 46 (1945).


Linder, Autocratically Flexible Workplace at 41-55.
executives in advertising firms, customers' brokers in stock exchange firms, and assistant buyers. In unconditionally recommending what was basically the NAM's proposal, Stein forgot or suppressed the profound skepticism that he had expressed toward a similar proposal by the movie studios regarding administrative employees executing "special assignments" with discretion and judgment and without direct supervision. Using a blue-collar example as an ad absurdum argument, he had suggested that an industrial homeworker who was expected to return finished garments without being told how or when to do the work might qualify.

Summarizing his view of this hodge-podge of workers and inserting what had by now become a labor standards enforcer's self-justifying and -hypnotic mantra, Stein concluded: "These miscellaneous groups include many employees who need the protection of the act as well as many who should obviously be exempt. The salary test and the requirement concerning the use of discretion and judgment should adequately draw a line between them." In fact, the only thing obvious about Stein's conclusion was that there was nothing obvious about which workers were non-bona fide administrative employees and thus needed protection and which were bona fide and did not. Stein himself came close to conceding this point when he added that (all that) all three subgroups had in common was that they were "all what is known loosely as white collar employees." In contrast, skilled craftsmen, such as tool and die workers, whose weekly earnings for 40 hours could exceed $100, were "traditionally...paid on an hourly basis and at overtime rates for overtime work. This is appropriate. Whatever their value to the employer, it would be improper to describe them as 'administrative' employees."

Granted that labeling them "administrative" employees made no sense, Stein nevertheless offered no reason whatsoever as to why his intuition that highly skilled and paid unionized workers in short supply should be paid overtime did not apply to all white-collar workers. His only pragmatic excuse for not taking a position on this issue would have been that the same Congress that had excluded some white-collar workers, had neither excluded such blue-collar workers nor empowered the WHA to issue regulations concerning them.

When it finally came to setting the salary threshold on which he had already staked so much for differentiating between deserving clerical (or non-bona fide administrative employees) and undeserving administrative employees, Stein

121Stein Report at 28.
122"1940 WHD Hearings Transcript" at 68 (July 25).
123Stein Report at 28.
124Stein Report at 28-29.
125Stein Report at 31.
frankly conceded that it was "difficult to determine precisely where to draw the line," especially since witnesses' proposals had ranged from a low of $18 a week (Indiana Manufacturers Association) to $5,000 a year (UOPWA). He also referred, rather casually, to the $150 and $200 exemption thresholds proposed by the Barden and Norton bills during the Seventy-Sixth Congress.\textsuperscript{126} In light of the Roosevelt administration's and the WHA's acquiescence in the intense political pressure for a $200 ceiling, it is plausible that Stein's ultimate selection of this figure was much less arbitrary than his quantitative reasoning made it seem.

In the end, Stein wound up relying on two precedents—the federal government's pay practices and a WHD report on the salaries of certain clerical workers and accountants. Stein found what he regarded as an "important guide in determining at what point an employee should be considered an administrative employee rather than a clerk"\textsuperscript{127} in the government's Clerical, Administrative, and Fiscal (CAF) Service classification system. Stein's reliance on this reference point was ironically part of a seamless web. First, Congress had not given these workers a raise in ten years. Second, the structure of the system itself was in part and the denial of overtime pay to any of these workers was wholly derived from a survey that the government had conducted in the 1920s of private employers' pay practices. Third, even as Stein was depriving large numbers of white-collar workers earning more than $200 a month of overtime protection, the Congress, impelled by the enormously increased work load brought about by militarization and then World War II, was in the process of entitling federal white-collar workers with considerably higher salaries to overtime pay. And fourth, many members of and witnesses before Congress later referred to Stein's regulations as a base point without realizing that he had ostensibly been tracking Congress's own schema from the 1920s.\textsuperscript{128}

The CAF system—which comprised classificatory definitions from the Classification Act of 1923, which Stein in large part adopted verbatim for defining administrative employees—divided the clerical grades 1-6 from the administrative grades 7-14 (and executive grades 15-16). Stein noted that "several years ago," when the Personnel Classification Board had reported to Congress on classification problems, the annual salary range for the highest clerical grade was $2,300-$2,800 and for the lowest administrative grade $2,600-$3,100; thus the averages of the two adjacent and overlapping ranges were $2,550 and $2,850, and $2,700 was the "turning point" between "the clerk and the administrative official."\textsuperscript{129} Having

\textsuperscript{126}Stein Report at 30; see above ch. 10.
\textsuperscript{127}Stein Report at 30.
\textsuperscript{128}For a detailed discussion of all these issues, see below ch. 19.
\textsuperscript{129}Stein Report at 31. In fact, by the time Stein was writing in 1940, the report was
found similar salaries for equivalent non-governmental positions ($2,550/$2,950 or an average of $2,750), Stein concluded that there was "some reason" to use $2,700 as the salary test to distinguish between clerical and administrative employees.\textsuperscript{130}

Even if these figures were representative of prevailing pay practices, Stein failed to explain why a mandatory labor standards statute, which was designed not to mimic private employers' practices—otherwise why would the FLSA have been needed if the private labor market was already securing workers the conditions that Congress deemed socioeconomically acceptable?—but to prohibit them, should be using them as guides. Again, Stein's only candid response would have been that it was above his own pay grade to question Congress's unquestioned exclusion of some white-collar workers.

The other guide on which Stein drew for setting the salary test was the probable percentage of persons in certain occupations who would be exempted: if a large proportion of those in highly routinized occupations were excluded, then the salary test would fail to distinguish between the deserving and undeserving. A WHD study (of mostly smaller towns in 1935-36) revealed that almost five percent of stenographers, typists, and secretaries earned more than $1,800, but fewer than 1 percent earned more than $2,400. On the assumption that only few of them had "truly responsible positions," while "the enormous majority" performed "routine clerical work," Stein—once again without explaining why exercising responsibility should serve to deprive workers of overtime protection—concluded that $1,800 would not "guard against abuse." As plausible as this conclusion seemed, its converse was bereft of any apparent empirical or logical basis: "a figure higher than $2,400 would tend to include within the coverage of the act

\textsuperscript{130}Stein Report at 31.
certain workers whose work carries with it a status that may well deserve exemp­tion from the act.”

Why the highest 1 percent of stenographers in terms of pay (or, for that matter, any workers paid more than $200 a month) “deserve[d]” to be forced to work long hours remained as mysterious as why any worker’s “status”—whatever that unexplicated term meant—should be a relevant consideration.

Stein’s reasoning became even more fractured when he shifted his attention to bookkeepers and accountants (in New York City in 1937). Since eight percent of those engaged in bookkeeping, which was “of course one of the most routine of all the normal business occupations,” earned more than $50 a week, Stein concluded that it was “again...obvious that adequate protection for a group of workers who need the protection of the act because of habitually long hours is not provided unless the salary limit is raised to at least $50 a week.” Although, once again, Stein did not even try to justify why the upper eight percent of bookkeepers should be exposed to “habitually long hours,” he nevertheless asserted that the fact that 50 percent of accountants and auditors earned at least $50 a week demonstrated that this salary threshold “would not also exclude persons who properly deserve the exemption....” Because these occupations required “far more training, discretion, and independent judgment” than bookkeeping, their incumbents were bona fide administrative (or professional) employees “in the proper sense of the terms.”

Whatever sense that was, Stein failed to explain why accountants in the lower half of the pay scale should be protected against low hours.

Stein was so impressed by this $200 monthly salary that he ultimately chose it despite the fact that “the best indicator of the appropriate amount is probably” the aforementioned $2,700 annual salary for civil servants. His initial hesitation to adopt the latter figure related to the $2,550 threshold for civil service professional employees: since administrative and professional employees were overlapping groups, it was desirable to use one salary limit for both. But instead of using $2,625 (or $218.75 per month) as the average of both, he unmediatedly interjected the notion that because the FLSA applied to low-wage industries and areas and to

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131 Stein Report at 31-32. Stein cited US DOL, WHD, Report on Proposal to Exempt Clerical Employees From the Hours Divisions [sic; should be Provisions] of the Fair Labor Standards Act, (March 1, 1940). On this report, see above ch. 10. Stein did not point out the coverage or time of the study.

132 Stein erroneously stated that these data were taken from “the same study.” Stein Report at 32. The data were included in the same WHD report as those on stenographers, but the WHD took them from two totally independent sources; the New York data were collected during a “period of business better than that covered by the earlier study.” U.S. DOL, WHD, “Report on Proposal to Exempt Clerical Employees From the Hours Provisions of the Fair Labor Standards Act” at 10.

133 Stein Report at 32.
high-wage groups, "[c]aution," which dictated the adoption of a "somewhat lower" figure, entitled him to shave $225 off the best indicator in order to arrive, by sheer coincidence no doubt, at the $2400 annual or $200 monthly threshold on which Andrews, Roosevelt, Norton, Fleming, and the House Labor Committee had already agreed in 1939. Any other reason prompting Stein to favor employers and injure workers with marginally above-average salaries in low-wage areas and industries is difficult to discern, especially since his rationale was inconsistent with his earlier programmatic observation that because a law of national application could not account for "every small variation occurring over the length and breadth of the country," salary thresholds should be "reasonable in the light of average conditions for industry as a whole."136

Professional Employees

Once a privileged group in society, the professionals too have been caught in the swamp of capitalist decline. ... "Mass production" methods applied to training professionals quickly created an over supply or at least more than the present organization of production could absorb. ...

The market of professionals or "educated labor" became as overstocked as manual labor. "It is no longer the manual workers alone who have their reserve army of unemployed and are afflicted with lack of work," wrote a prominent economist years ago. "The educated workers also have their reserve army of idle...."

Those who entered the professions in the last seven or eight years discovered quickly enough that the time had past [sic] when they could hang out their shingles and begin doing business on their own. They found that if they were to practice their professions at all it would be as salaried employees. ... At present four out of every five professionals are salaried employees.

Salary cuts, unemployment, and insecurity have forced professionals to realize that, like others who work for wages, they would have to resort to collective action if their interests were to be protected.137

Even on the professional level, increasing specialization and routinization have reduced the creative aspects of their work for many highly trained salaried professionals.138

134Stein Report at 32.
135See above ch. 10.
One of the great inducements for a person to become a registered nurse is the knowledge that in entering a nursing career, she’s joining a fully recognized profession. We submit that it is tremendously important to the national interest to be recognized as professionals by the Department of Labor.

Regardless of the other criteria by which persons may be judged as professionals, it is the Department of Labor’s definition which is most definite and tangible. If a registered nurse is not a professional under that standard, she would be less than a professional in her own eyes and in the eyes of others. Hospitals must continue to offer the best possible care to the American public, but to do this, we feel that we need your assistance.139

Stein recommended a number of revisions in the sub-definitions of “professional” employees, the overall effect of which, as he himself candidly conceded, was to “exempt more employees than have heretofore been exempt. In fact, the exemption is made broad enough to provide an opening for abuse in its application.” In addition, his most radical change, the exclusion of artistic professions, hinged on what even Stein acknowledged as “subjective judgment.” In order to “prevent abuse” linked to these innovations, Stein also introduced for the first time a salary-level test for professional employees, to which he assigned so much importance as a compliance and enforcement tool for executive and administrative employees. He also characterized the adoption of the salary test for professionals as “the only substantive change...regarding this term which imposes a more rigorous requirement. All the other changes merely clarify the existing definition or widen its scope.”140 That monthly salary, $200, was, as already noted, constructed in a manner similar to that for administrative employees and, like that one, was intentionally set at a somewhat lower level than was justified by the overlapping salary threshold between subprofessional and professional employees in the federal government and private sector.141 Stein’s conscious downward deviation from the labor market was especially remarkable in light of his declaration that the salary level was not only “the best single test of the employer’s good faith in characterizing the employment as of a professional nature,”142 but was also

Employees” at 266.

139US DOL, Wage and Hour and Public Contracts Division, Public Hearing: “Proposal to Increase Salary Tests for Executive, Administrative, and Professional Employee Exemption” at 286-87 (Sept. 16, 17, 18, 1969) (David Hitt, associate director, Baylor University Medical Center, appearing for Am. Hosp. Assoc.).

140Stein Report at 36.

141Stein Report at 43.

142Stein Report at 42.
of major importance in retaining the benefits of the act for a group of employees whose
hours of work are frequently long, whose hourly rate of pay has frequently been low, and
who frequently have enjoyed no compensatory advantages in the form of security of tenure
and vacations with pay that are more common among executive and administrative
employees....

Stein offered no explanation either for the absence of an artistic-professional
exclusion from the original 1938 regulations or for his decision to recommend
one in 1940. His only even arguably self-revelatory insight was the obscure com­
ment that although “only the most tortuous construction” could tease out of the
current regulations an inclusion of artists, “the general qualifications and methods
of work of the bona fide artist make it reasonable to include such workers with the
definition of ‘professional.’” What those common qualifications and work methods were, how Stein knew that Congress meant to include artists among the
excluded professionals, and what statutory purpose would be served by depriving
artists of overtime protection are all questions that Stein never raised, let alone
answered. The mystery surrounding Stein’s innovation is compounded by the

143 Stein Report at 42. During the war, the BLS confirmed that white-collar clerical
and professional employees, numbering about 11 million, “have always received modest
incomes....” US BLS, Trend of Earnings Among White-Collar Workers During the War
1 (Bull. No. 783, 1944).

144 He noted that “while there is no specific record of the matter available, it appears
that in drafting the present definition no thought was given to persons employed in the
artistic professions, such as acting or music....” Stein Report at 35.

145 Stein Report at 40.

146 The previous year, in response to demands for standard occupational information
to support the job placement activities of the U.S. Employment Service, the DOL
published the first edition of its Dictionary of Occupational Titles. It characterized
professional occupations as “predominantly requir[ing] a high degree of mental activity
by the worker and...concerned with theoretical or practical aspects of complex fields of
human endeavor. Such occupations require for the proper performance of the work, either
extensive and comprehensive academic study, or experience of such scope and character
as to provide an equivalent background, or a combination of such education and
experience.” It then distinguished between occupations such as mechanical engineer,
doctor, architect, and astronomer, which were “primarily concerned with the development
or practical application of formal and well-organized fields of theoretical knowledge,” and
those such as editor, actor, and librarian, which were “concerned with activities that
demand acquired abilities which may properly be considered of a professional character,
but may not require the background of a formal field of knowledge.” US DOL, US
Employment Service, Dictionary of Occupational Titles, Part II: Group Arrangement of
Occupational Titles and Codes 1 (June 1939).
The Stein Report and the Revised Regulations

The fact that, unlike the separate definition for administrative employees, which the NAM and many employers had strongly urged, no witnesses at the hearings advocated on behalf of an artistic exemption.  

The new sub-definition recommended by Stein (and adopted by Fleming) included among bona fide professionals any employee engaged in work

[predominantly original and creative in character in a recognized field of artistic endeavor as opposed to work which can be produced by a person endowed with general manual or intellectual ability and training, and the result of which depends primarily on the invention, imagination, or talent of the employee....]  

Thus the three additional requirements that artistic professionals had to meet in order to relieve their employers of overtime liability were being engaged in work (1) that was “in a recognized field of artistic endeavor”; (2) that was “predominantly original and creative”; and (3) whose result depended primarily on the employee’s “invention, imagination, or talent....”

Stein specified that by “field of artistic endeavor” he meant fields such as music, writing, theater, and the plastic and graphic arts. The requirement of originality and creativity was not difficult to apply to musicians, composers, conductors, and soloists, painters, and cartoonists. It was, he conceded, “perhaps more difficult” to draw the distinction in the field of writing, but it was clear that essayists, novelists and scenario writers would meet the criterion, provided that they chose their subjects and submitted a finished work to their employers, although most such writers would have been excluded from the FLSA in any case as non-employees.

When he tried to make the leap to newspaper writing, however, Stein’s logic and the plausibility of his classificatory innovation collapsed. His discovery of newspaper work as a “recognized field of artistic endeavor” was sufficiently counterintuitive to have merited at the very least a brief explanation, but none was forthcoming. Instead of elucidating the unorthodox notion that journalists were any more artistically creative than any other non-fiction writers, Stein immediate-

147Hollywood film producers were a possible exception, but their focus in this regard was make-up artists. See above ch. 12.
148Stein Report at 55.
149Stein Report at 41.
150In an effort to insure that publishers were freed of overtime regulation, one author grotesquely tried to demonstrate journalists’ artistic creativity by pointing to the example of a reporter who received a Pulitzer Prize for reporting that she later admitted was fabricated. Edward Cavanaugh, “Journalists as Professionals: Rethinking Professional Exemptions under the Fair Labor Standards Act,” Loyola of L.A. Entertainment L.J.
ly took refuge in the irrelevant circumstance of salary level: "The requirement
would also be met, generally speaking, by persons holding the more responsible
and better-paid positions in the editorial departments of newspapers or in advertis­
ing agencies. The fulfillment of this and the two other related qualifications in
occupations of this type is largely a matter of degree, and the degree is usually best
evidenced by the salary received. For this reason, the proposed salary requirement
will tend in itself to preclude from the exemption newspaper workers whose work
is, in general, not ‘original and creative in character,’ etc."151 Astonishingly, then,
Stein had merely presumed, without a shred of evidence or even argument, the
existence of artistic creativity among journalists and then, having hypostatized it,
turned salary level into its indicator, although salary could just as well have
indicated other, more pedestrian, qualifications such as the “intelligence, diligence,
and accuracy”152 that he more plausibly attributed to reporters.

As for the third criterion—“invention, imagination, or talent”—it was self-
explanatory that the likes of actors, musicians,153 singers, painters, short story
writers, and other artists would “normally” meet this requirement. Concerning
newspaper workers, however, he likened the distinction to that concerning
originality and creativity: “Obviously the majority of reporters do work which
depends primarily on intelligence, diligence, and accuracy. It is the minority
whose work depends on ‘invention, imagination, or talent.’”154 How the WHD was
supposed to identify that minority Stein did not explain.

Overall, then, Stein placed a huge proportion of artist-employees—the very
sorts of WPA workers who had sat in and held him hostage in his office just three
years earlier155—beyond the pale of federal wage and hour protection. In com­
parison, most of Stein’s other revisions of the exclusion for professional employees
were rather minor.156 The most important and interesting of them was his revision

151Stein Report at 41.
152Stein Report at 41.
153In excluding all musicians, Stein resolved (by fiat) the dispute that had arisen under
the Alien Contract Labor Act in the 1880s and 1890s, when unionized musicians had
argued that run-of-the-mill musicians were not “artists” within the meaning of the law and
therefore did not come within the exemption for artists from the prohibition on importing
contract labor. See above ch. 5.
154Stein Report at 41.
155See above ch. 11.
156For example, Stein deleted the requirement that a professional exercise discretion
and judgment with regard to “manner and time of performance” and free from “active
direction and supervision,” because otherwise doctors, lawyers, actors, and musicians
of the requirement that a professional employee’s work be “[b]ased upon educational training in a specially organized body of knowledge”; instead, such work now required “knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study....” Stein adopted almost verbatim from a decision handed down by the highest court of New York State barely six months earlier. Stein had interrupted the hearing on July 27 to announce that a member of the DOL legal department in attendance had brought to his attention a recently received memorandum from its regional attorney in New York, which was of “considerable general interest” regarding the subject matter of that hearing. He quoted briefly from the memorandum, which was devoted to the case—which had been reported on the front page of the New York World Journal on July 9—and in particular read aloud the aforementioned definition with no accompanying comment. The New York State case involved a 1935 state law imposing a tax on unincorporated businesses, which, if “carried on by a corporation would be taxable”; but the law also excluded the practice of law, medicine, dentistry, or architecture, precisely because these professions “under current law cannot be conducted under corporate structure....” In addition, the law excluded “any other case” in which more than 80 percent of the gross income was derived from personal services actually rendered by the individual or partners “in the practice of any other profession” and in which capital was not a material income-producing factor. The recalcitrant taxpayers in question were customhouse brokers, whom the New York Court of Appeals had no difficulty viewing as failing its newly coined definition, which it regarded as “implicit in the term ‘professional,’” especially since two of them had apparently never attended college, while the third, a lawyer, had testified that a legal education was unnecessary.

would fail to qualify. Stein Report at 37. As with the executive exclusion, he also changed “no substantial amount” to 20 percent of nonexempt work. Id. at 40.

157 Stein Report at 53, 55.
158 The language used by the court differed slightly: “knowledge of an advanced type in a given field of science or learning gained by a prolonged course of specialized instruction and study.” People ex rel Tower v. State Tax Cmmn, 282 NY 407, 412 (Apr. 16, 1940). Stein made two basic changes: the knowledge had to be “customarily” acquired and the course of study had to be “intellectual.”
159 1940 WHD Hearings Transcript” at 381-82 (July 27).
160 1935 NY Laws ch. 33, § 1, at 388, 389.
161 People ex rel Tower v. State Tax Cmmn, 282 NY at 410-12. Stein insisted that the court had taken the language from the article “Professions” in the Encyclopedia of the
Although Stein recognized that "the problem raised under" the tax law was different from the one presented by the FLSA, he argued that "the same general principles may apply," meaning that both decisionmakers had to limit "professional" to "those professions which have a recognized status and which are based on the acquirement of so-called professional knowledge through prolonged study." Stein, who had no legal training, had self-deprecatingly observed at the hearings: "I can't cite cases on insurance companies and I can't even argue the law. I am not competent to do so." The main difficulty with Stein's use of the decision was his neglect of the important difference in the context and function of the exemption in the tax law and the FLSA as well as of the distinction between an exemption and an exclusion. Congress mislabeled the exclusions of white-collar and other workers "Exemptions": an exemption is freedom, for example, from having to pay a tax, whereas an exclusion denies a benefit such as overtime pay. (If employers straightforwardly litigated exemptions as their own rather than, perversely, on behalf of their unwilling employees, the analogy to tax exemptions would be more precise.) Because the FLSA is a humanitarian statute, the courts have interpreted the exclusions from it narrowly so that as few workers as possible lose its benefits: "Any exemption from such humanitarian and remedial legislation must...be narrowly construed, giving due regard to the plain meaning of statutory language and the intent of Congress. To extend an exemption to other than those plainly and unmistakably within its terms and spirit is to abuse the interpretative process and to frustrate the announced will of the people." To be sure, since neither Congress nor anyone else has identified the purpose of the exclusion of the trinitarian formula, no court that has cited this canon of construction has been able to support its ruling by reference to the purpose of this exemption (as opposed to that of the statute or the overtime provision).

In contrast, New York State courts, while also adopting the policy that tax

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Social Sciences, but nothing in the decision suggests such a borrowing and the court's language was certainly not close enough to the article's to have constituted plagiarism. Stein Report at 38; A. M. Carr-Saunders and P. A. Wilson, "Professions," Encyclopedia of the Social Sciences 12:476 (1937).

Stein Report at 35.

163 1940 WHD Hearings Transcript" at 192 (July 10). One of his sons (both of whom are lawyers) did not believe that his father had known how to do legal research. Email from Adam Stein (Mar. 31, 2004).

164 See above "A Note on Terminology" at xx-xxiv.


166 Most of the cases that have cited this canon dealt with FLSA exemptions other than that for white-collar workers.
exemptions are to be construed "somewhat rigidly," insist that the "interpretation should not be so narrow and literal as to defeat its [the exemption’s] settled purpose." Because of this somewhat more relaxed treatment of tax exemptions than is articulated in the FLSA cases, it was possible that the same term—in this instance, "profession" or "professional"—could and should have been construed to have a different scope under the two laws.

169The New York State courts also appear to have developed somewhat more relaxed interpretation of tax exemptions than federal courts, which have tended to "apply the rule of construction that 'statutory exemptions from taxation...are to be strictly and narrowly construed.'" BA Properties, Inc. v. Government of the United States Virgin Islands, 299 F.3d 207, 215 (3d Cir. 2002). See also IHC Health Plans, Inc. v. Cmmr, 375 F.3d 1188, 1194 (10th Cir. 2003). Or, as the U.S. Supreme Court has enunciated the principle on more than one occasion: "The income taxed is described in sweeping terms and should be broadly construed in accordance with an obvious purpose to tax income comprehensively. The exemptions, on the other hand, are specifically stated and should be construed with restraint in the light of the same policy." Commissioner of Internal Revenue v. Jacobson, 336 US 28, 49 (1949). See also Bingler v. Johnson, 394 U.S. 741, 751-52 (1969) (recognizing the "principle that exemptions from taxation are to be construed narrowly"). The principle had been laid down before Stein wrote his report. E.g., New Colonial Ice Co. v. Helvering, 292 US 435, 440 (1934).
170To be sure, on the facts of the case, the customhouse brokers would not have passed muster as "professionals" under the 1938 or 1940 FLSA regulatory definitions. The specific case of the New York tax law was a depression-era measure designed "for the support of the government and to produce additional revenues to meet the financial emergency with which the state is faced...." 1935 NY Laws ch. 33 at 388. The Court of Appeals did not expressly hold that the exemption should be interpreted narrowly, but simply ruled that the legislature’s purpose was to tax non-corporate businesses "competing with corporations" and that the reason for the statutory exemptions "makes clear the Legislature’s intent...to reach by tax those vocations which, if conducted in corporate form, would be the subject of taxation." People ex rel Tower v. State Tax Cmmn, 282 NY at 409, 411. The court did not, however, explicate the legislature’s purpose in nevertheless exempting professions other than law, medicine, dentistry, and architecture that faced no legal impediments to incorporation. As a consequence, the courts were later at times unable to articulate a coherent reason for classifying would-be exempt taxpayers as practicing a profession or not. For example, in Teague v. Graves, 261 AD 652 (1941) a divided court held that an industrial designer was practicing a profession despite the lack of an advanced education; neither the majority nor the dissent based its conclusion on the purpose of the exemption. By the end of the 1940s, the courts circumvented this difficulty...
Stein's final contribution to the crafting of the professional exclusion was the gloss he put on the subsection of the original regulation that a professional's work be "of such a character that the output produced or the result accomplished cannot be standardized in relation to a given period of time." Stein saw no reason to revise this provision because "the phrase 'result accomplished' indicates that, to obtain a standard...the result itself must be of the kind that can be standardized." This claim made sense to him because: "Obviously the nature of the accomplishment of each biologist or architect or lawyer will differ, even though other biologists or architects or lawyers perform similar work at times. It is equally apparent that the work produced by a sculptor or violinist is not subject to standardization." Consequently, the results of professional employees' work could not be standardized in relation to given period of time because "the results themselves

by shifting the focus of their statutory analysis. A corporate finance and reorganization consultant who lacked a college degree argued that the exemption of certain occupations denied him equal protection: because "the legislative intent...was to tax noncorporate enterprises which would have been taxable if carried on by a corporation...the exemption...of certain enterprises from which corporations are not barred, is discriminatory and unconstitutional." According to the court: "The fallacy of this argument is that no business has been declared exempt. The distinction which the Legislature, the Tax Commission and the courts have consistently drawn, is between a business and a profession. If an individual is engaged in the former, he is taxable; if he is practicing the latter, he is exempt. All those conducting unincorporated businesses are in the same taxable category, and those practicing professions are, with certain qualifications, exempt, whether the professional pursuit be open to a corporation or not." New York ex rel Moffett v. Bates, 276 AD 38, 40 (1949), aff'd, 301 NY 597 (1950), cert. denied, 340 US 865 (1950). Availing itself of this analysis, courts at times denied the exemption to an undisputed learned professional, such as a very well known economics professor at New York University who was a high-profile consultant, on the murky grounds that his "service deals with the conduct of business itself rather than the application of some separately developed art or science in the needs and uses of business." Backman v Bates, 279 AD 1115, 1116 (1952), aff'd, 305 NY 839 (1953). See also Kormes v. Murphy, 9 AD2d 1003 (1959). Ironically, in devising a separate definition to exclude artistic professionals, Stein jumped to the conclusion that: "Since the exemption in New York tax law would not involve workers of this type, the opinion of the court is of no guidance...." Stein Report at 35. In fact, the Court of Appeals later had no difficulty finding that, under the same law, Donald Voorhees, "recognized as one our nation's leading orchestra conductors and musical directors," met its earlier definition of practicing a profession because music had become a recognized field at some of the country's most respected universities. Voorhees v. Bates, 308 NY 184, 192 (quote), 189, 190 (1954).

171§ 541.2(a)(iii), in Stein Report at 55.
are largely unstandardized."\textsuperscript{172} Although participants in the debate over the white-collar exclusion later sought to use this provision and Stein's gloss to support continued discrimination in favor of employers of professional workers, capitalist organizational imperatives have in the years since 1940 made enormous strides toward standardizing the results themselves and in relation to time for many professionals, including physicians (critical pathway and managed care techniques regulating the number of patients per day and minutes per patient) and lawyers (billable hours requirements).\textsuperscript{173}

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"Protection for the typical white collar worker from inconsiderate exploitation as to his or her working hours will continue," Colonel Fleming declared as he issued the new regulations.\textsuperscript{174}

On October 12, 1940, the same day that the Wage and Hour Administrator made the \textit{Stein Report} public, Fleming also published a revised set of white collar regulations—to go into effect October 24, the same day on which the overtime trigger was lowered from 42 to 40 hours\textsuperscript{175}—which, again, merited coverage above the fold on the front page of \textit{The New York Times}. While declaring that "the typical white collar worker...would continue to be protected from exploitation as to minimum wages and working hours," and especially from "long hours without

\textsuperscript{172}\textit{Stein Report} at 37-38.


\textsuperscript{174}"Fleming Redefines Employes Exempt from Overtime Pay," \textit{JC}, Oct. 14, 1940 (1:3).

\textsuperscript{175}No estimates were possible of the number of workers who might receive overtime pay after the trigger was lowered to 40 hours because there was "no way of ascertaining how many employers will spread the work to eliminate overtime," but the WHD estimated that 2,650,000 workers in affected establishments were likely to be working more than 40 hours in any fairly busy week, 700,000 of whom had been receiving time and a half before the law had required it: "By penalizing overtime Congress hoped to encourage the employment of additional labor and it is felt that substantial gains have been made in this direction." Louis Stark, "Nation's Industry Goes on 40-Hour Work Week," \textit{NYT} Oct. 20, 1940 (sect. 4, 10:1). See also "Forty-Hour Week Affects 2,000,000," \textit{NYT}, Oct. 23, 1940 (25:8).
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In making up for managerial inefficiency or to keep down payrolls, Fleming stressed that "the new regulations were written under the belief held by him and his associates that the Wage and Hour Law was not to cover people like Hollywood stars or types of business administrators earning high salaries." The major revisions dealt with the exclusion of administrative employees, resulting in the exclusion of an estimated additional 100,000 of them. Without attempting to quantify the outcome, Fleming also noted that he had both broadened the definition of "professional" by including artistic professions and narrowed it by requiring a $200-a-month salary. Finally, Fleming optimistically assured the public that enforcement would continue to expand as more and more clerical workers in covered workplaces became aware of their rights and "have the courage to bring violations to our attention." 176 The regulatory changes recommended by Stein and adopted by Fleming largely remained in effect even after the revisions of 2004. 177

Fleming hewed strictly (and virtually verbatim) to the Stein line in the regulations that he issued on October 12, repealing and superseding all previous regulations pursuant to § 13(a)(1). In addition to adopting Stein's most important revision—detaching the administrative from the executive exclusion and creating two separate categories—Fleming implemented Stein's revised (conjunctive) criterion for the executive definition by substituting for "who does no substantial amount of work of the same nature as that performed by nonexempt employees of the employer": "whose hours of work of the same nature as that performed by nonexempt employees does not exceed twenty percent of the number of hours worked in the workweek by the nonexempt employees under his direction; provided that this subsection...shall not apply in the case of an employee who is in sole charge of an independent establishment or a physically separated branch establishment." 178 Fleming also adopted Stein's recommendations that executive employees have the authority to hire or fire (rather than hire and fire) and that it be made explicit that the $30 compensation be on a salary basis. 179

176Louis Stark, "Wage Head Revises White Collar Pay," NYT, Oct. 14, 1940 (1:2, 11:1). The article did not explain how the figure of 100,000 was derived. According to "Fleming Redefines Employees Exempt from Overtime Pay," JC, Oct. 14, 1940 (1:3), the new regulations "affect[ed]" about 250,000 workers; the article did not make clear whether the number encompassed newly excluded and included workers or merely the former.

177See below ch. 17.

17829 CFR § 541.1(f), in FR 5:4077 (Oct. 15, 1940).

17929 CFR § 541.1(c) and (e), in FR 5:4077. Previously, according to Fleming, the executive "exemption was applicable to hourly paid employees if their hourly pay was sufficiently high to produce $30 a week." Letter from Philip Fleming to Elbert Thomas
Stein’s most enduring and transformative contribution was his fateful definition of the “employee employed in a bona fide...administrative...capacity,” which the WHA also adopted verbatim. In addition to requiring the same $200 monthly compensation “on a salary or fee basis” as for professional employees, this new regulation specified the following disjunctive but capacious duties tests:

(1) who regularly and directly assists an employee employed in a bona fide executive or administrative capacity..., where such assistance is nonmanual in nature and requires the exercise of discretion and independent judgment; or

(2) who performs under only general supervision, responsible nonmanual office or field work, directly related to management policies or general business operations, along specialized or technical lines requiring special training, experience, or knowledge, and which requires the exercise of discretion and independent judgment; or

(3) whose work involves the execution under only general supervision of special nonmanual assignments and tasks directly related to management policies or general business operations involving the exercise of discretion and independent judgment.

Fleming also adopted verbatim Stein’s revisions of the definition of “professional” employee, which in their extensiveness fell midway between the other two. In order to highlight the more intricate nature of these changes, the text is set out below with Stein’s additions in italics and the deleted provisions from 1938 enclosed in square brackets:

The term “employee employed in a bona fide *** professional *** capacity” in section 13 (a) (1) of the Act shall mean any employee who is—

(a) [Who is customarily and regularly] engaged in work—

[(i)] (1) predominantly intellectual and varied in character as opposed to routine mental, manual, mechanical, or physical work, and

[(ii)] (2) requiring the consistent exercise of discretion and judgment in its performance [both as to the manner and time of performance, as opposed to work subject to active direction and supervision], and

[(iii)] (3) of such a character that the output produced or the result accomplished cannot be standardized in relation to a given period of time, and

[(b)] (4) [Who does no substantial amount of work of the same nature as that

(Stein Report and the Revised Regulations, Nov. 19, 1940), printed in CR 86:6613, 6615 (App.) (Nov. 19, 1940). In his brief discussion of his recommendation of adoption of a salary basis provision, Stein had not mentioned the existence of such earlier rulings to the contrary. Stein Report at 23.

180 29 CFR § 541.2(a), in FR 5:4077. Fleming stressed to employers that paying workers a $200 salary did not automatically cause them to be excluded: the duties tests also had to be met. “Limits Exemption Under Wages Act,” NYT, Oct. 15, 1940 (47:1).

181 29 CFR § 541.2(b), in FR 5:4077.
performed by nonexempt employees of the employer] whose hours of work of the same nature as that performed by nonexempt employees does not exceed twenty percent of the number of hours worked in the workweek by the nonexempt employees; provided that where such nonprofessional work is an essential part of and necessarily incident to work of a professional nature, such essential and incidental work shall not be counted as nonexempt work; and

[(iv)] (5) (i) [Based upon educational training in a specially organized body of knowledge] requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study, as distinguished from a general academic education and from an apprenticeship, and from training in the performance of routine mental, manual, [mechanical] or physical processes [in accordance with a previously indicated or standardized formula, plan, or procedure]; or

(ii) predominantly original and creative in character in a recognized field of artistic endeavor as opposed to work which can be produced by a person endowed with general manual or intellectual ability and training, and the result of which depends primarily on the invention, imagination or talent of the employee, and

(b) compensated for his service on a salary or fee basis at a rate of not less than $200 per month (exclusive of board, lodging, or other facilities): Provided, That this subsection (b) shall not apply in the case of an employee who is the holder of a valid license or certificate permitting the practice of law or medicine or any of their branches and who is actually engaged in the practice thereof.182

Reactions

The application of scientific management procedures and mechanization has insured that the requirements for carrying out most white-collar activities would be relatively low.183

The new regulations spawned predictably mixed reactions. On the House floor on October 14, Lawrence Connery, who had been elected in 1937 to the congressional seat of his deceased brother (the eponymous advocate of the 30-hour and FLSA bills), criticized WHA Fleming on the first anniversary of his appointment on the grounds that “his whole approach to the problems presented” by the almost three-fold increase in wage and hour complaints was “first, to exempt the firms complained against from the provisions of the statute, in some cases even

182 29 CFR § 541.3, in FR 5:4077-78.
against the obviously stated congressional intent.... Almost daily,” he added, the WHD “issues a release exempting additional thousands from one or another provisions [sic] of the act.” Connery then appended the texts of pieces from the Washington Post and Newsweek to the same effect.

President Roosevelt’s public reaction to Stein’s work product was opaque. When asked about the new professional and administrative worker regulations at his news conference on Oct. 15, 1940, he replied: “I don’t know anything about it except what I read.” If his reading included the Journal of Commerce—which, regarding the FLSA as “a revolutionary piece of legislation,” editorially welcomed the elimination of “troublesome uncertainty as to overtime payments for relatively highly paid white collar employs about whom the authors of this law were clearly not concerned”—then he knew what he had presumably been planning all along: “Prospect of Congressional enactment of any major changes in the wage-hour law this session is now understood to be definitely forestalled by the several rulings of Wage-Hour Administrator Fleming.” And although “[i]ndustry’s reaction to the new definitions of administrative employee...was as favorable as expected by” the WHD, some confusion about it prevailed, “the most erroneous conception” being that an employee performing more than 20 percent non-exempt work was nevertheless not entitled to overtime pay for any bona fide administrative work that he did perform.

In letters—to Joseph Curran, president of the National Maritime Union and the

185 CR 86:13565.
187 “Wages and Hours Inspections,” JC, July 30, 1940 (2:2). The newspaper editorially opposed the FLSA’s setting of “uneconomically short maximum hours of work for skilled labor” and its requirement of “payment of punitive and very burdensome overtime wage rates.” “Labor Law Amendments,” JC, June 5, 1940 (2:1-2).
188 “Wages and Hours Law Clarification,” JC, Oct. 15, 1940 (2:1-2).
189 “Wage Act Revision Seen Forestalled by Fleming,” JC, Oct. 15, 1940 (1:2). The “sweeping revisions of the former regulations” also referred to the definition of “area of production.” The article referred to “several measures” which had been pending in the Senate for months “radically revising the law,” although defeat of the House bills in May had been widely viewed as definitive since the Senate lacked a majority to pass such legislation.
190 “Confusion over Fleming Hours Definitions,” JC, Oct. 24, 1940 (1:4). Following many inquiries, Fleming stressed that not “all white collar workers earning more than $200 a month were...exempted”: the duties tests also had to be met. “Limits Exemption Under Wages Act,” NYT, Oct. 15, 1940 (47:1).
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Greater New York Industrial Union Council (CIO), and B. O. Lum, business representative of the Seattle Association of Technical Engineers and Architects (AFL), who had protested against the new definitions—that Fleming made public on October 27, he asserted that, contrary to their apprehensions that the new regulations would remove large groups of workers from the maximum workweek provisions, these “exemptions...would not be so extensive as had at first been believed.” In spite of the enormous expansion of the universe of excluded administrative employees that Stein effected, Fleming made the astonishing claim—at least as reported by The New York Times—that the term had been “more tightly defined.”

To lend credibility to this implausible assertion, Fleming had recourse to a thoroughly atypical and small subgroup: Under the original regulations of 1938, “exemption” had been “denied to a large group of well-paid employees, many of whom were exceedingly important in the functioning of business. Cases could be cited where purchasing agents and personnel directors and persons of that type receiving as much as $7,500 or $10,000 a year were not eligible for exemption.... This just didn’t make sense.” Equally misleading was Fleming’s claim that: “At the other end of the scale are office personnel performing routine clerical tasks such as typists, comptometer operators, shipping clerks, etc. In my opinion these employees are as clearly in need of the benefits of the Act as the Purchasing Agent and the Personnel Director...are not.” However, no new definitions were needed to protect such workers, who could never have been lawfully excluded from overtime pay under the old regulations, whose merged category of executive and administrative employees was defined by reference to managerial and hire/fire powers. Similarly beside the point was Fleming’s boast that the new “definition of ‘administrative’ does not permit the exemption of...employees who perform manual tasks such as tool and die makers, no matter what they earn.” And empty rhetoric, bereft of any supporting evidence, was the WHA’s conclusion that he, any more than of his predecessors or successors, had ever considered the purpose of exposing millions of white-collar workers to unfettered employer power regarding hours of work: “It is my considered judgment that with these significant limitations, employees who meet the requirements of the administrative definition are properly exempt from the wage and hour provisions of the Act.”

On November 18, Senator Elbert Thomas, the chairman of the Senate Education and Labor Committee, requested that Fleming comment on the criticism that

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192 BNA, Wage and Hour Manual 468-69 (1941).
193 BNA, Wage and Hour Manual at 470 (1941).
his revised regulations had excluded from the FLSA “many hundreds of thousands of employees whom Congress had intended to cover.” In a further apologia, Fleming conceded in his reply of November 19 that he did not know how many employees had, as a result of the new regulations, been shifted from covered to excluded status and vice versa: “I am convinced, however, that the total effect has been to bring within wage and hour protected a very large number of those who formerly could have been excluded, and that those who now find themselves removed from the protection are in the higher paid categories and stand less in need of it.”194 The admission of ignorance concerning the quantitative impact of the white-collar regulations may be refreshing in contrast with more recent claims of certitude.195 Nevertheless, Fleming’s claim that higher-paid workers had less need for protection suggested that they may have had some need—a conclusion that manifestly begged for a justification in terms of the basis for that comparison as well as of the countervailing reason for denying that protection. Once again, in the absence of evidence that the excluded categories of workers did not face unemployment or any adverse physical or mental impact from long hours, the suspicion remains difficult to dispel that the exclusion rested solely on an unreflective value judgment that workers with salaries above a relatively low threshold simply did not “deserve”196 time-and-a-half pay. That criterion, however, was always the weakest foundation for any regime of overtime regulation, even regarding low-paid workers. And ironically, in spite of the DOL’s persistent rejection in recent years of a purely salary-level-based coverage system, that unexplicated notion of merit continues to undergird denials of the necessity for reducing the number of excluded white-collar workers.

At the AFL’s annual convention in November, the executive council, while conceding that the original regulations were “not necessarily perfect,” expressed the conviction that the “extremely difficult task of developing a definition which would fit all types of industries in all situations was carried out with notable success by the first Administrator, Elmer F. Andrews, in 1938....” Because Congress itself had already made the FLSA “an extremely flexible statute” by having written directly into it “[n]umerous qualifications, exceptions and exemptions...to make the application of the basic wage and hour standards as acceptable to the industry as possible,” the AFL had been able to “prove[ ]” at the hearings that “employers utterly failed to show any hardship had been sustained by them as the result of the application of the original definition....” Consequently Labor had

194Letter from Philip Fleming to Elbert Thomas (Nov. 19, 1940), printed in CR 86:6613, 6615 (App.) (Nov. 19, 1940).
195See below chs. 16-17.
196Stein Report at 32.
awaited the revised regulations "with much concern." Astonishingly, by the time of the next convention, the executive council, with a year to have reflected on the new white-collar regulations, concluded: "While certain modifications may be desirable in the definitions, they represent a substantial improvement over those previously in effect." The organization was of the impression, for example, that they required considerable discretion and independent judgment and did not permit bona fide white-collar workers to spend a substantial portion of their working time on nonexempt work. However, since the AFL had previously lauded the original regulations for imposing the condition that "in order to be eligible for exemption, employees must do 'no substantial amount of work of a non-exempted nature,'" which had "made it difficult for employers to widen the application of the exemption and to extend its application to the types of workers the Act was designed to protect," the source of the alleged improvement remained unclear.

In contrast, the CIO was no more persuaded by Fleming's letter to Curran and Lum than it had been by his and Stein's revisions. In his report on November 18, 1940, to the organization's annual convention, President John L. Lewis argued that the new regulations had effectuated some of the goals that the "combination of Tory Democrats and Republicans" had failed to secure in Congress. In first place he (erroneously) mentioned that the WHD had "removed the overtime limitations" on the hours worked by executive, professional, and administrative employees paid more than $200 a month. 

By December 1940, Fleming was virtually boasting to the NAM of the lengths to which he had gone to accommodate employers' demands for a separate and expansive category of excluded administrative employees. In an address to the organization in New York he stressed that:

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197 Report of Proceedings of the Sixtieth Annual Convention of the American Federation of Labor at 105, 107 (Nov. 18-29, 1940). It is unclear why a report delivered in November closed before the regulations had been issued more than a month earlier.


201 Daily Proceedings of the Third Constitutional Convention of the Congress of Industrial Organizations at 75. Stein and Fleming had in fact left the salary-level test for executives at $30 per week. A resolution on behalf of the ANG, UOPWA, and FAECT urged the WHA to "tighten[] administrative exemptions...." Id. at 202.

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Industry kept asking us about the important fellow in large organizations who didn’t boss people—the assistant to the president, the personnel adviser, the purchasing agent. He is considered an executive. He eats in the executive dining room. Anyway, his salary is so high that if he were paid time and a half for overtime, he would have serious doubts he earned it.

We took care of that fellow in our new definitions. We termed him an administrative employee. We accepted the idea that his work is too important to measure in hours. But we asked that that importance be measured on the pay check. We required that the pay check be at least $200 a month.202

The provision in the 1938 regulatory definition, under which an excluded executive employee could engage in “no substantial amount of work” of the same kind as covered employees, had, according to Fleming, “caused more questions than any other requirements.”203 Accordingly, he relaxed this “exceedingly troublesome phrase”204 to read: “whose hours of work of the same nature as that performed by nonexempt employees do not exceed twenty percent of the number of hours worked in the workweek by the nonexempt employees under his direction.” In addition, a proviso made even this limitation inapplicable to “an employee who is in sole charge of an independent establishment or a physically separated branch establishment.”205 Nevertheless, even this accommodation failed to satisfy the NAM, which in 1941 unsuccessfully requested that the WHD change its interpretation by using the specific employer in question rather than the industry as the standard by which to judge how much work putative managerial employees were performing of the same nature as that performed by nonmanagerial employees. The WHD rejected the proffered interpretation because it would have exempted many non-executive employees.206

202Philip Fleming, Address before the NAM, New York City, Dec. 12, 1940, in CR 86:6693, 6694 (App.).
203Stark, “Wage Head Revises White Collar Pay” (11:1).
204Letter from Philip Fleming to Sen. Elbert Thomas (Nov. 19, 1940), in CR 86:6613, 6615 (App.).
20529 C.F.R. § 541.1 (f), as published in FR 5:4077 (1940). Following the incorporation of retail and service employment, the provision read: “Who does not devote more than 20 percent, or, in the case of an employee of a retail or service establishment who does not devote as much as 40 percent, of his hours of work in the workweek to activities which are not directly and closely related to the performance of the [supervisory] work described in paragraphs (a) through (d) of this section.” 29 C.F.R. § 541.1 (e) (1999). On the elimination of these restrictions in 2004, see below chs. 16-17.
206aDivision Refuses to Redefine ‘Executive,’” WHR 4:509-10 (Sept. 22, 1941). The WHD gave as an example of an unjustified exemption an employee who performed
Employers in the wholesale distributive trades had been particularly eager to “convince the Wage-hour Administrator that the boss’ secretary is an executive in her own right....” The “rub” arose from the “does no substantial amount of work” clause: ‘The boss’ secretary could meet all the other requirements, but by taking dictation or typing letters—work similar to that done by nonexempt employees—she must come under the act. Wholesalers urged that this clause be stricken from the definition....” 207 Stein and Fleming had not accommodated this particularly outlandish request; Fleming’s exquisitely sexist-paternalistic explanation to the NAM in December was indelible:

[I]f there are employees in factories or offices who need the protection of an overtime penalty, the girl clerical worker is one of them.

We all know her. We all like her. We know the sound of her high heels clicking in at 9 o’clock. ... Your wife approves of the way she dresses and you know that is the highest compliment your wife can pay another woman. ... She decorates the office and makes it a pleasanter place to work.

There isn’t much in the game for her. Yet she’s as loyal and as willing to work long hours as the most ambitious of your junior executives.

And our inspections reveal that she frequently does work long hours. Usually because of inefficient supervision, and sometimes because some ambitious executive wants to make a record. She is unorganized and she was unprotected until the wage and hour law went into effect.

Well, now when she works more than 40 hours a week, she is paid time and a half for overtime. [C]ompliance is spreading and time and a half for overtime means that she is not going to work long hours often. Management is going to regard such overtime charges in the same light as demurrage on freight cars that could just as well have been unloaded. And I think this will make for greater efficiency. Your executive who gets going around 3 o’clock in the afternoon will have to get started closer to 9 a.m.208
Six weeks before the revised regulations were issued, the General Executive Board had reported at the UOPWA annual convention held over the Labor Day weekend: “It is apparent that attempts to emasculate the Fair Labor Standards Act through ‘redefinition’ are not being relaxed and are being centered on the white collar field as the opening wedge in a campaign for destruction of the act itself. Our membership and the unorganized must be mobilized to register effective protest against any contemplated changes in definition or administration of the act.”209 Lewis Merrill, the president of the union, which had perhaps more at stake in the regulations than any other union, called on the membership to rally to the defense of the societal standard, which he did not stigmatize as aiding only marginal workers, whose vulnerability was compounded by their total reliance on government bureaucrats for compliance:

The Fair Labor Standards Act is an Act of sound social significance, the only measure which promises in any way to stabilize the bases of wage structures and employment opportunities in this country. The inclusion of white-collar workers is largely the result of conferences of legislative committees through national organizations. Too little activity is going on, in the cities where our locals unions are located, in this connection. Unless...we develop programs in local unions designed to make this the property of the membership and the unorganized, white-collar workers in this country are no longer going to have the regulations of this Act.

It is a vitally important Act to any organization that wants to carry on collective bargaining.... If we eliminate white-collar workers from this Act we are going to pay a heavy penalty in the kind of contracts we negotiate, in the kind of people we organize.... In addition to popularizing the importance of the Fair Labor Standards Act, it is vitally necessary also that local unions undertake responsibility in securing enforcement of this measure. Every local union must consider this problem in the most systematic way if we are to prevent the ripping of this legislation, as it affects white-collar workers, from the statutes of the United States.210

Ultimately, the convention adopted a resolution opposing “any amendments of the regulations which would re-define the terms of ‘executive, administrative or professional employees’” and urging “extension of the Act to include all white-

the president of a firm that conducted a survey of 600 companies finding that 46 percent “exempt one or more of their secretarial levels from overtime pay” even though “27% of this group believe some exemptions wouldn’t stand up to Labor Department scrutiny.” Christopher Conte, “Labor Letter,” WSJ, Mar. 9, 1993 (A1:5) (Westlaw).

209A Summary of the Proceedings of the Third Constitutional Convention of the United Office and Professional Workers of America 79 (Aug. 31-Sept. 6, 1940).

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collar and other workers not protected.211

Following publication of the amended regulations, the UOPWA newspaper informed members under the hopeful headline, "Higher Paid Worker Still Covered in Wage-Hour Act," that:

The new rulings, eagerly interpreted by the press to exclude an estimated 200,000 employees, were further clarified in a conference held on Nov. 8 with the Administrator and representatives of the UOPWA, CIO, and other white collar unions. Although Colonel Fleming denied a request for repeal of the rulings pending a test of their application, he agreed to a procedure outlined in a letter by Lee Pressman, CIO General Counsel.

It was agreed that where serious questions of interpretation arose, interested parties would present the matter direct to Washington rather than on a regional basis, and that formal conferences between employer-employee groups involved would be held. In case of disagreement, public hearings would be held and evidence presented, on the basis of which action would be taken. In addition, if experience demonstrated necessity for revisions of the regulations, it was agreed that hearings would be held to consider the problem.212

The UOPWA, which had attended the conference together with other CIO-affiliated left-wing white-collar unions (the Guild, the FAECT, and the American Communications Association), warned that "reactionary employers will try to make salary earned as the final basis for classifying workers under these definitions, thus excluding them from the law." The union did not explain why it regarded the duties tests as a more reliable safeguard for workers, but it did urge locals "to report violations immediately so that a practical test can be made of the procedure agreed upon with the Administrator."213

The FAECT declared that the ruling exempting hundreds of thousands of employees from the FLSA "acts only in the interest of employers who are already adequately protected and benefited in their profits in national defense—their normal profits, their excess profits, and now the super-profit on overtime work."214 Attacking the revised definition of "professional" as "arbitrary, one-sided, and maliciously perpetrated," the FAECT appealed to Roosevelt, Perkins, and Fleming to set it aside. In contrast, the directors of the Metropolitan section of the American Society of Civil Engineers endorsed it as preserving protection for low-

211 A Summary of the Proceedings of the Third Constitutional Convention of the United Office and Professional Workers of America at 274.
213"Higher Paid Worker Still Covered in Wage-Hour Act."

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paid engineering employees “against exploitation while at the same time freeing the higher-paid men, whose work is largely professional, from the restrictions of the act.”\textsuperscript{215}

The \textit{Engineering News-Record}, a week after an initial article reprinting the new definition and pointing out that Fleming had cautioned against assuming that anyone paid more than $200 a month was exempt,\textsuperscript{216} published a lengthy editorial that, shying away from the brute fact that many employers would no longer be required to pay time and a half to their engineer-employees, was programmatically focused on the possibility that “the new definitions will prove to be a milestone in the efforts of engineers to strengthen their standing as professional men.” In contrast, under the earlier regulation, “professional” had been interpreted “quite narrowly, which had the effect of including within the limits of the act a large group of engineers...who would not otherwise be included under...an act designed to protect low-paid employees from exploitation.” The magazine, in other words, took the typical employer position of that time that long hours were not injurious to professional workers’ health and welfare and that their abolition would not lead to work-spreading. Rather, the original regulations’ impact lay in inducing employers to seek to avoid violations by requiring that such engineers’ “time be kept just like that of men in less responsible positions; and because the penalty for overtime work under the act is high, the practical effect has been a lot of ‘clock punching’ on the part of men who had little interest in watching the clock.” By requiring a $200-a-month salary, the amended definition “eliminates the possibility of an employer using a professional classification for the exploitation of low-paid men.” The editors commended the WHD for “its courage” in enlarging the scope of “professional” under the new regulations “despite strong opposition on the part of interested unions to any broadening of the scope of the terms executive, administrative and professional.” At the same time, the magazine criticized professional engineering organizations for having failed to testify at the hearings: “The ball was carried by the manufacturers; and as a result, the unions quite naturally see in their interest an ulterior motive.”\textsuperscript{217}

The American Newspaper Guild deeply resented the Stein-Fleming revisions. Secretary-Treasurer Pasche, the union’s witness at the hearings, “[d]eclaring that the value of the Wage Hour law had ‘been definitely lessened’ by the new definitions,” stated on behalf of the International Executive Board Contracts Committee

\textsuperscript{215}“Ruling on Engineering Work Attacked and Defended,” \textit{ENR} 125:518 (Oct. 24, 1940).
\textsuperscript{216}“Wage-Hour Administration Redefines ‘Professional’ Work Under the Act,” \textit{ENR} 125:504 (Oct. 17, 1940).
\textsuperscript{217}“Professional Work Defined,” \textit{ENR} 125:525 (Oct. 24, 1940).
that the Guild “‘more than ever must rely for hours regulations on our organized strength and contract protection.’’” Without explaining how the duties tests was any less deficient, Pasche argued that “‘basing definitions on salary earnings appears to us to ignore one of the stated purposes of the FLSA, to spread employment, something which can be done...by limiting hours in the higher brackets as in the lower.’’” Justifiably noting that the definition of “administrative” employee “appears to raise the widest possibility of doubt and of claims to exemption in respect to office and so-called white-collar workers generally,”218 he added:

Undoubtedly claims to exemption will be made in respect to all confidential secretaries, some assistant city editors and even their assistants, and to a variety of other newspaper jobs. The Guild can and must resist such claims, and undoubtedly very few of them will stand the test of full application of the definition. It is important, however, to note that the division’s report places repeated emphasis on the $200 salary line as a test of good faith of job classifications. This undoubtedly will be interpreted by many employers as justifying them in claiming as exempt any editorial or commercial employe earning $200 a month.219

The extent to which the definitional innovation of central interest to the Guild, namely that of artistic-creative professional employees, covered reporters was, according to Pasche, “uncertain and has been exaggerated.” Perhaps not fully appreciating the potential for expansive interpretation embedded in this novel classification, he concluded that “the exemption would include very few newspapermen....” Nevertheless, and in spite of Fleming’s statement that typically reporters assigned to regular beats and copydesk men would not “‘qualify for exemption even if they are paid $200 a month,’” Pasche anticipated that emphasis on the salary line would nevertheless lead to claims and confusion.220

The Guild’s sharp criticisms of the regulations notwithstanding, newspaper publishers were not quite so satisfied as engineering employers. While gratified that overtime pay had been eliminated for 200,000 or so actors, branch managers, cashiers of small banks, accountants, and newspapermen, Newsweek, perhaps on behalf of its fellow publisher-employers, bemoaned that the revised rules offered only moderate relief from the burden of complying with hours restriction in offices because most office workers were still covered.221 Editor & Publisher reported

218 “Pasche Assails Redefinitions in Hour Law,” GR, Nov. 1, 1940 (1:1, 4:1-3).
219 “Pasche Assails Redefinitions in Hour Law” (4:2).
220 “Pasche Assails Redefinitions in Hour Law” (4:2-3).
221 “Third Year Finds the Wage Act Finally Reaching 40-Hour Goal,” Newsweek, Oct. 28, 1940, at 36.
The Stein Report and the Revised Regulations

that Fleming had said at a press conference that the salary requirement alone would mean that 75 percent of reporters nationwide would fail to meet the test. The problem of "'continuous assignment'" (to cover, for example, political trips and athletic training camps) would be met by new rules because such work rarely fell to anyone paid less than $50 a week and otherwise qualified. Overall, then, the WHD "will permit the paycheck to balance the scales of 'professional' determination."222

The Guild’s optimism about the impact of the new regulations was tested by the WHD’s publication in 1943 of a manual of job classifications for the newspaper industry, whose "peculiar conditions...made it desirable to classify the various types of duties...performed by employees, with a view to indicating" the enforcement policy that the WHD would adopt.223 The Manual of Newspaper Job Classifications contributed to the development of the intellectually indefensible sub-category of artistic-creative professional employees that Stein had created and bequeathed to overworked reporters. The WHD took as its starting point that: "Only writing which is analytical, interpretive or highly individualized is considered to be creative...." Instead of explaining what any of these characteristics had to do with artistic creativity, the WHD proceeded to illustrate the sub-category of exempt writers by turning first to editorial writers, who wrote "comments on topics of timely interest, usually taking a stand on controversial topics or interpreting news events.... Editorial writing appears to be original and creative...and is, therefore, considered to be exempt work.” How any of these activities be-tokened artistic creativity and, more specifically, why pontificating about current events qualified as a recognized field of artistic endeavor were not even questions that occurred to the WHD to pose, let alone answer. Having already conceded that only "with possible rare exceptions" were newspaper writers learned professionals,224 the WHD was no longer in a position to justify why an editorialist who was required, for example, to have a doctorate in international relations or economics might plausibly be classified as a learned professional, whereas editorialists with no such academic-intellectual education who merely spouted off hack-

neyed opinions of the kind that appear by the hundreds every day on editorial pages should be classified as an artistic-creative professional. The WHD’s discussion of columnists, who were given “considerable latitude in expressing [their] personal views,” suffered from the same deficiencies, but at least here it added the potentially pertinent fact that they had “no fixed schedule of hours of work.” The only problem with this fact was that as relevant as it might be to the issue of overtime regulation, it was as irrelevant as an indicator of artistic creativity as was the columnist’s “relat[ing] anecdotes about...sports, politics, fashions, or motion pictures....”

The most important group of journalists discussed in the Manual was the “special reporter,” who covered “assignments of exceptional difficulty and importance” and wrote feature articles requiring “a considerably higher degree of judgment” and “ability to organize materials” than were required of other experienced reporters. The “few top-flight reporters” who fit this description were “distinguished from the nonexempt news reporters” by virtue of: covering “the most important ‘policy’ stories and news events...not entrusted to other reporters”; writing stories that required “continued investigation over relatively long periods of time”; relative freedom from supervision and control over their hours of work; a highly individualized style and a by-line; and “salaries commensurate with the higher degree of ability required of them....” As essential as these special abilities or skills may be for the more challenging tasks they carried out, none of them had anything to do with artistic creativity. The unprincipled basis on which the WHD nevertheless affixed that label to such reporters appeared to be an unexplicated and unsubstantiated analogy to learned professionals, who would doubtless have been declared exempt had they written the same newspaper articles with the help of their academically acquired specialized knowledge. However,

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225 It seems improbable that the WHD ever intended to or did undertake content analyses of editorials to distinguish the original and creative ones from the rest—nor, given the generality and absoluteness of its guideline, would such a case-by-case investigation have been called for.


228 This pattern was clearest with regard to another sub-group, the “special writer,” who was “an authority in his particular field,” who wrote analytical articles interpreting problems and conditions. US DOL, Manual of Newspaper Job Classifications at 6. Such a person seemed to have acquired the knowledge of a learned professional without the academic training. Stein had left open the possibility of making “the exemption available to the occasional lawyer who has not gone to law school, or the occasional chemist who is not the possessor of a degree in chemistry, etc., but it does not include the members of such quasiprofessions as journalism, in which the bulk of the employees have acquired
since the WHD’s own regulations foreclosed it from calling the “top-flight reporters” learned professionals and the statute did not authorize it to exempt sub-professionals, the WHD may simply have arbitrarily forced them into the pro-crustean bed of artistic-creative professionals as a concession to the ANPA.

Stein’s and the WHD’s illogic, whose saving grace was its self-confinement to only “few” journalists, perpetuated itself in the interpretive regulations that were promulgated in 1949-50. Not until several high-profile cases in the 1980s and 1990s and the Bush administration’s regulatory revisions of 2003-2004, however, did the illogic metastasize to engulf the majority of reporters. Even then, however, the Bush DOL bestowed high praise on Stein by observing that “much of the reasoning” of his report “remains as relevant as ever.”

These early struggles over whether white-collar workers would be subject to wage and hour regulation can be understood best in connection with the more fundamental campaign that broad segments of the employing class were conducting against the overtime payment provision in the FLSA. Their principal objective was limiting time-and-a-half liability to the minimum wage, thus relieving firms of any obligation to pay overtime on wages and salaries in excess of this largely sub-market rate—at least in the nonunion sector. In this context, the largely unorganized mass of white-collar workers could play a vital dual role in employers’ strategy: on the one hand, objectively, simply by virtue of being a constant reminder of the reality of the existence of a huge exclusion from the overtime-regulation system that could be politically expanded at any time; and, on the other hand, subjectively, as a kind of role model of a politically inert multitude fatalistically unable to contest employers’ agency.

The CIO strove to subvert the potential macro-social impact of this reservoir of passive acquiescence in disentitlement. In this spirit, John L. Lewis, who had resigned a few days earlier as CIO president (over his opposition to Roosevelt’s election to a third term) told the FAECT’s annual convention on November 30, 1940:

Technicians, engineers, all the categories lumped under the term “white collar worker” are coming to realize that their interests lie with all the workers.

They are learning this...through the hard experience of finding themselves just as much the victims of depression layoffs and unemployment as the industrial workers their experience....” Stein Report at 39.

229See below ch. 14.
230See below chs. 16-17.
232Linder, The Autocratically Flexible Workplace at 263-78.
employers had tried to teach them to disregard.

"In recent years those same white collar workers, so essential to the enterprise of modern industry, have come to understand that when business volume fell off and plant operation began to subside...they, although a part of management and a part of plant operation, were laid off and dispossessed of their jobs with the same ruthless enterprise that was applied to the millions of manual workers throughout the country."

Even as employers pursued their strategy, part of the business press itself was confirming Lewis’s analysis and undermining their claims that exempt white-collar workers neither needed nor expected overtime protection. For example, half a year before the United States entered the war, *Nation's Business*, the organ of the Chamber of Commerce of the United States, recycled an updated version of the piece by Edward Cowdrick of the big business group, the Special Conference Committee, that had made the rounds in 1937. After repeating his earlier observation that salaried workers’ lack of overtime pay was no longer offset by “privileges” such as annual vacation, sick leave without deductions, holiday pay, time off to take care of personal matters, job security, and good chances for promotion, that had traditionally been denied to wage earners, Cowdrick conceded that: “It is natural, therefore, that many exempt employees question the fairness of putting in unlimited overtime without extra compensation....” He then admonished employers that the argument that, having already paid production workers for overtime, they “can’t afford the usually much smaller outlay involved in doing the same thing for employees in the upper brackets,” was “dangerous” because it suggested to the exempt employees that they “take their case to Congress or to the unions.” The Chamber of Commerce magazine went on to recommend payment of time and a half to “office workers in the lower exempted positions—those who are closest to the rank and file and whose duties differ only

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233 Lewis Tells CIO: White Collar, Manual Workers Have Same Interest,” *CIO News*, 3(49), Dec. 2, 1940 (8:3-5). The article used quotation marks for some but not all of Lewis’s speech.

234 See above chs. 2 and 9. From 1923 to the late 1930s Cowdrick had been the secretary of the influential Special Conference Committee, a clearinghouse on personnel management and labor relations of a dozen of the biggest corporations. *Violations of Free Speech and Rights of Labor: Hearings Before a Subcommittee of the Committee on Education and Labor United States Senate*, Part 45: Supplementary Exhibits: The Goodyear Tire & Rubber Co.—The Special Conference Committee 16785 (76th Cong., 1st Sess., Jan. 16, 1939).


236 Cowdrick, “When the Boss Works Late” at 19.
slightly from those of the non-exempts....” While it was “true that these employees are closely related to management,” Cowdrick argued that “they may be even closer to labor. In the matter of compensation, they are likely to be more interested in the size of their pay checks than in the maintenance of their status in the managerial ranks.”237 Apparently most employers not only agreed with Cowdrick’s claim that “[t]hese employees have been subject to much exploitation in some companies,” but insisted on enjoying the fruits of that exploitation: only 13 percent of companies surveyed reported paying time and a half to some or all classes of exempt workers.238

Nor did the WHD undertake any revisions to alter that behavior: with the exception of one minor war-related formal regulatory amendment of the white-collar regulations implemented a month after the United States entered the war,239 the Stein-Fleming regulations of 1940 marked the end of WHD innovation in this area for almost a decade. The only significant change made in white-collar overtime rules during the intervening years came in the form of a WHD release in 1944 on the effect of disciplinary deductions on compliance with the requirement that employees be paid on a “salary basis” Although the salary had to be a “predetermined amount...not subject to reduction because of variations in the number of hours worked or in the quantity or quality of the work performed during the pay period,...disciplinary deductions...made for unreasonable absences would not” per se prove that the employer had not paid the employee on a salary basis. “On the other hand,” because it was “well recognized that bona fide executive, adminis-

237Cowdrick, “When the Boss Works Late” at 114-15. In contrast, for highly paid professional and administrative employees “who may be on the same intellectual and social levels as the top executives,” Cowdrick recommended keeping their overtime work to “the lowest possible minimums”; where “severe emergencies” thwarted this approach and such an employee “put in an excessive amount of overtime” that was not compensated, “he should be given equivalent time off (actually not theoretically) at a season which is convenient to him.” Id. at 115.


239The exception, amending § 541.2(b), was designed to exclude pilots ferrying planes to England and was deleted in 1949: “(4) who is engaged in transporting goods or passengers for hire and who performs, under only general supervision, responsible outside work of a specialized or technical nature requiring special training, experience, or knowledge, and whose duties require the exercise of discretion and independent judgment.” FR 7:135 (Jan. 6, 1942); FR 7:332 (Jan. 17, 1942).
trative, and professional employees are normally allowed some latitude with respect to time spent at work,” if employers made deductions for the kinds of absences that employees were “ordinarily allowed”—such as going home early or taking an occasional day off—then they were in violation of the salary basis requirement. That the WHD did not, however, intend to deprive employers of their disciplinary powers emerged from the final clause, according to which they would not lose the exemption if “under the circumstances of a particular case, such abs­ences must be considered unreasonable.”

The modernizing of the Fair Labor Standards Act is a continuing project which will be one of the major items of unfinished business of the Congress for the foreseeable future.\(^1\)

As with the FLSA as a whole, World War II prompted no changes in the white-collar exclusions. Against the backdrop of simultaneous (but ultimately failed) efforts by the Republicans to expand the white-collar exemptions statutorily during the Eightieth Congress (1947-48), which they controlled for the first time since the Hoover administration, the WHD held another extensive series of regulatory hearings. The resulting *Weiss Report* and adoption of its recommendations produced the last structural changes that the duties tests underwent during the rest of the century. Despite this dearth of transformative change, the hearings held by Congress and the DOL generated considerable pertinent testimony, which it is necessary and useful to analyze precisely because it continued to fail to raise, let alone answer, the crucial question as to the justification of the exclusion of white-collar workers from overtime regulation.

**White-Collar Workers and Unions**

Few people expected to live to see the day when meek and harmless stenographers, store clerks, and engineers would be singing “Solidarity Forever” while marching on the picket line.\(^2\)


\[^{2}\text{Edward F. Dension, Jr.,“The United Office and Professional Workers of America” at 3 (M.A. Thesis, Brown U. 1938).}\]
between the business and laboring class and prophesied that some day the white-collar workers “are going to get ourselves some guns and go out and shoot those union bastards.”

At one time white collar workers may have held an enviable status, but they have lost their relative advantages, for one reason, by failing to organize. ... Thus, clerical workers are largely unorganized and need to be protected even more than those workers in manual trades who are organized.

“For this new group of workers—for these so-called middle class people from the professional, scientific and cultural communities—we’re going to have to bring out a more attractive, thoroughly modern union” with “the sweet smell of high status....”

“What was right for grandpa when he was ‘working on the railroad’ or swinging a pick in a coal mine isn’t good enough for the man or woman in the classroom, in the laboratory or in the studio.... And why should it be?”

“Twenty years from now the majority of clerical workers will be in unions. It’s inevitable.”

Because the impact and efficacy of the white-collar overtime regulations, as with any government-enforced labor standards, depended in part on the extent to which the affected workers had overcome their atomization and forged organizations capable of undertaking collective action, an examination of the shape of unionization is helpful to understanding the development of the law. The war and early postwar periods witnessed increasing recognition by white-collar workers that they did not and could not live in splendid isolation from the working conditions that had impelled production workers to self-organization. Even during the depression of the 1930s it had been becoming clear that the difference between clerical and manual workers with regard to security was only one of degree: “The

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3The Citizen-News Co. v. Los Angeles Newspaper Guild, 21 NLRB 1112, 1116 (Mar. 26, 1940).


6Louise Howe, Pink Collar Workers: Inside the World of Women’s Work 171 (1977) (quoting Sidney Heller, president, Local 888 Retail Clerks International Association).
advantages ascribed to office work, in contrast to manual work—better working conditions, shorter hours, paid vacations, security, and opportunity for advancement—are largely imaginary, and to the extent that they have foundation [sic] in reality, disappearing.”

The Great Depression gave firms an impetus to rationalize labor processes that had been protected by the prosperity of the 1920s. During the 1930s, the urgent need to cut overhead costs and the abrupt reversal of a tight labor market “gave employers every incentive to use measurement plans to impose more factorylike conditions in offices....” Office worker unions began describing the results as flattened wages, firing of older workers, breakdown of protections for men of their less routinized work methods. Business machine firms reported a surge in sales, while more sophisticated combinations of electrical machinery permitted systematizing and centralizing more employees’ work.

The DOL estimated that in 1935 about 675,000 “‘white collar,’ or at least non-manual” workers were union members, evenly divided between the AFL and independent unions. The leading occupational groups were railway clerks and telegraphers, newspaper editorial employees, public servants, actors, musicians, radio operators, telephone and telegraph employees, retail clerks, stenographers, and office workers. A sense of the accommodationist character of the AFL white-collar unions during the early 1930s can be gleaned from the claim of an officer of the Stenographers Local Union 11773 writing in the AFL monthly magazine near the bottom of the Great Depression that: “The modern union need not bring conflict. We are living in a cooperative age. Prolonged struggle between employer and employee represents a loss to both.” He did not even shy away from

7Dension, “The United Office and Professional Workers of America” at 34, 42 (quote).
arguing that thorough unionization brought about so much community of interest and joint responsibility that "loyalty to the employer and duty to the union become synonymous."  

By 1938, Business Week noted that white-collar union membership included 359,200 in the AFL, 204,921 in the CIO, 46,575 in the United Office and Professional Workers of America, and 17,755 in the Newspaper Guild. The following year, when the left-wing UOPWA, the leading general white-collar union, had 48,000 members in 49 cities in 26 states, the union claimed that, based on data from the 1930 census—which returned more than one-third of all clerical workers as located in the 10 leading cities—four of eight million white-collar workers came within its jurisdiction, which included, in addition to office workers, insurance agents, social workers, editorial workers, artists, cartoonists, and advertising agents.

The UOPWA relentlessly insisted on the linkages between the proliferation of mechanized and automated office equipment and speed-up, unemployment, and impairment of office workers' physical and mental health. While the FLSA was pending before Congress, the UOPWA's president telegraphed Roosevelt to propose a meeting with a group of white-collar and professional people to discuss these significant changes triggered by the mechanization of office work. Propagating as "fact that the white-collar workers are the most exploited group in industrial America," the union, even before Congress had passed the FLSA, vowed to try to remove its "serious limitations." When the Senate Education and Labor Committee held hearings in 1939 on a national health program, the UOPWA's legislative committee submitted a statement arguing that: "The lightning speed of today's office machinery creates new health problems for the white collar workers who operate them. [T]he introduction of office mechanization has severely taxed

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13 Legislative Department, UOPWA, "The Health Problem of the White Collar Worker: Statement of the United Office and Professional Workers of America: Presented to the U.S. Senate Committee on Education and Labor in Support of the Wagner Health Bill --- S. 1620" at 1-2 (June 1939), in #6046 Box 281 Folder 7: Office and Professional Workers of America, United. Legislative Dept. (Kheel Center, Cornell University).


the physical strength and mental balance of office workers. [S]peed-up typified in
deVICES that record the number of typewriter strokes made each day, and the
sedentary nature of office work were all cited as conditions producing special
health problems.” Indeed, the union found that the mechanization that had “con­
quered office as well as factory” had “brought on hysterical condition [sic] of
office workers by the end of the day.”

Lewis Merrill, the UOPWA president, took great pains to underscore the
homogeneity of blue- and white-collar workers with respect to the socioeconomic
risks they faced. At the National Right to Work Congress in Washington, D.C.,
in June 1939, calling unemployment “the outstanding question of our day” at a
time when “most New Deal social legislation seeking to curb or stabilize unem­
ployment, often specifically excludes these [white-collar] workers,” he urged the
setting of new legislative and administrative objectives that would “serve as a
barrier to the social abyss into which our economy is permitting the ‘white collar’
workers to drift.” The UOPWA’s general political orientation was revealed by
Merrill’s claim that “industry, under the grim lash of fading profits, which did not
revive through normal methods of exploitation, turned to the area of administration
and services with all of its familiar enegery [sic], ingenuity, and ruthlessness.”

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17“Bills to Protect Health and Wages Pushed by UOPWA,” UOPWA News, 5(6):1:3-4,
3:1-2 (June 1939).

18Legislative Department, UOPWA, “The Health Problem of the White Collar
Worker: Statement of the United Office and Professional Workers of America: Presented
to the U.S. Senate Committee on Education and Labor in Support of the Wagner Health
Bill --- S. 1620” at 4-5. This submission was, however, not printed in To Establish a
National Health Program: Hearings Before a Subcommittee of the Committee on Educa­
tion and Labor of the United States Senate on S. 1620 (76th Cong., 1st Sess., 1939).

19According to Irving Howe and Lewis Coser, The American Communist Party: A
Critical History 373 (1962 [1957]), the UOPWA, “led by [Communist] party-liner Lewis
Merrill, was merely a continuation of an old CP-dominated union, but it now received all
kinds of help from other CIO units such as it had never received before.” C. Wright Mills,
White Collar: The American Middle Classes 318 (1967 [1951]), observed that in the 1930s
and early 1940s, larger proportions of white-collar than wage worker unionists were in
CIO unions controlled by Communist Party cliques; by 1948, the proportions were 40
percent and 20 percent. This structure was, in his view, an historical accident of the CIO’s
development: white-collar unions were located mainly in larger cities, especially New
York, which was the CP’s stronghold.

20Lewis Merrill, “The Plight of the White Collar Unemployed: An Urgent Problem of
the National Government: Speech Before the National Right to Work Congress,”
Washington, D.C., June 9, 1939, at 1, 5, in #6046 Box 281 Folder 7: Office and Profes­
sional Workers of America, United. Legislative Dept. (Kheel Center, Cornell University).
Although white-collar workers' "somewhat privileged status" belonged to the past, Merrill did not need to remind this audience, living in the world of 1939, of the fascist device, now a matter of history, which is to organize this profound discontent existing among the white collar masses, for the purpose of providing the most reactionary sections of our social and economic life with a base from which they can proceed to organize the most backward elements among all workers...to accomplish the complete destruction of all institutions and barriers which stand in the way of their untrammled and barbaric exploitation of the whole people. The white collar workers today (who provide a bridge between the manual workers and the middle class, both of whose experiences they share), are in a frame of mind and in an economic situation where they are the natural prey of all sorts of vile demagogery.

Nevertheless, Merrill argued that the contradiction between the average white-collar worker's working-class economic position and his middle-class "social habits and values" was "being resolved daily." The "cruel effects" that the wider use of machines was having on white-collar employment merely revealed that in "this respect the white collar worker is following in the path hundreds of thousands of manual workers have had to travel."

What made the UOPWA noteworthy is that by the late 1930s changes in office work organization had created a large number of lower- and mid-level salaried positions sharply distinguished from the traditional office occupations of bookkeeper, stenographer or secretary inasmuch as they either engaged in only a narrowly specialized sub-operation (such as using an adding machine) or, as general clerks, carried out general, occupationally no longer definable office assistant's and clerical activities. The occupational content of these types of activities had, in the course of an intensifying division of labor, largely been split up or had virtually disintegrated. Consequently, labor union organization based on the principle of occupation would have been just as impossible at the lower levels of the modern office as among the unskilled and semi-skilled workers of modern mass industry. When a number of locals of the Bookkeepers, Stenographers, and Accountants Union broke away from the AFL in May 1937 and merged with several indepen-

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22 Merrill, "The Plight of the White Collar Unemployed" at 4-5.
23 "Business Change and the Salaried Employee: Statement of Lewis Merrill at a Hearing of the Temporary National Economic Committee with respect to Technology and Economic Recovery" at ix, 7 (Apr. 19, 1940), in #6046 Box 282 Folder 9: Office and Professional Workers of America, United. Merrill, Lewis, (Kheel Center, Cornell University). Although Merrill did testify at this hearing, this statement was not read or printed.
dent locals to form the UOPWA, it marked the first attempt nationally to form a union that did not focus on a special industry or individual occupations or professions, but on the organization of all white-collar salaried employees, regardless of industrial branch or occupational borders, conceived of as a stratum with sufficiently similar problems and characteristics to be encompassed within the same organization. According to this conception, shared by segments of labor and management, long-term structural changes in office work, the impact of the Great Depression, and the tendential leveling of the socioeconomic difference between blue- and white-collar workers had made the latter ripe for organization.

The disparity between the wartime increase in the cost of living and salaried workers' fixed incomes prompted the Special Subcommittee on Wartime Health and Education of the Senate Education and Labor Committee, chaired by the very labor-friendly Claude Pepper, to devote several days in January 1944 of its extensive hearings to white-collar workers. "For the first time in the history of the United States," the UOPWA rejoiced, "the white collar workers are getting their day in court." In addition to a broad array of socioeconomic data that Merrill and others brought to the subcommittee's attention, Foster Pratt, the president of the International Federation of Technical Engineers, Architects, and Draftsmen's Union, AFL, included among his recommendations amending the FLSA to include technical engineers, architects, and draftsmen.

During the brief interval between the end of World War II and the demise of Communist unions promoted by the Taft-Hartley Act, the collective bargaining agreements of the UOPWA (whose organizing slogan was: "Don't be collar blind!—can you live on your salary?") extended to all financial and commercial institutions such as banking, insurance and general commercial offices, graphic arts such as publishing and advertising, nonprofit institutions such as private social service agencies, and office, technical, and engineering personnel employed by manufacturing firms. By name the companies at which members were organized included: Metropolitan Life Insurance, Prudential Insurance, John Hancock Insu-

The white collar worker is faced with a great dilemma. He is drawn to the employers because they dress the same way, have many tastes in common and work in offices as he does. And of course there have been cases where immediate supervisors have risen out of the ranks to executive positions.

The white collar worker, therefore, is inclined to feel that he can depend solely upon the employer for a secure, decent existence and chance to get ahead in the world. ...

Only the union can rescue the white collar worker from social isolation.30

By the same token, the blue-collar labor movement could not afford to continue to ignore office workers. As CIO president Philip Murray told a national conference of white-collar and professional groups at the beginning of 1945: "when white-collar workers are driven down to a sort of degenerated economic status, it constitutes a millstone around the workers of the country."31

As the war was drawing to a close, a well-known industrial consultant assured the employer-readers of the venerable magazine Factory Management and Maintenance that no such fear as job security united white-collar workers: "Instead, the very fact of their being on salary enormously lessens their interest" in unions. As long as the prevailing set-up convinced them that they were getting the best chance of advancement, it was unlikely that they would join either the CIO office workers

28 Lewis Merrill, You Can Get It: How White Collar Workers Can Win Higher Pay 2 (n.d. [1946]).

29 Paul Hutchings, “Office Workers Look at Their Trade,” AF 54(3):11, 13, 31-32, at 32 (Mar. 1947). A few months earlier Hutchings had used the same phrase, adding: “We know that under our democratic form of government (sometimes referred to as a capitalistic system) we as a people have surpassed all other systems in promoting and improving our standard of livelihood and well-being.” The OEIU was also “opposed to foreign ideologies....” Paul Hutchings, “‘White Collars Going Union,” AF 53(9):9, 20, 32, at 32 (Sept. 1946).

30 Merrill, You Can Get It at 18-19.

31 “White-Collar Aid Is Offered by CIO,” NYT, Jan. 16, 1945 (36:5). UOPWA president Lewis Merrill was present as were representatives of the United Wholesale Retail and Department Store Employes of America and the American Association of Scientific Workers.
known to be headed by a "radical collectivist" or the AFL union believed to be run by a "plain racketeer."32 Events that took place just a few days after the end of World War II shattered that smug attitude. As Business Week reported in mid-September under the title "Clerical Revolt": "Operations of Westinghouse Electric Corp. were crippled this week by the biggest strike of white-collar employees the nation has ever witnessed." A dispute over a demand by the Federation of Westinghouse Independent Salaried Unions (not affiliated with the AFL or CIO) for extension to white-collar workers of the incentive bonus plan for production workers had led to a strike of 12,000 employees in plants and offices in six states. The dispute, according to Business Week, "takes on almost historic importance in dramatizing the 'revolt of the white-collar worker' which forecasters have sometimes predicted." Some observers called it the most important strike since the CIO had crashed into mass production in 1936. If successful, "victory may open up to unionism the biggest area of unorganized territory still remaining 'open shop' in industry."33 In its second week, the strike showed both that office employees could "stop manufacturing operations cold" and that "unionized white-collar workers exhibit no importantly different characteristics from unionists in overalls."34 When the FWISU voted to end the strike after 20 days, its president, Leo Bollens, announced that white-collar workers had demonstrated to the white-collar workers of the country that they could be organized and stay out for as long as necessary in a fight for a just cause.35

To be sure, once the post-Taft-Hartley anticommunist campaign took root, the UOPWA's organizing capacity diminished, prompting CIO president Philip Murray in November 1948—when the union's membership was about 70,00036—both


33"Clerical Revolt," BW, Sept. 15, 1945 (108-109). According to Kocka, Angestellte zwischen Faschismus und Demokratie at 276-77, 457 n.196, the FWISU in 1939 successfully lobbied against the effort initiated by employers to distinguish between exempted and non-exempted employees by reference to a $225 monthly salary in order to increase the number of the former. Kocka offered no source for this claim, which makes little sense since in 1940 the level was set at $200.

34"White-Collared," BW, Sept. 22, 1945 (102-103). The left-wing United Electrical Workers, which represented the bulk of Westinghouse production workers and 2,000 salaried employees in South Philadelphia, made an aggressive effort to sign up FWISU members without much success, and Westinghouse production workers showed little sympathy with the strike. Id.


36US BLS, Directory of Labor Unions in the United States 36 (Bull. No. 937, 1948). The membership of the other major white-collar unions was as follows: NFFE 93,000;
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to take the union to task for its failure to organize and to threaten it with charter withdrawal. Then at the beginning of 1949 he put the UOPWA under "organize—or else' orders. By this time, with the UOPWA in the CIO's "bad graces," industrial unions were no longer deferring to it with regard to organizing office workers of industrial firms, and in 1948 it was badly hit by defections of right-wing insurance locals. Then in 1949 the UOPWA—with which the Federation of Architects, Engineers, Chemists and Technicians, which was expelled from the CIO for its Communist Party connections, had merged in 1946—was expelled for the same reason from the CIO and disappeared.

Nevertheless, neither the AFL nor the CIO unions had undertaken significant organizing efforts among white-collar workers. The stance of the UAW, one of the CIO's most prominent unions, is especially instructive. On May 22, 1937, two days before the FLSA bill excluding untold numbers of them was introduced in Congress, Alan Haywood, regional director of the CIO, while predicting that Henry Ford would soon be signing a collective bargaining agreement, "warned white-collar workers that they must organize or be crushed between the industrial workers and employers." Ironically, whatever crushing took place resulted not from white-collar workers' lack of interest in unionization, but from the UAW's studied neglect, if not outright rejection, of them. "In general," as the chronicler of its efforts observed in the early 1970s, "the UAW moved from an early rejection and dismissal of possible white-collar organization to an indifferent acceptance of such workers. ... At Ford blue-collar expediency in bargaining away white-collar organizing rights created extensive resentment among that company's technicians. Even today this continues to be a major liability of the UAW with this group of employees." The international union, with interested locals' agreement, was initially willing to trade the Union's white-collar organizing future for "here and now" bargaining gains for blue-collar members.

Certain deals or horse trades were negotiated with automobile management in the Union's early days. There is a general record of formal and informal exclusion of white-

AFGE 30,500; ANG 25,000; OEIU 22,790; UOPWA 70,000; AFSCME 88,300. Id. at 25, 28, 35, 36, 45.


38On the Communist Party's control of the FAECT, see Howe and Coser, American Communist Party at 374.

39Kocka, Angestellte zwischen Faschismus und Demokratie at 264-66.

40See above ch. 9.


42Carl Snyder, White-Collar Workers and the UAW 31-32 (1973).
collar or similar groups, which at one time or another included foremen, skilled trades personnel associated with technical and engineering employees, laboratory technicians, draftsmen, and office personnel. ... Various concessions for blue-collar groups were gained in exchange. The Union was also involved in even more specific exchanges of white-collar interests for blue-collar benefits. Actually or nearly organized office and technical groups were bargained out of existence....

Not only did UAW collective bargaining agreements expressly commit the union to exclude white-collar workers from its organizing activities, but the union also "repudiat[ed]...embryonic white-collar organizing interest." For example, the 1941 Ford-UAW agreement excluded from the union's exclusive representation numerous categories including all employees employed in Ford's administration building; the 1942 agreement expressly stated that the union would not try to organize workers in those excluded categories. Only after a similar list appeared in the 1946 contract did the 1946 UAW convention pass a resolution against these exclusions, prompting their deletion from later Ford agreements. Nevertheless, these exclusions proved to be a long-term liability for the union in organizing white-collar workers, especially in the Detroit area.

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43 Snyder, *White-Collar Workers and the UAW* at 38, 75.

44 At the union's convention in 1941, a leader of the Industrial Office Workers Amalgamated Local 889, declaring that "[t]his, I believe, is the first time in the history of the U.A.W....that an office worker in the automotive field was given a voice at an International Convention," contended that if the union started a campaign to organize the 70,000 office workers in the industry, "there should be no further necessity of drawing up contracts with corporations which bargain the rights of office workers away...." *Proceedings of the 1941 Convention of the International Union, United Automobile Workers of America* 167, 168 (Aug. 4-16, 1941).

45 Snyder, *White-Collar Workers and the UAW* at 38.

46 Snyder, *White-Collar Workers and the UAW* at 39-42. Under the UAW-Ford contract of Nov. 4, 1942, the UAW undertook not to organize "all employees in the...pay roll and employment departments;...all employees at branch plants who are engaged in work which corresponds to that done in (the) Administration Building...; confidential clerks; time study men...." Ford alleged before the NLRB that the UAW was encouraging, supporting, and participating in the UOPWA's drive to organize Ford employees and that it was the UAW's intention to transfer to itself any bargaining rights that the UOPWA gained. The UOPWA sought a unit of all office clerical employees except the chief clerk, assistant chief clerk, internal auditor, traffic division head, buyer, sales managers, service supervisors, time study foreman, labor relations department personnel, and employment manager. Ford Motor Company (Chicago Branch) and United Office and Professional Workers of America, C.I.O., 66 NLRB 1317, 1319 n.2 (quote), 1319, 1320 n.5 (Mar. 28, 1946). As late as 1949 a delegate from the aforementioned Local 889 had to remind the
resentment of office workers and resistance to their admission to the UAW by some members, after yet another resolution was offered at the 1947 convention reaffirming the union’s determination to organize office workers, one delegate, taking umbrage at the notion that salaried employees would be taken within “our Local,” asked rhetorically: “Then we are going to take in the company, is that right...? We might as well.”

The chairman of the resolutions committee had to inform the brother that, although the resolution did not permit supervisory employees into the union, “a $20-a-week clerk who has not got the right to hire and fire has a right to belong to our Union.”

The development of the FAECT, which, as already noted, was intertwined with that of the UOPWA, was more tightly bound up with the exclusions from the FLSA because so many of its members were potentially subject to them as professional employees. The FAECT’s growth was in large part a function of the “economic hardships” that its members suffered during the Great Depression, when 50 percent of all persons engaged in a technical capacity were unemployed, and the inflationary boom of World War II. What in principle opened engineers and chemists to “the possibilities of collective action” was their transformation, from the 1920s through World War II, from independent consultants into salaried employees, so that by the end of the war fewer than 5 percent were still engaged in independent practice: “As employees, the members of this group have seen their

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49 Herbert Northrup, Unionization of Professional Engineers and Chemists 4 (1946).

50 NICB, Unions of White Collar Employees 7 (Studies in Personnel Policy, No. 51, 1943).

51 According to Jack Culley, “A Primer on Engineering Unionism” at 1-2 (U. Iowa Bureau of Labor and Management, Reprint Ser. No. 12, June 1959), the advent of collective bargaining agreements in the war industries provided the real impetus to the expansion of engineering unions in 1943-45.
conditions of work industrialized, so that, instead of being able to apply their engineering and scientific skills individualistically, many now function as members of a team. The result has often been to blur the lines of distinction between the professional man and the technicians, to confront the former with problems of employment relations, and to bring him into contact with unions of nonprofessional employees.”52 Unionization was fostered, as the National Industrial Conference Board noted in 1943, by the fact that a “large number of technicians in the architectural, chemical and engineering fields are in the same relative position as office and clerical workers when it comes to their compensation, hours and working conditions.” Indeed, in an important sense they were even worse off because, as big business’s NICB candidly put it, the “professional character of the jobs enables employers to circumvent” the FLSA.53 Consequently, during the period of rearmament and war in the 1940s, the standard of living of engineers and chemists, like that of other salaried employees, failed to keep pace with living costs, while “production workers’ incomes were swelled by overtime pay....”54

**Attempted Cross-Fertilization with Taft-Hartley**

One reason why the white-collar worker is not as good organization material as the other workingmen is that in almost every office...everybody is somebody’s boss and everybody works under the direction of somebody else—with the sole exception of the proprietor and the newest office boy.55

The UOPWA annual convention in February 1946 may have called for the “Elimination of exemptions from overtime payments for all but bona-fide executives,”56 but once the Republican Party gained control of the Eightieth Congress at

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52 Northrup, Unionization of Professional Engineers and Chemists at 3-4.
53 NICB, Unions of White Collar Employees at 6.
54 Northrup, Unionization of Professional Engineers and Chemists at 4.
the elections in November, employer organizations began planning for the rollback of New Deal labor legislation. In the closing days of that year a minority report of the National Association of Manufacturers favored outright repeal of the FLSA as well as of the NLRA and the Norris-LaGuardia Act. The organization’s radical objectives were visible in the limited nature of the chief dispute between the minority and majority—namely, “whether the NAM should declare for repeal ‘as a necessary prelude to constructive legislation,’ as urged by the dissenters, or simply declare, as the majority wished, for those principles that should be set forth in the statutes and refrain from comment on the legislative procedures by which they might be arrived at.”

This latter strategy, under the name of the Taft-Hartley Amendments, succeeded during the first session in 1947 in fundamentally revising the NLRA in employers’ favor. Employers also successfully carried out a similarly broad-gauge attack on the FLSA by means of the Portal-to-Portal Act.

Employers engaged in some cross-fertilization between amendments to the NLRA and the FLSA white-collar regulations. On the one hand, the latter’s definition of excluded professional employees was largely incorporated into the Taft-Hartley law in order to confer on such workers the right not to be placed in the same bargaining unit with non-professionals. In turn, employers in 1947-49 representative, mentioned nothing about the white-collar exclusions, although he did criticize the general overtime problem of the fluctuating workweek. Proposed Amendments to the Fair Labor Standards Act: Hearings Before the Committee on Labor House of Representatives 407-31 (79th Cong., 1st Sess., Oct. 15-Nov. 15, 1945 [1946]); “Can’t Live Decently on $26 a Week, UOPWA Tells Congressional Committee,” OPN, 11(11):1-3-5, 4:3-5 (Nov. 1945).


H.R. 1754 (80th Cong., 1st Sess., Feb. 6, 1947) (introduced by Rep. John Hinshaw, Rep. Cal.); Labor Management Relations Act, ch. 120, Pub. L. No. 101, § 101, 61 Stat. 136, 138 (June 23, 1947) (codified at 29 USC § 152(12)). The FLSA provision imposing a 20 percent tolerance for nonexempt work was not adopted. When a professional engineering witness explained to a House committee that the definition had been “taken almost verbatim” from the FLSA regulations, Illinois Republican Thomas Owens, a very aggressive opponent of labor who died in the middle of his first term, immediately challenged its pedigree: “You think that the wage and hour law is all right, do you?” The witness defensively replied: “I did not say that.” Amendments to the National Labor Relations Act: Hearings Before the Committee on Education and Labor House of
unsuccessfully sought to persuade the WHA to adopt the Taft-Hartley Act’s much broader definition of “supervisor” as the definition of an excluded executive employee.61

From the outset, the NLRB had taken a broad view of the covered status of professional employees. In early 1936, the Board decided a case involving


61 See below. The same broad definition of “supervisory employees” had been used in the so-called Case bill, which would have amended the NLRA. Congress passed the bill in 1946, but President Truman vetoed it and Congress sustained the veto. H.R. 4908, § 12 (79th Cong., 2d Sess., May 25, 1946). There was nothing in the NLRA, according to one major study from 1940, to “prevent professional or ‘executive’ employees from resorting to self-organization for mutual benefit ... Some beginning toward the organization of the white-collar, professional and technical workers has already been made. This trend may be expected to increase in tempo with the growing consciousness of the benefits to be derived from collective bargaining even among the groups which hover about the periphery of economic power, in actual contacts and social attitudes, if not in economic well-being.” Joseph Rosenfarb, The National Labor Policy and How It Works 49 (1940). The Board did at times exclude “from bargaining units of rank and file workers executive employees who are in a position to formulate, determine, and effectuate management policies. These employees we...deem to be ‘managerial,’ in that they express and make operative the decisions of management.” Ford Motor Co., 66 NLRB 1317, 1322 (Mar. 28, 1946). A year later, in a decision that the Taft- Hartley Act promptly overruled, the Supreme Court stated: “If a union of vice presidents, presidents or others of like relationship to a corporation comes here claiming rights under this Act [NLRA], it will be time enough then to point out the obvious and relevant differences between the 1,100 foremen of this company and corporate officers elected by the board of directors.” Packard Motor Co. v. NLRB, 330 US 485, 490 n.2 (Mar. 10, 1947). Board policy regarding this category of non-statutory managerial employees, which it itself created, shifted over the years and it was not completely clear whether the Board was merely excluding them from bargaining units together with rank and file workers or from the act altogether. The scope of the category also changed over time; in 1950, for example, the NLRB excluded buyers as representatives of management because they made substantial purchases for the employer. American Locomotive Co., 92 NLRB 115, 117 (Nov. 16, 1950). The Supreme Court, in a substantively sharply divided 5 to 4 decision, sought to put an end to the confusion in 1974 by ruling that managerial employees were not covered by the act at all. NLRB v. Bell Aerospace Co., 416 US 267 (Apr. 23, 1974). On remand, the confusion was restored when the Board ruled that the buyers in question were not managerial employees because they did “not exercise sufficient independent discretion...to truly align them with management....” Bell Aerospace, A Division of Textron Inc., 219 NLRB 384, 386 (July 23, 1975). The inclusion of buyers within the category of “managerial employees” demonstrates that it encompasses both administrative and executive employees under the FLSA white-collar definitions.
Chrysler Corporation and the 2,300-member Society of Designing Engineers, which had been formed in 1932 to improve the employee status of mechanical engineers, draftsmen, and designers. In response to wage cuts, Chrysler engineers began joining in considerable numbers in early 1935, pushing union membership there up to 476. The principle underlying the Board’s decision in favor of NLRA coverage was rooted in the act’s purposes in a way that was completely alien to FLSA decisionmakers: “They are in no sense executives. The engineers have need of organized strength in common with all wage earners. This is their opinion as shown by the impetus to organization provided by a wage cut uniformly suffered. We can find no reason for differing with them.”

The 1947 House Education and Labor Committee hearing devoted to the bill to amend the NLRA to empower professional workers to segregate themselves from their co-workers displayed the self-contradictory forces underlying such a demand. Vastly exaggerating the professionals’ occupational circumstances in large-scale industrial employment, the bill’s sponsor, California Republican John Hinshaw, contended that: “Regimentation of professional employees...and maintenance of the standards of professionalism...are impossible of joint attainment. ... Neither the output nor the value of professional employees can be standardized as can that of skilled and unskilled labor. The production output of the professional man is the production of his mind while that of the nonprofessional depends largely on his manual skill and dexterity.” Hinshaw went so far as to assert that “the best of them would not be employees at all if they could have adequately equipped laboratories of their own.” Despite the fact that the logic of capitalist research and development made the concentration of capital and the mass production and employment of scientists and technicians necessary, Hinshaw claimed that his bill was “designed to set free the inventive genius of our engineers and scientists....”

It was the bill’s permissiveness regarding professionals’ unionization and alliances with national labor unions that sowed the seeds of self-contradiction that New York Republican Ralph Gwinn—who viewed labor standards legislation as...
socialistic—swiftly detected. He asked Hinshaw directly: “Well, should they be permitted to organize and become part of labor when as a matter of fact they more nearly belong in the managerial group, and would occupy, if they joined labor, rather an inconsistent position?” Suddenly Hinshaw recollected that, his plea on behalf of independent professionals notwithstanding, in “some large...production organizations, such as an aircraft company or a large electrical concern, many hundreds and in cases thousands of professional employees are engaged by these employers, and...as such they are entitled if they choose to have a bargaining unit of their own....” Dissatisfied with this concession to unionism, Gwinn joined issue from a slightly different perspective, asking Hinshaw whether he would grant the same rights to foremen and supervisors with the power to hire and fire; Gwinn succeeded in prompting Hinshaw’s subtly formulated response that, based on his familiarity with large aircraft factories in his district, he knew that some foremen supervising only five workers were also performing manual labor themselves and should therefore “have something to say” on being organized. Although he had apparently failed to elicit the precise response he had been expecting, Gwinn resumed the Socratic dialog by opining that Hinshaw’s professionals “more nearly belong” with supervisors than with labor. Again Hinshaw confounded both Gwinn and his own general argument with a more differentiated analysis: “They do and they do not. It depends on how high in the skill they are. If they are a chief engineer, the medical officer, entitled to cause the discharge of an employ­ee...perhaps they belong to the management group. But if there are large numbers of them employed..., I think they have a right to discuss their problems with man­agement as a group.” Indeed, Hinshaw specifically drew the conclusion from the massed presence of technical and laboratory professionals that they “certainly...have a right to discuss...their hours and working conditions...with manage­ment.” He thus implicitly raised the question as to why, if professionals could collectively bargain over their “regimentation” with their employers, it would be inappropriate for the federal government to intervene by establishing a protective ceiling over those hours.

Hinshaw’s acknowledgment that only the relatively small stratum of mana-

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66Marc Linder, “‘Moments Are the Elements of Profit’: Overtime and Deregulation of Working Hours under the Fair Labor Standards Act 509-10 (2000).
67Amendments to the National Labor Relations Act: Hearings Before the Committee on Education and Labor House of Representatives 5:2774.
68Amendments to the National Labor Relations Act: Hearings Before the Committee on Education and Labor House of Representatives 5:2775.
69Amendments to the National Labor Relations Act: Hearings Before the Committee on Education and Labor House of Representatives 5:2778.
gerial professionals did not need a union made Gwinn—whose Socratic tables had been turned on him—melancholy: “Mr. Hinshaw, it is a bit shocking to realize from the implications of this bill that lawyers and engineers, professional persons, are so far removed from management that they cannot make themselves directly felt as individuals.” Worse still, Gwinn feared that unions would target “the vice presidents” next.70 Another committee member, Kansas Republican Wint Smith, expressed disbelief: “I have heard everything now. When the builders of bridges and the builders of highways come to Washington to a paternalistic Government for redress.”71

When E. Lawrence Chandler, representing several professional engineering societies with about 100,000 members, testified, the second-ranking Republican on the committee, Gerald Landis of Indiana, sought to persuade him to exclude his membership from the NLRA because if they all organized, then the low-salaried teachers would want to organize: “But the danger is of all these different professional groups forming a union of their own, and I have always thought that the engineers and architects...have had decent wages, salaries and all, which have been pretty high.”72 However, the one-term congressman, failing to explain how a ban on collective bargaining would aid professionals whose salaries were not so high after all—an engineer at GE testified that in a “stratified” profession engineers were “very, very much disturbed” about the rapid pay increase for rank and file workers which “swamps out the real differential”73—was unable to shake Chandler, who, though he favored the open shop, had to accommodate “the young men” among his members who opposed exclusion.74

Yet another anti-labor congressman who abhorred unionization of professional

70Amendments to the National Labor Relations Act: Hearings Before the Committee on Education and Labor House of Representatives 5:2777.
71Amendments to the National Labor Relations Act: Hearings Before the Committee on Education and Labor House of Representatives 5:2791.
72Amendments to the National Labor Relations Act: Hearings Before the Committee on Education and Labor House of Representatives 5:2778.
73Amendments to the National Labor Relations Act: Hearings Before the Committee on Education and Labor House of Representatives 5:2795, 2793 (Mr. Ransom). Ransom summarized the industrial stratification as follows: 15 percent (vice presidents, divisional and assistant divisional engineers considered management) no union was trying to represent; 10 percent (supervisory engineers) were trying to avoid enforced inclusion in the CIO plant-wide supervisory bargaining unit; 35 percent on the monthly payroll were petitioning for bargaining rights to avoid forced inclusion; and 40 percent were brought into the weekly salary group with no choice. Id. at 2794-95.
74Amendments to the National Labor Relations Act: Hearings Before the Committee on Education and Labor House of Representatives 5:2792.
employees was forced to watch his logic turned against him. Texas Democrat Wingate Lucas admonished Chandler that “you are attempting to reduce your status as professional men in seeking protection under the Wagner Act” because they would no longer be permitted to ask for remuneration for their services based on their value “rather than upon the time expended in performing them.” This admission entailed the more damaging admission that employers were in a position to make professional employees account for their time; thus, once again, the objection to government protection of workers from employers imposing long hours lost its force. However, as far as Lucas was concerned, the mere fact that 1,800 Boeing engineers wanted government protection in bargaining for salaries proved that they were “not engineers....” When another engineer told him that engineers wanted to bargain over wages and working conditions, Lucas shot back: “That almost, in effect, reduces them to the status of the other employees,” prompting the engineer to reply: “The younger professional man just out of school is practically in that position, is he not?” Lucas then tried to proselytize the engineer on behalf of the school of hard knocks: congressional exclusion of professional employees from the Wagner Act would give them the “initiative to rise rather than to be stymied, and thereby held to a certain level within the group.” But when the engineer asked him “what redress would the junior professional employee have” on his own, Lucas was forced to concede: “I do not know.”

The 1947 House FLSA Hearings

Ever since the formation of the American Newspaper Guild in 1933, we have been waging a continuing battle to prevent classification of newspaper employees as professional people. It is not, I assure you, a matter of modesty on our part. Our objections to being rated as professionals have been solely a matter of economics. It has seemed to us that the zealous desire of some to classify us as professionals was not so much to enhance our dignity as to...deny us overtime pay....

75Amendments to the National Labor Relations Act: Hearings Before the Committee on Education and Labor House of Representativess 5:2799.
76Amendments to the National Labor Relations Act: Hearings Before the Committee on Education and Labor House of Representativess 5:2800-2801 (Mr. Hathaway).
77Amendments to the National Labor Relations Act: Hearings Before the Committee on Education and Labor House of Representativess 5:3733 (Milton Murray, president, ANG).
The thing that has bothered me most about coming here is the feeling that I would look just like the representative of any other group of employers that is trying to get out from under the provisions of this act.\textsuperscript{78}

As WHA William McComb noted in his annual report for 1947, significant changes in the economic situation and the DOL’s enforcement experience since 1940 had made necessary revision of the regulations, which had been under consideration for some time: “However, action on this matter was postponed for the reason that it was considered advisable, in the early periods of reconversion of industry from war-time conditions, to delay any revisions. Early in 1947, however, the Administrator decided to take the necessary steps to present the question of revision of the regulations for consideration at a public hearing at which all interested parties will have an opportunity to present their views. As a preliminary step the Administrator appointed a labor-management advisory committee to consider and advise him on the question of revision.”\textsuperscript{79} Several months earlier, on October 18, 1946, the left-wing United Electrical, Radio and Machine Workers of America had filed a petition requesting that the salary level for all three categories of white-collar workers be increased to $500 per month, but since the WHD investigation was already under way, the petition was “held over for consideration” with other proposals.\textsuperscript{80} In June 1947, after many labor and management spokesmen had criticized the $30 executive salary level as too low—a position that employers had not previously been well-known for advocating—in view of wartime wage increases, Labor Secretary (and former Washington Senator and U.S. district court judge) Lewis Schwellenbach announced the appointment of the labor-management committee consisting of representatives of the National Association of Manufacturers, Chamber of the Commerce of the United States, the AFL, and the CIO to decide whether to raise the level and consider other exemption tests applicable to “the so-called white collar employees....”\textsuperscript{81} The committee meeting


\textsuperscript{81}“To Weigh ‘Executive’ Rule,” \textit{NYT}, June 18, 1947 (21:3).
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on July 9, 1947\(^{82}\) marked the first external action taken by the DOL to reconsider the regulations since 1940.\(^{83}\)

Already in July, at the end of House Education and Labor Committee hearings on increasing the minimum wage, its chairman, New Jersey Republican Fred Hartley, disclosed that the House leaders had “reached a final decision not to touch” the FLSA until the 80th Congress’s second session in 1948.\(^{84}\) Nevertheless, in September, Pennsylvania Republican Samuel McConnell, chairman of Subcommittee No. 4, Wages and Hours of Labor, after conferring with Hartley, decided to hold “open”\(^{85}\) and “exploratory” hearings “without having any specific legislative proposal pending” in October and November, whose scope was now expanded to include other FLSA issues as well.\(^{86}\) In August and September, during the interim between Hartley’s disclosure and McConnell’s announcement, “executives and officers of more than 200 employer organizations throughout the country met in Washington,” as the administrator of one state employers organization informed one of the subcommittee’s members, “and a great deal of their time was spent in discussion of needed amendment to the Wage and Hour Law other than the minimum wage provision.”\(^{87}\) Among the proposed amendments they formulated were that “[h]ighly paid salaried workers should be exempted from the overtime requirements of the law” and that “[w]herever practicable, Congress should define all terms used in the act rather than leave problems of definition for solution by the Administrator or the courts—e.g. executives, professional and administrative employees.”\(^{88}\)


\(^{84}\)“House Picks Group for Labor Survey,” *NYT*, July 18, 1947 (7:1).


\(^{88}\)“Major Amendments Proposed by Representatives of a Large Number of Industrial Relations Organizations Throughout the Country September 24, 1947,” enclosed with
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The high point of these hearings, to whose subject matter McConnell attached "extreme importance," was the colloquy between James West, the director of public relations (in charge of wage-and-hour grievances) at the Buckeye Steel Castings Company, and first-term Minnesota Republican George MacKinnon. West maintained that employers' problems with the white-collar regulations could be addressed by establishing a minimum salary as the sole criterion for overtime pay, which would eliminate border-line cases and contradictory interpretations. To those who would be excluded from overtime pay West offered the consolation that his proposal "would certainly work no hardship on those able employees who would otherwise be entitled to extra compensation, as ability and initiative and the desire to progress will always be present and will be recognized under our economic system." In order to determine the appropriate salary level, West asked what the law's intent was: "It was to take care of the low-paid workers, the hourly and salaried worker, not the type of people that I am talking about." Since the Bureau of Labor Statistics' most recent report stated that average weekly manufacturing wages were $48, West asked rhetorically: "Now, is it necessary under any law to protect workers who are making in excess of that amount?" West's rounding it off to $200 a month then prompted MacKinnon to spark a discussion that Congress had never heard before: "That is all right except for the

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letter from Jack Schroeder to George McKinnon [sic] (Oct. 31, 1947). Schroeder called the list of proposals a "digest of their most important conclusions" without identifying the digester. The employers also recommended that the "term 'employ' should be defined to remove from the acts [sic] coverage [sic] 'bona fide' independent contractors."

89Letter from Shepard to MacKinnon (Sept. 12, 1947).


93The witness immediately preceding West, Frank Morfoot, the secretary and assistant treasurer of Owens-Illinois Glass Co., had made the same proposal of $200 a month as the sole test based on virtually the same arguments, yet MacKinnon, who questioned him at length on this very issue, did not embark on the more fundamental discussion that he had with West. Minimum Wage Standards and Other Parts of the Fair Labor Standards Act of 1938, vol. 2:1051-63.
spread-the-work theory on account of which the act was originally passed.\textsuperscript{94} Since West had earlier declared that one of the “three simple problems” of which the FLSA was designed to “afford a relaxation” was to “[s]pread employment by establishing a maximum workweek,”\textsuperscript{95} he had constricted his room for argumentative maneuvering, but he gamely plunged into the interrogation:

Mr. \textit{West}. Frankly, in a company such as mine and any number of companies, the types of workers we are talking about are at a premium; you cannot distribute that sort of work.

Mr. \textit{MacKinnon}. You may not be able to do so now, but down through the years it has not always been that way. The fact that you were not able to work your men 10 hours a day has resulted in the employment of more men than would otherwise be the case, has it not?

Mr. \textit{West}. I question that very seriously.

Mr. \textit{MacKinnon}. It could not be any other way. If you were permitted to work those men 10 hours, you would not have to employ as many men as when you work them only 8 hours.

Mr. \textit{West}. I am talking about the executive type of employee, your administrative and professional type of employee. I do not think the fact that we have a law on the subject is going to make any difference as far as the unemployment situation of those people is concerned. Of course, that is only my personal opinion.

... Mr. \textit{MacKinnon}. Practically all of these plants are now on a 5-day basis and you have your executive staff on a 5-day basis. That requires more executive employees to do the same amount of work, just as it requires more employees for the other classifications of work. And I say that from personal experience.

Mr. \textit{West}. Of course, the work has to be done. The salaries of most of the executive employees are so set up for the work that they do that it would make very little difference to them. ...

Mr. \textit{MacKinnon}. Of course, the point was in connection with the $200 minimum wage to take care of a certain group of workers. Let me put it this way. Your suggestion might take care of the requirement to put them all on some kind of a fair basis, but your suggestion does not go to that part of the original law which was intended to take care of the distribution of the work. If the purpose were valid then, then it is just as necessary and desirable to distribute the work among those that are getting more than $200 as those who were getting under $200.

Mr. \textit{West}. ...I still do not believe that this is the type of worker that was contemplated to be covered by the act.


Mr. MacKinnon. Let me put it this way. You have suggested...that no person who gets more than $200 a month be subjected to the time-and-a-half provision. It strikes me that that would be all right to clarify the exemption. But when you propose not to have anything to supplant the other part of the law which was intended to spread the work, then you are covering only part of the problem. ... You are going to clarify one part but you are going to destroy one of the purposes of the original act. The original purpose was to spread the work, was it not?96

At this juncture in this breathtakingly unprecedented congressional colloquy, West tried to brake the momentum by casting doubt on whether work-spreading was desirable or necessary. MacKinnon, echoing widespread postwar fears of renewed depression, tenaciously refused to allow his point to be sidetracked: “You recognize...that it would take away a substantial encouragement to spread the work if that ever became desirable and necessary again.” West again tried to sidestep the main argument by claiming that union agreements “[a]s a practical matter resolved the problem for nonunion salaried workers as well: “I do not believe industry will ever go back to the point where they are going to work their office workers 84 and 90 hours a week, because your production workers are not going to work that kind of hours. It is not necessary to work your office people 10 or 12 hours a day for 7 days a week. It just is not in the picture.”97 Just how many hours office employees would be worked West did not reveal, but MacKinnon finally relented,98 shifting instead to the criticism that the $200 threshold might “tend to become a kind of ceiling and result in a loss of productive capacity” because a worker earning near that amount might stop working hard lest he lose his overtime pay.99 Ironically, West’s response—that salaries are “figured on the number of hours that a person would normally work during a workweek or...month”100—undermines employers’ virtually ubiquitous argument that overtime is inappropriate for white-collar workers because their tasks and outputs cannot be standardized in relation to

98In response to West’s admission that white-collar employees at his company (unlike those at some others) were not covered by union time-and-a-half provisions, MacKinnon’s statement that “[w]hether they got $200 a month or not would not make any difference” is difficult to understand.
MacKinnon’s unique insight into the applicability of the purpose of the penalty overtime pay regime to white-collar workers was all the more noteworthy for the fact that this one-term congressman, whom twenty years later President Nixon appointed to the D.C. Circuit Court of Appeals, otherwise expressed thoroughly pedestrian anti-labor and anti-communist views, which he shared with his then congressional colleague Nixon. MacKinnon’s analysis was perhaps even more remarkable in light of his overwhelmingly employer-oriented and anti-FLSA constituent correspondence.

In the midst of the subcommittee’s hearings, for example, he received a letter from Leavitt Barker, a name partner of the important Minneapolis corporate law firm of Dorsey, Colman, Barker (of which future Supreme Court Justice Harry Blackmun was also a partner), bemoaning that it was “probably too late to condemn the principle of a minimum wage as socialistic legislation,” but expressing his very strong feeling that “if the principle is accepted at all, the measure should be that of a bare subsistence standard based solely upon considerations of public health and safety and not upon any concept of Government regulation of our economic structure.” Although it was Barker’s “honest belief” that the country’s “best interests...would be served if the Act were repealed in its entirety,” he realized that such a desideratum was “probably not in the picture.” He therefore focused on the

101See above ch. 2.

102David Binder, “George E. MacKinnon, 89, Dies,” NYT, May 3, 1995 (D21:1). That MacKinnon had scarcely mastered the FLSA was underscored by his assertion that the act’s definitional term “employ” was a “broader term than suffer and permit” [sic; in fact “suffer or permit to work”]. Minimum Wage Standards and Other Parts of the Fair Labor Standards Act of 1938: Hearings Before Subcommittee No. 4 of the Committee on Education and Labor House of Representatives, vol. 4:2575 (80th Cong., 1st Sess., Nov. 17-Dec. 17, 1947). Like almost all Republicans, MacKinnon voted for the Portal-to-Portal Act and the Taft-Hartley Act. “House Vote on Portal Pay Measure, NYT, Mar. 1, 1947 (2:4-5); “Vote in House Overriding Truman’s Veto,” NYT, June 21, 1947 (2). In support of legislation banning the Communist Party, MacKinnon declared on the House floor that there was “nothing illegal about outlawing something that is evil. Bank robbers, assassins, murderers...are outlawed.” CR 94:6141 (May 19, 1948). As a judge on the most important appeals court for NLRA cases, MacKinnon wrote a decision that was principally responsible for depriving taxicab drivers of collective bargaining rights on the grounds that they were not employees but lessors. Local 777, Democratic Union Org. Comm. v. NLRB, 603 F.2d 862 (D.C. Cir. 1978); Marc Linder, “Towards Universal Worker Coverage Under the National Labor Relations Act: Making Room for Uncontrolled Employees, Dependent Contractors, and Employee-Like Persons,” UDLR 66(4):555-602 (Summer 1989).

103Several firms wrote him urging amending the FLSA to exclude highly paid workers.
“serious economic and social repercussions” of increasing the minimum wage once an “economic depression occurs”: it “would add...to the ranks of the malcontents and provide a fertile field for the activities of the Communists among us whose objective is anarchy and ultimate overthrow of our existing government.” In case MacKinnon regarded his letter as “alarmist talk,” Barker—who was on a first-name basis with him—hastened to assure the congressman that he was “convinced that the danger is real, the most realistic and serious objection to any increase whatsoever in the existing minimum rate which from this point of view is probably already much too high.”

Without adopting any of Barker’s ideologically freighted terms, MacKinnon matter-of-factly replied that the committee was “fully cognizant” of the effect of an increase in the minimum wage “in a possible recession,” but that “[s]ome raise in the rate has not been opposed generally.”

Prompted by Barker to furnish MacKinnon with “factual matter,” Jack Schroeder, the general manager of Associated Industries of Minneapolis—with whom MacKinnon was also on a first-name basis—not only believed that Barker was “absolutely right” about the minimum wage, but informed the congressman that “one of the most general complaints heard from employers has been that the investigators employed by the Wage and Hour Division adopted the tactics of the ‘gestapo’” by trying to “induce employees in private conferences in their offices after working hours to file complaints against their employers....” Without any of his usual bluntness, MacKinnon thanked him for the “very informative material,” which was in conformity with the information and suggestions the committee had already received.

Of special interest is an exchange with the St. Paul Committee on Industrial

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Relations—a name that the open-shop Citizen’s Alliance took in 1937—as the House hearings were ending in December 1947. Its executive secretary, W. H. McMahon, wrote MacKinnon suggesting that the statutory overtime rate be fixed at time and a half the minimum wage and asking whether the idea sounded “feasible” to him. MacKinnon forthrightly responded that several witnesses had already made this suggestion to the committee: “The substance of it is to ignore the spread work phase of the Act and to convert it into merely providing a minimum wage law. The Committee will certainly give serious consideration to that approach. Frankly, I do not believe it will be adopted by the Congress.” This reply was consistent with MacKinnon’s aforementioned colloquy with West and characteristic of his candid tone to those he viewed as politically unrealistic correspondents. Thus, for example, to an employers organization urging him to consider a pending bill to repeal the FLSA, “at least as a counter-measure for many of the unsound proposals which have been advanced,” MacKinnon bluntly replied: “There is absolutely no chance that Congress will repeal the Fair Labor Standards Act.”

Individual firms also advised MacKinnon of their specific complaints and suggestions. A Minneapolis home furnishings wholesaler displayed a sense of humor in observing that the WHA and courts had “narrowed work includable under ‘20% non-exempt work’ to a point where an Executive just sits.” Because employees

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111H.R. 4599, § 1 (80th Cong., 1st Sess., Nov. 28, 1947 (introduced by Max Schwabe, Rep. MO), declared that “Congress cannot legislatively fix wage rates paid by employers in conflict with economic forces without seriously upsetting our economy....”


Early Post-World War II Finishing Touches

who had “shown their ability and proved by performance that they can handle responsible work should be relieved from the necessity of punching a time clock,” it also recommended that highly paid salaried workers be relieved of overtime pay. Another Minneapolis firm suggested leaving the salary level for white-collar workers at its prewar level of $200.

As the House subcommittee hearings stretched into November, Paul Hutchings, the president of the AFL-affiliated Office Employees International Union (OEIU), whose 30,000-35,000 members represented about 0.5 percent of all white-collar workers, opposed any amendment excluding office and clerical workers from the protection of the FLSA. The most belligerent questioning was conducted by the House Education and Labor Committee’s general counsel, Irving McCann, whose anti-labor and anti-communist fervor had, two months earlier, exploded into physical violence against a witness whose own verbal aggressiveness he could not abide. His penchant for hyperbole was also visibly on display in his question to [114]Letter from G. A. Brambilla, comptroller, Leitz Carpet Corp., to George MacKinnon (Nov. 4, 1947), in George E. MacKinnon Papers, Location 144.J.19.2F, Box 6: Labor: Fair Labor Standards Act: Correspondence, 1947-1948, Folder 1.


[117]At a House Education and Labor Committee hearing on jurisdictional strikes in Hollywood film studios the AFL’s general counsel Joseph Padway protested the “Gestapo proceedings like Mr. McCann is trying to make,” shouting at him that he was not afraid of him or anyone like him. McCann then “grabbed the AFL counsel with both hands, and forced him backwards, until Mr. Padway fell over a chair onto the floor. His glasses were knocked off. ... The more than 200 witnesses...shouted, and women shrieked, until the two men finally were separated after about a 30-second scuffle.” Instead of reprimanding McCann, the Subcommittee chairman, Carroll Kears, merely said that he was “very sorry about this incident,” adding that McCann had been under great strain because two subcommittee members were absent. When the president of the letter carriers union demanded that McCann disqualify himself from further participation on the grounds of bias and prejudice, McCann “sneered”: “Here...comes a man who five years ago was a letter carrier pretending to tell a Congressional committee how to run its affairs—a man with more brains in his feet than he has in his head.” This evoked an astonished gasp from the audience.” McCann then made an “amiable apology” after the president demanded one to himself and “every letter carrier in the United States postal service.” Gladwin Hill,
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a former WHA as to whether "the vice president of some large company, with a salary of $100,000 a year, should not be able to come in and ask for overtime because of the fact that he was fired for perhaps getting drunk last Friday night...." McCann asked Hutchings whether he favored "allowing a person to be exempted from the provisions of the wages-and-hours law if he wanted to be...." Hutchings definitively said no, but, lest he be misunderstood, emphasized that the labor movement felt that it was "part of the free enterprise team. ... I believe in the free-enterprise system. ... I think it is the one beacon light of hope in the world today...." Such testimonials apparently failed to impress Kansas Republican Wint Smith, who seemed to be astounded that anyone might object to permitting a worker to say: "I want to work an excess number of hours...and I’m not going to charge you with any overtime." A sense of the radical revision of the FLSA at which some industrial employ­ers were aiming was given by a group of 19 Cleveland firms employing more than 50,000 workers, which advocated total repeal of the overtime provision. Short of that maximalist goal, the coalition proposed this definition of "executive" consisting of "commonly accepted meanings":

one who is charged with the responsibility for the achievement of the objectives of the establishment in which he is employed, or of a customarily recognized department or

"Padway Is Felled by Rival at Inquiry," NYT, Aug. 20, 1947 (1:3, 14:2-3). The next day the Times editorialized that McCann’s behavior had been "a disgrace which degrades still further the standing of Congressional hearings," but allowed as he had not been "at his best" and merely called on the committee to give him a rest "at least until he can cool off." Amusingly, the official record of the hearing describes McCann’s violent physical attack on Padway as "(Discussion off the record.)" Jurisdictional Disputes in the Motion-Pic­ture Industry: Hearings Before a Special Subcommittee of the Committee on Education and Labor House of Representatives, vol. 1:287 (80th Cong., 1st Sess., Aug. 11-Sept. 3, 1947).

119Minimum Wage Standards and Other Parts of the Fair Labor Standards Act of 1938, vol. 3:1575. McCann, who was not embarrassed to reveal that he absorbed his knowledge of the world from Readers’ Digest, repeated this question with regard to night shifts after having read about “B type people” who function best at night. Id. at 1579.
122See Linder, “Moments Are the Elements of Profit” at 105-107.

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subdivision thereof, or who regulates or assists in regulating the course and conduct of other employees therein, and whose compensation does not depend upon his working any fixed or customary number of hours.123

Indiscriminately throwing executives together with lowest-level supervisors, this definition in effect sought legal approval of the pre-existing practice of making salaried employees work long but uncounted hours. That the Cleveland firms intended to exclude low-level supervisors from the FLSA was clear from their alternative proposal to substitute as the sole criterion that the “executives” be paid at least 10 percent more than the average base pay of the highest-paid quarter of the group (of supervisees) in which they were employed.124 Labor’s reaction to this initiative can be gauged by a resolution adopted by the International Association of General Chairmen of the Brotherhood of Railway Trainmen, assembled in Cleveland in January 1948. Viewing the Cleveland employers’ “backward recommendations” as “a part of the over-all program, of which the Taft-Hartley Act is also a part, designed to destroy not only living standards in America, but also to destroy American labor unions,” the union resolved to “turn back this legislative assault....”125

In late November, shortly before the DOL’s white-collar regulatory revision hearings were schedule to begin, WHA McComb testified before the House Labor subcommittee, emphasizing that the white-collar regulations had “caused people to say a lot of things which they felt were justified, but actually were not.” Since the regulations were nevertheless “being corrected” in connection with the upcoming hearings,126 the subcommittee seized the opportunity to bring its desiderata to his attention. Taking the lead, once again, general counsel McCann, reciting an employer’s testimony, asked McComb whether the WHD should protect “a man getting $400 a month” to insure that he either did not work more than 40 hours or

received time and a half if he did. The WHA refused to answer, preferring to await his own hearings, but promising to give the subcommittee information well before it reported to the full committee.  

McCann then tried a somewhat different tack with Harry Weiss, who was about to preside over the WHD hearings. Explaining that the subcommittee had had "some rather distressing reports from employers" about the 20-percent nonexempt work tolerance and that he was "trying to get these things into the record so that the Administrator may consider them in his work next week," McCann asked Weiss: "Do you not think...it would be a very definite improvement to this act if the Congress...exempted all managerial employees from the act regardless of the pay, or anything else?" After Weiss had replied that it would still be necessary to define "managerial employees" and that if the term were defined to include all white-collar employees, he would not agree with it, McCann hastened to add that he meant "presidents, vice presidents, treasurers, cashiers, secretaries, and people who hold office in a...business, or people who are owners or who have supervisory jobs such as defined in our Taft-Hartley law." When McComb allowed as such a definition might bring clarity "if we get the proper testimony" at the hearings, McCann unveiled the possibility of legislative intervention: "I wish you would consider the idea—and I think you will—whether or not Congress may clear up this problem better than regulations would." Since his power to issue regulations stemmed from Congress, McComb had little choice but to note that the WHD would make its recommendations to the committee and "let the committee decide whether we should regulate or whether you should do it by law."  

Bull-doggedly, McCann stayed on point, this time reading a statement from the comptroller of the Pittsburgh Plate Glass Company that whereas, in its opinion, Congress "intended to exempt all highly paid office and nonmanual employees," the WHA still required employers to make the same duties-test showing for $400 or $500-a-month as for $200-a-month employees. Weiss’s reply that until the Portal-to-Portal Act was passed that year, the division had had an inspection policy instructing inspectors “not to look behind a man earning $325 a month where his duties appeared generally to be of the kind described in the regulations” prompted

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McCann to ask McComb whether $325 “should be the basis for a law exempting such employees by the Congress....” Harvesting yet another declination to answer for the record, McCann turned to Weiss, who gave a straight answer: he “might well agree” with $325 for executive employees, depending on the definition of term, but he also mounted more resistance to yielding regulatory power than had his boss, suggesting that the WHD’s “experience shows that it is easier for an administrative agency to define those terms than it is for Congress, because we can change it from time to time as difficulties develop with the term.” McCann took no umbrage at Weiss’s defense of his agency’s jurisdiction, but underscored that “certainly we are not bothering about anybody who is going hungry or being in want, when we speak of someone getting $325 a month...”\(^{131}\) Neglecting to mention that Pittsburgh Plate Glass had in fact proposed a $400 salary level,\(^{132}\) McCann went further and suggested that Congress “might well adopt” the $325 threshold to exclude executive, administrative, and professional employees from time and a half pay, before Samuel McConnell, the Pennsylvania Republican who chaired the subcommittee, recognizing that the real world of the workplace might be a tad more complex than his legal counsel realized, finally intervened to caution: “You have to be very careful that you do not make the regulations so that the job of supervisor becomes unattractive. Perhaps he would then prefer to be just an employee, and not have a title.”\(^{133}\)

In a lengthy post-hearing written supplementary statement submitted in December after the WHD hearings had begun, McComb observed that the testimony before the subcommittee had been so “widely divergent” that some witnesses wanted the salary test eliminated while others wanted only a salary test. Nevertheless, despite these divergences, McComb argued that “[t]he problem involved in this whole group of proposals is not a question of fundamentals but of applications, particular situations and fringe questions.”\(^{134}\) The WHA’s judgment was

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accurate in the sense that no one (with the possible exception of MacKinnon)\textsuperscript{135} had seriously contested the exclusion of white-collar employees, although some congressmen\textsuperscript{136} and employers favored the elimination of statutory overtime pay for any white-collar or perhaps any workers at all.\textsuperscript{137} In any event, whatever regulatory amendments for which the WHD hearings might demonstrate a need, McComb opined that legislative action was unnecessary.\textsuperscript{138}

At the end of October 1947, \textit{U.S. News and World Report} observed that although doubt had been expressed as to whether employees earning $5,000-10,000 a year needed time and a half, any changes in the FLSA depended on whether the Republican Party leadership wanted to make a campaign issue out of them; some Republicans wanted to increase the minimum wage in order to offset enactment of the Taft-Hartley amendments and to make it hard for President Truman to veto FLSA amendments that also included provisions that labor opposed.\textsuperscript{139} A month later the news magazine reported that it was likely that the FLSA would undergo a major overhaul in 1948 with an increase in the minimum wage to 65 cents but reduced overall coverage. On the other hand, although some employers were pushing for a revision that would abolish premium pay and

\textsuperscript{135}In one limited context—refuting Representative Owens’ factually incorrect claim that Congress in 1938 had not intended the FLSA to require payment of time and a half on wages above the minimum—McComb did assert that “the work-sharing objective...applies to all workers.” \textit{Minimum Wage Standards and Other Parts of the Fair Labor Standards Act of 1938,} vol. 4:2516.

\textsuperscript{136}Illinois Republican Thomas Owens, a first-year congressman who died before his term was up, advocated limiting time and a half to the minimum wage, in part because he believed that work-sharing was no longer a goal, and rejected Harry Weiss’s argument that “[i]n another year or so you may well have a flood of overproduction in many of the consumer industries.” \textit{Minimum Wage Standards and Other Parts of the Fair Labor Standards Act of 1938,} vol. 4:2515, 2517 (quote).

\textsuperscript{137}For example, a joint statement submitted to Congress by 46 state and national industrial employers organizations declared that with the “‘share-the-work’ slogan of the 1930s...a thing of the past...the overtime requirements” of the FLSA had “served their purpose and should be repealed.” “Joint Statement by a Group of Industrial Organizations with Respect to Proposed Amendments to the Fair Labor Standards Act of 1938,” \textit{Minimum Wage Standards and Other Parts of the Fair Labor Standards Act of 1938,} vol. 4:2852, 2855.


legalize straight-time wages for hours over 40, it was unlikely that Congress would enact such a change in an election year\textsuperscript{140}—a plausible explanation of the Republicans' failure to enact any FLSA amendments in 1948 while they still held a congressional majority. In fact, by July 1948, in the legislative rush, the aforementioned increase in the minimum wage together with removal of various groups of workers from coverage had been sidetracked because "Republican leaders...decided against pressing for enactment at this time."\textsuperscript{141}

The sustained intense hostility that Republican members of the labor subcommittees displayed toward the coverage of virtually any white-collar workers whose salaries exceeded the minimum wage strongly suggests that if Dewey had beaten Truman and the Republicans had retained their control of Congress, the FLSA would have been as radically revamped as the NLRA. If the Republicans failed to take advantage of their brief legislative supremacy to enact amendments excluding even more white-collar workers from overtime coverage, the Democrats, following their surprise retention of the presidency and recapture of congressional control for 1949-50, never even put expansion of coverage on their FLSA agenda\textsuperscript{142}: executive, administrative, and professional employees, as the business press reported as early as February 1949, would remain exempt.\textsuperscript{143}

The 1947-48 Wage and Hour Division White-Collar-Regulation Hearings

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Paid overtime for salaried workers is not a general employment practice. A few hours of extra work to finish a special task from time to time generally is disregarded by both worker and employer. Office employers are not overtime conscious.\textsuperscript{144}

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\textsuperscript{140}"Wage-Hour Change Coming?" \textit{USNWR}, Nov. 28, 1947, at 24, 26.
\textsuperscript{141}"Moves to By-Pass Labor-Law Changes," \textit{USNWR}, July 11, 1948, at 50.
\textsuperscript{142}\textit{Fair Labor Standards Act Amendments of 1949: Hearings Before a Subcommittee of the Committee on Labor and Public Welfare United States Senate on S. 58, S. 67, S. 92, S. 105, S. 190, S. 248 and S. 653} (81st Cong., 1st Sess., Apr. 11-22, 1949) (no bill proposed amending coverage of white-collar employees). In its statement, even the CIO failed to include these workers among the excluded who should be covered, although it stated that all workers should be covered by the overtime provision. \textit{Id.} at 177, 182.
In October, while the House FLSA hearings were still underway, Wage and Hour Administrator William McComb gave the public notice that, because it appeared "advisable," based on "changes in economic conditions" since the white-collar regulations had been issued, to "consider amendments...which will more effectively carry out the purposes of the exemptions," and also because the UE had filed its (aforementioned) petition to increase salary level to $500 a month, the WHD would hold a hearing beginning December 2, 1947. In addition, McComb announced that witnesses would be heard on whether certain specified changes (of a relatively limited scope) should be made. A "revaluation" of some conclusions reflected in the regulations had, McComb remarked in his 1948 annual report, become "imperative" in the light of changes in the economy since 1940 as well as of the fact that many employers had improperly considered employees exempt, with the result that large sums of back wages had been due.

The hearings, over which Harry Weiss—who, as director of the WHD's Research and Statistics Branch, had participated in the 1940 hearings—presided,

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145 FR 12:6896 (Oct. 22, 1947). In addition to soliciting comment on the need to revise such terms as "primary duty," "sole charge," "salary basis," and "general business operations," the WHA mentioned amending one of the administrative employee definitions (from "nonmanual office or field work") to read "office or nonmanual field work."


147 Weiss was born in 1907 and in 1933 received a Ph.D. (having written his dissertation on workers compensation) from the University of Wisconsin, where he was an assistant to John R. Commons. He worked at the National Industrial Recovery Board from 1933 to 1936 and the Social Security Board from 1936 to 1938 before joining the Labor Department in 1939. He was executive director, Office Manpower Administration, 1939-61, and Deputy Assistant Secretary of Labor for International Affairs, 1962-67, before becoming an industry consultant. Who's Who in America 2:3419 (40th ed. 1978-1979). Weiss was listed in the Official Register of the United States for the first time in 1941 as principal economist in the Wage and Hour Division; in 1942 he was acting director of the Economics Branch, and director from 1943 to 1947; in 1948 he became director of the Wage Determinations and Exemptions Branch; in 1950 he was Assistant Administrator in the Office of the Wage and Hour Administrator and in 1951 Assistant Administrator in charge of the Division of Wage Determinations, Regulations, and Exemptions; during the Korean War he was Executive Director in the Office of Executive Director of the Wage Stabilization Board; he then returned as Assistant Administrator in Charge of Determinations, Regulations, and Statistics in 1954-55; from 1956 to 1958 he was Assistant Administrator in charge of the Office of Wage Determinations; in 1959 he became Defense Mobilization Coordinator in the Office of the Secretary of Labor. ORUS 1941, at 172; ORUS 1942, at 207; ORUS 1943, at 243; ORUS 1944, at 255; ORUS 1945, at 247; ORUS 1946, at 196; ORUS 1947, at 191; ORUS 1948, at 232; ORUS 1949, at 449;
turned out to be very extensive, stretching out over 22 hearing days with more than a hundred witnesses in addition to 140 briefs and statements in lieu of personal appearances. Although it is unfortunate that the National Archives has reported that it was unable to locate the very lengthy hearing transcripts, the substance of the detailed hearing report supports the surmise that by 1947-48, unlike the more fluid and contentious situation in 1940, the structural limits of the white-collar regulations had become so taken for granted that little political space remained for iconoclastic or basic framework-challenging views. Instead, the consensus, in which the union movement had acquiesced, that large numbers of white-collar workers would and should be excluded from overtime regulation and that the entitlement of their covered colleagues—unlike that of blue-collar workers—to overtime pay should be means tested, meant that the focus was on relatively minor adjustments to a largely uncontested doctrine.

In addition to the hearing report, contemporaneous newspaper accounts offer additional, if sporadic, detail of the hearings, which, like those in 1940, were devoted to separate industries, including manufacturing (general, food, heavy, and cotton), extractive, transport, distributive, communications, general office employees, professional groups, publications, farm products processors, and banking and insurance. The New York Times published relatively lengthy articles on the first few days' hearings, but then lost interest except in the one subject in which its owners had their own personal financial stake—whether newspaper reporters were


The hearing report included a reference to a transcript page number as high as 3679. Weiss Report at 88 n.238. To a request for information about the 1947 hearings, the National Archives replied: “Record Group 155 does not include any other hearings relating to the definition of ‘executive,’ ‘administrative,’ and ‘professional’ employees aside from the [1940] hearings we previously discussed. The subsequent hearings were apparently not brought into the National Archives as permanent records. There is no explanation I can offer as to why. We regret that we cannot be of more assistance to you in your research.” Email from Tab Lewis, Archivist, Civilian Records, Textual Archives Services Division (Oct. 2, 2003).

excluded professionals. On the opening day, December 3, the very first witness, Walter de Bruin of Goodyear Tire and Rubber, proposed that a salary of more than $200 a month should create a presumption that an executive, administrative, or professional employee was excluded from the FLSA; the burden would then shift to the employee to prove that he was not excluded. The UE’s $500 threshold he characterized as “‘so absurd as not to require comment.’” The United States Independent Telephone Association both opposed any change in the salary limitations and, taking a position shared by many employers who protested restrictions on their “flexibility,” proposed eliminating the 20-percent ceiling on so-called non-exempt work. An overly optimistic representative of the Borg-Wamer Corporation urged the DOL not to undertake any major regulatory changes until Congress decided what changes to make in the statute itself. The hearing chairman duly responded that the department would withhold the regulatory revisions if there were indications that Congress was going to amend the FLSA. 151

The UE buttressed its $500-a-month proposal the next day by presenting six “factory workers” to substantiate its “contention that employers were arbitrarily relying on salary cut-off points to differentiate between exempt and non-exempt workers.” The point was sharpened by calling largely employees of the General Electric Company, whose white-collar conditions were, according to the union, above average. Interestingly, these workers appeared (at least according to the Times account) not to be traditional white-collar workers at all, but targets of a subterfuge. Thus a “production and tool planning man” testified that when he received a 17-cent-an-hour increase in 1943, GE also “put him into an exempt classification” and eliminated overtime compensation, with the result that his net weekly pay increase amounted to 40 cents. Although he was not an executive,

administrative, or professional employee, the only explanation the company gave him was that he "'became exempt by getting $200 a month.'" Other witnesses testified that when their departments worked overtime, "they received less pay than employes subordinate to them." In attacking the $500 proposal, some employers appeared not to have grasped the basic purpose of the overtime law: when, for example, a representative of the Heating, Piping and Air-Conditioning Contractors National Association complained that members could not pay such a salary without hampering operations or pricing themselves out of their market, he failed to understand that they could sidestep that predicament altogether by hiring an additional worker and thus avoiding the choice between overtime pay and higher salaries.152

At the third day's hearing, as labor and capital debated where to draw the salary line between covered and excluded white-collar workers, the lawyer for the Standard Oil Company of Ohio suggested that if the salary line for exempt executives were set at $100 a week, unions would seize on it to raise wages generally, prompting the ILGWU's assistant research director to protest that they "'don't give a tinker's dam what the boss pays his son-in-law or uncle'" as a supervisor or executive."153

The National Association of Manufacturers appeared at the hearing on December 12 devoted to manufacturing. The content of the statement of its associate counsel, Reuben Haslam, has been preserved because the NAM had it inserted into the record of a Senate FLSA hearing a few months later.154 Inferring from the paucity of court cases involving administrative employees that that definition was "workable and generally satisfactory," Haslam instead focused on the definition of "executive" employees, from which he urged deletion of the nonexempt work tolerance, which was (as many employers' representatives including the Chamber of Commerce agreed) its chief problem.155 He sought to broaden the definition of "executive" by contending both that the NRA codes had used it and "supervisor"
“interchangeably”156 and that adoption of the Taft-Hartley Act’s definition of “supervisor” was appropriate not only because that statute and the FLSA were "designed to protect the interests of the same...classes of workers,” but also because the new definition of “supervisor” “appears to encompass that class of worker exempt from” the NRA codes’ wage and hour provisions “as executives and supervisors.”157 None of these claims can withstand scrutiny as Senator Claude Pepper pointed out a few months later.158

Although it is true that the NRA codes extensively excluded executives and supervisors (and other white-collar workers),159 they did not use the terms interchangeably for the obvious reason that they were not then (nor are they now) synonyms. Because an “executive”160 “holds a high-ranking management position,” the term “has status connotations”161 not attaching to a mere “supervisor,” huge numbers of whom occupy the bottom rungs of employer hierarchies as the “industrial non-commissioned officers...who command...in the name of capital.”162 Haslam was such a careless propagandist that in his attempted demonstration he himself quoted the NRA administrator as referring to code exceptions encompassing “‘executives and their personal secretaries and other employees engaged in a supervisory capacity....’”163 Moreover, the Taft-Hartley definition was primarily designed to exclude foremen from self-organization rights on the anti-

158See below.
159See above ch. 7.
160The Oxford English Dictionary dates the first use of this term (which originated in the United States) to 1902; Oxford English Dictionary 5:522 (2d ed. 1989). However, a computer search of The New York Times disclosed an earlier use of “business executive”: it quoted Roswell P. Flower—a millionaire banker—as saying at the 1891 New York State Democratic convention that nominated him for governor: “I shall remain a plain businessman, a plain business executive.” “The Convention at Work,” NYT, Sept. 17, 1891 (1:5-6, 2:4). The term did not show up again in the Times until 1907, becoming common by World War I.
paternalist grounds that such protection would interfere with the rugged individualism that, according to the House Labor Committee, conferred on them and other supervisors the “ability to take care of themselves without dependence upon the pressure of collective action.” Indeed, Representative Hartley’s committee declared that it would be “wrong” not to expel foremen from the NLRA because inclusion would discourage what made them foremen in the first place—namely, that they were “those best qualified to get ahead.”

This myth was blatantly contradicted by the experience of World War II, when foremen complained that, because they were not paid overtime while production workers were, on average their wage barely exceeded that of their supervisees. Indeed, foremen, who even before the war had (like white-collar workers) been subjected to pay cuts, enjoyed neither job security nor seniority and were often paid only 5 to 10 cents more an hour than production workers. Because the postwar foreman had to a great extent become “only a ‘straw boss,’” who no longer had the power to hire or fire or set production standards, the group had developed “serious grievances against management,” which collectively found expression in the Foreman’s Association of America.

Without explaining why the NAM had changed its mind, Haslam retracted its recommendation of a salary test from 1940 on the grounds that it was unnecessary if the regulation properly emphasized the employee’s principal activities. Referring to suggestions made at the 1947 hearings that the WHA adopt “some general definition of executive with an extremely high salary requirement” that “would make it practically impossible for an employer to misclassify executives,” Haslam drifted off into factless rhetoric by charging that, instead, the proposal “would make it practically impossible for the bulk of employers to classify any of

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164 Labor-Management Relations Act, 1947, at 16, 17 (H. Rep. No. 245, 80th Cong., 1st Sess., Apr. 11, 1947). The unserious nature of employers’ proposals to adopt the Taft-Hartley definition was underscored by the joint statement of a large group of employers organizations to the House Labor subcommittee asserting: “As the term ‘executive’ implies, these very people, to a large measure, control their own time. Many work when they see fit to work; go home when the job is done. Generally speaking, only the individuals themselves are in a position to know whether they perform the same type of work as is performed by nonexempt employees during 20 percent of their working time.” “Joint Statement by a Group of Industrial Organizations with Respect to Proposed Amendments to the Fair Labor Standards Act of 1938,” Minimum Wage Standards and Other Parts of the Fair Labor Standards Act of 1938, vol. 4:2852, 2859. This description, as applied to huge numbers of the supervisors excluded by the NLRA, is and was risible.

their employees as executives." While choosing not to take exception to the proposition that "only a few employees in each small plant occupy management positions," Haslam insisted that it did not justify depriving "smaller employers" of the exemption that Congress meant to give them.166 In spite of this ardent attack on salary definitions, Haslam then did an about-face and proposed one that, to invert his rhetorical flight of fancy, would have made it possible for any employer to classify all of its supervisors as exempt executives. Acknowledging that from a WHD inspector's standpoint it "would be most helpful" if he could make exemption determinations just based on company records, Haslam offered a rather spongy proviso with a very low salary threshold under which "any employee performing managerial, administrative, or professional duties of the general character described in the foregoing definitions, and who is paid the equivalent of $300 or more per month on a salary basis is deemed an 'executive,' 'administrative,' or 'professional' employee...even though he may not otherwise strictly qualify for exemption under all of the specifications of the applicable definition."167

The hearing on newspaper reporters in mid-January appears to have been a reprise of the session in 1940, with the Times management doubtless taking delight in asserting that "Guild Fights 'Professional' Status." The ANPA again submitted statements from journalism school deans attesting to the reporters' professional status, while the Guild's vice president Sam Eubanks insisted that the publishers' sole intent was to make their employees more subject to their whims by removing legislative protection.168 Eubanks also denied that the Guild was seeking to compel publishers to pay anyone $500 a month: "They can earn $50 as far as we are concerned, but pay them when they work overtime." And Cranston Williams, the ANPA general manager, contended that a reporter's freedom of action was related to the creative nature of his work so that his objective was measured only by his own intellectual capacity: "Some reporters are actually, in a general way, their own bosses, regulating their own time."169 At least one publisher registered a dissent:

166 Fair Labor Standards Act Amendments: Hearings Before a Subcommittee of the Committee on Labor and Public Welfare United States Senate, Part 2:931-32. According to Haslam, 70 percent of NAM members employed 500 or fewer workers. Id. at 925.


William Block, the publisher of the Pittsburgh Post-Gazette and the Toledo Blade protested telegraphically to the ANPA president that the latter did not represent him in his request to exempt a large number of employees from the 40-hour-week rule: “In our opinion, only top ranking highly paid writers and editors should be exempt.” In response to the deans’ statements, the president of the American Association of Schools and Departments of Journalism declared that they had spoken in their personal capacities and did not represent the association’s views.170

The 1948 Senate FLSA Hearings

It was not so long ago that...[s]alaried employees worked from 44 hours a week and up and as many evenings as their boss demanded, without receiving any compensation for the overtime.171

Two weeks after the hearings ended, the Times reported that bankers who had been following them had been advised that no changes in the regulations were contemplated in the near future because it was expected that the WHA would postpone any amendments until after it became clear whether Congress was going to amend the FLSA.172 What Congress might do became clear on March 25, 1948, when Minnesota Republican Senator Joseph Ball introduced the Republicans’ omnibus FLSA revision bill (S. 2386), which added an exclusion of “any employee employed on a salary basis amounting to not less than $100 a week.”173 At the time he explained that this “new exemption...would not change the exemption now applicable to executive, administrative, and professional employees but would make it unnecessary to consider the close questions often arising under the latter

171Leo Bollens, White Collar or Noose? The Occupation of Millions 2 (1947).
173S. 2386, § 13(b)(3) (80th Cong, 2d Sess., Mar. 25, 1948). The bill also defined “salary basis” as follows: “An employee shall be deemed to be employed ‘on a salary basis’ if all or part of the compensation of such employee is made up of weekly, semi-monthly, monthly, or annual payments predetermined in amount and not subject to reduction because of variations in the number of hours worked: Provided, That deductions may be made for absences in violation of, or in excess of the time allowed under, a reasonable annual or sick-leave plan applicable to the salaried employees of his employer.” Id. § 3(o).
exemptions by providing a fixed standard for high-salaried workers.”

Ball himself chaired the Labor Subcommittee (of Senator Taft’s Labor and Public Welfare Committee), which three weeks later opened hearings on Ball’s and other bills amending the FLSA. The $100 a week blanket exclusion generated considerable testimony. That Wage and Hour Administrator McComb and Weiss, the director of the wage determinations and exemptions branch who had recently presided over the regulatory hearings and was writing his report, were not hostile to its adoption may help explain why 21 months later they incorporated a compromise version in the form of the $100 short test into the revised regulations. McComb and Weiss were constrained to agree that the “proposal would, of course, simplify enforcement,” but added that it should be limited to office and nonmanual field workers, thus foreclosing the possibility that employers would put skilled workers on a salary and then employ them “for excessive hours without overtime pay.” Ball appeared taken aback that the witnesses could suspect “very much danger that skilled workers who are able to command more than $5,000 a year could be maneuvered into that kind of deal,” but Weiss admonished him that he was too much influenced by “the acute labor shortage.” In contrast, during periods of labor surplus “possibilities of that kind were definitely taken advantage of.” No resolution was achieved, but when Weiss added that he assumed that Ball “had in mind the white collar field,” Ball repeated that “[o]rdinarily, skilled production workers are not on a salary basis,” prompting Weiss to suggest that the possibility of extension to blue-collar workers be eliminated.

Indeed, two weeks before the hearings began McComb had already written a letter to committee chairman Taft stating that he “would not interpose an objection to the exemption” if it were limited to office and nonmanual field workers. And, in a written statement supplementing his testimony, McComb repeated this concession in spite of the proposal’s “direct effect” of making the overtime provision inapplicable to white-collar workers “who are not now exempt.” Presumably the DOL agreed with committee counsel Archibald Cox, whose “Memorandum in Explanation of S. 2386” asserted that these “higher-paid employees...do

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not require the protection of such legislation as” the FLSA and that, consequently, Ball’s proposal would, “without weakening the basic safeguards where they are required,” eliminate the administrative mistakes made in trying to identify the exempt and nonexempt.\textsuperscript{178} In any event, the DOL approved of the Republicans’ approach knowing that the existing white-collar regulations would become moot unless their salary thresholds were “kept below $100 a week.”\textsuperscript{179}

In contrast, the AFL opposed the proposal outright.\textsuperscript{180} Its national legislative representative, Walter Mason, admitted that “[a]t first glance this might appear to be a very reasonable provision since one would hardly expect an employee earning as much as $100 a week to be in need of protection of the Fair Labor Standards Act. However,” adopting a universalist position with which the AFL had not previously been intimately associated, he added that “the principle of overtime compensation for all time worked after 40 hours weekly...should apply without exception to all employees regardless of the size salary which they might earn.” Moreover, Mason pointed out, given the continual rise in wage rates and the steady increase in the number of employees earning more than $100 a week, the amendment’s “practical effect...would be to create a large and increasing group of salaried employees deprived of any rights to overtime compensation.” Consequently, some salaried workers would find that a pay increase above $100 “would actually mean a reduction in take-home pay since overtime compensation would be lost.” Interestingly, only as a final brief point did the AFL representative allude to the potential negative impact on its own members—“higher paid production workers”\textsuperscript{181}—which had been the DOL’s principal concern.

An even more radical position on the salary bar was adopted by the independent National Federation of Salaried Unions,\textsuperscript{182} whose president Leo Bollens filed a written statement declaring that there was “no justification for salary limitations above which overtime need not be paid.” The reason that he offered was clearly unavailable to the AFL: “No limitation is placed upon hourly paid


\textsuperscript{181}Fair Labor Standards Act Amendments: Hearings Before a Subcommittee of the Committee on Labor and Public Welfare United States Senate, Part 1:120-21

\textsuperscript{182}See “Independent Union Leaders Begin Drive to Organize a Third Labor Movement,” \textit{NYT}, Apr. 5, 1946 (18:6-7).
employees, many of whom take home more pay than the trained office employee who has spent several years and a considerable amount of money obtaining his education.” This interjection of stratum resentment may have been an example of deficient alliance building, but neither then nor since has anyone explained why blue-collar workers' entitlement to overtime pay should be decoupled from their wage levels, while their white-collar counterparts with salaries (say) only one-fourth as high should be excluded. In the end, even Bollens compromised, allowing as executives could be excluded, but if Congress insisted on retaining the $100 threshold, it should apply only to employees who were guaranteed an annual salary.¹⁸³

Not embarrassed to disclose that it had opposed passage of the FLSA a decade earlier, the Chamber of Commerce of the United States felt vindicated that it had not been “amiss in seeing the difficulties that would arise.”¹⁸⁴ Nevertheless, its representative, Herbert Ramel, vice president of a piston ring manufacturing corporation owned by New York University and a member of the chamber’s labor relations committee, tried to engage the proposed amendments.¹⁸⁵ Specifically, he urged Congress to take matters into its own hands and define “executive” and “professional” employees statutorily by adopting the definitions it had just grafted onto the Taft-Hartley Act. Totally ignoring the different purposes of the laws and their exclusions, Ramel asserted that since these groups were what they were by virtue of their activities, there was “no good reason” to define them differently under the NLRA and FLSA. Despite the chamber’s preference for duties tests, the terms “could very well be supplemented by an over-all exemption on the basis of salary alone,” just not one as high as $100 a week because the FLSA’s purpose was to insure minimum wages, not “to provide a means for the harassment of employers through administrative imposition of penalties for nonobservance of interpretive rulings and regulations designed to provide for the payment of overtime to salaried employees whose remuneration is far in excess of the minimum hourly rate prescribed by law.” Personally he would have set the threshold at $300 to $325 a month, and even this figure “should be carefully studied for


the impact it would have upon our economy."186 (The Southern States Industrial Council, whose representative J. H. Ballew had played such a prominent role at the 1940 DOL hearings, also suggested, after coaxing by Senator Ellender, $75 a week.)187

A member of the committee but not of the subcommittee, Florida Democrat Claude Pepper, a staunch supporter of labor who lost his Senate seat two years later, inserted into the hearing record a refutation of Ramel’s proposal to adopt Taft-Hartley’s “executive” definition. Proceeding from the assumption that the chamber’s purpose was “obviously” to broaden the group of employees excluded from the FLSA, Pepper observed that “executive” and “supervisor” had “wholly different” meanings: the former an economic and the latter a functional relationship to management. That Congress excluded supervisors from the right to self-organization because their divided loyalties made it impossible to protect them was not only no reason for denying them FLSA protection, but “the very fact” of the exclusion from the NLRA underscored the importance of including them within the wage-hour law. Finally, the mass-production working foremen and supervisors excluded by the Taft-Hartley Act were not only not executives, but were “subjected to all of the evils which” the FLSA was “designed to remedy.”188

The American Newspaper Guild was the only union that chose to re-enact for the subcommittee’s benefit the debate that had been staged a few months earlier by the DOL.189 (The UE did submit a written statement reiterating its $500 a month proposal designed to prevent abuse and eliminate costly duties-test analysis and litigation.)190 Its executive vice president, Sam Eubanks, was particularly concerned about the $100 threshold because an above-average proportion of employees in the newspaper industry and all of the Guild’s members were salaried; he estimated that at the very least 9,000 nonsupervisory salaried employees were paid $100 a week or more. Eubanks rejected all three “rationalizations for this effort to reduce the coverage” of the FLSA: 1) the overtime provision was not designed to cover higher-paid employees; 2) higher-paid salaried employees “cannot do their work within a regular 40-hour schedule, and consequently the


189 See above ch. 14.

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requirement of overtime pay is costly or disruptive or both”; and 3) since they were actually executive, administrative, or professional employees anyway, they should be exempted without reference to salary levels. In attacking the first claim Eubanks pointed out, as has only rarely been done by overtime pay protagonists, that: “Long hours do not become less detrimental to health and efficiency merely because the employee earns more than the average salary.” What he failed to observe, however, was the lethal obverse for those who favor overtime pay instead of maximum hours—namely, that overtime premiums do not lessen those detriments either. With regard to the second point, Eubanks stated that publishers under ANG contracts had had no difficulty in creating schedules that permitted higher-salaried employees “to do their work properly in 40 hours”—so much so that “the amount of overtime now required of the employees in the daily newspaper industry we have under contract is too small to be worthy of any consideration.” On the third point, Eubanks involved himself in a blatant inconsistency: after relating that the ANPA had opposed establishing any salary test on the grounds that it was superfluous because reporters were all professionals, Eubanks then charged that the $100 amendment “appears to be drafted particularly for the benefit of newspaper employers....” This factually implausible claim—after all, the WHA, as Eubanks himself admitted noted a little later, estimated that 50,000 to 100,000 workers would be directly affected, of whom the Guild believed 10,000 were employed in the newspaper industry—bestowed an easy debating point on Ball, whose refutation, however, highlighted the proposal’s expansively exclusionary purpose with all imaginable clarity: “There are plenty of salaried workers who get over $100 a week who would not qualify as administrative or executive employees under the Administrator’s definition—a great many of them.”

194Fair Labor Standards Act Amendments: Hearings Before a Subcommittee of the Committee on Labor and Public Welfare United States Senate, Part 2:743. Eubanks himself opposed any salary test, but his opposition was not consistent and, without naming a figure, he did not oppose a figure that was so high that the number excluded would be “negligible.” Id. at 748 (quote), 749.
Ball would presumably have preferred to characterize his amendment as anti-paternalist rather than punitive. Eubanks’s opinion that the “very fact” that the ANG had grown so much showed that “the higher paid people in the industry are not capable of taking care of themselves” and needed either a union or protective legislation was manifestly more than Ball could stomach: “God help America when the majority of the people whose abilities are such that they can command a salary of $100 a week, feel that they cannot stand on their own feet, that they need protection from anything. I think that is the road to collectivism, if ever I heard it.”197 Similarly, after Eubanks had explained that, under Ball’s proposal, a publisher could save $35 worth of overtime for a 50-hour week by raising a $95-a-week reporter’s salary five dollars, Ball retorted: “You rather amuse me, Mr. Eubanks, when you talk about employers exploiting men making $100 a week. I think, frankly, the people of the United States would be somewhat amused at the concept.”198 It turned out, however, that it was the people of Minnesota who were not amused and six months later made Ball, whom the labor movement had targeted for defeat, a one-term senator.199 In any event, Ball’s choice of $100 as the boundary marker between rugged and ragged white-collar individualists was hardly scientifically calibrated at a time when the average weekly earnings of all nonsupervisory production workers in manufacturing were $53.12 and those of their counterparts in transportation equipment (including autos) were $61.12,200 while the hourly wage rate for tool-and-die makers and patternmakers at the GM, Ford, and Chrysler assembly plants in Detroit reached $2.03.201 Indeed, Eubanks himself pointed out to Ball that just days earlier the Typographical Union had achieved an agreement with newspapers in New York City for a day printers’ scale of $99 for a 36.25 hour week and $109 for a 35-hour night shift. While not suggesting that such wage-earners be included in the $100 exemption, Eubanks


199 Though a zealous advocate of Taft-Hartley and other anti-labor measures, Ball was not a stereotypical Republican reactionary. In 1944, refusing to support Dewey for president on account of the latter’s isolationist views, he took the unusual step of backing Roosevelt. Turner Catledge, “Ball Stand Jolts GOP,” *NYT*, Oct. 4, 1944 (38:6); “Ball to Support Roosevelt as Hope for World Peace,” *NYT*, Oct. 23, 1944 (1:1).


explained that there was no reason to distinguish between the two groups, both of which bore the same relation to management. Ball ventured no refutation.

The only point on which Ball—who had himself been a political reporter for the St. Paul Pioneer Press and militant Guild member (until he broke with the union in 1937 over communists and affiliation with the CIO) before he was appointed to the Senate to fill the term of a deceased senator in 1940—and Eubanks were able to agree was that there were no "standards by which one can adequately define for legislative purposes a professional" reporter. The only criteria that Ball was able to articulate—"ethics" and "considerable training...although special college training may not be necessary"—amounted to little more than the sense that some skill was involved: "you cannot take anybody off the street and make a good reporter out of him...." Little wonder that under these unfavorable definitional circumstances Ball intuited that only a dollar amount could serve publishers' (and other employers') exclusionary interests.

Several employers organizations requested that Congress itself intervene by writing exclusions directly into the FLSA. Of foremost interest was the National Association of Manufacturers, whose counsel, Raymond Smethurst—a ubiquitous witness at early postwar FLSA and NLRA hearings—testified on a broad range of issues, including the white-collar exclusions. He focused on executive employees, urging Congress to adopt the Taft-Hartley Act's definition of supervisory employees. Although he expressed approval of the $100 ceiling in S. 2386, he criticized it for its failure to define those performing managerial or executive duties. For the rest, Smethurst confined himself to inserting into the hearing record the statement that his associate counsel Haslam had presented at the DOL hearings a few months earlier and that on this very point has already been seen not to have been a paragon of clarity.

The American Institute of Accountants was disturbed that its members in general, whose junior accountants' salaries at the outset of their careers did not

206 See above ch. 12.
reach $200 a month, and members in some smaller localities, whose accountants were paid less than $200 a month, had been unable to take advantage of the professional exemption. Even more disturbing was that the WHD’s agents went beyond ascertaining the salary level to scrutinize the accountants’ work and sometimes concluded that it did not meet the duties test, “in many cases” recommending that particular employees “be excluded from the professional class.” Unable to “afford to engage in such extended controversy and turmoil,” employer accountants “usually acquiesce,” but then were forced not only to pay time and a half to some accountants, but to suffer “lower morale” among the accountants whose exempt professional status was not contested and therefore received no time and a half payments. Because accountants often worked overtime—and “[o]bviously, accountants cannot work on a job in shifts because the knowledge acquired by those who began an accounting examination is essential to its continuation and completion. There must be continuous effort by the same minds”—and their employers did not want to pay them extra for it, the American Institute of Accountants requested that Congress simply amend § 13(a)(1) by adding a proviso that “staff accountants employed by certified public accountants shall be considered as employed in a professional capacity.”

The American Bankers Association expressed its disappointment that after having felt, in the wake of the 1940 DOL hearings, that the revised regulations were a “substantial improvement” that “provided a more liberal exemption for executive and supervisory employees of banks,” it had to deal with the WHA’s “restrictive interpretations.” It viewed Ball’s $100 threshold as of “some help to larger banks but...of no value to the smaller banks, many of which do not pay even their chief executive officer” that much. Without furnishing the subcommittee a finished text, the ABA suggested that the salary test be based on an (unspecified) salary percentage differential instead of a dollar amount and that Congress statutorily eliminate the ceiling on nonexempt work. (At the 1947

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210**Fair Labor Standards Act Amendments: Hearings Before a Subcommittee of the Committee on Labor and Public Welfare United States Senate**, Part 2:1086. The ABA also revisited the issue of hours-averaging for which it had pleaded at the 1940 DOL hearings. Now it urged Congress to amend § 7(b) to permit banks to average hours over four weeks as long as they paid time and a half for daily hours over 12 or weekly hours over 56. The ABA claimed an entitlement to such an exemption on the grounds that banks
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House hearings a banker had submitted a proposal, prepared with the cooperation of the ABA, setting the salary level for executives at least 20 percent above the average regular rate of pay of the non-exempt employees under the executive's direction and for professional and administrative employees at least 20 percent higher than the average rate of pay of nonexempt clerical employees in the same establishment.)

The seriousness with which influential segments of big business in the early postwar years combated the status quo in—not to mention any contemplated expansion of—hours regulation is captured by the campaign conducted by General Motors president Charles E. Wilson for a longer workweek. At the annual Congress of American Industry held at the Waldorf-Astoria hotel, he, NAM president-elect Morris Sayre, and other “[l]eading industrialists called...for...temporary lifting of the work week standard in the wages and hours act as the only way to raise real wages while combating high prices at home and misery, economic stagnation and the spread of the ‘police state’ abroad.” Wilson “attacked the forty-hour week as ‘a heritage of the days of planned scarcity,’ ‘a job rationing measure.’” Displaying solicitude on behalf of America’s proletariat, Wilson held that “the penalty for extra hours of work interferes with the rights of many, particularly of lower paid and unskilled workers, to earn a better living....” Wilson’s call for longer and harder work was echoed by Sayre, who, citing his Puritan roots, opined that it “would be a wonderful thing if the work week was increased from” 40 to 42 hours.

As late as 1948 Wilson was still advocating a 45-hour week. In chiding labor for having “made a ‘sacred cow’ of the forty-hour week when...the welfare of the country was at stake,” he sounded less like the head of the largest manufacturing firm in the country accounting for half of world manufacturing output, and more like the German iron and steel capitalist August Thyssen, writing the German chancellor four years after the end of World War I that the “most unfortunate thing” that the revolution had been able to bring Germany was “the undifferen-
tiated introduction of the eight-hour day for all workers and salaried employees. For over 4 years we carried on war against the whole world, all our work during this time was economically unproductive. We lost the war. The Entente has taken away our fleet, our colonies, all our foreign assets, and a large part of our country. In addition, for years we have had to deliver to the enemy many billions in gold and physical assets. And still the German people, which had to work 10 hours during the peace to feed itself, believes it now needs to work only 8 hours and could live better than before the War.”

At the other end of the political spectrum, the 1948 Progressive Party platform called for all workers to be covered by the FLSA.

The Weiss Report and the 1949 Regulatory Revisions

It should only be if the person is really an executive assistant with responsibility that entails making independent judgments and use of discretion. There are some high-level people that fit this. However, most in that category are, excuse me, glorified secretaries doing prescribed work and should get overtime. The basic premise of the overtime exemption should be questioned and...salary should be the cut-off—not what you do. The fact is that many employers look for ways to push people into these categories so that they can force you to work long hours with no extra pay.

In June 1949, a year and a half after the hearings had ended, the WHD finally issued Weiss’s report, which had presumably been delayed because the DOL had been waiting to see whether congressional action would preempt its regulatory revisions. But once the Republicans had lost control of Congress and the Democrats had failed to make the white-collar exclusions a part of their plans for amending the FLSA during the Eighty-First Congress, the department felt free to proceed. Although no longer dealing with uncharted regulatory and administrative territory and thus more constrained than Stein had been nine years earlier, Weiss, facing an even more extensive hearing transcript, produced a longer report than Stein’s. Despite its greater detail, however, the Weiss Report was less focused on

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217 Email from the human resources director of a large private employer to Marc Linder (May 13-14, 2003).
fundamentals, which had largely been settled in 1940, and more concerned with adjustments.

Weiss's first step was to reject proposals to adopt the Taft-Hartley Act's definitions of "supervisor" and "professional." Employers had testified in behalf of this revision primarily because it would have eliminated the 20-percent non-exempt work ceiling and the salary-level test.\(^{218}\) Weiss criticized as unsound the underlying assumptions that the Taft-Hartley Act and the FLSA had the same general objectives and that the definitions were intended to encompass the same classes of employees. To begin with, Congress defined "supervisor" and "professional employee" for radically different reasons—to deny the former collective bargaining rights and to confer on the latter special self-organization rights to form separate bargaining units if they preferred not to bargain together with non-professionals; in contrast, Congress defined "bona fide executive" and "professional employees" for the same purpose—to exclude them from overtime protection—regardless of whether or how they were organized. Second, the very fact that Congress had already excluded supervisors from collective bargaining rights had made "increasingly important the need to distinguish carefully between those whom the Congress meant to exempt as 'bona fide executives" because they do not need" the FLSA's protections, "and those who, though they may perform some supervisory duties" do need the FLSA's protection "because they do not have the privileges and benefits which normally accrue to bona fide executives."\(^{219}\)

Hearing testimony on the exclusionary salary levels had run the gamut from abolishing them altogether to making them the sole criterion and, quantitatively, from leaving the dollar-amounts unchanged to raising them to $500 a month. Unsurprisingly, employers were primarily concerned that, if the thresholds were set above a certain amount, they would be required to start paying for some white-collar employees' overtime work that they claimed Congress had left unprotected.\(^{220}\) The WHD strongly supported a salary test on the grounds that it was "a ready method of screening out the obviously nonexempt employees, making an analysis of duties in such cases unnecessary." And although the failure to update the levels had weakened their effectiveness and reinforced the trend toward

\(^{218}\) *Weiss Report* at 3.

\(^{219}\) *Weiss Report* at 4-5.

\(^{220}\) *Weiss Report* at 6-7. Local 119, Technical Engineers, Architects, and Draftsmen's Union, AFL, taking the position that salaried employees should not be exempt from the overtime provisions, urged elimination of the salary requirement and revision of the definition to exempt as "professional" only those whose compensation was limited to fees, bonuses, dividends, or other emoluments. *Id.* at 9 n.29.
employer misclassification,221 Weiss attributed some of these violations to employers' mistaken notion that salary level was the sole criterion and their treatment, for example, of "clearly nonexempt" administrative employees as no longer entitled to overtime pay as soon as their salaries reached $200.222

That the salary levels had to be raised to what Weiss called "more realistic" amounts was a foregone conclusion at a time when the salaries of office boys in large cities exceeded the $30 executive test and large numbers of clerks were paid more than the $200-a-month administrative-professional test-level. Unsurprisingly, while most labor witnesses supported a salary level of $500 a month or $100 a week, employers' range was much lower—from $40 a week to $300 a month.223

Satisfied with the guidelines shaped by Stein in 1940 in setting salary levels, Weiss, too, believed that they should "approximate the prevailing minimum salaries for this type of personnel and [be] above the generally prevailing levels for nonexempt occupations...."224 Weiss noted that according to some testimony in 1947-48, the $30-a-week executive salary level may have been too low, but he added that Stein himself had been "fully aware that it was a relatively low figure" and that Stein's reasons "appear to have been valid in the light of conditions in 1940 and for the most part are still valid." Consequently, like the $30 in 1940, the new figure "should be somewhere near the lower end of the current range of prevailing salaries for executives" (as well as for administrative and professional employees).225 Stein, as already discussed, was willing to make do with a salary level so low that it was hardly greater than a skilled craftsman's wages (and would become even less favorable over time) on the dubious grounds that bossing other people and heightened chances of promotion were compensating factors and that work-sharing and thus employment-spreading was not possible among executives or was less possible than among administrative and professional employees.226

221Weiss Report at 8.

222Weiss Report at 8 n. 27. That some management witnesses proposed salary levels as the sole tests might be explicable on the grounds that such a system would facilitate evasion of the law. Id. at 9.

223Weiss Report at 10.

224Weiss Report at 11-12. Without explanation, Weiss asserted that the "'prevailing minimum salary' is not necessarily the same as the lowest salary received by such persons. The salary level selected for executives obviously cannot be the salary of the lowest paid supervisory person or the lowest paid person considered by an employer to be an 'executive.'" Id. at 11 n.47.

225Weiss Report at 12.

226US DOL, WHD, "Executive, Administrative, Professional...Outside Salesman" Redefined: Report and Recommendations of the Presiding Officer at Hearings
Weiss offered no evidence that he had independently analyzed Stein's assumptions or collected data on them.

Weiss acknowledged that DOL data revealed that between October 1940 and April 1949 average hourly and weekly earnings of all manufacturing employees had risen by more than 100 percent (107.5 percent and 101.1 percent, respectively), but he nevertheless chose to raise the executive salary level only by 83 percent to $55, in spite of the fact that it was "somewhat lower in relation to average weekly earnings for all manufacturing of $52.70 in April 1949 than the $30 test was in relation to comparable average weekly earnings of $26.20 in October 1940." This "somewhat lower" not only turned out to be 4.4 percent compared to 14.5 percent, but was also an understatement because Weiss failed to take into account that the 1940 setting had itself not been adjusted vis-à-vis its original fixing in 1938, during which interim average weekly earnings of non-supervisory and production workers in manufacturing had risen by 13.1 percent. In any event, Weiss had apparently become too close to his subject to be able to step back and recognize the absurdity of treating as an "executive" an employee whose salary barely exceeded the wage not only of highly paid craftsmen, but of the average factory worker as well.

Weiss did concede that there was "merit" to the argument that $55 was too low, but dismissed it on the grounds of lower pay for executives in smaller establishments, although in a footnote he admitted that the differentials were small. Thus, in the end, Weiss accorded methodological primacy to the claim that "[t]he salary test for bona fide executives must not be so high as to exclude large numbers of the executives of small establishments. In these establishments, as in the large ones, the level selected must serve as a guide to the classification of bona fide executive employees and not as a barrier to their exemption." (The DOL's solicitude on behalf of small firms' equal right to require supervisors to work additional hours without pay also manifested itself in Weiss's rejection of the proposal—by the Pittsburgh Plate Glass Company—that a bona fide executive supervise at least six employees: "in very small enterprises...the supervisor of even..."

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Preliminary to Redefinition: Effective October 24, 1940, at 21-22 (1940) (Stein Report).

See above ch. 13.

227 Weiss Report at 13 (percentages calculated from Weiss's absolute data).
228 Weiss Report at 14.
231 Weiss Report at 14 n.54.
232 Weiss Report at 15.

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as few as two employees is very close to the top management...")233

Weiss increased the salary level for administrative and professional employees from the equivalent of $50 a week to $75. This 50-percent increase was smaller not only than what he had determined for executives, but also than that for the salaries of white-collar employees generally.234

Weiss’s chief innovation was the creation of three “Special Provisos for High-Salaried” white-collar employees, which were not the single-criterion salary tests that several employers had advocated, but which embodied such a low dollar-threshold that they were never able to function as screening devices. With the Republicans, for the time being, unable to impose their purposes on a FLSA amendments bill, the WHD was no longer under any informal pressure to adopt some version of Senator Ball’s $100-a-week single-criterion test for excluding salaried (white-collar) employees. Indeed, without legislative amendments (such as those of S. 2386), Weiss noted, an exclusionary definition in terms of a high salary alone would not be “consistent with the intent of Congress...and would be of doubtful legality since many persons who obviously do not fall into these categories may earn large salaries.” Although Weiss did not identify the occupations of such persons with high salaries (as opposed to wages), he did mention blue-collar craftsmen, whom the Seventy-Fifth Congress indisputably did not wish to exclude. Nevertheless, Weiss did recommend a $100-a-week salary in tandem with a two-part abbreviated duties test235 on the grounds that such a “short-cut test” would facilitate administration because, in the Division’s experience, at that salary those whose primary duty was the performance of work characteristic of bona fide executive, administrative, or professional employment met, “with only minor or insignificant exceptions,” all the basic duties tests.236

233 Weiss Report at 45.
235 The two criteria were: for executives—primary duty of management and direction of two or more employees’ work; for administrative employees—primary duty of performing office work directly related to management policies or general business operations and work requiring exercise of discretion and independent judgment; and for professional employees—primary duty of performing work either requiring knowledge of an advanced type in a field of science or learning, which included work requiring consistent exercise of discretion and judgment, or in a recognized field of artistic endeavor including work requiring invention, imagination, or talent. Weiss Report at 89-90.
236 Weiss Report at 23. The claim that the introduction of the short test has held the WHD “hostage to successful Congressional efforts to thwart the increases in the upset salary levels necessary to reflect...inflation” was not documented and finds no support
It is not clear whether Weiss believed that he was in effect implementing (using Ball’s dollar amount) the NAM’s (aforementioned) proposal that $300 per month be the sole criterion, provided that the employee performed the already existing regulatory duties “of the general character...even though he may not otherwise strictly qualify for exemption under all the specifications....”\textsuperscript{237} Nor was the proposal solely the NAM’s preserve: Weiss was also accommodating a number of large corporations such as Corning Glass Works, Goodyear Tire and Rubber, and Pittsburgh Plate Glass.\textsuperscript{238} Although Weiss did set the short-test salary level one-third higher than the NAM’s proposal, he failed some management representatives, who had suggested figures as high as $500 a month,\textsuperscript{239} and hardly complied with his own precept that the “special proviso must be based on a salary considerably higher than the [long-test] minimum salary levels.”\textsuperscript{240} Having recommended that the long-test salary level for administrative and professional employees be fixed at $75 per week, Weiss could not convincingly argue that $100 satisfied his criterion—especially when, as pointed out earlier, skilled blue-collar craftsmen had already crossed that iconic threshold.

Weiss, who opined that “the term 'bona fide executive' was not intended to apply solely to the type of executive who spends his time behind desk constantly making decisions and directing his subordinates,”\textsuperscript{241} rejected the initiative of the AFL and Office Employees International Union to restore to the term some of the lofty status associated with it in common parlance and limit its applicability to those who made “‘decisions which can really stick....’” They had proposed adding to the definition that “he participates in the formulation of policy relating to his field of responsibility,” but Weiss dismissed it out of hand because its adoption “would probably result in a material change in the present standards for exemption by defeating the exemption for many bona fide executives who under modern business organization execute rather than formulate policy.” Specifically he meant that “there are many executives in business organizations who are charged with the supervision of men and the management of departments but who carry out policy formulated by others.”\textsuperscript{242} Regardless of whether the unions, in their effort to insure that the category of “executive” did not sweep in petty supervisors whom employ-
ers treated almost as oppressively as the rank and file with regard to their working hours, had articulated the new definitional criterion appropriately or not, Weiss’s dismissive attitude toward narrowing the huge scope of the exclusion reflected the DOL’s seamless tradition of uncritical acceptance of the subversion of a central labor standard that lacked any rational policy basis.

Another excellent example of arational policy making was Weiss’s treatment of the administrative assistant to a bona fide executive or administrative employee\(^\text{243}\): “The work of determining whether to answer correspondence personally, call it to his superior’s attention, or route it to someone else for reply requires the exercise of discretion and independent judgment and is exempt work of the kind described in the regulations. Opening the mail for the purpose of reading it to make the decisions indicated will be directly and closely related to the administrative work described. However, merely opening mail and placing it unread before his superior or some other person would be related only remotely, if at all, to any work requiring the exercise of discretion and independent judgment.”\(^\text{244}\) Even granting arguendo the difference in the levels of discretion and independent judgment involved, why should the worker who reads the correspondence be forced to work overtime without pay? This is precisely the type of fundamental question that someone with Weiss’s experience should have raised—especially since there was absolutely nothing in the FLSA itself that preordained an answer—but, as with everyone else in the WHD who has ever participated in public discussion of the issue, his preoccupation with talismanic show-stoppers (“discretion and independent judgment”) totally disabled him from taking a fresh look at the unarticulated underlying policy.\(^\text{245}\)

\(^\text{243}\)The 1940 regulation read: “who regularly and directly assists” a bona fide executive or administrative employee, “where such assistance is nonmanual in nature and requires the exercise of discretion and independent judgment....” § 541.2(B)(1), in Weiss Report at 94. Weiss recommended adding “proprietor” as an assistee at the request of the National Institute of Cleaning and Dyeing. Id. at 70-71, 70 n.203, 89. The WHA adopted it as 29 CFR § 541.2(c)(1), in FR 14:7706.

\(^\text{244}\)Weiss Report at 57. The WHA codified this language verbatim in the new interpretive regulations issued at the end of 1949 and retained it unchanged. FR 14:7730-45 at 7739 (Dec. 28, 1949); 29 CFR § 541.208(d) (2003).

\(^\text{245}\)Consequently, when the Clinton administration WHD issued an opinion letter advising an executive secretary (in contradiction of the Stein and Weiss reports and 29 CFR § 541.201(a)), that she was not an exempt administrative employee, it did so on the grounds that she did not exercise sufficient discretion and independent judgment:

This is in response to your recent letter regarding the application of the Fair Labor Standards Act...to your executive secretary position. You ask whether you would qualify
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This disability also manifested itself in connection with Weiss’s recommendation that the 20-percent tolerance for nonexempt work also be introduced for bona fide administrative employees. Most representatives of labor and management had voiced opposition to it at the hearings, but for opposite reasons. Employers (including the NAM) opposed it because they believed that at the time the WHD permitted a greater (or even unlimited) tolerance; in contrast, unions had assumed that until then the performance of any nonexempt work effected a disqualification. In recommending the adoption of the 20-percent rule, Weiss argued that: “While it is entirely reasonable to exempt an employee who performs a small amount of such unrelated clerical or low-level work, it would be contrary to the purposes of section 7 (a) and 13 (a) (1)...to extend the exemption to employees who spend a substantial amount of time in such activities.” Yet neither Weiss nor anyone else at the DOL has ever explained what those purposes were and why it would be any more or less reasonable to empower employers to require administrative assistants rather than clerical workers to work unlimited hours without additional compensation.

as an exempt employee under section 13(a)(1) of the FLSA.

As executive secretary, you answer, screen and direct telephone calls, open and sort incoming correspondence, compose memos and general correspondence, type and proof correspondence and other documents, transcribe dictation, make copies and send faxes. You also maintain the employer's calendar, schedule and set-up meetings, appointments and travel, maintain contact with employer while on travel, provide reminders of due dates, etc., set-up and maintain filing system, prepare expense reports, maintain bookkeeping records and documents, handle company deposits for pension plans, and assist visitors with transportation, meals, reservations, hotel accommodations or leisure activities. ...

We have reviewed your job description and it is our opinion that, as executive secretary, you would not qualify for exemption as an “administrative employee” under the criteria of Regulations, Part 541.2. It would appear from the information submitted that your primary duty involves the performance of routine clerical work rather than the performance of work directly related to management policies or general business operations of the employer, even though you may exercise some measure of discretion and judgment as to the manner in which you perform your clerical tasks. ... In addition, the duties that you perform do not require the level of discretion and independent judgment as required in the Regulations; rather, it would appear that you are using skills in applying techniques, procedures, or specified standards acquired through special training or experience. (See section 541.207 of the Regulations.)


246 Weiss Report at 53-54.
247 Weiss Report at 59.
One of the subdefinitions of "administrative" employee in the 1940 regulations had included performing "under only general supervision, responsible nonmanual office or field work, directly related to management policies or general business operations, along specialized or technical lines requiring special training, experience, or knowledge, and which requires the exercise of discretion and independent judgment...." In his notice the WHA had asked the public to comment on whether one phrase in it should be amended to read "office or nonmanual field work...." The purpose of the proposal was to broaden what had already been the exclusion that had made least sense by "mak[ing] it clear that office work regardless of whether it is manual or nonmanual in nature is exempt work if it has the other characteristics of exempt work described in the regulations." The WHD raised the issue because the 1940 language had led to the misunderstanding that only nonmanual office work was exempt. The ever so slight change was designed to signal that the Division "recognizes the accepted usage of the term 'white-collar' to include all office workers and is consistent with the purpose of including in the administrative exemption only employees who are basically 'white-collar' employees." A number of (presumably union) witnesses were skeptical of this change lest it exempt employees engaged in the "routine operation of office machines," but Weiss pooh-poohed such fears on the grounds that typists, calculating machine operators, and others could not meet the other requirements. Weiss did not specify which ones he had in mind, but presumably the most plausible one from his perspective would have been their failure to exercise "discretion and independent judgment." However, in the light of the history of employers' imaginative efforts to impute such qualities to the most mundane work, skepticism about relaxation of an already spongy and capacious definition was understandable.

Employers' expansionary proclivities were not long in manifesting themselves: what publicly intrigued employers about this minor change in phrasing was not the possibility of expanding the universe of excluded white-collar workers; rather, some management representatives (including the Chicago Association of Commerce and Industry) proposed deleting "nonmanual" to make possible the extension of the exclusion to those performing manual work. Weiss dismissed this proposal out of hand because its adoption would have changed the white-collar character of the administrative exclusion and might even have made it possible to

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248 § 541.2(B)(2), in Weiss Report at 94.
249 Weiss Report at 93.
250 Weiss Report at 59. This language was by and large adopted in the 1949 interpretive regulations and was retained intact. FR 14:7736; 29 CFR § 541.203(a)(2003).
251 Weiss Report at 60.
252 Weiss Report at 60 n.184.
extend it to craftsmen and highly skilled manual workers who might also exercise discretion and judgment.\textsuperscript{253} To be sure, Weiss also immediately muddied the waters by declaring that, although an employee who “performs so much manual work that he cannot be said to be primarily engaged in office or nonmanual field work,...is not basically a ‘white-collar’ employee and should not qualify for the exemption,” nevertheless, an “office employee...is a ‘white-collar’ worker” and under the new wording “would not lose the exemption on the grounds that he is not primarily engaged in ‘nonmanual’ work....”\textsuperscript{254} He sought to broaden the exclusion even further by recommending that the term “field work” be interpreted to include work taking place in factories so that, for example, the employer of an “efficiency expert” who performed most of his work in a factory would not lose the administrative-employee exemption and be required to pay for his overtime hours.\textsuperscript{255}

The major and enduring coup that the NAM and employers had pulled off in 1940, inducing the DOL to promulgate a broad definition for excluded administrative employees that embraced the phrase “directly related to management policies or general business operations,”\textsuperscript{256} came under attack at the 1947-48 hearings by unions as too broad and by employers as too restrictive. The National Federation of Salaried Unions proposed deleting “general business operations,” while the ILGWU suggested “general business policies” instead. The Communications Workers of America’s proposal identified what was most irrational about this subdefinition by urging that it be amended to require administrative employees to perform “‘work directly related to the administrative rather than the production operations of the company.’” Although most employers found it too limiting because, inter alia, it limited the exemption to “‘the top levels of management, where they are engaged in the determination of basic policies,’” astonishingly the Standard Oil Company of Ohio wanted it deleted because it “‘actually imposes no restrictions and tends therefore to confuse the proper application by employers of the otherwise readily understood provisions of these subsections.’”\textsuperscript{257} Ultimately, Weiss agreed with labor that the phrase should describe administrative (as opposed to production) activities including work performed by white-collar employees in “‘servicing’ a business” by advising management, planning, negotiating, purchasing, promoting sales, and business research, but he also stressed that it was not limited to those who participated in formulating management policies, but also

\textsuperscript{253}\textit{Weiss Report} at 60.
\textsuperscript{254}\textit{Weiss Report} at 60-61.
\textsuperscript{255}\textit{Weiss Report} at 61.
\textsuperscript{256}See above ch. 11.
\textsuperscript{257}\textit{Weiss Report} at 62.
included those whose work affected them or who carried them out.258

In addition, Weiss decided that the phrase "should not exclude from the exemption employees whose duties relate directly to the management policies or to the general business operations of their employers' customers." By circumventing the obstacle that such workers were engaged in production for their own employers, Weiss was able to extend the exclusion from overtime protection to the "many bona fide administrative employees," such as tax experts and financial and labor relations consultants who performed "important functions as advisors and consultants but are employed by a concern engaged in furnishing such services for a fee."259

The phrase "directly related to management policies or general business operations," in Weiss's view, also applied to those whose "work affects business operations to a substantial degree...." And although he conceded that it was impossible to formulate rules indicating "the precise point at which work becomes of substantial importance to the management or operation of a business," Weiss knew the difference when he saw it: whereas the cashier of a bank performed "work at a responsible level and may therefore be said to be performing work directly related to management policies or general business operations," the bank teller did not.260 Similarly, statisticians who merely tabulated data "clearly should not be treated as exempt," but if they analyzed data and drew conclusions from them that were "important to the determination of...financial or other policy," then they should be. Why the one group should be within and the other outside of the regime of working time regulation it did not even occur to Weiss to attempt to explain. This failure was all the more discordant because Weiss in this very context emphasized that: "The fact that there are a number of other employees...performing identical work should not affect the determination of whether they meet this test so long as the work of each such employee is of substantial im-


259 Weiss Report at 65. The WHA adopted this language in the 1949 interpretive regulations and retained it intact. FR 14:7737; 29 CFR § 541.205(d)(2003). For an example of a case in which the employee's loss of overtime protection hinged on the distinction between employer and customer, see Webster v. Public School Employees of Washington, Inc., 247 F.3d 910, 915-17 (9th Cir. 2001). Ironically, the defendant employer was a labor union, which successfully argued that its members and their bargaining units were its "customers," to which the employee, who negotiated collective bargaining agreements for them, provided administrative services. Why the employee agreed that the members and bargaining units were the union's customers is unclear.

260 Weiss Report at 63.
portance to the management or operation of the business.”

In other words, even where Weiss conceded that the policy of work-sharing and employment-spreading was fully applicable, he was incapable of recognizing that his exclusion-classification scheme was untenable.

In the realm of professional employees, Weiss rejected the proposals of several industries that entire occupations be excluded from the FLSA regardless of the specific duties of particular individual employees. Among such employer groups were the ANPA with respect to all persons engaged in gathering news and editorial content, the American Institute of Accountants regarding all junior accountants working for public accounting firms, and the National Association of Broadcasters regarding all radio announcers. In contrast, the ANG testified that only top-flight newspaper employees were professionals, while the American Federation of Radio Artists (AFL) argued that no staff announcer could qualify as exempt. Weiss concluded that the blanket exclusions were inconsistent with the language and purpose of § 13(a)(1), though his reasoning, oddly enough, suggested that exemption was a benefit for the workers in question so that the across-the-board approach “would discriminate against other occupations...in which each individual is required to meet the standards set in the regulations in order to qualify for exemption.” In addition, organizations of architects (American Institute of Architects), engineers (National Society of Professional Engineers), and librarians (American Library Association) proposed revising the regulations to drop the salary requirement for them as was already the case for physicians and lawyers. Weiss sympathized with the organizations’ objective of achieving recognition on a par with law and medicine, but declared it unrelated to the purposes of § 13(a)(1).

In September 1949, three months after publication of Weiss’s report, Wage and Hour Administrator McComb gave notice of proposed rule making based on the report and proposed a $55 long-test for executives, a $75 administrative-professional long-test, and a $100 short-test. While these increases, according to McComb, would expand coverage, “other changes would tend to have the opposite effect”; he did not think that the revisions would “materially change the number of employes affected,” which he estimated at 2,500,000. At the end of

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261 Weiss Report at 64.
262 Weiss Report at 74.
263 Weiss Report at 76-78.
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December 1949, the WHA issued virtually the contents of Weiss’s recommendations as final regulations, pursuant to which, as of January 25, 1950, the executive salary level was increased (83.3 percent), for the first time in 12 years, to $55, while the administrative-professional salary level was raised (62.5 percent) for the first time in a decade to $75. The newly created universal short-test salary was set at $100. Four days after promulgating the new legislative regulations, McComb issued a detailed set of white-collar interpretive regulations, which were in large part taken verbatim from the nine-year-old Stein Report (as well as from the Weiss Report) and which more than half a century later remained largely intact.

Public Contracts Divisions: Fiscal Year 1949, at 19 (1949).

266 FR 14:7705-7707 (Dec. 24, 1949). At its next annual convention following the issuance of the final regulations, which were timed to become effective at the same time as the 1949 FLSA amendments in January 1950, the report of the UE’s general officers devoted considerable space to attacking the latter, but said nothing about the former. United Electrical, Radio and Machine Workers of America, Report of General Officers 1950: 15th International Convention September 18-22, 1950, at 33-35 (1950). The UOPWA, which, following enactment of the Taft-Hartley amendments was preoccupied with non-compliance with them, published no articles in its renamed newspaper, Career, which ran through Sept. 1, 1950, on the 1949 white-collar regulatory changes.


268 Part of the provisions on newspaper writers was taken from an earlier enforcement release. § 541.303(f), in FR 14:7741; US DOL, WH & Public Contracts Division, Manual of Newspaper Classifications (Apr. 1943).
Planned Obsolescence of the Salary-Level Tests

In the archives of federal labor laws, the FLSA holds a position nearly comparable to that of the Dead Sea Scrolls—there are other items more ancient, but not many.¹

Whereas coverage under and exclusions from the rest of the FLSA underwent a dynamic transformation during the postwar period, incorporating, for example, large numbers of retail and other workers under a vastly expanded concept of interstate commerce, as well as farmworkers and domestic employees, but also excluding a bewildering array of categories of workers,² regulation of the administrative, executive, and professional exclusions stagnated. Following publication of the Weiss Report in 1949 and of the regulatory revisions it recommended,³ the only significant changes with regard to the duties tests were statutory in origin: special terms for retail and service executive employees in 1961, and exclusion of teachers in 1966 and of certain computer occupations in 1990. Overshadowing these developments, however, was the DOL’s failure to increase the salary thresholds in tandem with even the congressionally rather leisurely enacted and modest increases in the minimum wage; as a result, not only did the ratio between the salary-test levels and the minimum wage never again approach its pre-World War II highs, but, after the DOL, in the words of John Fraser, the Deputy Wage and Hour Administrator from 1990 to 2000, “shirk[ing] its important responsibility,”⁴ ceased increasing them at all after 1975, the salary

²Compare § 13 of the original FLSA with that of any of the postwar codifications.
³See above ch. 14.
levels fell below the minimum wage itself, thus creating the grotesque situation in which it became seemingly lawful for employers to pay excluded white-collar workers both less than the minimum wage and no overtime premium. Ironica lly, the DOL’s dereliction of duty cut the Gordian knot by giving a practical answer to the long avoided theoretical question as to the justification for means-testing white-collar workers’ entitlement to overtime protection: as the regulatory salary levels fell far below those in any real-world labor market, the means test de facto disappeared together with the salary test itself, thus depriving ever wider swaths of administrative, executive, and professional employees of any protection whatsoever from overreaching employers intent on imposing long hours without paying for them.

The Last Salary-Level Increases of the Twentieth Century: 1950-75

A blonde office worker was in trouble and a figure seemed to be the root of it all. It wasn’t the kind of a figure you would expect a woman to worry about though—this was a mathematical one. Being efficient, however, she hurried over to the office accountant because she found herself lamentably short in figuring overtime pay under the Federal wage-hour law.

The only significant revision of general applicability of the interpretive regulations during the rest of the twentieth century involved the salary basis test. In 1954 WHA McComb expanded the interpretation to explain on what basis deductions would or would not be regarded as lawful. For example, the employer forfeited the exemption if it made deductions for absences caused by itself or the business’s operating requirements, but did not lose the exemption for making

5In this context the following judgment in 2003 by the Congressional Research Service’s FLSA expert is incomprehensible: “Defining the terms under which the Section 13(a)(1) exemption is applied is a difficult task equitably to achieve. Perhaps not surprisingly, the duties tests have not undergone major revisions since the 1940s; the salary thresholds, since 1975.” William Whittaker, “The Fair Labor Standards Act: Exemption of ‘Executive, Administrative and Professional Employees’ Under Section 13(a)(1)” at 7 (CRS, RL 31995, July 17, 2003). There may have been no important reason to revise the duties tests; no equitable argument could have justified leaving the salary thresholds unchanged.

deductions when the worker absented himself for a day or more for personal reasons other than sickness or accident. The WHA also gave employers a so-called window of opportunity by declaring the exemption not lost if the deduction was inadvertent or for reasons other than lack of work and the employer reimbursed the worker and promised to comply in the future.\(^7\)

In November 1955, almost six years after the previous increase in the white-collar regulatory salary levels, and three months after Congress had enacted an increase in the minimum wage from 75 cents to $1.00 (effective March 1, 1956),\(^8\) the DOL announced that it would hold a hearing on December 12 on the question of what if any changes should be made. In connection with the hearing the DOL prepared a report on earnings data pertinent to a review of the white-collar salary levels.\(^9\) That survey, also published in November, was based on data that were not generated by a special statistical sample, but were, rather, collected as a by-product of (all) the Wage and Hour and Public Contracts investigations conducted from January to August 1955; consequently, the agency did not consider them representative of all establishments covered by the FLSA.\(^10\) For what they were worth, the study, which surveyed 22,595 of all 762,586 establishments with employees protected by the FLSA, identified a total of 105,540 executive, adminis-

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\(^7\)29 CFR §§ 541.118(a)(1)-(2) and (6), in FR 19:4405, 4406 (July 17, 1954). The only change that the WHA made in response to comments was deleting a provision that would have permitted employers to impose penalties for major disciplinary reasons other than infractions of safety rules. 29 CFR §§ 541.118(a)(5), in FR 19:1321-22; FR 19:4406. In 2003-2004 the Bush administration revised regulations, eliminating the distinction between the regulations and interpretations in an effort, inter alia, to "eliminate confusion regarding the appropriate level of deference to be given" to each. FR 68:15563 (Mar. 31, 2003).


\(^10\)US DOL, WHPCD, Earnings Data Pertinent to a Review of the Salary Tests for Executive, Administrative and Professional Employees as Defined in Regulations Part 541, at i (Nov. 1955). For each establishment, the investigator “determined...the number of employees found to be exempt under each of the subsections of Regulations, Part 541, and listed all exempt employees paid less than $100 a week,” at a time when $100 was the short-test salary. \textit{Id.}
trative, and professional employees" who qualified for exemption." Of this total, 62,830 (or 59.5) percent were executive employees employed in 15,571 establishments, 26,835 (or 25.4 percent) administrative employees in 7,088 establishments, and 15,875 (or 15.0 percent) professional employees in 2,217 establishments. Of the 22,595 establishments that the DOL investigated, 6,620 or 29 percent employed no exempt executive, administrative, or professional employees at all. The department estimated that, as of September 1953, there was a total 2,300,000 such exempt white-collar employees (not including those excluded on the basis of being employed by retail or agricultural employers).

The survey also revealed that in 1955 the following proportions of excluded white-collar workers were being paid less than the long-test weekly salary that was fixed in 1958: 6 percent of executive employees were paid less than $80, and 14 and 7 percent, respectively, of administrative and professional employees were paid less than $95.

In his March 1958 report, the presiding hearing officer, Harry Kantor, an Assistant Administrator in charge of the Office of Regulations and Research,

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12Kantor Report at 6.
17Harry Simkha Kantor was born in Russia in 1903 and was brought to the United States the following year; he received a B.A. and M.A. from Columbia and did further graduate study. He worked at the U.S. Department of Agriculture and other government agencies from 1926 to 1938, when he joined the Labor Department. From 1958 to 1964 he was an analyst in the Office for Research and Development in the Office of the Secretary of Labor; from 1964 until his retirement in 1969 he was an analyst with the Office of Policy Planning; from 1969 to 1972 he was a consultant with the Office of the Secretary of Labor. Who’s Who in America 1:1770 (41st ed. 1980-1981). Kantor was first listed in the Official Register of the United States in 1941 as principal economist in the WHD, then as senior statistician in 1942, principal industrial economist from 1943 to 1945, industrial economist in 1946-47, as employed in the Research and Statistics Section.
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shed some light on the methodology used by the DOL in setting the regulatory salary levels. Taking as his point of departure that the salary test was designed to function as “an index of status that sets off the bona fide executive from the working squad-leader, and distinguishes the clerk or sub-professional from one who is performing administrative or professional work,” Kantor observed that until then the salary tests had been set for the country as a whole “with appropriate consideration given to the fact that the same salary cannot operate with equal effect as a test in high-wage and low-wage industries and regions, and in metropolitan and rural areas, in an economy as complex and diversified as that of the United States.” Despite these unavoidable variations in impact, however, Kantor insisted that it was “clear that the objectives of the salary tests will be accomplished if the levels selected are set at points near the lower end of the current range of salaries for each of the categories. Such levels will assist in demarcating the ‘bona fide’ executive, administrative and professional employees without disqualifying any substantial number of such employees.”

Because there was considerable overlap between the salaries being paid covered and excluded workers, the new salary levels had to be “set above the absolute minimum salaries” being paid to the latter group. The inevitable result of new regulatory salary settings during a period when salaries had been rising was that some employers would lose the exemption for some of their employees. This outcome was also to be welcomed because the WHD’s experience was that there was “a tendency on the part of employers to misclassify employees, particularly in the administrative and professional categories, when the salary levels become outdated by a marked upward movement of wages and salaries.” In spite of the lack of representativeness of the data in the 1955 survey—of which Kantor, as director of the Division of Research and Statistics, had been in charge—Kantor


18Kantor Report at 2. As at earlier and later hearings, several witnesses contended that the salary tests were unnecessary and/or illegal, and Kantor dismissed their arguments. Id. at 3.

19Kantor Report at 5.

20Kantor Report at 5.

believed that they reflected "the salary patterns with reasonable accuracy." Consequently, based on them he concluded that "the lower portion of the range of prevailing salaries will be most nearly approximated if the tests are set at about the levels at which no more than about 10 percent of those in the lowest-wage region, or in the smallest size establishment group, or in the smallest-sized city group, or in the lowest-wage industry of each of the categories would fail to meet the tests."²²

Kantor concretized these guidelines by noting that 10 percent of exempt executives in the lowest-wage region, the South, and in the smallest establishments (with one to seven employees) were paid less than $75 weekly; in towns of less than 2,500 population nine percent were paid less than $75 and 14 percent less than $80; in the lowest-wage industry (services), six percent were paid less than $75 and 10 percent less than $80; and nationally 4 percent were paid less than $75. As for exempt administrative employees, 10 percent in the South were paid less than $85, 14 percent in the smallest establishments, 11 percent in the smallest towns, 10 percent in the lowest-wage industry (finance and insurance), and 6 percent nationally. Finally, 9 percent of professional employees in the South were paid less than $90 and 14 percent less than $95; in the smallest establishments 8 percent were paid less than $85 and 13 percent less than $90; 8 percent were paid less than $90 in the smallest towns, and 4 percent were paid less than $85 and 15 percent less than $90 in the lowest wage group (finance and insurance); in the country as a whole 7 percent were paid less than $95. Summarizing, Kantor determined his target range of the lowest 10 percent of salaries to be $75 for executives and $85-$90 for administrative and professional employees. Taking into account changes during the three years since the survey and other factors such as the impact on small establishments with only one or very few executives, he then adjusted these levels slightly upwards to $80 and $95, respectively, and proposed $125 as the short-test on the grounds of maintaining the same ratio to the long-test.²³

In April 1958, the DOL published a notice of proposed rule making soliciting comments on its proposal to adopt Kantor’s recommendation to increase the executive salary level to $80, the administrative-professional level to $95, and the short-test salary to $125.²⁴ Then in November, Wage and Hour Administrator Clarence Lundquist announced that, effective February 2, 1959, the proposed increases would go into effect.²⁵

²²Kantor Report at 6-7.
²³Kantor Report at 7-10.
²⁵FR 23:8962-63 (Nov. 18, 1958). In view of these weekly salary levels, the following account makes no sense: "At the Erie GE plant, the average salaried employee worked 456
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At the beginning of the Kennedy administration Congress undertook a major revision of the FLSA. In the course of discussing H.R. 3935, which Representative James Roosevelt, the chairman of the Special Subcommittee on Labor, had introduced to amend the Act, inter alia, by incorporating retail employers and employees, the House Education and Labor Committee in March 1961, as an accommodation to the newly covered industries, amended the bill to make § 13(a)(1) of the Act’s white-collar exclusions provision read: “except that an employee of a retail or service establishment shall not be excluded from the definition of employee employed in a bona fide executive or administrative capacity because of the number of hours in his workweek which he devotes to activities not directly or closely related to the performance of executive or administrative activities, if less than 40 per centum of his hours worked in the workweek are devoted to such activities.” This change, which became law, represented the first instance in which Congress intervened to specify a white-collar exclusion since 1938. Although the House and Senate reports failed to explain the change, Roosevelt, with

hours of overtime a year, most of which was [sic] uncompensated. The protections offered by legislation on this issue had become almost meaningless for salaried employees by 1960, since employees who earned as little as $200 a month were excluded from the provisions of the Fair Labor Standards Act....” Mark McColloch, White Collar Workers in Transition: The Boom Years, 1940-1970, at 145 (1983).

28Fair Labor Standards of 1961, Pub. L. No. 30, § 9, 75 Stat. 65, 71 (May 5, 1961). This same section also transferred from the WHA to the Secretary of Labor the power to define and delimit the terms “any employee employed in a bona fide executive, administrative, or professional capacity” and inserted the phrase “from time to time” so that the provision read “(as such terms are defined and delimited from time to time by regulations of the Secretary...).”
help from Representative John Dent (who had sought to undermine criticism that Roosevelt had not given the bill’s opponents enough time),\textsuperscript{30} in a traditionally choreographed bit of legislative history, inserted into the House floor debate the explanation

that we specifically wrote into the bill that those in executive positions who are beginning to learn the business and are on their way up, as well as others who perhaps have advanced to some degree may have up to 40 percent of their time devoted to nonexecutive duties. We used this for a very specific purpose and upon the representation of reliable people in the retail industry who pointed out their particular need for this kind of exemption and because of the fact that in the administration of the present act...there is a limitation of 20 percent, yet in our bill we have in the retail field extended it to 40 percent.\textsuperscript{31}

and Beall opposed the repeal on the grounds that the nonsupervisory work of selling and handling stock was an integral part of the work of executives and supervisors in retail and service establishments; they argued that such supervisors were different from machine-shop foremen and that the committee had heard no evidence that any relevant changes had taken place since 1961. \textit{Id.} at 125. The bill was not enacted and half a year later, when Williams reported out a bill that eventually did become law, it lacked the repeal. \textit{Fair Labor Standards Amendments of 1974} (S. Rep. No. 690, 93d Cong., 2d Sess., Feb. 22, 1974). The Republican minority’s failure to specify how retail supervisors differed from production foremen was also a failure to justify excluding either group from overtime protection. Harold Stein had not been guilty of this failure: “While undoubtedly in many instances a working foreman or supervisor is an employee of a mixed type since he does perform some duties in an executive capacity and some duties which are admittedly not so performed, it would be inconsistent with the purposes of the act to encourage excessive hours of work on the part of such foremen by granting an exemption.” US DOL, WHD, \textit{“Executive, Administrative, Professional...Outside Salesman” Redefined: Effective October 24, 1940: Report and Recommendations of the Presiding Officer at Hearings Preliminary to Redefinition 17} ([Oct. 10,] 1940) (\textit{Stein Report}). Harry Weiss had even concluded that: “The primary purpose of the exclusionary language placing a limitation on the amount of nonexempt work is to distinguish between the bona fide executive and the ‘working’ foreman or ‘working’ supervisor who regularly performs ‘production’ or other work which is unrelated or only remotely related to his supervisory activities.” US DOL, WHPCD, \textit{Report and Recommendations on Proposed Revisions of Regulations, Part 541 Under the Fair Labor Standards Act Defining the Terms “Executive” “Administrative” “Professional” “Local Retailing Capacity” “Outside Salesman”} 32 (June, 1949) (\textit{Weiss Report}). Weiss’s language was adopted verbatim in the first set of interpretive regulations and remained in place. \textit{FR} 14:7734; 29 CFR § 541.115(a)(2003).


\textsuperscript{31}CR 107:4631 (Mar. 23, 1961).
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In addition to having failed to identify either that "very specific purpose" or employers' "particular need for this kind of exemption," the choreographer of this sole congressional explanation also misled his colleagues by suggesting that there were retail and service industry executives to whom the exclusion would not apply.\(^32\)

In the wake of the 1961 amendments, the DOL held hearings in October 1962 to deal with the applicability of the administrative, executive, and professional exclusions to the retail and service industries.\(^33\) The testifying unions included the AFL-CIO, Amalgamated Clothing Workers, Amalgamated Meat Cutters, and Retail Clerks; among the more numerous employer representatives, in addition to individual retail store chains such as Grand Union and Federated Department Stores, were the Chamber of Commerce of the United States, the American Retail Federation, and the National Association of Retail Grocers.\(^34\) In March 1962, the DOL also held separate hearings on the white-collar salary thresholds because "[t]he widespread increases in wage and payroll levels which have taken place since these salary levels were established in February, 1959, indicates [sic] that consideration should be given to further changes of these rates."\(^35\) Then in July 1963 the DOL issued its Tentative Decision on Proposed Rule Making Proceedings taking into consideration the evidence received at both sets of hearings.

\(^{32}\)The claim that "Congress considered these limitations on the amount of time that exempt employees could devote to nonexempt duties when it extended the FLSA to retail and service establishments in 1961 and modified them only by setting the tolerance level for executive and administrative employees in those industries at 40%" lacks empirical support—there is no evidence that Congress considered any revisions applying to workers who had been covered before the 1961 amendments. Final Rule on Overtime Pay: Hearing Before the Subcommittee on Labor, Health and Human Services, Education, and Related Agencies of the Committee on Appropriations United States Senate 18 (S. Hrg. 108-542, 108th Cong, 2d Sess, May 4, 2004) (statement of Craig Becker).


\(^{34}\)The hearings took place in Washington D.C. from Oct. 15 to 23 and in Puerto Rico on Oct. 29. FR 28:7002 (July 9, 1963). Although the notice stated that the proceedings would be stenographically reported and transcripts made available to interested parties, it is unclear whether any copies are extant.

\(^{35}\)FR 27:665 (Jan. 23, 1962) (notice). These hearings were held on Mar. 26-29 in Washington, D.C. and in Puerto Rico on Apr. 9-10. Again, it is unclear whether the transcript is extant. Employees were represented by the AFL-CIO, ANG, IBEW, ILGWU, IUE, OEIU, UAW, USW, and two engineers organizations; among the much larger number of employers organizations testifying were the American Bankers Association, American Retail Federation, Association of Stock Exchange Firms, and the National Restaurant Association. FR 28:7002.
With regard to salary levels (other than for retail service employees), some employers at the hearings had proposed eliminating this criterion altogether, while others had suggested that they be set at the level of the lowest paid executive employees in the country’s lowest wage and salary areas. Employers’ basic position was not to increase the level at all, but if there had to be an increase, to limit it to the increase in the cost of living. Unions, in contrast, proposed a $125 long-test threshold for executives and $150 for administrative and professional employees alongside a $200 short-test level. Alternatively, they proposed that the executive salary test be set at 30 percent more than the pay of their highest paid supervisee.36

Clarence Lundquist, the Wage and Hour Administrator, dismissed employers’ proposal to eliminate the salary test altogether and also rejected their proposal to key the salary level to the lowest-paid executives in the lowest wage areas: “To do so would be to render the salary test meaningless for all but a relatively few....”37 He did, however, accept their (and especially retail employers’) argument that the administrative salary level should no longer be higher than that for executives, as it had been since 1940, when the WHD decided that the differential was necessary because, unlike the executive category, administrative positions were too heterogeneous to permit a determination of a percentage of non-exempt work as a delimiting characteristic. The higher salary level was thus supposed to guard against employers’ abusive classification of employees, but when the WHD amended its regulations in 1949 to add the same 20-percent “tolerance for nonexempt work” for administrative employees that it had already been applying to executives and also included “definite criteria for determining what constitutes exempt and nonexempt work,” retention of the salary level differential should have become superfluous. Since the work performed by both groups often overlapped, making them difficult to distinguish, and executives were paid salaries at least as high, the WHA determined that identical thresholds “would recognize the realities of their relationship in practice....”38

Lundquist also rejected both sides’ proposals as to salary levels. Survey data for 1961 had shown that 11 percent of establishments paid one or more executives less than $95 and 13 percent less than $100; for administrative employees the corresponding data were 4 percent less than $100 and 15 percent less than $105, while only 12 percent of employers employing professional employees paid them less than $115. He therefore proposed setting the administrative/executive salary thresholds at $100 and the professional at $115, which bore about the same

36FR 28:7002.
37FR 28:7004.
38FR 28:7004.
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relationship to minimum salaries as was the case in the 1958 survey, when 10 percent of establishments employing executives paid one or more less than the minimum adopted for executives and 15 percent in the case of administrative and professional employees.39

Employers’ basic position regarding the application of the white-collar regulations to retail and service industries was that they were inappropriate because a merchandising executive’s status was “determined by the function he performs as part of the management team, whether actually managing an establishment or department or merely participating in its management....”40 Retail and service employers therefore proposed a special definition of management that would regard as exempt work “any activity of whatever nature...performed by managerial persons for the ‘purpose of management.’” Employers frankly admitted that their proposals were designed to exempt from minimum wage and overtime pay assistant managers and assistant buyers whom they considered key management personnel but who failed to qualify as executives because they did not supervise two employees and often failed to qualify as administrative because of the salary test. Retail employers claimed that it was necessary to “delegate managerial authority and responsibility downward to the lowest possible echelons.” They contended that assistant managers and buyers were not assistants to the manager or buyer but “in fact have equal authority and responsibility with the manager or buyer in the managerial function.” Thus, in lieu of the requirement that excluded managers supervise at least two employees, retail employers proposed that the regulations recognize that there could be more than one executive in a department. Finally, retail employers urged a relaxation of the regulations for administrative employees as well, proposing that they be renamed “staff employees,” who would no longer even be required to confine themselves to office or nonmanual work.41

Although the WHA dismissed retail and service employers’ contentions concerning the unique functions of their managers, he was “impressed...by the multiplicity of essentially nonmanagerial tasks which executive-type personnel” performed “in the regular course of their duties which,” but for the new special congressional tolerance, “would disqualify such employees for exemption....” Ultimately, however, Lundquist’s appreciation exerted no influence on his proposed treatment of these exclusions; rather, he used the reference to interpret

39FR 28:7004.
40FR 28:7002.
41FR 28:7003. With regard to the request for renaming administrative employees staff employees, Lundquist merely pointed out that interpretive regulation § 541.201(a)(2)(i) already recognized staff (as opposed to line) employees as a subset of administrative employees.
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Congress's creation of the special 40-percent tolerance as "tacit approval" of the propriety and adequacy of the DOL's pre-existing definitional general 20-percent tolerance.42

Some employers argued against any salary test for retail and service employees because retail practice was to pay part of an executive's salary in annual bonuses based on sales or profits. In the alternative, they proposed that the then existing salary thresholds be retained, whereas unions contended that all regulations should apply fully to these newly covered sectors.43 Lundquist acknowledged that the then level of minimum white-collar salaries in retail and service establishments was relatively low: in the type of establishment in which all employees would have been excluded as retail employees, 29 percent of executive and 32 percent of administrative employees were paid less than $100, while 13 percent and 19 percent, respectively, were paid less than $80. He therefore proposed setting the long-test thresholds at $80 for executive and administrative employees and $95 for professionals and the short-test level at $125.44

At the same time, the WHA recognized that these levels would not long serve to distinguish between exempt and nonexempt white-collar retail and service workers, in large part because these industries were already "in the process of adjusting their compensation practices to the act's progressive requirements." Historically, the DOL's executive salary level had fluctuated between 73 and 120 times the statutory minimum wage with an arithmetic mean of 92; the multiples at that time were 80 for retail and service and 87 for the rest of industry. If these multiples remained unchanged until 1965, when the standard minimum wage was to go into effect for the newly covered industries, the multiples would become 64 and 80. A multiple of 80, twice the minimum wage for a 40-hour week, in Lundquist's opinion, "does not appear unreasonable in the light of our previous experience, but a multiple of 64, which is no more than the minimum wage employees will earn for a 56-hour week, will not...be truly descriptive of the wages of executive and administrative employees in retail and service establishments, nor will it serve as a useful criterion in identifying those who are employed in a bona fide executive, [sic] or administrative capacity." With 71 percent of executives and 68 percent of administrative employees in retail and service industries already being paid at least $100 weekly, the WHA proposed that as of September 3, 1965, the special salary tests for retail and service industries would end and the uniform levels of $100 for administrative and executive employees, $115 for professional

42FR 28:7005.  
43FR 28:7003.  
44FR 28:7004.
employees, the $150 short test would go into effect. The Wage and Hour Administrator rejected the proposal by certain professional groups that professional employees such as licensed engineers and chemists with academic degrees be treated like physicians and lawyers by eliminating the salary test for them altogether. The Administrator argued that whereas there was "generally no question as to whether practicing physicians and lawyers are actually employed in a 'professional capacity,'" it was not always the case in all of the many fields in which a degree or license was required for chemists or engineers that they were actually being employed in the professional capacity for which their credentials qualified them.

However, four years later, in 1967, the WHA did except teachers from the salary test at the same time that they were included within the professional exemption to conform to the 1966 FLSA amendments, which represented Congress’s second (albeit entirely unexplicated) intervention to exempt an entire occupational group. The original bill, H.R. 13712, did not cover elementary or secondary schools or exclude teachers; nor did the bill as it came out of committee. The House adopted coverage of elementary and secondary schools as enterprises engaged in commerce during floor debate without expressly providing for exclusion of teachers or academic administrative personnel. The amendment was offered by Illinois Republican Harold Collier, who stated that he had not discussed the issue with school educators or administrators. His purpose was to "establish equity," so that, for example, a dishwasher in an elementary or secondary school cafeteria would enjoy the same coverage as his counterpart in an old-age home or college. Neither Collier nor anyone else mentioned teachers, let alone insured that they be excluded from coverage. After John Dent, the bill’s floor manager, had observed that Collier’s “sincerity...has struck me with a warm and corresponding chord,” the amendment was agreed to without debate. The Senate committee deleted this provision not on the basis of the merits, but because the House had not held hearings on the issue, although the committee did express concern “about the

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45 FR 28:7005.  
46 FR 28:7002.  
47 FR 28:7007.  
48 FR 32:228, 229, 7823, 7824 (Jan. 10 and May 30, 1967); 29 CFR § 541.3(e).  
In 1966, when Congress amended the FLSA to cover public educational institutions, it amended § 13(a)(1) to exclude “any employee employed in the capacity of academic administrative personnel or teacher in elementary or secondary schools....” Fair Labor Standards Amendments of 1966, Pub. L. No. 89-601, § 214, 80 Stat. 830, 837 (Sept. 23, 1966).  
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impact which a possible increase in wages for such employees might have upon local school districts..."51 The conference committee conformed to the House bill, but also added a provision to make it clear that teachers and academic administrative personnel came within the exemption.52

By the end of the 1960s, after the DOL had once again reported "significant increases" in white-collar salaries since the regulatory thresholds had last been set in 1963, it proposed raising the executive-administrative and professional long-test salaries to $130 and $150, respectively, and the short-test salary to $200.53 In 1968 the WHD conducted another survey of white-collar salaries to evaluate the adequacy of the regulatory salary settings. The data, again, showed the lowest salary paid an exempt executive, administrative, and professional in each investigated establishment employing such workers. Unlike the 1955 survey, the establishments chosen for investigation were largely ones in which the WHD had reason to believe that FLSA violations existed, a large proportion of which tended to be in the South and nonmetropolitan areas. Nevertheless, the agency continued to be concerned that "if the salary tests are set too high, they could prevent many bona fide" white-collar employees, "particularly in the South and in nonmetropolitan areas, from qualifying for the exemption."54 The agency did not identify the deleterious consequences of subjecting such southern and small-town employers to overtime regulation. Since the WHD's investigation program (rather than a scientifically selected sample) controlled inclusion in the study, the division could not determine the degree to which the results were representative of all establishments; in any event, because that program emphasized employing units with a high violation potential, those with relatively low minimum salary levels were undoubtedly overrepresented.55 The WHD did estimate that as of February 1, 1969, 10 million executive, administrative, and professional employees were covered by the FLSA but excluded by § 13(a)(1), of whom three million were employed in schools and hospitals operated by state and local governments

54US DOL, WHPCD, Earnings Data Pertinent to a Review of the Salary Tests for Executive, Administrative and Professional Employees as Defined in Regulations Part 541, at 3 (June 1969).
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Between May and October 1968 the Division investigated 36,056 establishments, of which exempt white-collar employees were found in 17,645: 17,453 had at least one exempt executive, 5,635 at least one administrative, and 1,787 at least one professional employee. Of the total 112,049 exempt employees employed in these establishments, 69,930 (62.4 percent) were executive, 22,967 (20.5 percent) administrative, and 19,152 (17.1 percent) professional employees. In 19 percent of the establishments, the lowest paid exempt executive was paid a weekly salary lower than the highest paid nonexempt employee he supervised; in 41 percent of establishments, executives who were paid exactly $100—the long-test salary at that time—earned less than the highest paid nonexempt employee they supervised; and in 24 percent of establishments, executives paid $100 earned $25 or more less than the highest paid nonexempt employee they supervised.

The hearings that the Wage and Hour Administrator announced as beginning on September 16, 1969, lasted three days and proved to be revelatory. As the first witness, assistant administrator for research and legislative analysis Clara Schloss, was explaining that the methodology of the collection of salary data by the WHD "would tend to have a downward bias, in that Wage-Hour investigations tend to be directed towards establishments that are relatively low paying establishments," Louis Jackson, an employer-gadfly who identified himself only as living in New York City, asked Schloss a question that employers had harped on at the DOL hearings in 1940: "Are you not, in effect, trying to set a minimum wage for a class of employees which is completely (ultra-virus) [sic] as far as your department is concerned?" When Paul Tenney, a government attorney, inter-

59US DOL, WHP CD, Public Hearing: “Proposal to Increase Salary Tests for Executive, Administrative, and Professional Employee Exemption” (Sept. 16, 17, 18, 1969) (hereinafter DOL, “Hearing” (1969)). The transcript used here is a rare and perhaps unique copy, which is located in the DOL Wirtz Labor Library in Washington, D.C.
60DOL, “Hearing” (1969) at 9. The transcript repeatedly referred to Schloss erroneously as “Carla.”
61DOL, “Hearing” (1969) at 18. The staff report on the exclusion of white-collar workers of the Minimum Wage Study Commission repeated this odd claim and then four pages later contradicted it: “The current salary test as a basic criterion used to identify exempt workers implicitly introduces a minimum wage type concept in the administration
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vened to note that failure to meet the salary tests did not constitute a minimum wage violation, but merely resulted in the employer’s loss of the exemption, Jackson retorted that “[n]o matter how you are dressing up your stories, sir,” whereas Congress alone could enact a minimum wage of $1.60, the DOL was trying to put into effect a minimum wage of more than $100 a week for certain employees. Finally letting go of this unproductive theme, Jackson then turned to a considerably more important point: “in the history of the law the penal provisions of time and a half, back in the Blue Eagle days, was [sic] an attempt to spread the work.” Inquiring “why penalties should be assessed with respect to administrative and executive employees,” Jackson pointedly asked: “Is it the position of this Department that employers will employee [sic] more administrative assistants or more executive help to spread the work? That indeed is the history of the penalties.” Instead of requesting discussion on this crucial question, the hearing examiner John Mealy interjected the patently false claim: “I think your question has been adequately answered. I wouldn’t want this to be an interminable discussion here, which would just slow down the worthwhile matters that we have to consider.”

It was hardly surprising that Tenney chimed in: “I think you are right, Mr. Examiner, we shouldn’t take time for this argument here.” But it was indicative of the labor movement’s failure to challenge the massive exclusion of white-collar workers that Lazare Teper, the research director of the ILGWU, joined in the suppression by observing that courts had upheld the validity of the salary tests, rather than availing himself of the opportunity to turn Jackson’s objection on its head by showing that the very fact of the absence of an overtime pay penalty did indeed dysfunctionally promote white-collar unemployment. Jackson himself was doubtless unaware of how right he was in responding that it was “good from time to time to look into some other things we do in the presentation and exchange of

of this provision which is counter to the original intent of the exemption. [I]t is important to note that the salary test is not a minimum wage that employers are required to pay. It is relevant only as a determination for increased hourly wage rates for hours worked in excess of 40 per week and as a convenience to compliance officers....” Conrad Fritsch and Kathy Vandell, “Exemptions from the Fair Labor Standards Act: Outside Salesworkers and Executive, Administrative, and Professional Employees,” in Report of the Minimum Wage Study Commission 4:235-71, at 240, 244 (1981).

DOL, “Hearing” (1969) at 19-20. How little employers understood the ostensible purpose of the overtime penalty was again on display later in the hearings when David Flowers, representing a North Carolina auto distribution firm, asserted: “As one witness put it, if an employee loses his exemption he must be paid additional amounts in the form of overtime pay, or be raised to a level of salary which will maintain the exemption.” Id. at 326. He overlooked that the legislature’s presumptive preference in this situation was for the employer to hire another worker.

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statistics, to see if we are not getting away from the fundamentals of law."63

The labor relations representative of the Chamber of Commerce of the United States, William Walter, offered the labor movement another opportunity to highlight the irrationality of the white-collar exclusion, but once again it went unrecognized. After plausibly claiming that "[t]he time has come...for a reevaluation of the function of the salary test in light of the purposes of the Act,"64 Walter briefly embarked on the same detour about the allegedly unlawfully imposed minimum wage that Jackson had unwisely used to put his audience off. But Walter quickly recovered, emphasizing that: "If the test has any validity, it lies in the concept that a salary requirement provides an essential protection and prevents easy avoidance of the Act. [T]he question that must be addressed now is not whether an increase in the minimum salary levels for exempt employees will help distinguish them from non-exempt employees, and thereby...aid enforcement efforts, but whether such an increase will further the central purposes of the Act"—namely, eliminating labor conditions detrimental to the maintenance of the minimum standard of living necessary for workers’ well-being. In the same vein, he noted that "the premise of the exemption is that executive, administrative, and professional employees enjoy satisfactory working conditions, and need no protection against oppressively low wages and hours." Instead of pursuing this potentially fruitful thought, however, Walter drifted off into cliches (derived, to be sure, from the Stein Report)65 almost predestined to brand him as an unengageable ideolog. Thus in pleading that salary tests had to be set in light of all the "compensating advantages," he immediately focused on the "prestige, status and importance" implied by the white-collar titles alone, which "itself has value. Several of them also imply authority over people—another privilege generally regarded as worth something."66

At this point Walter descended into either incoherence or unveiled threats of self-fulfilling promises in illustrating how higher salary tests "could...frustrate the purposes of the Act."67

Paradoxically,...as the salary tests escalate higher and higher, the protection for those who fail to continue to qualify becomes less and less meaningful. ... A presently exempt

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64DOL, “Hearing” (1969) at 24.

65See above ch. 13.


administrative employee, earning the minimum of one hundred dollars a week, would no longer be exempt under the new salary test.... For a forty-hour week...his earnings could be cut to the statutory minimum level of $64, a reduction of 36 percent. And he would then have to work 15 additional over-time hours each week to regain his former weekly pay level.

The National Chamber seriously questions what type of protection it is that would require an employee to work 55 hours a week to maintain his former weekly earnings level without regard to hours worked.

No doubt, some will attempt to justify such action on the ground that the exempt administrative employee is subject to unlimited over-time work without compensation. But this merely points up another serious deficiency in the current proposal: A lack of any meaningful study into actual over-time experience for exempt employees.68

The bizarre upshot of this parade-of-horribles rhetoric was the Chamber’s proposal that the salary tests not be changed until “average over-time experiences have been determined.... Only then can there be a judgment of the protection that will be afforded those who are thrust into non-exempt status. Only then can the salary tests be reasonably keyed to the purposes of the Act.”69

Teper, instead of piercing to the reason for the exclusion of white-collar workers, elicited from Walter that he was an attorney, read him section 18 of the FLSA, and then asked whether the salary reductions in his nightmare scenario would not be a violation of the FLSA, prompting Walter to reply: “I hardly think so. Wages are a matter of private agreement between employer and employee. Most employees in these categories do not operate on a contract basis, and the wage can be determined at any time.”70 Not only had Teper squandered his chance,71 but, grotesquely, neither he nor Walter was aware that the U.S. Supreme Court had resolved the dispute over section 18—“No provision of this Act shall justify any employer in reducing a wage paid by him which is in excess of the applicable minimum wage under this Act, or justify any employer in increasing hours of employment maintained by him which are shorter than the maximum hours applicable under this Act”—in employers’ favor more than a quarter-century earlier.72

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68DOL, “Hearing” (1969) at 27.
69DOL, “Hearing” (1969) at 28.
71Teper shared this blame with AFL-CIO economist Rudy Oswald, who also went off on an insignificant tangent about whether the Chamber of Commerce kept records of the its exempt white-collar employees’ hours. DOL, “Hearing” (1969) at 40-43.
Planned Obsolescence of the Salary-Level Tests

While director Everett Samsel of the National Institute of Dry Cleaning proposed dropping the salary test altogether because “[e]conomic realities would seem to suggest that an employee assigned to executive, administrative responsibilities would not accept a salary equal to the minimum wage, or any wage paid to a subordinate,” Henry Bison, Jr., the general counsel of the National Association of Retail Grocers, maintained that the salary test should be subordinate and not “so high, so unrealistic that anyone who is qualified under the other five requirements of the regulation would be excluded because he didn’t meet this sixth one by reason of the fact that the...salary requirement was so high that true bona fide executives would no longer be entitled to the exemption.” The absurdity of Bison’s protesting against the salary test levels while conceding that “[t]he purpose...of the regulations...is really to determine whether the individual is truly an executive,” was revealed by AFL-CIO economist Rudy Oswald: the DOL’s proposal of $130 for executive and administrative employees provided no differential over the $129.11 average earnings of nonsupervisory production workers in manufacturing. Indeed, even the AFL-CIO’s own proposal of $150 was only 17 percent higher.

By far the most radical critic at the hearing (and perhaps during the whole post-World War II period) was Anthony Conole, administrative assistant to Douglas Fraser, UAW executive board member at large, who appeared together with a representative of the Teamsters to present the views of their newly formed (and short-lived) Alliance for Labor Action. Although on the surface the ALA seemed to focus on the inadequacy of the salary levels, in fact it stood alone in stressing that the white-collar exclusions had been overinclusive from the very beginning: “The hundreds of thousands of white collar employees who were denied overtime pay by their employers as a matter of policy because their salaries exceed the exempt-

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73 DOL, “Hearing” (1969) at 116 (quote), 117. William Baker, the director of personnel management of the New Jersey Hospital Association, also suggested eliminating salary tests altogether. Id. at 263.

74 DOL, “Hearing” (1969) at 48.

75 DOL, “Hearing” (1969) at 165-66. Although it came to only $153.85 a week, Louis Rothchild, counsel for Menswear Retailers of America, manifestly believed that he was acting generously in proposing $8,000 a year as the sole test of an excluded bona fide administrative or executive employee to simplify enforcement. Id. at 235.

tion standard, are the exploited victims of a low standard.” Implicitly the union alliance was taking the DOL to task for having issued regulatory definitions contravening a much more labor-protective legislative intent: “The salary standards since their inception have consistently denied protection to hundreds of thousands of workers who were intended to be covered by” the FLSA. The ALA drew out this implication in a claim that sounded plausible enough, but lacked any empirical support, in particular any explanation of congressional inaction following publication of DOL’s first set of exclusionary definitions in 1938: “If the drafters of the original Act were here today, I’m sure they would protest most vigorously any action such as is proposed that would deny pay for overtime work to workers striving to attain a moderate standard of living....”

The ALA pointed out that in 26 of the 30 years since the Stein Report (1940-41 and 1963-64 being the only exceptions) average weekly wages for 40 hours at straight-time pay for manufacturing production workers had exceeded the DOL salary threshold for executive employees. The salary standard for administrative employees has been lower during the previous five years and 11 of 30 years in all, while the higher professional employee salary level had been lower in eight years. If UAW automobile production workers were taken as the point of comparison, the DOL salary levels for professional and administrative employees had been lower in 24 of the 30 years, including all 18 years since 1951; for executive employees, the salary standard had been lower than auto workers’ 40-hour wage in all 30 years—by an average of $26.99 (compared to $13.66 for administrative and $10.16 for professional employees).

The ALA also drew empirical conclusions from the past for current salary level settings: “[T]he data clearly indicates that the salary standards established in 1960 were grossly inadequate at the time they were set. Updating those figures to 1968 simply perpetuates the mistakes of the past.” The union observed that data from the Bureau of Labor Statistics’ own National Survey of Professional, Administrative, Technical and Clerical Pay for the lowest level of employees the WHD considered exempt showed that the average weekly salary in 1968 of all 6 occupations (chemist II, engineer II, accountant III, auditor III, job analysts III, managers office services I) was $184.70, and that only 1 percent earned less than $130 and 7

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77DOL, “Hearing” (1969) at 247.
80DOL, “Hearing” (1969) at 243-44.
81DOL, “Hearing” (1969) at 244-46.
82DOL, “Hearing” (1969) at 248.
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percent less than $150. The ALA therefore argued that:

Any realistic standards should not be set at such a low level that virtually all of the workers who might possibly be considered exempt would not be affected by the standard, yet the data made available in the National Survey of Professional, Administrative, Technical and Clerical Pay of June 1968 indicates that this is exactly what will happen with the proposed salary standards. [T]he salary standards proposed are virtually [sic] so low that no employees at the lowest level of exempt jobs would be affected by that and virtually no employers would be required to pay overtime to persons whom they now consider as exempt. ...

It is crystal clear...even without any updating of the data, that the proposed salary standards are already below typical salary levels for non-exempt occupations in the U.S. The salary standards proposed by the Administrator are completely unrelated to the actual practices of private industry in compensating employees for overtime work.84

The ALA buttressed this last claim by reference to a 1967 National Industrial Conference Board study showing that 52 percent of manufacturing companies paid FLSA-exempt employees for overtime work; among firms with more than 20,000 employees, the proportion reached 70 percent. Of 94 companies using a maximum salary level to determine whether to pay for overtime, 84 percent paid those earning more than $154 a week ($8,000 a year); the highest bracket was $385 or more per week ($20,000 a year). Only 3 percent set the maximum as low as $115-153 a week ($6,000-7,999 a year).85

In spite of this barrage of data and historical criticism, the ALA nevertheless proposed salary thresholds that were hardly radically discontinuous with the DOL’s settings: for executive and administrative employees $170—which “is still considerably below the earnings needed to provide a moderate standard of living for a typical worker and his family, and is substantially below the pay level where manufacturing companies generally begin to deny pay for overtime hours worked”—$195 for professionals, and a $260 short test. But neither these proposals nor the ALA’s call for an automatic annual escalator formula prompted any

83DOL, “Hearing” (1969) tab. 2 at 249 (citing, BLS, National Survey of Professional, Administrative, Technical and Clerical Pay (Bull. 1617)). The lowest average weekly salary was $171.74 for chemists, of whom only 3 percent earned less than $130; the occupation with the highest proportion earning less than $150 was 16 percent for managers.


85DOL, “Hearing” (1969) at 255-56 (citing NICB, Overtime Pay for Exempt Employees (Studies on Personnel Policy No. 208, 1967)).
comment or questions from the DOL or employers.\textsuperscript{86}

In January 1970, several months after the close of the hearings, the Nixon administration DOL responded by asserting without a shred of (legislative-history) evidence that unions’ proposed increases would “cause the loss of the exemption to a substantial number of employees who were intended by Congress to be exempt.” Wage and Hour Administrator Robert Moran “elected, as in the past, to propose salaries which are not geared to high wage areas (such as the Northeast and West) but which take into consideration the lower wage nonmetropolitan areas of the South.” Thus of the lowest paid executives determined to be exempt in investigated establishments for all regions in 1968, 20 percent received less than $130 weekly compared with only 12 percent in the West and 14 percent in the Northeast. The WHA did concede that “[v]ery significant evidence that the current salary tests are no longer meaningful is the finding that in one out of every five establishments the lowest paid exempt executives for whom data were collected during the May 1-October 31, 1968, period actually earned less than the highest paid nonexempt worker whom he supervised.” Moreover, 1969 earnings data showed that only 5 percent of the lowest paid executives and 3 percent of the lowest-paid administrative employees determined to be exempt had salaries as low as $100, with 5 percent of their professional counterparts below $120. Consequently, without an increase, the salary tests would be rendered meaningless except for few employees.\textsuperscript{87} In the end, the WHA raised the salary levels only to $125 for administrative and executive employees, $140 for professionals, and $200 for the short test.\textsuperscript{88} Even a proposal as modest as annual adjustment of salary levels, which the WHA conceded had “some merit,” especially since amendments took place about every seven years, was too radical for adoption and “require[d] further study”—the progress that such study ever made being signaled by the fact that the salary levels were raised only once more (in 1975) and then never again for the next three decades.\textsuperscript{89}

Studious congressional neglect of the white-collar overtime exclusions was prominently on display during the 1971 debates on amending the FLSA, which included proposals to repeal the exclusion of bona fide administrative, executive, and professional employees from the protections of the Equal Pay Act, a provision within the FLSA prohibiting sex discrimination in wage payments for equal work.\textsuperscript{90} So self-explanatory had the first exclusion become that when Senator

\textsuperscript{86}DOL, “Hearing” (1969) at 259-60.
\textsuperscript{87}FR 35:883-85 at 884 (Jan. 22, 1970).
\textsuperscript{88}FR 35:885.
\textsuperscript{89}FR 35:884.
\textsuperscript{90}Equal Pay Act of 1963, Pub. L. No. 88-38, 77 Stat. 56 (codified at 29 USC §
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Philip Hart discussed his bill to apply the Equal Pay Act to them, he assured his colleagues: “My bill would not, of course, in any way remove or affect the existing exemption for these white-collar workers from the minimum wage and overtime provisions” of the FLSA. Similarly cavalier was the neglect accorded the exclusion from overtime regulation by Judith Lonnquist, legal counsel for the Chicago chapter of the National Organization for Women. Testifying that the white-collar exemption had been used as a loophole to avoid coverage of equal pay requirements, she mentioned that a major employer in the Midwest classified secretaries and other “clericals” as executives. While the WHD had been quick to disregard such job-classification subterfuge, “the employees so classified, propagandized into believing they are management, may not realize that they are entitled to equal pay....” Oblivious of their entitlement to overtime pay, the NOW lawyer insisted that “[i]nherent in the FLSA are advantages not only for professional, executive and administrative personnel, but for all employees,” without being able to identify the advantages accruing to excluded white-collar workers.

In September 1970, WHA Moran, reopened the question of the occupational scope of the exclusion of professional employees in the wake of the 1966 FLSA amendments, which had made the Act applicable to paramedical employees, hospitals, nursing homes, and residential care establishments. At the same time, he announced that the WHD was also considering the exemption status of employees in data processing, including program operators, programmers, and sys-


tems analysts, who performed “a variety of tasks which are difficult to measure in terms of their significance and importance to management.” Then, too, the Division took up the propriety of classifying as “professional” “certain highly paid occupations (i.e., highly skilled technicians in the electronics and aerospace industries),” which were “not in a field of science or learning,” but which were learned primarily by means of extensive experience and on-the-job training. The hearing scheduled for December 1, 1970 would also hear testimony on the need for a minimum salary level for outside salesmen.94 This final issue of the feasibility of a minimum salary requirement was placed on the agenda because outside sales employees had complained, “in many cases,” about “being exploited. Complaints range from those who receive no pay...to those who must work excessively long hours to earn a disappointing payment....”95 The hearing, which was postponed until February 2, 1971,96 was not a vehicle for reacting to WHD proposals (which did not exist), but to furnish the agency with information.97

By the end of 1971, the WHD, after considering the evidence gathered at the hearings from February 2 to 11, decided, for various reasons, not to take any direct regulatory action on any of the aforementioned matters.98 With regard to data processing employees, employers unsurprisingly argued that systems analysts and programmers (and even junior programmers) should be classified as “professional.” Stymied in satisfying the regulatory definition by the absence of any requirement of a college degree for entry into the occupation, the dearth of college computer science courses, and the lack of a certification requirement for employment, employers proposed a postsecondary technical course and on-the-job training and work experience as a substitute. The employee representatives who testified were

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94FR 35:14268-69 (Sept. 10, 1970). As early as the late 1950s the DOL had begun studying job classifications such a programmers and systems analysts in the data processing industry with respect to the white-collar exclusions. US DOL, Annual Report, 1960, at 243.


96FR 35:17116 (Nov. 6, 1970).


98Without further explanation the WHA stated that the hearings had not generated sufficient evidence of the need for a salary-level test for outside salesmen to justify altering the regulation. FR 36:22976-79 at 22977 (Dec. 2, 1971). Although he also concluded that the regulatory definition of “professional employees” did not need revision to deal with paramedical occupations, the WHD did supplement the illustrations in the interpretive regulations to explain what would qualify as the requisite “prolonged course of specialized intellectual instruction” for medical technologists; likewise, it stated that x-ray technicians lacked the opportunity to exercise the requisite level of discretion and judgment to qualify. Id. at 22976-77, 22978 (§ 541.302(e)(1)), and 22979 (§ 541.306(b)-(c)).
just as adamantly opposed to being shoe-horned into the professional category, feeling that “to expand the exemption was an invitation for employers to work such employees longer hours with no additional compensation.” In the end, the WHD decided against inclusion of data processing employees in the professional category for two distinct reasons, one pertaining to the evolution of the occupation, the other to preserving the integrity of the regulatory definition. First, it found that “at the present time the computer sciences are not generally recognized by colleges and universities as a bona fide academic discipline” and there was “too much variation in standards and academic achievement to conclude logically that data processing employees are part of a true profession of the type contemplated by the regulations.” Second, the WHA contended that adoption of the employers’ alternative to formalized intellectual education “would seriously weaken the professional exemption by allowing employers to claim the exemption for various kinds of para-professional and subprofessional groups.”

Employers of highly paid technicians (including those paid less than $200 a week) in the electronic and aerospace industries, the funeral industry, news media, and employment placement agencies recommended that the regulations be revised to exclude these workers from overtime protection. The technical employees themselves, however, took the opposite position, citing as reasons not only loss of overtime pay, but also longer working hours and—most interestingly—“resultant increase in unemployment....” Without revealing a clear basis, but apparently assigning weight to the hearing evidence that for the most part the technicians in question “were paid at levels that were not exceptionally high in relation to current salary levels for those occupations which are universally recognized as professional,” the WHA found no reason to amend the definition.

Four years after the previous increase in regulatory salary levels and one week after President Nixon’s resignation, the new Wage and Hour Administrator, Betty Southard Murphy, issued a notice of proposed rulemaking. Noting that since 1970 the consumer price index had risen 27 points and the minimum wage had been increased, she proposed that in order to make the tests “realistic, interim salary tests are being proposed, pending a study” during the following six months, after which “a further change, if necessary,” would be made. In the meantime the WHA proposed $160 for administrative and executive employees, $185 for professionals, and a $300 short-test salary.

The “vast majority” of comments that the Employment Standards Administration received in response objected that the proposed increases were inflationary.

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100 FR 36:22977.
Arguing that the 50-percent increase in the short-test salary exceeded the rise in the Consumer Price Index, the NAM suggested a 25 percent increase to $250 as "more consistent with what has happened in the economy." More specifically, the NAM complained about the burden of having to comply with the duties tests if the proposed $300 short test were implemented: "Throughout industry, there are many supervisory positions, both in the plant and in the office, which pay less than $15,600. To establish the upper limit at that level would create administrative chaos since, for a substantial percentage of employees with responsibilities that are generally executive or administrative, it would become necessary to document all the other tests to ensure compliance with the law."\footnote{102} In sharp contrast, Nat Goldfinger, the AFL-CIO research director, commented to Murphy that although the union organization was aware that in the early days of the FLSA "concern was expressed that the salary tests might be set too high and thus tend to disqualify for exemption persons whom the Congress intended to exempt," the proposed increases would not be effective enough. Instead, the AFL-CIO proposed $200 for administrative and executive employees, $225 for professionals, and $350 for the short test.\footnote{103} A one-day public hearing on October 22, 1974, produced "an almost-solid negative reaction from witnesses" except the AFL-CIO. In particular retail businesses complained that the proposed salary thresholds were "too high to prevent" [sic; should be "enable"] administrative and executive employees, especially in the South, rural areas, and in small stores, from being exempted. Employers also objected to any interim increases at all, demanding that no changes be instituted until the detailed wage study had been completed.\footnote{104}

In February 1975, four months after a one-day hearing,\footnote{105} Murphy announced the new salary levels effective April 1, 1975. While continuing to accept the consumer price index "as a guide for establishing these interim rates," the WHA cut back the proposed increases below the inflation rate "in order to eliminate any inflationary impact," setting the long-test salaries at $155 and $170 respectively.\footnote{106} Without revealing how she had arrived at the conclusion, Murphy also found in retrospect that her proposed $300 short test was "too high"; but acknowledging that the salary levels "have become obsolete and interim rates are required to protect

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\footnote{102}{"Comments Are Mostly Negative on Salary Tests for Executives, Administrators, Professionals," \textit{DLR}, No. 199, A-12-A14, at A-12, A-13 (Oct. 11, 1974).}
\footnote{103}{Letter from Nat Goldfinger to Betty Murphy (Sept. 11, 1974), in \textit{DLR}, No. 199, E-1 (Oct. 11, 1974).}
\footnote{105}{\textit{FR} 39:33377 (Sept. 17, 1974).}
\footnote{106}{\textit{FR} 40:7091 (Feb. 19, 1975).}
the interests of all concerned, including employees and employers,” she reduced it by almost 17 percent to $250. The WHA justified an increase on the grounds that: “For example, there are indications that certain employers are utilizing the high salary test to employ otherwise nonexempt employees”—that is, those performing nonexempt work beyond the 20 or 40 percent tolerance allowed for executive and administrative employees—“for excessively long workweeks. Such employees do not qualify for exemption under the...regular salary tests and some may no longer qualify for exemption under the interim upset salary test....” Murphy’s successors may have taken her warning that the use of interim rates was not to be considered a “precedent” all too seriously: for the next 29 years, no increase at all was considered a precedent, leaving Murphy’s settings in place into the next millennium.

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A person who can qualify for these exemptions...does not need, nor does he want, in my personal experience, the so-called protection of the over-time provision. He’s working to do a job.108

The effectiveness of the FLSA white-collar exclusions was captured by special BLS surveys during the 1970s showing that the proportion of professional employees working more than 41 hours a week and receiving premium pay during the month of May between 1973 and 1979 ranged between 16.6 and 21.0 percent, while the corresponding range for managers and administrators was 11.3 to 12.9 percent. In contrast, about 60 percent of clerical workers and 70 percent of blue-collar workers received premium pay.109 The discrepancy was even greater among those who worked 60 hours or more: whereas only about 7.5 percent of the professional and technical workers and managers and administrators working 60 hours

107 FR 40:7092.
109 US BLS, Long Hours and Premium Pay, May 1979, tab. B at A-6 (Spec. Lab. Force Rep. 238, 1980). The proportion of professional and blue-collar workers working 41 hours or more was about the same, while that of managers and administrators was much higher and that of clerical workers much lower. Id. These BLS occupational categories were not identical with the FLSA statutory/regulatory categories.
or more hours in 1979 received premium pay, 53 percent of clerical and blue-collar workers did.\textsuperscript{110}

A little more than a year after the Carter administration took office and three years after the last round of increases, Wage and Hour Administrator Xavier Vela, based on increases in the consumer price index, the statutory minimum wage—in 1977 Congress enacted an increase in the minimum wage to $2.65, $2.90, $3.10, and $3.35, effective in 1978, 1979, 1980, and 1981, respectively\textsuperscript{111}—and various wage and salary indexes, informed the public that the existing interim regulatory salary thresholds “no longer provide basic minimum safeguards and protection for the economic position of low paid executive, administrative, and professional employees, as contemplated by” Congress and the DOL. He therefore proposed increasing the executive-administrative and professional long-test and the short-test salary levels to $225, $250, and $350, respectively, and solicited comment for a one-day hearing in May.\textsuperscript{112} In fact, the hearings lasted three days (May 8-10, 1978), at which 22 witnesses testified and in conjunction with which numerous written comments were submitted.\textsuperscript{113} Arguing that the proposed increases were inadequate, some employee-commenters pointed out that the new salary levels were lower than the average hourly wages paid to nonexempt workers in many industries.\textsuperscript{114} One “misconception” that the DOL found prevalent among employer-commenters (especially among those with fixed or declining revenues) was that “they would have no option but to lay off some of their employees, if the levels were raised.”\textsuperscript{115} This attitude can be understood to mean that, instead of spreading employment by hiring additional workers, these employers would be motivated not to have the work done: in other words, the work that until then had been performed during overtime hours had to be done gratis or not at all. The attitude was also unsurprising in light of a contemporaneous DOL survey that found a “significant inverse relationship...between the percentage of executive employees with scheduled hours of more than 40 per week and weekly salary levels.”\textsuperscript{116} Although em-
ployers' and unions' opposing comments were "similar to comments that have historically been made when increases in the salary tests have been suggested," the DOL nevertheless undertook such an "intensive review" of its own methodology that had generated the proposed increases that almost three years passed before it finally took public action in January 1981.117

One reason for this self-paralysis was the vigorous and principled objections to the proposed increase in salary thresholds filed with the DOL by the Council on Wage and Price Stability on June 9, 1978.118 The COWPS took the strong position that: Congress had offered no rationale for the exemptions in the FLSA; the regulations creating the salary thresholds lacked any explanation as to why they had been chosen; the regulatory proposals failed to explain the nature of the "basic minimum safeguards and protection of the economic position of low paid executive, administrative, and professional employees as contemplated" by § 13(a)(1) and the regulations; and since no rationale had been given for the salary test, "no consistent reason for or methods of changing it can be or is offered."119 The critique culminated in the statistical-methodological injunction that the DOL "must avoid becoming involved in the circular process whereby it uses its salary tests to define who is employed in an executive, administrative or professional capacity and then uses this group of workers and their wage levels to determine the amount by which to raise the salary test. Some independent criterion must be used to determine the appropriate salary test or increases in that test (such as the minimum hourly wage or even the CPI) or else an independent criterion must be used to define the group of exempt workers and their salary must be used to determine the minimum exempt salary level."120

The COWPS's acute—and in part unprecedented—the-emperor-has-no-clothes-type criticisms were incongruously conjoined with dogmatic speculation

Salaries and Hours of Work at 2.

117FR 46:3012.

118The COWPS, which was created by the Council on Wage and Price Stability Act, Pub. L. No. 93-387, 88 Stat. 750 (Aug. 24, 1974), was authorized to intervene in rule-making before any federal department or agency "in order to present its views as to the inflationary impact that might result from the possible outcomes of such proceedings." Act of Aug. 9, 1975, Pub. L. No. 94-75, § 4, 89 Stat. 411 (adding § 3(a)(8) to the COWPS Act).


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about Congress’s purposes. The Council conjectured that “Congress no doubt recognized that” the three white-collar groups “are offered unique advancement, training, and often fringe benefits and that their work was more of a mental than a manual nature that could not as easily be governed by the clock. In 1938 Congress was trying to effect a redistribution of income and omitted” the three groups” from that redistribution...since it no doubt felt that the potential advancement and rewards of this type of employment were sufficient to protect the economic status of these workers.”121 The Council’s repetitive rhetorical use of “no doubt” could not disguise its ignorance: whereas the minimum wage may have been designed to redistribute income from capital to labor, the overtime provision was intended to shorten the workweek to 40 hours and to redistribute hours from overworked to underworked workers. It was not fully employed workers’ economic status, but their social status that was at issue; and even if unemployed workers’ economic status was implicated by the redistribution of working hours to them, there was no evidence that unemployed white-collar workers’ “potential advancement” and benefits could protect that status while they were jobless.122

The COWPS went on to assert that the rationale behind the DOL’s use of a salary test “can be easily surmised. Setting a minimum salary for exemption that is significantly higher than the minimum wage for a forty hour workweek insures that no salaried worker will be working for less than the minimum hourly wage when overtime work is considered. As long as the exempt salary level is high enough this purpose will be served and all possible redistribution benefits of the salary test will accrue to society.” The Council then suggested that the DOL use certain methods for setting salary tests that would “reflect the apparent intent of Congress to insure that no employee receives less than the minimum hourly wage even after overtime is considered.” The COWPS failed to explain its leap from surmising that the DOL had formed this intent to attributing it to Congress as well, but it did illustrate that if the salary threshold were pegged to 60 hours a week and thus 60 times the minimum wage ($2.65 at the time), the resulting $159 minimum exempt salary would equal the income of a minimum wage worker working 53 hours a week with overtime pay: “Few, if any of the lowest paid supervisors work


122See above ch. 2. To be sure, the COWPS was scarcely alone in its exclusive focus on money instead of time; the WHD itself routinely adopted the same position. For example, in an opinion letter it declared that the WHA was constrained to interpret exemptions narrowly “because the application of an exemption deprives an employee of the monetary benefits which the Act otherwise provides.” US DOL, WHD, Opinion Letter, WH-376 (Mar. 5, 1976) (Westlaw).
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in excess of 53 hours a week and so the intent of Congress to protect these employees would be preserved.” In the end, the COWPS urged the DOL to withdraw its salary level proposal because it was “unnecessary to protect workers,” Congress had not required it, and it was inflationary.123

The Council’s guesswork was breathtaking, especially since, when the WHD had set the salary threshold for the first time in 1938, the volume of public (including congressional) attention riveted on it was arguably at its maximum. Yet the $30 level that the WHD fixed was about twice as high as the COWPS’s method would have warranted. That the Council in 1978, when the ratios between the salary levels and the minimum wage had sunk to their historically lowest or near-lowest points, nevertheless proposed that the DOL leave well enough (i.e., $155 a week) alone verged on the preposterous—though, to be sure, no more so than the surmise that Congress was satisfied that in the midst of the deepest depression in U.S. history white-collar workers could safely be excluded from overtime protection so long as they earned the equivalent of 25 cents an hour straight-time for 60 hours because their “unique advancement” opportunities would protect them (but not against overwork, which remained outside the Council’s ken). Regardless of its tenability, the COWPS’s argument reinforced the DOL’s inaction for the following three years.

In the interim, the Minimum Wage Study Commission, which Congress had created in 1977, inter alia, to study and report and make recommendations on “the exemptions from the...overtime requirements” of the FLSA,124 undertook a re-examination of the white-collar exclusions, which was one of its least imaginative efforts. The Commission, after noting that about 13 million executives, “administrators,” and professionals were exempt, simply asserted that “[t]he statutory language is clear in its intent to exempt such employees....”125 Even if Congress had used these three words—and in fact Congress did not use “administrators”126—the commission failed even to articulate, let alone grapple with, the obvious question as to what Congress meant by them and whether it was plausible that Congress intended that the DOL should ultimately exclude such a huge proportion of the working population from hours regulation. (The MWSC’s failings in this regard were seminal in that the Bush administration, in seeking to justify its regulatory revisions in 2003, referred back to the Commission as the source of all of its

126See above ch. 9.
information on the “scant” legislative history.”)\textsuperscript{127} The MWSC offered a reason for recommending elimination or retention of all the other numerous exclusions from the minimum wage and/or overtime provision of the FLSA.\textsuperscript{128} Only with regard to retaining the white-collar exclusions did the commission not even purport to have an explanation: “The Commission recommends that this exemption be retained and that salary test levels used as a partial criterion to determine eligibility for this exemption be raised to the historical level prevailing during the period 1950 to 1975 and adjusted upward as necessary to maintain this historical relationship.” In the same vein it merely went on to point out that whereas from 1950 to 1975 the executive salary test had been increased several times to maintain a level of twice the minimum wage for 40 hours, by 1981 the salary test had fallen to 15 percent above the minimum wage.\textsuperscript{129}

The only vote that the MWSC took on this exclusion was on this narrowly and mechanistically framed motion: “The historic relationship both with respect to the salary test and to the upset test should be re-established and maintained in the future.” Five of the six commissioners who voted approved, the only No vote being registered by the commission’s sole nonagricultural employer, S. Warne Robinson,\textsuperscript{130} board chairman of G. C. Murphy Company of McKeesport, Pennsylvania, a retail chain of variety stores.\textsuperscript{131}

To be sure, in an earlier section of its “Findings and Recommendations” volume the Commission did mention seven cases justifying exemptions from the

\textsuperscript{127} FR 68:15561 (Mar. 31, 2003). See also below ch. 16.
\textsuperscript{128} Report of the Minimum Wage Study Commission 1:121-37.
\textsuperscript{130} Report of the Minimum Wage Study Commission 1:167. Two commissioners did not vote on the motion.
\textsuperscript{131} Report of the Minimum Wage Study Commission 1:i. In the 1980s the company sold out and its stores were later closed by the successor firm. http://www.geocities.com/zayre88/R_murphy.html. In his 43-page “Minority Report,” Robinson—who was opposed to a statutory minimum wage altogether—after asserting that “[p]erhaps in no other section of the Commission’s report did the majority display such a total disregard for the available evidence as its recommendation on the longstanding exemption” for white-collar employees, leveled the bizarrely nonsensical charge that the commission’s “ill-considered recommendation” to update the salary levels “would effectively eliminate this important exemption.” Report of the Minimum Wage Study Commission 1:206-207. How increasing the weekly salary level above $155 would have effected this result Robinson failed to explain, but alluding to the Reagan administration’s action four months earlier, he insisted that the DOL’s recent attempt to raise the salary level “substantially” had been blocked “because of its serious inflationary effects and its potential for disrupting vital labor-intensive industries, including the retail and service trades.” Id. at 207.
overtime provision, one of which, "Compensatory privileges and non-standardized work output," was illustrated by reference to administrative, executive, and professional occupations. The MWSC, conveniently using the subjectless passive, reported:

Although these employees often work more than 40 hours a week, it was argued that the value of compensatory privileges is sufficient to offset wages lost by nonpayment of an overtime premium. Moreover, work output in these occupations cannot be standardized relative to a specific time period, thereby negating the employment-expanding effects of an overtime provision.

In the following two paragraphs the Commission then appeared to offer its own (albeit ambiguous) assessment of these two claims. It commented that "[t]o the extent" that excluded white-collar workers received "fringe benefits beyond those received by nonsupervisory employees, a direct monetary tradeoff may exist." In particular, "[i]ncreased tenure, security, higher base pay and improved advancement opportunities" could "also be viewed as substitute compensation for lack of overtime premium pay provisions." Whatever the hypothetical validity of this argument, the DOL's regulations, as the Commission could (or at least should) not have been unaware, have never tested for the presence of any of these non-wage terms or conditions of work. Consequently, it was and remains unclear whether in fact these excluded employees actually enjoyed such benefits or whether covered white-collar or even blue-collar workers did as well. Nor did the Commission reflect on how to evaluate the appropriateness of basing exclusions from mandatory norms of labor standards legislation on speculation concerning the future careers of myriad employees who, after having conferred on their employers the benefits of supra-normal hours for months or years, may wind up never snatching the dangled carrot of a promotion. Moreover, the MWSC also failed to explain not only how to quantify the "tradeoff" (and over what time period), but also how to make any monetary benefits commensurable with the multifariously deleterious effects of long working hours over long periods of time.

As to the non-standardized work output argument, the commission asserted that overtime penalties could "most easily" expand employment "where employees are perfect substitutes for each other such as factory assembly-line workers, machine operators, sales-counter clerks, and in jobs that do not require independent

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134 Report of the Minimum Wage Study Commission 1:120.
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discretionary decision making. At the other extreme, employment levels of most executive, administrative and professional jobs would not increase with required overtime pay...[t]o the extent that performance on these jobs depends on individualized job requirements...."135

Unfortunately, the commission failed to go beyond these bare assertions to explain why one person engaged in independent discretionary decisionmaking 80 hours a week could not be joined by a co-worker so that each worked 40 hours a week. The commission also neglected to ask the crucial question as to how many of the then 13 million excluded white-collar workers were more like portrait painters whose unique talents could not be duplicated by a second-shift artist and how many were more like Dorothy Haywood and her 50 co-workers processing damage claims.136 Critical, too, was the MWSC’s failure to probe why, even if these workers were non-fungible, any of them had to be working more than 40 hours in the first place.

The problem, apart from the deficiencies already noted, with this justification is twofold: first, the MWSC never made it clear whether it fully accepted the argument or was merely reporting others’ opinion;137 and second, the commission also recorded a countervailing “Justifying the Elimination of Exemptions to the Overtime Provisions of the FLSA.” Whereas the first justification was framed in terms of situations in which the employment-spreading effect of overtime penalties were stymied,138 the second was immune to it:

After more than 40 years under the Act, it may be reasonably argued that the 40-hour workweek is widely accepted by the American public. The work spreading objective of the maximum hour provision...has been largely achieved and continued overtime exemptions are therefore anachronistic. As a result, all employees should receive the overtime premium to reinforce the acknowledged public acceptance of the 40-hour workweek and to provide additional compensation for the inconvenience and added risk of injury associated with overtime work. Under this view, the employment-expanding effect of the penalty wage, which was a major original consideration for maximum hour legislation, is minimized or considered irrelevant.139

Nevertheless, the MWSC failed either to evaluate this argument or to make an express judgment as to whether this eliminationist justification should have pre-

135Report of the Minimum Wage Study Commission 1:120.
136See above ch. 2.
137It used, for example, the subjectless passive “it was argued....” Report of the Minimum Wage Study Commission 1:119.
139Report of the Minimum Wage Study Commission 1:120.
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vailed.

The rigid framework (as well as the data) that the commission used here were supplied by the two staff members (a senior economist and his research assistant) who wrote the detailed chapter on the white-collar exclusions.140 Conrad Fritsch and Kathy Vandell, who were as little able to transcend mere assertions as the commissioners, contended in their “Executive Summary”141 that:

The basic justification for the exemption resides in the nature of the work performed by exempt employees. Unlike factory employment and clerical jobs, executives, administrators and professionals perform duties whose output is not clearly associated with hours of work per day. In conducting their duties, they are expected to exercise individual discretion and make independent judgments. ... Moreover, unlike occupations subject to the maximum hour provisions of the Act, the nature of the work performed generally precludes the potential for job expansion associated with the standard FLSA overtime premium.142

Fritsch and Vandell offered no empirical or theoretical support for these claims in the body of the chapter either. Ironically, they even conceded that their only source was itself based on mere assertion. Relying on the subjectless passive, but presumably referring to the Stein Report, they stated that “it was asserted that reducing the hours worked by executives would not increase employment since executive work cannot be easily spread.”143 What Stein really wrote, as a side comment in the context of seeking to justify his decision to recommend “a comparatively low salary requirement” for executives, was that the overtime penalty “in the case of persons truly employed in an executive capacity would not usually have any considerable effect in spreading employment because in many instances the executive’s work cannot be shared. In any event, it would produce this effect far less commonly than in the case of administrative and professional employees....”144 Thus Stein not only expressly distanced himself from the assertion with respect to administrative and professional employees, but, by using “usually” and “many,” made it clear that he was not alleging the impossibility of work-sharing even for

142Fritsch and Vandell, “Exemptions from the Fair Labor Standards Act” at 236.
144US DOL, WHD, “Executive, Administrative, Professional...Outside Salesman” Redefined: Report and Recommendations of the Presiding Officer at Hearings Preliminary to Redefinition: Effective October 24, 1940, at 22 (1940) (Stein Report).
executives.\textsuperscript{145}

Fritsch and Vandell then concluded their “Executive Summary” by asserting that “[t]here is no good rationale for eliminating this exemption. It was included in the Act as enacted in 1938 following the precedent of the National Industrial Recovery Act and existing state statutes. There has never been serious discussion about its elimination.”\textsuperscript{146} The authors, who helped maintain this unserious tradition, could just as well have added that there has never been a serious discussion of the purpose of excluding white-collar workers. They also contributed to that tradition by remarking that such “workers were exempted because they were believed to be typically earning salaries well above the minimum wage level”\textsuperscript{147} without offering any reason for imposing a means test on protection from being overworked.

Fritsch and Vandell asserted that a further basis for exclusion, “particularly in the case of professionals, [was] that the work performed was often difficult to standardize in relation to a specified period of time, making enforcement of overtime provisions difficult.”\textsuperscript{148} Even if it is true, as Stein observed, that “the work produced by a sculptor or a violinist is not subject to standardization” and that therefore “the results can[not] be standardized ‘in relation to a given period of time,’”\textsuperscript{149} this circumstance does not warrant the conclusion that enforcing compliance with the overtime law would be difficult. After all, as Stein approvingly paraphrased a witness, “although a lawyer...might be confined to regular office hours, he may within that time determine the actual number of hours required for satisfactory preparation or examination of each lease or document.”\textsuperscript{150} In other words, regardless of how idiosyncratic or creative a professional employee may be, the actual number of hours he worked may be no more difficult to ascertain than for an assembly-line worker.

In spite of the manifest dysfunctionality of the 1975 interim salary test, which had already “become obsolete” by 1978, the Carter Administration, “[a]s a result of unexpected delays,” the cause of which it did not reveal, waited another three years before it issued a final rule.\textsuperscript{151} This delay apparently stemmed from the aforementioned opposition by the COWPS. Despite employers’ “outraged protests” and threats to sue to enjoin implementation of the regulation, Carter, “lobbing a small

\textsuperscript{145}See above ch. 13.
\textsuperscript{146}Fritsch and Vandell, “Exemptions from the Fair Labor Standards Act” at 236.
\textsuperscript{147}Fritsch and Vandell, “Exemptions from the Fair Labor Standards Act” at 240.
\textsuperscript{148}Fritsch and Vandell, “Exemptions from the Fair Labor Standards Act” at 240.
\textsuperscript{149}Stein Report at 38.
\textsuperscript{150}Stein Report at 37.
\textsuperscript{151}FR 46:3011, 3012 (1981).
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bombshell at employers,” proceeded with the rule on January 7, the day after the MWSC had reported that employers violated the FLSA more often with regard to salaried than hourly-paid employees.¹⁵² On January 9, 1981, less than two weeks before the Carter administration came to an end, Donald Elisburg, the Assistant Secretary for Employment Standards,¹⁵³ finally issued the final rule embodying higher salary-level tests to go into effect on February 13, one month after publication in the Federal Register and three and a half weeks after the inauguration of President Reagan. Raising the executive-administrative and professional long-test salaries to $225 and $250 in 1981 and $250 and $280 in 1983, respectively, and the universal short-test salary to $320 and then $345 two years later was justified on the grounds that the 1975 salary tests—which had already become “obsolete” by 1978—were “no longer high enough to be even a rough guide to exempt status, because employees at this time who satisfy the tests for duties and responsibilities are generally paid much higher salaries than the current salary test levels.”¹⁵⁴ The urgency of the increase derived from “[t]he purpose of the salary test,” which had “always been to prevent evasion of the FLSA by the designation of an excessive number of workers as executives, administrators or professionals, with minimal or nominal duties designed to barely meet the duties and responsibilities requirements of the exemption.”¹⁵⁵ The DOL no more explained the nature of the “unexpected delays” in issuing the regulations than it did the basis for not adjusting the long-test levels upward to account for increases in white-collar salaries between 1978 and 1981 or the reason that the short-test salary in 1983 would still be five dollars lower than that proposed by the DOL in 1978.¹⁵⁶

Repeating the DOL’s forty-year-old position that the salary level is “the best single test” of employers’ bona fides in classifying their employees as executives, Elisburg observed that in order to fulfill that function, the salary test “ha[s] to be

¹⁵³According to Elisburg, who was the main force behind raising the salary level, the White House and the Office of Management and Budget caused the initial delay; at the end of Carter’s term, when the president finally agreed to the increase, there were so many last-minute regulations pending that in the rush it was not possible to insure that the regulation went into effect before Reagan took office. The AFL-CIO’s lukewarm support for what it viewed to be an inadequate increase left Elisburg with little political strength to fend off Administration opponents of any raise. Telephone interview with Donald Elisburg, Washington D.C. area (carphone) (Nov. 17, 1993). John Zalusky, an economist with the AFL-CIO, confirmed that unions were not satisfied with the proposed salary test regulation. Telephone interview, Washington, D.C. (Nov. 18, 1993).
¹⁵⁵FR 46:3011.
¹⁵⁶FR 46:3012.
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increased periodically to take into account the higher salary levels that...are in fact paid to bona fide executive...employees." Because the DOL contended that the exclusion of managers had always been based on their receipt of “compensatory privileges and benefits which are superior to those of other employees,” the salary test level “must be periodically adjusted” to reflect not only increases in the minimum wage but also in average salaries of executive employees. 

In announcing a new executive long-test salary of $225 for 1981 and $250 for 1983 superseding the old salary test, which it variously described as “seriously outdated,” “ineffective[,]” and “virtually useless as a guide for employers and the Department of Labor in determining FLSA exemption status,” the DOL urged employers to understand that the increase would enhance regulatory certainty: “Formerly, employers could rely on the salary test as a good indicator of whether an employee was likely to be exempt or not. Now that the test levels are lagging so far behind actual salaries, employers who do so could be misled into inadvertent noncompliance with the FLSA.” (The DOL apparently regarded its own regulation as a guide for employers only, showing no concern for whether the test reliably instructed employees as to whether they were lawfully or unlawfully being “exempt” from the burden of being paid the minimum wage and premium wages for overtime.) To be sure, the DOL’s obfuscatory assertion made no sense: by complying with an “obsolete” salary test, employers assumed no risk whatsoever of being deemed in violation of the FLSA by the DOL—so long as their employees performed the aforementioned “minimal duties designed barely to meet the duties and responsibilities requirements of the exemption.”

Instead, employers gained the certainty of immunity from liability under the FLSA for extracting unpaid overtime hours from employees without alternatives.


158 FR 46:3016.

159 FR 46:3016.

160 Employers, in turn, prefer self-help: “It is not customary...to ask the [DOL] to classify all of a firm's employees, for...the agency is generally more liberal with overtime benefits than the average employer would be. Most employers classify their own personnel....” E. Gottlieb, Overtime Compensation for Exempt Employees 7 (AMA Research Study 40, 1960).

161 FR 46:3011. Similarly incomprehensible was Elisburg’s assertion: “‘If you do not have a realistic salary test, you have to start counting the number of hamburgers the assistant manager fries to find out if he is really exempt from the act.’” “A Raise for Low-Level Bosses.”
This employer overreaching vis-à-vis low-paid hybrid supervisor-grunts was documented, for example, by appellate litigation against Burger King Corporation. Its "deliberate corporate policy" of requiring "exempt" assistant managers to spend more than half of their fifty-four hour workweeks performing the same work as their supervisees was driven by the firm's desire to avoid paying premium overtime rates or any wages at all: "Were the Assistant Managers to abstain from production work, more hourly employees would be needed, 'thereby "blowing payroll"'-that is, spending more than the store's budgeted amount for hourly labor."\(^{162}\) Such practices directly subverted the mandatory overtime premium's goal of applying financial pressure on employers "to spread employment to avoid the extra wage...."\(^{163}\)

The niceties of the calculus entering employers' decisions as to whether to comply with the FLSA were made moot, however, by the Carter administration's postponing until the last days of its term the promulgation of the revised salary tests, which were scheduled to go into effect February 13, 1981. Employers' "infuriation at this and other lame-duck decrees"\(^{164}\) swiftly vanished as President Reagan, in one of his first official acts, issued as part of his overall deregulatory program a memorandum on January 29, 1981, postponing for sixty days all pending final regulations.\(^{165}\) The same day, the DOL stayed the effective date of the regulation indefinitely, reopening the comment period.\(^{166}\) The new Secretary of Labor, Raymond Donovan, himself a construction firm executive, justified the suspension by reference to the "devastating" impact the increased salary test would have had on small businesses.\(^{167}\) Donovan's efforts to eliminate such "unwarranted obstacles which cost the economy billions of dollars a year" were ap-

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\(^{162}\)Donovan v. Burger King Corp., 675 F.2d 516, 518-19 (2d Cir. Apr. 2, 1982) (citing the trial court opinion). See also Donovan v. Burger King Corp., 672 F.2d 221 (1st Cir. Feb. 22, 1982); Marshall v. Erin Food Services, Inc. d/b/a Burger King, 672 F.2d 229 (1st Cir. 1982). As the DOL described employers' choices after a higher salary test has gone into effect: employers would pay the new rate "only if the resulting cost would be no more than paying this worker on an hourly basis with premium pay for overtime." FR 46:3017.


\(^{165}\)FR 46:11227 (Feb. 12, 1981). Of the increase in the salary-level test the Chamber of Commerce said: "'Of all of the raids pulled by the Carter people, none is more significant than this.' "A Raise for Low-Level Bosses."

\(^{166}\)FR 46:11972 (1981). Because the DOL failed to give the proper notice period or to solicit public comment on its decision to stay indefinitely (or effectively to repeal) the regulation, the stay was arguably invalid. 5 USC §§ 551(5), 553(b) & (c) (1988).

plauded by the Chamber of Commerce of the United States, which welcomed his ""play[ing] hardball on regulatory reform."" In March, the DOL, in the spirit of Reaganomic marketization that echoed employers’ complaints about the alleged burdensomeness of the salary test, specified that it was seeking public comments about "the probable economic impact of raising the salary tests to the revised levels...."

The comments that it did receive were largely from restaurants—orchestrated especially by Burger King—many of them identical and charging that the proposed increases were inflationary and would reduce the number of "secondary level management positions...." Burger King’s aggressive stance was typified by the comments of its vice president for public affairs, Ronald Platt, who opposed any increase in "government mandated wage rates" on the alleged grounds that by the DOL’s "own admission, most of these workers are already above such minimum levels due to the operation of free market forces." Finally, almost a year before two federal appeals courts had granted Burger King this exemptionalist interpretation, Platt presciently commented to the DOL that "managerial personnel are capable of doing work which is and work which is not directly related to executive responsibilities at the same time," so that Burger King managers might be "working in a production capacity...and at the same time supervising the work of many hourly employees."

After the submission of the employers’ comments the process of regulatory revision once again became dormant, and not until Reagan’s second term did the DOL renew its interest in the salary tests. The trade press had reported in 1983 that "[u]pon reflection, the Reaganites concluded that the Carter-proposed salary test increases were not so unreasonable after all." DOL officials were said to be

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169*FR* 46:3011-12.


171“Majority of Comments Thus Far Oppose FLSA Salary Test Rule,” *DLR*, No. 69, A-5 to A-8 (quotes at A-7) (Apr. 10, 1981). Hotel employers were not only prominently represented among the commenters, but also managed to manipulate some of their employees into submitting comments as well. For example, a large proportion of the letters that the DOL received from the industry stemmed from the Hyatt Regency in Lexington, Kentucky, whose executive chef wrote: "'Whoever made this last-minute payoff by the Carter Administration to labor should be sent to a hardworking job in the hotel industry; I would love to be HIS supervisor.'” *Id.* at A-7.

Preparing a redraft by the end of the year "(probably containing several key concessions to restaurant industry lobbyists concerned over the Government's unwillingness to recognize more than one overtime-exempt manager per food-service unit)." But this proposal, too, was postponed as mysteriously as it had been initiated.\textsuperscript{173} Deeming the intervening four years insufficient for a review of the regulations, the DOL once again reopened the comment period. This time it expressly solicited comments on whether the test should be eliminated altogether.\textsuperscript{174} After the comment period was extended yet again in 1986,\textsuperscript{175} employers' organizations were unable to formulate a united deregulatory program. In the face of union demands for a doubling of the long-test salary to $320-$325, the National Mass Retailing Institute urged outright elimination of the test. The Association of General Merchandise Chains, however, declined to support this position, in part for fear that the alternative would be ""far more detailed and burdensome inquiry [by DOL enforcement agents] into exempt employees' duties and responsibilities."" Despite the retail trade press's reports of the DOL's accommodation of the employers' proposed relaxation of the duties test,\textsuperscript{176} this clash of lobbyists, too, failed to produce any agency action.

Here the extremes met as the "'if it ain't broke don't fix it' opposition to an increase in the salary test mounted by Burger King and other employers\textsuperscript{177} was matched by the relief expressed by the AFL-CIO that the dreaded "'brutalization'" of the test by the Reagan administration had never materialized.\textsuperscript{178} Nevertheless, inaction systemically favored employers: under the regulatory status quo the salary test was further eroded by inflation and minimum-wage increases, creating a de facto enforcement vacuum. By the end of the George H. W. Bush administration, which posted a "'Next Action Undetermined' notice in its semi-annual DOL agenda,\textsuperscript{179} proposed rulemaking was no longer even rumored.\textsuperscript{180}

\textsuperscript{173} Ken Rankin, "Labor Dept. Quietly Shelves Plans to Rewrite Labor Practices Rules," \textit{NRN}, Nov. 7, 1983, at 6 (Nexis). Although only one employee per establishment may fall under the "'in sole charge of an independent establishment' exemption, more than one may qualify under the general duties test. 29 CFR §§ 541.1(e), 541.113(d) (1993).

\textsuperscript{174} \textit{FR} 50:47696-97 (1985).

\textsuperscript{175} \textit{FR} 51:2525 (1986).


\textsuperscript{177} \textit{NRN}, Mar. 10, 1986, at 46; \textit{id.}, May 12, 1986, at 87 (Nexis).

\textsuperscript{178} \textit{DLR}, Mar. 4, 1987, at A-7 (Nexis).

\textsuperscript{179} \textit{FR} 54:44,366-67 (1989); see also \textit{id.} at 16,443-44.

\textsuperscript{180} All the DOL could muster was a buried footnote that consideration of the salary tests "'will be undertaken in connection with any future rulemaking." \textit{FR} 57:37,666 n.1
Ironically, the only occasion on which Congress even mildly criticized the DOL for failing to raise the salary thresholds after 1975 was linked to rare congressional intervention to direct the DOL to exempt a certain group of white-collar occupations from the FLSA as “professional.” In 1989, in the course of floor debate on the Minimum Wage Restoration Act, Minnesota Republican David Durenberger—who in 1981 had written to the Reagan DOL opposing any increase in the salary-level tests—offered an amendment “to address an inequity that currently exists in the Department of Labor’s interpretation of ‘professional employee’” under the FLSA. Joined by Senators John Kerry and Edward Kennedy as cosponsors, Durenberger proposed that:

Not later than 90 days after the date of enactment of this Act, the Secretary of Labor shall promulgate regulations that interpret the professional exemption contained in section 13(a)(1) of the Fair Labor Standards Act of 1938 (29 U.S.C. 213(a)(1)) in a manner that permits computer systems analysts, software engineers, and other similarly skilled professional workers to qualify under such section for such exemption. Such regulations shall ensure that such employees shall continue to be eligible for such exemption even if such employees are compensated on an hourly basis, except that to qualify for such exemption such employees shall be compensated at an hourly rate that is at least 6 1/2 times greater than the applicable minimum wage rate under section 6 of such Act (29 U.S.C. 206).

In thanking the bill’s managers for accepting his amendment, Durenberger justified it on the (factually shaky) grounds that:

In 1973, the Department of Labor issued regulations specifically excluding employees in the computer field from the professional employee exemption.

The Labor Department stated that there was too great a variation in the standards and academic requirements to conclude that employees in the computer science field are true professionals.

Therefore, these employees are covered by the minimum wage and overtime provisions of the FLSA.


184See above ch. 15.
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matically.

Today universities offer intense course studies in computers on both an undergraduate and graduate level.

In fact, the field of computers is advancing each day, and it is considered to be an integral part of the high technology field.

Computer programmers, systems analysts and software engineers are respected professionals, who should be treated as such.

In addition, in 1986 Congress added another twist to this issue when we adopted the Tax Reform Act.

An amendment to the Tax Reform Act requires certain independent computer consultants working for a broker to convert from independent contractor status to employee status for tax purposes....

These computer programmers, analysts, and software engineers contract their work through a broker or third party, and are paid at an hourly rate substantially higher than the minimum wage.

They generally set their own work schedules, including the number of hours they work each week, and they voluntarily enter into written contracts with brokers to be paid on an hourly basis.

However, because they are no longer independent contractors for tax purposes and because they are not considered professional employees, they are covered by the minimum wage and overtime requirements of the FLSA.

In my view, the Department of Labor’s 1973 assessment of employees in the computer field is outdated.

I believe that these computer specialists meet the employment test of work that is “predominantly intellectual and varied in character” set out in the professional exemption.185

Senators Kerry and Kennedy, who were presumably engaged in constituent service work on behalf of Route 128 employers, eagerly followed Durenberger’s lead. Kennedy, who was chairman of the Senate Labor and Human Resources Committee, confined himself to noting that Durenberger’s amendment was a “fair and worthwhile improvement,” which the committee has not considered,186 whereas Kerry spoke at some length on how a prosperous Massachusetts economy hinged on employers’ ability to work computer employees long hours without having to pay premium rates for overtime:

Under current rules, the Department of Labor operates with a 16-year-old rationale that these workers cannot qualify for the professional exemption in section 13(A) because “computer sciences are not generally recognized by colleges and universities as a bona fide

186 CR 135:6152.
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academic discipline with standardized licensing, certification or registration procedures.” Well, times have changed. In Massachusetts, these technical workers are highly educated, highly skilled, and highly paid. They are the backbone of many of the high-technology industries that fuel our growing economy. It is imperative that they be exempted from these provisions so that they are able to provide services as efficiently and productively as possible.

DOL’s salary guarantee requirement is unreasonable when applied to these highly skilled, highly compensated employees who earn between $25 and $100 an hour.

An exemption is necessary because it recognizes that the world has changed since the Department of Labor made its rulings. In Massachusetts, DOL has targeted several companies for audits for failure to pay time-and-a-half overtime to highly paid technical workers. This just does not make any sense any more.

Many companies, large and small, in Massachusetts depend on the services of computer programmers and other highly technical workers to solve problems. The nature of the free-lance computer programmer’s business is that the hours are unpredictable. They are compensated well, even though on an hourly basis. The Department of Labor must recognize that the economy has changed in the past 16 years, and that our computer programmers, systems analysts, software engineers, and other similarly skilled technical workers are, indeed, professionals.

[T]he current use of the technical services professionals covered by this amendment is an important factor in keeping Massachusetts’, and the Nation’s, high-technology industries flexible, responsive, and competitive. These characteristics of our industry must be increased, not reduced, if our standard of living is going to increase. This amendment provides one small, specific way in which we can reinforce those critical characteristics of a competitive American industrial base.187

Neither Kerry nor anyone else having asked why these computer workers could not work 40 hours with the additional hours being spread among others, the Senate quickly agreed to the amendment,188 and although the House bill lacked such a provision,189 in conference the House receded. More importantly, the bill’s managers, including the chairmen of the House and Senate Labor Committees and other leading committee Democrats, expressly added in the conference report of May 8, 1989, that:

The managers are also concerned that the salary tests in these regulations have not been adjusted since 1975. When the Secretary of Labor adjusts these tests, this level of six and one-half times the minimum wage should serve as a guide to the appropriate levels for the

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Since the minimum wage at the time was $3.35 an hour, and the bill provided for increasing it to $3.85 in 1989, $4.25 in 1990, and $4.55 in 1991, the salary threshold could have been increased to $21.78, $25.03, $27.63, and $29.58, which, on the basis of a 40-hour week, worked out to $871.20, $1,001.20, $1,105.20, and $1,183.20, respectively, at a time when the weekly short-test salary threshold was only $250. Had the Labor Secretary in fact applied this guideline, the estimated 20,793,000 executive, administrative, and professional employees who fell under the white-collar exclusions would have been sharply slashed.

Republican Senator Orrin Hatch, the ranking minority member on the Senate Labor and Human Resources Committee, did the same calculations and the horror that he expressed on the Senate floor a week later was hardly surprising given that he believed that even “an increase in the minimum wage is an ineffective means of helping the working poor in our society.” Since Hatch knew that the FLSA white-collar exemptions applied to about 20 million workers and the average annual incomes of managers was $28,000, he asked Senator Kennedy:

Are we...instructing the Secretary of Labor to increase the entire 13(a) salary tests which are now set at not less than $250 per week to a level that would equal over $870 per week...? In annual terms this directive would increase the threshold from $12,500 to $43,500. If that is so...it would mean that if the minimum wage were indeed raised to $4.55 an hour as is being attempted under this bill...any manager would have to earn about $60,000 per year to qualify for an exemption...It would also mean that the vast majority of the approximately 20 million senior level employees currently covered by this bill would no longer be exempt. It would mean that almost every business...would have to start paying people overtime. ...

If that is not what we mean, and the language seems to say that, I think we should make sure that this statement of direction is not misinterpreted by the Secretary of Labor or by the many business people who would be affected by a major expansion of the coverage of the Fair Labor Standards Act.

So I ask the distinguished Senator from Massachusetts just what it means, and can we instruct the Secretary of Labor in such a way to make it clear that we are not going to have to pay overtime for everybody who is willing to work extra hours...for the benefit of the countless businesses in America without overtime today? And they are willing to do so

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because they are managers, and they are administrators. They are professionals or they are executives. Because if it means the other, then it is going to be a further deterioration of rights and privileges throughout this country, and a loss of tremendous business expansion in this country. As a matter of fact, I think there will be a lot of businesses going out of business.\textsuperscript{193}

To Hatch’s relief, Kennedy confirmed that beyond the computer workers there was “no requirement for other employees who are subject to the salary tests,” but he did reiterate that the bill managers’ statement suggested that the “this level of $6\frac{1}{2}$ times the minimum wage should serve as a guide.” And although he noted that there was “no mandate,” Kennedy added that: “Since it has not been changed since 1975, it is a guide, and one I hope is followed soon.”\textsuperscript{194}

President George H. W. Bush vetoed the minimum wage bill, but the House and Senate promptly passed new bills, which contained the same directive to the DOL concerning computer programmers.\textsuperscript{195} And consistent with Kennedy’s response to Hatch, his Senate committee report contained exactly the same expression of concern about the white-collar salary levels as the aforementioned conference report,\textsuperscript{196} while the House report was even more definite and specific: “In undertaking the necessary revisions in these salary tests, the Secretary of Labor should use as a guide the level of six and one-half times the minimum wage as an appropriate distinction for a professional salary test.”\textsuperscript{197} Without explanation, Representative Austin Murphy, the chairman of Labor Standards Subcommittee, on November 1, 1989, made a unanimous-consent request to strike the computer employees provision from the bill, to which there was no objection.\textsuperscript{198} Inclusion of the provision on computer professionals “was the intent of everyone in Congress in passing this bill,”\textsuperscript{199} but, oddly, “[l]ast minute concerns” about its wording arose on the day it was brought to the House floor”; because there was not enough time to review and revise the language, the provision was dropped from the bill that was enacted in 1989. However, the following year, having “had plenty of time to

\textsuperscript{193}CR 135:9505 (May 17, 1989).
\textsuperscript{194}CR 135:9506.
\textsuperscript{198}CR 135:H7855 (Nov. 1, 1989).
consult with both [sic] industry, professionals and Members of this body,” Murphy offered a “technical” amendment, with slightly different wording, to cover all concerns. Murphy regretted that “in the computer industry where most of the employees are high-technology, high-paid, beyond minimum-wage levels,...we failed to exempt those high-technology, high-paid employees from the overtime provisions, and in order that we can provide that industry with the right to continue and grow in our American system, we would like to have those employees exempted from the overtime provisions.”\textsuperscript{200} Why the computer industry in particular could not expand without privileged access to uncompensated overtime work Murphy did not explain. With the enactment of Murphy’s amendment as a free-standing bill in 1990,\textsuperscript{201} for the first time in the FLSA’s history Congress excluded an occupational group from overtime protection solely by reference to salary level.\textsuperscript{202} Senator Kerry celebrated passage as “an important step that removes antiquated Government regulations from the backs of employees and employers and helps take at least one positive step toward more efficient management of our important human resources. And the future economic strength of Massachusetts and our Nation.”\textsuperscript{203}

In its interim final rule in February 1991, the DOL sought to divine congressional intent in “resolv[ing] certain ambiguities in the statute,” while defending its existing regulations as in fact already permitting the computer programmers and others “to qualify for exemption” if they were paid on a salary basis and met the duties tests. Despite statutory silence on the status of computer professionals not paid on an hourly basis, the DOL decided that Congress intended that “highly skilled workers in the computer field” paid more than \(6\frac{1}{2}\) times the minimum wage “should be exempt without regard to the basis of their compensation,” although it


\textsuperscript{201} Congress directed the Labor Secretary to exempt certain computer programmers and others: “Not later than 90 days after the date of enactment of this Act, the Secretary of Labor shall promulgate regulations that permit computer systems analysts, computer programmers, software engineers, and other similarly skilled professional workers as defined in such regulations to qualify as exempt executive, administrative, or professional employees under section 13(a)(1) of the Fair Labor Standards Act of 1938 (29 U.S.C. 213(a)(1)). Such regulations shall provide that if such employees are paid on an hourly basis they shall be exempt only if their hourly rate of pay is at least 6 1/2 times greater than the applicable minimum wage rate under section 6 of such Act (29 U.S.C. 206).” Act of Nov. 15, 1990, Pub. L. No. 101-583, § 2, 104 Stat. 2871. See also 29 CFR §§ 541.3(a)(4) and (e), 541.303 (2003).

\textsuperscript{202} Frank Swoboda, “Rule Curbs Overtime on Computer Work,” WP, Jan. 25, 1991 (F1).

\textsuperscript{203} CR 135:S17772 (Oct. 27, 1990).
also concluded that those paid on a salary basis whose salary equaled or was less than $6\frac{1}{2}$ times the minimum wage “should continue to be eligible for exemption” if they met the duties test.\textsuperscript{204} The regulatory process, however, was not over: the DOL invited interested parties to submit comments, evaluation of which together with promulgating a final rule took the Department a year and a half. A number of employers organizations commented that the interim final rule was inconsistent with the statutory intent because the law required the Labor Secretary to permit salaried computer workers to qualify as exempt regardless of whether their compensation exceeded $6\frac{1}{2}$ times the minimum wage.\textsuperscript{205} Unsurprisingly, numerous workers employed in the computer fields at issue who were hired through “service firms” and were paid premium overtime on an hourly basis “expressed general opposition” to the statute. Most interesting of all was the correspondence that the DOL received from members of the House Education and Labor Committee who had been the chief sponsors of the bill, Murphy and the ranking Republican member, Representative William Goodling, who also contended that the interim final rule was inconsistent with the statute and congressional intent. Based on these comments, the DOL concluded that the commenters were right: the exemption was not limited to computer employees whose compensation exceeded $6\frac{1}{2}$ times the minimum wage. Thus under the final rule, the exemption was not limited to those paid more than $6\frac{1}{2}$ times the minimum wage, whether on an hourly or salary basis.\textsuperscript{206}

The upshot of these changes, which, unsurprisingly, were “pushed through by computer industry trade groups,” was the potential for “big savings for companies that pay programmers on an hourly basis....” To be sure, computer industry officials observed that the new law would make little difference to hardware and software companies since they by and large paid their full-time employees on a salaried basis, who were therefore already exempt. The principal impact was expected on the industry’s counterpart to temporary personnel agencies, which sent out programmers to computer companies and users as part-time employees who, as already noted, until 1986 had been treated as non-employees not covered by the FLSA at all; once the Congress had amended the Internal Revenue Code to put an end to that scam, employers successfully lobbied for this new method of avoiding overtime regulation for hourly employees.\textsuperscript{207}

From such inconspicuous and inauspicious circumstances thus arose the one

\textsuperscript{204}FR 56:8250-51 (Feb. 27, 1991) (to be codified as 29 CFR § 541.5c).
\textsuperscript{205}FR 57:46742 (Oct. 9, 1992).
\textsuperscript{206}FR 57:46743, 46744-45 (to be codified at 29 CFR §§ 541.3(a)(4), (e), 541.303).
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notable, albeit nonbinding, congressional expression of dissatisfaction during the last quarter of the twentieth century with the DOL’s failure to update the white-collar salary thresholds. In 1996, Congress intervened regarding computer workers again, this time both to freeze the trigger wage at $27.63 an hour (6.5 times the minimum wage of $4.25 before it was increased that year), if the computer workers were paid on an hourly basis, and to create an entirely separate categorical exclusion no longer subject to the DOL’s definition of “professional” employee.208

Even when the minimum wage had reached $5.15 in 1997 and thus the ratio of the computer exemption wage to it had fallen to 5.4, the Clinton administration

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made no effort to increase the salary thresholds at all. Instead of fixing them at 6.5 or 5.4 times the minimum wage, the DOL permitted the ratio between the long-test salary for professional employees and the minimum wage to sink below 1.0 for the first time and that between the short-test salary and the minimum wage to plummet to 1.2. (Significantly, in testimony before the House Labor Standards Subcommittee in 1993, the AFL-CIO proposed nothing more robust than increasing the salary threshold to three times the minimum wage as "a level commensurate with truly executive, administrative and professional occupations....")

In 1993 the Acting Assistant Secretary for Employment Standards and Deputy Wage and Hour Administrator in the Clinton administration conceded the "absurdity of having a salary test that's lower than the minimum wage," while another national DOL official both characterized as "totally embarrassing" the agency's having permitted the test-salary to become obsolete and acknowledged that "we're not out there looking for section 541 violations." The Clinton administration DOL repeatedly announced that the white-collar overtime regulations were on its regulatory agenda. In 1994 it announced that, with 23 million workers within the scope of the white-collar exemptions, the salary level tests "are outdated and offer little practical guidance in the application of the exemption. ... Because the regulations are sorely out-of-date, a comprehensive rulemaking is necessary. ... Legal developments in court cases are causing progressive loss of control of the guiding interpretations under this exemption and are creating law without considering a comprehensive analytical approach to current compensation concepts and work-place practices." Yet even after the General Accounting Office in 1999

209 According to John Fraser, the Deputy Wage and Hour Administrator at the time, Maria Echaveste, the WHA, did prepare a proposal to increase the short-test salary level to 6.5 times the minimum wage, but the DOL rejected it several times. As far as Fraser was aware, this initiative was never made public. Telephone interview with John Fraser, South Otselic, NY (July 14, 2004).

210 See below tab. 4 and 5.


212 Telephone interview with John Fraser, Washington, D.C., Nov. 19, 1993, at 9 a.m. CST.

213 Telephone interview with Ray Kamrath, Wage and Hour Division, Office of Policy, Planning, and Review, Washington, D.C., Nov. 8, 1993, at 11:00 a.m. CST.


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had found the salary level to be universally regarded as "virtually meaningless" and in need of revision,216 Clinton’s Assistant Secretary of Labor for Employment Standards made brutally clear how hopeless the prospect for raising the salary level had become when he elevated employers into "constituencies" of the DOL: "any change in the current regulatory structure requires balancing the diametrically opposed, conflicting interests of the many and differing constituencies that would be affected. The views of interested parties are intractably held on opposite sides of the various issues under these regulations."217

Because Congress expressly delegated to the Secretary of Labor the authority to issue so-called legislative regulations elucidating the meaning of an "employee employed in a bona fide executive, administrative, or professional capacity," they "have the force of law as much as though they were written in the statute."218 Legislative regulations, however, "are as binding on the courts as if they had been directly enacted by Congress" only to the extent that they "are reasonable."219 Thus if the DOL issued a regulatory definition that either was originally or, through the passage of time, became "arbitrary, capricious, or manifestly contrary to the statute,"220 a federal court must, in a proper case, declare it invalid. In particular where "there is no longer a rational connection between the facts originally supporting the exclusion...and the regulation as it operates today[, t]he original purpose of the regulation...has become so detached from actual effect...as to make the current regulation arbitrary and capricious...."221 Moreover, such invalidation

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217Letter from Bernard Anderson to Cynthia Fagnoni, GAO, in GAO, Fair Labor Standards Act at 53. The WHA echoed these remarks in calling changes "extremely unlikely in the short-term." The Fair Labor Standards Act: White-Collar Exemptions in the Modern Work Place: Hearing Before the Subcommittee on Workforce Protections of the Committee on Education and the Workforce House of Representatives 9 (Serial No. 106-104; 106th Cong., 2d Sess., May 3, 2000) (statement of T. Michael Kerr). Significantly, WHA Tammy McCutchen stated after she had left office that employers’ intense opposition to increasing the salary thresholds was easily explicable: the latter was like an increase in the minimum wage, but one with which, after a quarter-century of inaction, they had long since stopped having to deal. Telephone interview with Tammy McCutchen, Washington, D.C., Sept. 16, 2004.

218Helliwell v. Haberman, 140 F.2d 833, 834 (2d Cir. 1944).

219Fanelli v. United States Gypsum Co., 141 F.2d 216, 218 (2d Cir. 1944).


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is powerfully supported by the protective purposes of the FLSA, which require courts to interpret exemptions narrowly and against employers.\textsuperscript{222}

As a result of long-term agency neglect, political stalemate, and/or lack of civil courage—even Clinton’s Wage and Hour Administrator, the daughter of migrant farmworkers, sought to excuse her failure to exercise her power to increase the salary levels on the grounds that it would “alienate the other interested parties” such as McDonald’s\textsuperscript{223}—the justification for what might once have passed muster as a minimally reasonable regulation had, through the mere passage of time, “long since evaporated.”\textsuperscript{224} The fact that the minimum wage more than doubled between 1975 and 1997 rendered the salary test a “clearly obsolete”\textsuperscript{225} regulation so lacking in the requisite rationality and reasonableness as not merely to be “unrelated to the tasks entrusted by Congress” to the agency,\textsuperscript{226} but to have turned them on their head. (Significantly, at a House hearing in 2004, Secretary of Labor Elaine Chao, while not specifically referring to the salary level test, testified that the DOL would be violating its statutory duty to define and delimit the terms that Congress used in § 13(a)(1) if it did not update the regulations.)\textsuperscript{227} Based on the Administrative Procedure Act’s mandate that federal courts invalidate agency regulations found to be “arbitrary, capricious, [or] an abuse of discretion,”\textsuperscript{228} other agencies’ failure to adjust similar monetary indexes for inflation during shorter periods has

Hazard v. Shalala, 44 F.3d 399, 404 (6th Cir. 1995). But see Gamboa v. Rubin, 80 F.3d 1338, 1343 (9th Cir. 1996) (“the Secretary’s failure to adjust the automobile equity $1500 limit for inflation since its adoption almost 15 years ago has thwarted Congress’s purpose in establishing the AFDC program and the Secretary’s own rationale for adopting the $1500 limit”), vacated on other grounds sub nom. Gamboa v. Chandler, 101 F.3d 90 (9th Cir. 1996).


\textsuperscript{223}Telephone interview with Maria Echaveste, WHA, Washington, D.C., Nov. 22, 1993.

\textsuperscript{224}Geller v. Federal Communications Comm’n, 610 F.2d 973, 980 (D.C. Cir. 1979).

\textsuperscript{225}The Fair Labor Standards Act 181 (Ellen Kearns ed. 1999).

\textsuperscript{226}Walling v. Yeakley, 140 F.2d 830, 832 (10th Cir. 1944) (discussing the executive exemption and quoting Gray v. Powell, 314 U.S. 402, 413).

\textsuperscript{227}Assessing the Impact of the Labor Department’s Final Overtime Regulations on Workers and Employers: Hearing Before the Committee on Education and the Workforce House of Representatives (108th Cong., 2d Sess., Apr. 28, 2004), on http://edworkforce.house.gov/hearings/hrarchive.htm. Shortly after resigning as WHA, Tammy McCutchen agreed that by the 1990s a lawsuit challenging the validity of the salary thresholds as arbitrary and capricious should have and probably would have been successful. Telephone interview with Tammy McCutchen, Washington, D.C., Sept. 16, 2004.

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prompted courts to declare welfare regulations invalid.229

The Clinton administration’s failure to undertake any public initiative to raise the salary test level contrasted sharply with the alacrity with which the president himself asked Congress to raise another long unchanged threshold—that for Social Security coverage for domestic workers. As soon as the $50 per quarter threshold became politically embarrassing for him, when several of his prominent nominees were revealed to have violated the Internal Revenue Code by having failed to pay Federal Insurance Contributions Act taxes on behalf of their maids and nannies,230 President Clinton informed Congress that “[t]he financial threshold in the law is outdated, having remained unchanged for the past four decades. It is time to amend the law.”231 Congressional inaction since 1950 with regard to this threshold had favored domestic workers—at least those who worked for the fewer than one-quarter of employers who complied with the law.232 Although it was on notice that tens of thousands of domestic workers would lose benefits,233 no “conflicting interests of the many and differing constituencies” deterred Congress from quintupling the threshold and relieving many affluent recipients of maid services of em-


232Hearing on Proposals to Simplify and Streamline the Payment of Employment Taxes for Domestic Workers Before the Subcommittee on Social Security and the Subcommittee on Human Resources of the Committee on Ways & Means House of Representatives, 103d Cong., 1st Sess. 5 (Mar. 4, 1993) (statement of Marshall Washburn, IRS) (mimeo 5); Michael Wines, “Panel Eases Employers’ Tax on Domestic Workers,” NYT, May 12, 1993 (C18:3).

employment tax liability.234

Similarly, in 1992, when the DOL concluded that its regulation defining what it means for excluded white collar workers to be paid “on a salary basis” contradicted congressional intent as applied to public-sector employees, it promptly amended it to accommodate their employers.235 This dispute arose because under the DOL’s regulation an employer forfeited its exemption from the minimum wage and overtime provisions of the FLSA if it docked exempt employees for absences from work for personal reasons of less than a day.236 State and local government employers complained that compliance with this regulation would require them to violate public accountability laws prohibiting payments to government employees for time not worked that is not covered by accrued leave.237

Private employers, however, were less successful in demanding modification of what even Republican administrations regarded as a bedrock principle of regulation.238 Firms began lobbying Congress for relief after the Second Circuit, in a 1991 case prosecuted by the DOL during the first Bush administration, unanimously held that deductions for partial-day absences from the salaries of 24 employees triggered the employer’s loss of the exemption for approximately 400 employees who “were required to deduct from personal leave time or make up the hours they missed in order to avoid salary deductions” because the regulation did “not require that a deduction for an absence of less than a day actually have been made, but only that an employee’s pay be ‘subject to’ such a deduction.”239 A bill (the Workplace Leave Fairness Act) was introduced in the House in March 1993 to amend the FLSA to eliminate the problem for employers; the House Labor Standards Subcommittee held a hearing on the subject, but no further action was taken on the bill.240 To no avail at that hearing, William Kilberg, the former DOL

23529 CFR § 541.5d (1993).
23629 CFR § 541.118(a).
237FR 57:37666-77 (1992)
238See below chs. 16-17.
240H.R. 1309 (103d Cong., 1st Sess., Mar. 11, 1993) (introduced by Robert Andrews, Dem. NJ. By the end of the 103d Congress, the bill had 48 cosponsors. Andrews misstated the origins of the dispute by attributing it to a DOL ruling rather than a unanimous
solicitor who as a congressional witness has repeatedly represented big business in FLSA matters, abandoned all rhetorical limits in characterizing such decisions as “the civil law equivalent of capital punishment for spitting on the sidewalk,” which opened up the possibility of an aggregate backpay liability of $180 billion.241 Employers would have to wait another decade before finding the appropriate forum for pressing the issue again.242

The persistent absence of an explanation of the purposes underlying the ex-

appeals court decision and exaggerated the scope of the ruling by suppressing the fact that the employer forfeited the exemption only with respect to employees subject to the same policy. In addition, on the House floor he failed to explain why employees whose employer was privileged to require them to work unlimited overtime hours without additional compensation should have their salaries docked for going to a doctor’s appointment for a few hours: “The problem I am attempting to correct is what I believe to be an anomaly in the Fair Labor Standards Act.... While Congress intended the Fair Labor Standards Act to protect the hourly employee, recent Labor Department interpretations have placed the salaried employee under the provisions of the FLSA. For example, if an employer grants unpaid leave to a salaried employee for less than a full day, the employee is then given the status of an hourly employee under the FLSA. The same conversion then takes place for the entire salaried work force. I believe that this unintended consequence is harmful to the employer and the employee for two reasons. For the employer, an obligation is incurred to pay time-and-a-half wages for overtime worked by all hourly employees over the past 2 years. While I believe that the additional compensation is essential for hourly employees, Congress specifically intended for the creation of an exemption from the FLSA overtime rules for salaried employees. For the employee, the recent interpretations of the FLSA have hindered the ability of a workplace to be family-friendly. If a salaried employee requests to take a partial day off—beyond his or her allotted leave time—for a family emergency, an employer must either pay the employee for a full day’s work, dock pay for a full day, or deny the leave request. Therefore, the ability to achieve increased flexibility in workplace schedules is stifled.” CR 139:E622 (Mar. 11, 1993).


clusion of white-collar workers from the FLSA overtime provision came back to haunt workers as the judiciary felt freer to deny overtime coverage to some highly paid professional and managerial employees—whose status in terms of their job duties seemed grey—on the grounds that their high incomes made them prima facie low-priority candidates for protection. Big business, eager to shed regulation of the duties of its putatively excluded white-collar employees and to avoid FLSA suits filed by “quite high level executives...well-to-do individuals,” began to show more interest in setting a much higher salary level as the exclusive criterion for coverage. This initiative surfaced at a 1995 House Subcommittee on Workforce Protections hearing. Kilberg, appearing on behalf of a coalition of “significant employers of white collar employees” such as accounting firms, computer companies, media outlets, and engineering consultants, argued that “[i]f the rationale for protecting certain employees is that they lack the bargaining power to protect themselves, then the exemptions should be designed to separate those who possess adequate bargaining power from those who lack it. ... One promising solution would be to base exempt status for white collar employees...on the amount paid to each employee....”

Appearing on behalf of the Labor Policy Association, “an organization of the senior human resource executives of 220 of the nation’s largest corporations,” which employed 11 million workers or 12 percent of the nonfarm private-sector

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243 As a writer for the NBC Nightly News with a weekly salary of a thousand dollars observed: “We’re proud of the work we do.... We think it’s very important work and we think we do it very well. But it’s not brain surgery and it’s not painting “Mona Lisas.” We are just not creative artists. We are journalists.” Alan Finder, “Are NBC News Writers Professionals? In Lawsuit, Writers Decline Honor,” *NYT*, July 14, 1991 (12:1, at 3. nat. ed.).

244 E.g., Freeman v. National Broadcasting Co., 80 F.3d 78, 86 (2d Cir. 1996) (FLSA is “not a sword by which writers and producers at the pinnacle of accomplishment and prestige in broadcast journalism may obtain a benefit from their employer for which they did not bargain”).


247 *Hearings on the Fair Labor Standards Act: Hearings Before the Subcommittee on Workforce Protections of the House Committee on Economic and Educational Opportunities* at 77-78 (statement of William Kilberg).
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work force, Maggi Coil amplified and specified Kilberg’s suggestion:

We believe that the exempt/non-exempt rules need to be simplified. There should be some nexus between the amount of compensation earned by an employee and eligibility for the exemption. If an employee is highly paid, who cares whether he or she is engaged in production or management, or is exercising independent judgment or discretion. If an employee is being paid $40 per hour, to say that he or she must be paid $60 for each hour over forty because he or she is not being paid “on a salary basis” does not pass the common sense test.

We realize that this is easier said than done. What is the magic number that divides a well-compensated employee from one who is on the “lower rungs” of the economic ladder? ... There are no easy answers and you can be sure that no matter what you come up with there will inevitably be anomalies at the margins.

Despite these complexities, we believe the current crisis should compel you to pursue a solution because the current problems are well beyond “marginal.”

Coil’s point might have made sense if the purpose of overtime regulation were to help workers “make ends meet” by increasing their incomes by means of overtime premiums. If, however, that purpose is the prevention of overtime work, then the workers’ salaries are irrelevant.

The following year the Flexible Employment Compensation and Scheduling Coalition—which included a heterogeneous group of employers and associations of large and small employers employing a large proportion of the workforce such as Boeing, Eastman Kodak, General Electric, Hewlett-Packard, the NAM, NRA, National Federation of Independent Businesses, and the Chamber of Commerce of the United States—submitted Coil’s statement verbatim at a Senate Labor and Human Resources Committee hearing on the FLSA. The Labor Policy Association also submitted to the House Workforce Protections Subcommittee a paper that called for “chang[ing] the white collar exemption to a ‘highly compensated employee’ exemption defined solely by salary or wages paid. This would retain the current approach of covering all employees not excepted but would simply state

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248 Hearings on the Fair Labor Standards Act: Hearings Before the Subcommittee on Workforce Protections of the House Committee on Economic and Educational Opportunities at 18 (statement of Maggi Coil).

249 Hearings on the Fair Labor Standards Act: Hearings Before the Subcommittee on Workforce Protections of the Committee on Economic and Educational Opportunities House of Representatives at 23.

250 See below chs. 16-17.

that, once an employee’s wages or salary reached a certain level, he or she no longer has a statutory entitlement to overtime premiums.”252

With such proposals—Coil’s $40 an hour figure would have equated to an annual salary of $80,000—big business encountered some interest on the labor movement’s part. Since Kilberg emphasized that “no one on our side of the table...is urging that the assistant deli manager be characterized as an exempt employee. We are concerned about accountants, engineers, paraprofessionals,”253 the United Food and Commercial Workers International Union representative, assistant general counsel Nick Clark, whose chief objective in testifying was to urge updating the obsolete salary level, perceived the common ground:

this morning, the employer proposals seemed to coalesce for a bright-line test to solve many of these problems. In other words, if the salary levels were sufficiently high..., then workers above that salary level would not have to worry about the salary basis test regulations.

Now that seems to be something we might be able to work with. Certainly, workers that are making over $100,000 a year, I think we can all agree, should be salaried and not have to worry about docking regulations. I think the figures that were floated out by Mr.}


253Hearings on the Fair Labor Standards Act: Hearings Before the Subcommittee on Workforce Protections of the Committee on Economic and Educational Opportunities House of Representatives at 120. A few weeks later, Kilberg published an op-ed piece in the Wall Street Journal summarizing Big Business’s position. William Kilberg, “A 1938 Law that Hurts Workers More Than It Helps Them,” WSJ, May 10, 1995 (A19:3). After having heard from Nick Clark, the UFCW attorney who testified at the hearing, about the testimony, the present author submitted a letter to the editor to the Wall Street Journal (with a copy to Kilberg) on May 10, 1995, responding to Kilberg and calling, tongue in cheek, on employers, if they were “seriously interested in deregulating labor relations,” to “seize the opportunity” to reach agreement with unions on a higher, dispositive salary level. Although the Journal did not publish the letter, on July 31 and Aug. 3, 1995, the author received a telephone call from Sandra Boyd, assistant general counsel of the LPA. Stating that she had read and liked the letter, she asked whether the author might be interested in testifying at the counterpart Senate hearings in the fall or spring, since congressional committees liked to hear testimony from academics. Boyd stated that LPA members might be able to accept a salary level cutoff of $40,000 to $50,000, though she conceded that restaurant owners were not enthusiastic about such a proposal. Finally, she observed that although the AFL-CIO wanted the salary level increased, it did not want to open the FLSA up for debate for fear of other changes.
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Kilberg were six-figure incomes and things of that nature. ...

What we are concerned about is workers who have had their wages and salaries eroded over 20 years of inflation, and who are on the low end of the scale, not the highly compensated workers that make six-figure incomes that Mr. Kilberg referred to. 254

The UFCW was so conciliatory that when California Democratic Representative Lynn Woolsey asked the obvious question as to whether it would not be "simpler just to pay everybody overtime, except for business owners," Clark declared: "we certainly are not suggesting that. We think that the salary exemption makes sense for a class of workers, and it's always been there in the Act, and certainly I'm on salary, and I don't have an objection to that." 255 Such acquiescence was remarkable since the MWSC had reported that on one view overtime exemptions had become "anachronistic" in light of the widespread approval of the 40-hour week; while the premium penalty's employment-spreading effect had become irrelevant, universalizing it would "reinforce the acknowledged public acceptance of the 40-hour workweek and...provide additional compensation for inconvenience and added risk of injury associated with overtime work." 256 When Clark repeated that "we, on the side of labor, would entertain" exempting from overtime everyone with a six-figure income, the chairman, North Carolina Republican Cass Ballenger, ended the hearing by observing that, regardless of whether Clark or Kilberg had brought up the $100,000 figure, "there might be a point of

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254 Hearings on the Fair Labor Standards Act: Hearings Before the Subcommittee on Workforce Protections of the Committee on Economic and Educational Opportunities House of Representatives at 100.

255 Hearings on the Fair Labor Standards Act: Hearings Before the Subcommittee on Workforce Protections of the Committee on Economic and Educational Opportunities House of Representatives at 118. Oddly, the chief characteristic that Clark used to explain why the overtime claims of workers with six-figure incomes were not a concern to the UFCW was not their high standard of living or the bargaining power that made possible the high salary; rather the income was an indicator of workplace autonomy and self-direction: "The reason the employer is paying these six-figure incomes to these workers is because they expect to exercise judgment as to how they allocate their time. They pay for a job to be completed. They don't tell the worker how to do the job, they say, here's the job, you get it done...and you work the number of hours it takes...." Id. 114, 115. These criteria are traditionally used to identify independent contractors, who are not covered by the FLSA or other labor-protective statutes, whereas executive and administrative employees, no matter how highly paid, are universally recognized as controlled by the employer and thus in an employment relationship.

256 Report of the Minimum Wage Study Commission 1:120.
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discussion there...."257 But if there was, no one pursued it: when Clark testified on a different aspect of the FLSA before the same House subcommittee four years later, he observed that although in 1995 committee members and employer representatives had agreed that the salary levels were obsolete, neither the committee nor any employer had proposed a bill rectifying even that inequity.258

The only congressional initiative even remotely embodying Clark’s proposal was undertaken by Wisconsin Republican Representative Thomas Petri, who introduced identical bills in the 104th and 105th Congress in 1996 and 1997 that would have amended the exclusions and exemptions section of the FLSA to exclude from minimum wage and overtime coverage “any employee whose rate of annual compensation is not less than $40,000.”259 No action was taken on either of these bills—the first of which had no other supporters, and the second only three—which, like several bills in 1939-40, would have applied to all employees regardless of whether they fell into the three statutory white-collar categories.260

Ironically, Petri’s purpose was not to protect workers from overreaching employers; on the contrary, his proposal was designed to

create an income threshold that automatically exempts from FLSA scrutiny the highest paid strata of the workforce. This would directly reverse the trend toward questionable and irrational overtime awards for highly compensated employees. There is no reason that the FLSA, which was passed to protect laborers who “toil in factory and on farm,” and who are “helpless victims of their own bargaining weakness,” should ever be interpreted to protect workers making high five-figure or six-figure incomes.261

Despite Petri’s tendentious legislative history, it was clear from his own arithmetic

257Hearings on the Fair Labor Standards Act: Hearings Before the Subcommittee on Workforce Protections of the Committee on Economic and Educational Opportunities House of Representatives at 121. In 2003 the UFCW objectively repudiated Clark’s initiative by rejecting the DOL’s proposed regulation excluding (minimally defined) white-collar workers with salaries in excess of $65,000. “Advocates for Workers, Business Speak Out on Overtime Changes,” LRR 172:323-26 at 324 (July 7, 2003); see also below ch. 16.


260See above ch. 10.

as well as from reality that many workers with intermediate five-figure incomes lacked the bargaining power to resist employer demands to overwork free of charge.

By the mid-1990s, inspired perhaps by the statutory success achieved by employers of computer workers, firms began agitating and propagandizing Congress on behalf of yet another categorical exclusion from overtime regulation—so-called inside sales personnel. Employers’ strategy this time was to present as congressional hearing witnesses hourly-wage employees willing to testify that they found it restricting to work only 40 hours a week (for employers that prohibited overtime work because they refused to pay time and a half) and preferred to work on a salary more than 40 hours a week without overtime premiums in order to obtain more in commissions and bonuses. The principal logical impediment to achieving employers’ goal of equating inside sales workers to the “outside salesman,” whom Congress had deprived of overtime protection ever since 1938, was that the original exclusion was premised on the alleged difficulty, if not impossibility, for employers to monitor, let alone, control the number of hours worked by sales employees far away from managerial eyes. Inside sales workers, tethered to telephones, fax machines, and computers at corporate headquarters, constituted no such challenge to supervision, but, as the chief congressional sponsor of the exclusionary measure demonstrated, mere logic need not be an impediment. In the words spoken by Illinois Republican Congressman Harris Fawell in 1997 to one of the aforementioned inside sales employees eager to be liberated from the 40-hour week: “You might say that you are a traveling salesman without the car, you do not need the car because you have the computer...and a law drafted in 1938 did not foresee any of that.”

Thus when Fawell introduced H.R. 2888 a few months later, its exclusion appeared to be a loophole not even in search of a (publicly articulable) rationale.

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265 See above ch. 2.

266 Hearing on the Treatment of Inside Sales Personnel and the Public Sector Volunteers under the Fair Labor Standards Act at 29.
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That rationale that dared not speak its name was clearly enunciated by an opponent during House floor debate: “The Sales Incentive Compensation Act is simply a thinly veiled scheme for employers for boost their profits by increasing sales while simultaneously decreasing benefits to their employees.... Employees who work long hours but are unable to make significant sales to boost their own commissions will receive little or no additional pay for the extra hours they work.” Fawell’s lack of comprehension of the historical origins of the exclusion culminated in his assertion that: “Salesperson[s] who work away from their employer’s premise...were exempt, allowing them to work as many hours as they wished.... This exemption was granted on an idea that professional salespeople work irregular hours in response to their customers’ needs....” So little “professional” were these salesmen, however, that Stein in his report observed that “while it is absurd on its face to speak of an executive...who is paid only $12 a week, it cannot be denied that a man can earn as little as $12 a week and still be an outside salesman.”

The bill, divertingly titled, “Sales Incentive Compensation Act,” would have created a new § 13(a) exclusion for any sales worker if: her position required “specialized or technical knowledge related to products or services being sold”; her sales were predominantly to those to whom she had made previous sales or her position did not involve initiating sales contacts; she received as base compensation, “without regard to the number of hours worked,” a sum equal to not less than 1.5 times the minimum wage multiplied by 2,080 (or $16,068), plus compensation based on each sale attributable to her, which in the aggregate equaled at least 40 percent of $16,068 (or $6,427.20 or a grand total of $22,495.20); and that the rate of compensation on individual sales above the $6,427.40 were no less than the aforementioned 40 percent.

In spite of this “ludicrous” salary threshold for a “professional,” the bill’s Democratic cosponsor, Robert Andrews, asserted that “our bill guarantees security and protection for workers. The Sales Incentive Compensation Act ensures that lower earning workers cannot be exploited or denied the protections of time-and-a-

269 Stein Report at 52.
half overtime for work beyond a 40-hour week. The bill establishes a stringent test which guarantees that salespeople cannot be exempted from the wage and hour laws unless they receive a substantial minimum salary and are guaranteed the opportunity to earn significant commissions or incentive-based compensation...."272 Andrews failed to address the question as to how his proposal could avoid triggering the race to the bottom that mandatory hours norms are designed to prevent—namely, that labor market pressures ultimately force many employees to work the same abnormally long hours that a few initially accept in order to increase their individual income.273

In connection with the subcommittee mark-up session on March 5, 1998, Labor Secretary Alexis Herman “complained that the overall design of the expanded exemption clearly shifts business risk from employers to employees. Those who work long hours, but, for whatever reason, are unable to make significant sales will receive little or no additional pay for the extra hours they work....” The ranking Democrat on the subcommittee, Major Owens of New York, argued that: “Since the employer is receiving a direct benefit from the employee’s labors for the employee’s entire work period, why shouldn’t the employer be required to pay overtime when the employee is required to work more than 40 hours a week?” Owens indicated that he could support the bill if it included the same $58,000


273 The former Deputy Wage and Hour Administrator, John Fraser, and his colleagues, for all their critical acumen in evaluating the Bush administration’s regulations in 2004, adopted what for long-serving enforcers of the country’s principal tool of fair labor standards was an astonishingly narrow conception of the larger purposes of the FLSA. In reasonably rejecting the possible criticism that workers should accept that some may lose overtime protection because overall economic disruption would be avoided and job growth promoted, they observed that “[m]any U.S. workers...simply don’t operate at the ‘macro’ level—they have to find the means to feed, house, clothe, transport, educate, and care for their families every week. Workers who lose up to one-quarter of their income (and may still be required to work excessive hours to keep their jobs) will find little solace or satisfaction in hearing that some workers someplace else may have experienced an increase in their base pay (to maintain exempt status), or started getting paid overtime..., or had their hours cut back (to 40 hours per week to avoid overtime pay)....” John Fraser, Monica Gallagher, and Gail Coleman, “Observations on the Department of Labor’s Final Regulations ‘Defining and Delimiting the [Minimum Wage and Overtime] Regulations for Executive, Administrative, Outside Sales and Computer Employees” at 7 n.9 (July 2004), on http://www.aflcio.org/yourjobeconomy/overtimepay/upload/OvertimeStudyTextfinal.pdf.” The attitude they described explains exactly why mandatory, legally coercive norms are required to prevent atomized workers from seeking to work long hours to make ends meet, thus setting in motion an anarchic process that results in longer hours for all workers.
annual threshold that Congress had established for computer industry employees, but exclusion of workers earning no more than $22,600 a year from overtime protection was a ""horrific policy."" These objections notwithstanding, the subcommittee reported the bill to the full committee, which voted in favor of reporting out the bill with minor modifications requiring the excluded employee to have ""a detailed understanding of the needs"" of buyers and to exercise discretion in what she offers to sell. In contrast, the committee rejected Owens' proposals to increase the salary threshold to $40,000 and to prohibit employers from requiring employees to work overtime against their will.275

In reporting out the bill, the Republican majority on the Committee on Education and the Workforce had no more robust refutation of Democrats' criticism than the belief that ""the specter of employers forcing their professional and skilled sales force to spend long hours in the office, against the employees' wishes, when they are not making additional sales (and thus increasing their income) is simply not realistic."" On the contrary, as the minority members pointed out, employers would have ""a very powerful incentive to require...an employee to work as many hours as possible"" since they would have no FLSA obligation to pay employees anything who made no sales during overtime work and even for those who do make sales, employers would be required to pay only 40 percent of the rate required during the 40-hour week.277

A week after the committee report had been filed the House debated the bill. In a masterful illustration of obfuscation, cosponsor Andrews asserted that his bill was not one that ""divests people of overtime,"" but rather ""appropriately invests a carefully selected number of people with an opportunity to better themselves."" While not denying that the number of sales workers who would meet the exemption criteria totaled, according to a DOL estimate, 1.5 million workers, Andrews insisted that the bill applied only to a ""carefully selected group of people who are engaged in the process of doing better by working more."" Instead of explaining why ""working more"" for employers that disdained being subject to overtime


275Deborah Billings, ""House Committee Agrees to Expand FLSA Exemptions for Sales Staff, Young Drivers,"" DLR, Apr. 2, 1998, at A-6.


277H. Rep. No. 105-558: Sales Incentive Compensation Act at 18 (quote), 19 n.5.1.

278CR 144:4470 (June 10, 1998).

279Even the Employment Policy Foundation, a big business organization, admitted that the figure was 540,000. ""Proposed FLSA Inside Sales Exemption Would Have Limited Effect, Study Says,"" DLR, No. 87, May 6, 1998, at A-2.
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regulation is "beneficial" for employees, he praised the bill for doing away with an "anomaly" by treating a salesworker "the same if she is sitting in the office making the same as she would be if she is driving out on the road and making the sales."\textsuperscript{280} Unconcerned with the fact that no "anomaly" had ever existed because the differential treatment was rooted in perceived differences in employer control, the bill's supporters declared that it was "time to unleash the salespersons...."\textsuperscript{281} Either from lack of principle or a desire to ward off the worst in a lost cause, Owens, the Democrats' floor leader on the bill, abandoned even the aspirational norm of shorter hours to offer a monetized compromise: "We could have total bipartisan cooperation if we really recognized what is at the heart of this controversy at this point. It is money. It is only money; $22,600 is not a proper cutoff point." Owens mentioned a compromise range between $40,000 and $57,000,\textsuperscript{282} but none of the bill's proponents responded, and, instead, Owens offered an amendment prohibiting an employer from requiring an employee exempt under the bill to work more than eight hours a day or 40 a week unless the latter gave voluntary consent "and not as a condition of employment...." Fawell rejected the amendment because no other FLSA exemption was subject to such a condition,\textsuperscript{283} while Andrews asserted that it "would unduly complicate matters...." The House rejected the proposal 181 to 246 and passed H.R. 2888 by a vote of 261 to 165,\textsuperscript{285} but the Senate did not take up the bill, which died for the 105th Congress.

Despite opposition by the Clinton administration to the inside sales employee provisions,\textsuperscript{286} the House passed the same exclusionary provisions as part of a Republican minimum wage bill in 2000,\textsuperscript{287} but it, too, failed to be enacted during

\begin{itemize}
\item \textsuperscript{280}CR 144:4470.
\item \textsuperscript{281}CR 144:4472 (Rep. John Peterson, Rep. PA).
\item \textsuperscript{282}CR 144:4472.
\item \textsuperscript{283}FR 144:4474.
\item \textsuperscript{284}FR 144:4475.
\item \textsuperscript{285}FR 144:4488-89, 4490-91 (June 11, 1998).
\item \textsuperscript{287}The provision was first a separate bill, H.R. 1302 (106th Cong., 1st Sess., Mar. 25, 1999) (John Boehner, Rep. OH, and Andrews). It then reappeared as part of a Republican minimum wage bill: H.R. 3833, § 3 (106th Cong., 2d Sess., Mar. 6, 2000) (Rep. John Shimkus, Rep. IL), and again in H.R. 3846, § 3 (106th Cong., 2d Sess., Mar. 6, 2000) (Shimkus). Democrats' proposal to recommit the latter bill in order to strip it of its exclusions of inside salesworkers, computer employees, and funeral directors was defeated 243 to 181 and the bill itself then passed 282 to 143. CR 146:H900-902 (Mar. 9, 2000). By virtue of a complicated procedural rule, these FLSA provisions were then appended to
\end{itemize}

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the 106th Congress. Two more bills were introduced in the 107th Congress embodying the same exclusion: one was a tax bill with the FLSA provisions attached to it, while the other, H.R. 2070, was a dedicated inside sales exemption measure, whose sponsor outlandishly mischaracterized it as "a very narrow, technical amendment" to the FLSA.

The day after the latter bill's introduction, the House Workforce Protections Subcommittee held another hearing on the issue. The testimony of J. Randall MacDonald, senior vice president for human resources at IBM Corporation, proved to be the most revelatory of all that Congress received on the subject. Observing that "the exemption that is the closest match for our 'inside sales' employees is the 'administrative' exemption," which the DOL and the courts had ruled did not apply to them because they were "the equivalent of production employees," producing sales, MacDonald lamented that "even if we put all our legal resources behind a legal challenge, we do not think we could successfully challenge the 'inside sales' classification in court." Hence IBM's request for congressional intervention. In spite of his admission that Congress in 1938 had exempted outside salesworkers because of "the difficulty in tracking overtime," MacDonald could devise no more logical basis for shoehorning inside salesworkers into the same classification than that: "Unfortunately, the authors [of the FLSA] never envisioned the networked Internet-based business operations or the need for 'inside sales' reps." Nevertheless, acknowledging a place for logic in political-economic discourse, he proceeded to explain why IBM—which "worked hard in our sales call centers to build a climate that supports...risk-taking"—eschewed statutorily imposed penalty overtime rates and preferred to shift the risk of non-performance


292The Sales Incentive Compensation Act: Hearing at 44 (2001). Despite this realism, MacDonald, presumably driven by IBM's own ideological needs, erroneously asserted that the FLSA treated outside salesworkers as "professional salaried employees." Id. at 42. The classification has in fact never had anything to do with "professionals."
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to its employees:

It is logical to ask why IBM does not simply accept the increased cost of overtime payments and enable the employees to work longer hours to drive higher performance. We would, in fact, be willing to increase compensation if the payments were linked to increased sales performance. However, under FLSA, these increased costs would result from overtime hours worked and not sales performance. The fundamental business model of ibm.com does not support increased costs that are derived simply from more hours worked rather than increased sales.  

At the subcommittee mark-up of H.R. 2070 on June 27, 2001, Representative Owens tried to call the rhetorical bluff of the bill’s supporters by proposing to raise the salary threshold to 6.5 times the minimum wage (or $69,628): “‘They say we should treat these workers like professionals,’ Owens said. ‘Fine. Let them be paid like professionals.’” But both his proposal and Representative Lynn Woolsey’s proposal to make inside salesworkers’ overtime work voluntary lost on party-line votes. H.R. 2070 was approved and reported to the House Committee on Education and the Workforce, but, unlike its two immediate predecessors, the full committee failed to act on it, leaving the issue dormant for the time being.

In the interim between its hearings in 1995 and 2000, Ballenger’s Subcommittee on Workforce Protections requested that the Government Accounting Office (GAO) provide it with information on employer compliance with the white-collar exclusions. The GAO dutifully recounted that: “The purpose of the overtime provision was to shorten the work-week to a more reasonable 40 hours. This was expected to result in less employee fatigue, fewer accidents, higher productivity and efficiency, and more employee time for education and family duties.” Yet it never again referred to these purposes, which did not inform its analysis. Nevertheless, the GAO did submit its estimate that in 1998 between 19 and 26 million full-time white-collar workers accounting for between 20 and 27

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298 GAO, Fair Labor Standards Act at 5. It went on to note that “[b]y requiring overtime premium pay, it was expected that employers would hire more workers to avoid the extra wage costs, and that workers would be assured additional pay to compensate them for the burden of a week in excess of 40 hours,” only to mention the MWSC’s aforementioned dismissal of the relevance of these considerations for excluded white-collar workers. Id.
percent of all full-time wage and salary workers\textsuperscript{299} "would most likely be properly classified as exempt workers under the DOL exemptions."\textsuperscript{300}

That more white-collar workers excluded from overtime regulation worked overtime during the same 15 years is hardly surprising: whereas 35 percent of them worked more than 40 hours a week in 1983, by 1998 the figure had risen to 44 percent; the comparable figures for covered white-collar workers were 15 and 19 percent, respectively. The trend among those working more than 50 hours was even starker: the proportion of excluded white-collar employees rose from 10 to 15 percent, while among their covered counterparts the increase amounted to only 1 percent—from 4 to 5 percent.\textsuperscript{301}

The GAO also documented the drastic impact of the DOL's failure to update the salary levels by estimating that, based on the salary-level test, in 1975 30 percent of the full-time workforce would have been automatically "nonexempt" in contrast to only 1 percent in 1998. Likewise, in 1975 30 percent would have been "nonexempt" unless they met the percentage limitation on performing nonexempt work, whereas by 1998, the long duties test would apply to only 8 percent of the workforce. Finally, in 1975, 40 percent could have qualified as exempt under the short duties test in contrast to 91 percent in 1998.\textsuperscript{302} In order to reflect the same level of purchasing power in 1998 as in 1975, the short-test salary of $250 would, the GAO determined, have to be raised to $757.\textsuperscript{303}

Employers and state and local government representatives told the GAO that the traditional limits of the white-collar exemptions are outdated in the modern work place. They believed that certain highly skilled, well-paid line workers should be treated as exempt workers because they have the knowledge equivalent to an exempt professional. Officials from manufacturing employers pointed to new technology used in factory work places, which they said required advanced technical skills but required far less traditional "manual" labor. Moreover, they told us that while these workers may have to follow precise written guidelines to perform their work, prescribed procedures were key to modern quality control.\textsuperscript{304}

What employers did not tell the GAO and what it never occurred to the GAO to ask, however, was why any of these developments—which constituted firms'
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acknowledgment of the convergence of blue- and white-collar workers—should justify depriving these non-degreed "technicians" of protection against overtime work rather than conferring such protection on the professional engineers who allegedly perform comparable work. Inadvertently employers reinforced the reality of this convergence by stressing their belief to the GAO that "adherence to strict written guidelines—one major distinction between exempt and nonexempt workers—is necessary in a modern, efficient work place."305 In other words, by conceding that they control and have to control white-collar workers just as they do their blue-collar counterparts, employers have objectively abandoned any pretense that any principled basis remains for treating the two groups differently with regard to overtime. That employers made this admission against interest to the end of requesting that their imposition of such guidelines should no longer disqualify them from enjoying the exemption of closely controlled white-collar workers would be amusing if the GAO had not failed to draw the logically compelling conclusion that whatever justification may once have undergirded the dichotomous treatment of production and office workers, socioeconomic convergence should result in legal convergence. The GAO's failure was all the more startling in light of its recognition that "[i]n recent years, the distinctions between production and nonproduction workers, and between professional and technical production workers have been increasingly blurred."306

Employers' proposal of this new category of excluded nonsupervisory "knowledge" workers would necessitate a new definition in order to overcome the definitional obstacle that administrative and professional employees must exercise the kind of discretion and independent judgment307 that would be incompatible with the aforementioned guidelines. The expansionist proposal also encountered strenuous resistance from unions, which correctly pointed out that "today's computer-assisted technicians are the modern equivalents of traditional factory workers...."308

Employers also pointed to differences between exempt and nonexempt status as creating difficulties in managing their workforce: imputing management's perspective to workers, firms claimed that covered workers had less flexibility in work shifts because any work beyond 40 hours had to be paid at time and a half "even if the employee is planning on working fewer than 40 hours in the next workweek" (as if that kind of autonomous unilateral power to reduce hours were a common feature of factory workers' lives).309

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305 GAO, Fair Labor Standards Act at 22.
308 GAO, Fair Labor Standards Act at 33.
Finally, the GAO discovered that retail firms, dissatisfied with the special 40-percent tolerance that Congress had granted in 1961, were demanding elimination of all limits on the proportion of nonmanagerial work. Because the advent of 24-hour-a-day stores with many part-time workers and managers on each shift meant that the latter "must pitch in and work the cash register or stock the shelves," employers did not want to have to pay extra for the longer hours they were imposing on managers. In response, unions complained that employers, apparently in an opportunistic effort to avail themselves of the FLSA's exclusions, "had adjusted their work places to include many new levels of supervision in order to create exempt executive positions." For example, a grocery store that in the past had been run by one or two store managers, was now divided into many different departments so that each departmental manager could be treated as an exempt executive. The GAO could not gainsay the unions' contention that judicial construction of the executive duties tests had led to "inadequate protection of low-income supervisory employees." Indeed, the agency confirmed that its review of 32 federal cases decided between 1994 and 1998 dealing with the executive duties test found "hardly any instances in which a court overturned an employer's classification of a lower-income supervisor as an exempt executive."

Despite the fact that the duties test was already more lenient for the retail trade and service sectors—permitting "executive employees" to spend as much as 40 per cent of their time on grunt work before they forfeited their bona fides—and that the judiciary had interpreted the short test's requirement that an executive employee's primary duty consist of management so limply that it was met even where Burger King assistant managers devoted more than half of their time to non-exempt work, employers complained that even this restriction was discriminatory because their managerial employees had to perform the same routine "nonexempt"

310GAO, Fair Labor Standards Act at 32.
311GAO, Fair Labor Standards Act at 29.
314Donovan v. Burger King, 675 F.2d 516, 520-22 (2d Cir. 1982). The court claimed that "much of the oversight of the operation can be carried out simultaneously with the performance of non-exempt work...." Id at 521. Ironically, in 1940 when the American Bankers Association proposed a stripped-down executive test, even it conceded that "primary duty" meant 51 percent managerial functions. Official Report of the Proceedings Before the Wage and Hour Division of the Department of Labor In the Matter of a Hearing on Proposed Amendments to Part 541 of Regulations with respect to the Definition of the Terms "Executive, Administrative, Professional...Outside Salesman" as They Affect Employees in Banking, Brokerage, Insurance, Financial and Related Institutions at 38-39 (July 9-10, 1940) (A. Wiggins).
work as their own subordinates while they were engaged in supervising the latter. Because the Second Circuit had ruled that “assistant managers could be exempt executives even if they spent most of the day cooking hamburgers,” the GAO also found that the Burger King decision had intimidated the DOL into requiring its investigators to consider percentage limitations as only one factor in determining the worker’s primary duty, with the result that only in “very limited situations” could an employer’s classification of an employee supervising two or more workers be challenged.

Thus the overriding impression that the GAO’s description of its interviews with employers and unions conveyed was that, apart from updating the salary levels, labor tacitly accepted the status quo, whereas employers demanded a significant overhaul of the duties tests. In other words, by acquiescing in the 60-year tradition of the massive exclusion of white-collar workers from hours regulation, the labor movement deprived itself of any principle on the basis of which it could criticize employers’ claims that modernization of the depression-era FLSA would properly require the exclusion of an even wider swath of white-collar dom. Unless they adopted the position that the categorical distinction between blue- and white-collar workers had been mistaken and pernicious even in the 1930s and made even less sense now than then, unions could not plausibly resist the extension of the exclusion to new types of white-collar jobs. To be sure, unions did, as noted, oppose the addition of a category of “knowledge” workers, but in contending that “the same principles underlying the historical limitations on work hours and requirements for overtime pay should apply to the modern workforce,” they were also subscribing to the entire unprincipled freight of the hodgepodge of regulations that led to the exclusion of 30 million white-collar workers.

A few months after receiving the GAO report, in yet another reprise, Ballenger’s Subcommittee on Workforce Protections held a hearing in May 2000 on White-Collar Exemptions in the Modern Workplace populated by familiar figures. Kilberg, appearing this time on behalf of the Chamber of Commerce, asserted in a written statement that:

In exempting individuals in a “bona fide executive, administrative, or professional capacity” from the FLSA, Congress made a judgment that such individuals are not “helpless victims of their bargaining weakness” who need federal intervention to obtain fair pay

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315 29 C.F.R. § 541.111(b) (2003).
318 See above ch. 2.
319 GAO, Fair Labor Standards Act at 33.
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and working conditions. These workers are better served by a system that allows them to negotiate their own pay arrangements rather than having a rigid hourly wage structure dictated to them.\textsuperscript{320}

The former solicitor of labor, quoting from the Senator Black’s 1937 FLSA committee report,\textsuperscript{321} misleadingly suggested that Congress had in fact been referring to white-collar workers. In fact, the Senate Education and Labor Committee had made no reference whatsoever to white-collar workers, and by the same illogic Kilberg could have claimed that Congress had also excluded farmworkers because they too were not “helpless victims of their bargaining weakness.” Continuing along the same pseudo-historical lines, he charged that “[o]ver time, the line between ‘blue-collar’ and ‘white-collar’ workers, which seemed so clear then [1937-38], has become blurred as radical changes have redefined America’s workforce.”\textsuperscript{322} Neither Kilberg nor anyone else at the hearing reflected on the fact that, since this indisputable blurring had entailed incorporation of large numbers of white-collar workers into the blue-collar industrialized-bureaucratic model, the legal consequence should have been paid rather than unpaid overtime for more workers. Similarly, when Kilberg opined of the production/administration distinction, which the DOL had devised to help identify bona fide administrative employees, that “[t]here is little reason to believe, in the modern economy, that a worker who brings experience, judgment, and discretion to bear in performing his duties should be treated differently depending on whether the subject of that expertise is the ‘product’ on which the employer’s economic success is built,”\textsuperscript{323} he failed, again, to explain why neither rather than both should be required to work overtime without compensation.

The LPA, the association of senior human resources executives of more than 200 leading corporations employing more than 12 million employees or 12 percent of the private-sector workforce\textsuperscript{324} which had appeared before the subcommittee


\textsuperscript{322}The Fair Labor Standards Act: White-Collar Exemptions in the Modern Work Place at 71.

\textsuperscript{323}The Fair Labor Standards Act: White-Collar Exemptions in the Modern Work Place at 73.

\textsuperscript{324}The Fair Labor Standards Act: White-Collar Exemptions in the Modern Work Place at 118.
before, filed a written statement pleading (ungrammatically) for a major expansion of the universe of excluded white-collar workers\textsuperscript{325}:

Another category of knowledge workers that should be considered under an updated administrative exemption are degreed administrative personnel who have independent responsibility that is greater than mere clerical functions, but that may not be as extensive as an executive secretary. These are individuals who are often key parts of an office team, who are experienced in performing their jobs and who are paid well, but fall outside of the current regulatory requirements. Frequently, these employees ask to be made exempt because of the higher status it confers upon them in the office. In some cases, they seek the flexibility that their exempt coworkers enjoy. Because of the regulations, employers frequently must refuse to "reward" employees with exempt status or face potential overtime violations.\textsuperscript{326}

Unable to devise any objective justification whatsoever that might be continuous with the DOL regulations for excluding yet more workers from overtime regulation, the largest corporations in the United States instead attempted to convince the public that it was the workers themselves who insisted on trading off overtime pay (or less overtime work) for the prestige that exclusion allegedly conferred on them in the minds of their less fortunate covered co-workers. If not with anyone else, this claim doubtless resonated with the subcommittee chairman, Cass Ballenger, himself a factory owner, who allowed as: "[T]o a very large extent, getting off the clock is a promotion."\textsuperscript{327} In an unorthodox, if not bizarre, innovation for labor standards legislation, the LPA then recommended enshrining this subjective status-driven exclusion in a waiver:

Employees above a certain income level ought to be allowed to waive their right to overtime if they choose and memorialize the waiver in an agreement with the employer. ... This would eliminate the problem where employers agree to make employees exempt in order to grant them a higher workplace social status or more flexible schedules. This proposal, which is the most progressive of the recommendations, would probably require

\textsuperscript{325}The LPA agreed with Kilberg that highly skilled and well-paid "knowledge workers" should be exempted, for example, by eliminating the production/administration distinction under the administrative employee exemption and the "absurd result" it creates. The \textit{Fair Labor Standards Act: White-Collar Exemptions in the Modern Work Place} at 118, 121.

\textsuperscript{326}The \textit{Fair Labor Standards Act: White-Collar Exemptions in the Modern Work Place} at 121-22.

\textsuperscript{327}The \textit{Fair Labor Standards Act: White-Collar Exemptions in the Modern Work Place} at 19.
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legislation, but still merits discussion.\textsuperscript{328}

The LPA linked this proposal to an approach more grounded in economic reality, although the employers organization was still unable to articulate a reason for means-testing overtime pay or protection other than the manifestly exaggerated claim that all white-collar workers with salaries above $40,000 were individually capable of fending off employer overreaching:

The FLSA exists to protect employees who cannot protect themselves from unscrupulous employers. As times have changed, more employees wield market power by virtue of their skills and experience. The LPA Task Force has long advocated a bright-line test that exempts employees above a certain salary level, such as $40,000. ... Setting an income threshold would eliminate...absurd results, such as requiring employers to pay overtime to highly skilled and trained personnel earning substantial salaries.\textsuperscript{329}

That an exclusively means-tested exclusionary criterion's time had still not come\textsuperscript{330} was apparent from the testimony of the UFCW’s assistant general counsel Clark, who refrained from resuming the debate on this point from mid-1990s. Instead, he emphasized that the “striking numbers” of excluded white-collar workers estimated by the GAO “suggest that additional consideration should be given to how Congress can limit the exemptions’ scope.”\textsuperscript{331}

\textsuperscript{328}The Fair Labor Standards Act: White-Collar Exemptions in the Modern Work Place at 125.


\textsuperscript{330}To be sure, since the LPA was well aware that one of the major components of its coalition, the National Restaurant Association, was opposed to a salary limit as high as $40,000, it is unclear how seriously it meant even this figure as an opening negotiating offer.

\textsuperscript{331}The Fair Labor Standards Act: White-Collar Exemptions in the Modern Work Place at 106 (written statement). The question of whether the UFCW fully understood the diminishing deterrence exerted by the time-and-a-half penalty even with regard to covered workers was raised by Clark’s statement that it “creates huge economic disincentives to work employees over 40 hours. But that is the whole idea of this legislation.” \textit{Id.} at 16. Significantly, Tammy McCutchen, shortly after resigning as WHA, admitted that, as a result of the increase in non-wage benefits, time and a half no longer exerted the same deterrence that it had in 1938. Telephone interview with Tammy McCutchen, Washington, D.C., Sept. 16, 2004.
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Appendix:
Ratio of the Salary Tests to the Minimum Wage and Inflation-Adjusted Salary Tests, 1938-2004

[W]here a regulation’s rationality is dependent on current socioeconomic conditions periodic review is essential to preserve that rationality.332

Table 4 and Chart 1 show the course of the relationship between the minimum wage and the long-test salaries from 1938 to 1997.333 Table 5 and Chart 2 display the ratio between the short-test salary and the minimum wage from the former’s inception in 1950 to 2004 (when it was reconceptualized as the standard-test salary).334 They all document that a regulatory salary level that was never high enough to protect white-collar employees from overreaching, has, through the passage of time, become irrational.

By the time the minimum wage reached $4.25 in 1991, the ratio of the long test to it fell below 1:1. In other words, employers could perversely yet (allegedly) lawfully pay long-test executive employees salaries lower than the minimum wage, while requiring them to work overtime free of charge. In 1975, when the minimum wage was $2.10 per hour, an exempt assistant manager earning $155 per week had to work 22 hours of overtime before her salary failed to cover the minimum wage plus overtime (on the basis of the minimum wage). By 1997, the same “bona fide executive” reached this point after only 30 hours of straight time. Seen from a


333 Table 4 and Chart 1 include every year in which the minimum wage or long-test (or pre-short-test) salary was raised. From 1938 to 1940 the salary test for executive and administrative employees was the same and professional employees were not subject to a salary test. From 1940 to 1963 the long-test salary for administrative and professional employees was higher than that for executive employees; from 1963 to 2004 the long-test salary for professionals was higher than that for the other two groups. The weekly minimum wage is computed as the product of the statutory hourly minimum wage and the maximum weekly number of sub-overtime hours (44 in 1938-39, 42 in 1939-40, and 40 thereafter).

334 Table 5 and Chart 2 include every year in which either the minimum wage or the short-test salary was increased; the short-test salary was not introduced until 1950. The weekly minimum wage is computed as the product of the statutory hourly minimum wage and the maximum weekly number of sub-overtime hours (44 in 1938-39, 42 in 1939-40, and 40 thereafter).
different perspective: by 1991, only a weekly salary of $319.30, or more than
double the salary test level, would have held her harmless against twenty-two hours
of overtime (at the minimum wage). Indeed, by 1997, even the short-test salary,
which was supposed to be high enough to avoid ambiguity in distinguishing bona
fide from mala fide executives, had fallen to a mere 20 per cent above the
minimum wage. For 1999 the DOL estimated that only 34,000 or 0.2 percent of
all exempt executive, administrative, and professional employees earned less than
$155 a week and only an additional 12,000 or 0.1 percent earned between $155
and $174, while only 231,000 or 1 percent earned less than the short-test salary of
$250. Indeed, more than 90 percent of all the other wage and salary workers also
earned more than $250 a week.\footnote{US DOL, WHD, Minimum Wage and Overtime Hours Under the Fair Labor Standards Act, tab. 11 at 33 (Jan. 2001). The WHD failed to explain how workers with salaries below the long-test level could be “exempt.”}

The increasing inadequacy of the salary thresholds over time can also be
examined in terms of the failure of the WHD/DOL to adjust them for rises in the
consumer price index. Table 6 and Chart 3\footnote{Table 6 and Chart 3 include every year in which the long-test (or pre-short-test) salary was increased.} reveal that the $30-a-week long test,
when originally created in 1938, was worth $400 in 2004 prices; it then rose
through 1963, when it peaked at $614, and fell to the equivalent of $542 in 1975,
when it was last increased. By 2004, the $155 salary level was worth 29 percent
of its inflation-adjusted value in 1975, 25 percent of its peak adjusted value in
1963, and only 39 percent of its adjusted value in 1938. Similarly, as seen in Table
7 and Chart 4,\footnote{Table 7 and Chart 4 includes every year in which the short-test salary was increased.} the $100-a-week short test at its establishment in 1950 was worth
$780 in 2004 prices; it peaked at an inflation-adjusted $969 in 1970 before falling
to $874 in 1975. Thus by 2004, the $250 salary level was worth 29 percent of its
adjusted value in 1975, 26 percent of its peak value in 1970, and only 32 percent
of its initial adjusted value in 1950. And even when the Bush administration raised
the short-test—now renamed standard-test—salary to $455 in 2004, it did not
amount to one-half its peak value in 1963.\footnote{See below ch. 17.}
### Planned Obsolescence of the Salary-Level Tests

Table 4: Ratio of Long-Test Salaries to the Minimum Wage, 1938-1997

<table>
<thead>
<tr>
<th>Year</th>
<th>Long-test executive/ administrative salary ($/week)</th>
<th>Ratio of Long-test to minimum wage</th>
<th>Long-test administrative/ professional salary ($/week)</th>
<th>Ratio of to minimum wage</th>
<th>Minimum wage ($/week)</th>
</tr>
</thead>
<tbody>
<tr>
<td>1938</td>
<td>30</td>
<td>2.7</td>
<td>11</td>
<td></td>
<td>11</td>
</tr>
<tr>
<td>1939</td>
<td>30</td>
<td>2.4</td>
<td>12.60</td>
<td></td>
<td></td>
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<tr>
<td>1940</td>
<td>30</td>
<td>2.5</td>
<td>50</td>
<td>4.2</td>
<td>12</td>
</tr>
<tr>
<td>1945</td>
<td>30</td>
<td>1.9</td>
<td>50</td>
<td>3.1</td>
<td>16</td>
</tr>
<tr>
<td>1950</td>
<td>55</td>
<td>1.8</td>
<td>75</td>
<td>2.5</td>
<td>30</td>
</tr>
<tr>
<td>1956</td>
<td>55</td>
<td>1.4</td>
<td>75</td>
<td>1.9</td>
<td>40</td>
</tr>
<tr>
<td>1959</td>
<td>80</td>
<td>2.0</td>
<td>95</td>
<td>2.4</td>
<td>40</td>
</tr>
<tr>
<td>1961</td>
<td>80</td>
<td>1.7</td>
<td>95</td>
<td>2.1</td>
<td>46</td>
</tr>
<tr>
<td>1963</td>
<td>100</td>
<td>2.0</td>
<td>115</td>
<td>2.3</td>
<td>50</td>
</tr>
<tr>
<td>1967</td>
<td>100</td>
<td>1.8</td>
<td>115</td>
<td>2.1</td>
<td>56</td>
</tr>
<tr>
<td>1968</td>
<td>100</td>
<td>1.6</td>
<td>115</td>
<td>1.8</td>
<td>64</td>
</tr>
<tr>
<td>1970</td>
<td>125</td>
<td>2.0</td>
<td>140</td>
<td>2.2</td>
<td>64</td>
</tr>
<tr>
<td>1974</td>
<td>125</td>
<td>1.6</td>
<td>140</td>
<td>1.75</td>
<td>80</td>
</tr>
<tr>
<td>1975</td>
<td>155</td>
<td>1.8</td>
<td>170</td>
<td>2.0</td>
<td>84</td>
</tr>
<tr>
<td>1976</td>
<td>155</td>
<td>1.7</td>
<td>170</td>
<td>1.8</td>
<td>92</td>
</tr>
<tr>
<td>1978</td>
<td>155</td>
<td>1.5</td>
<td>170</td>
<td>1.6</td>
<td>106</td>
</tr>
<tr>
<td>1979</td>
<td>155</td>
<td>1.3</td>
<td>170</td>
<td>1.5</td>
<td>116</td>
</tr>
<tr>
<td>1980</td>
<td>155</td>
<td>1.25</td>
<td>170</td>
<td>1.4</td>
<td>124</td>
</tr>
<tr>
<td>1981</td>
<td>155</td>
<td>1.2</td>
<td>170</td>
<td>1.3</td>
<td>134</td>
</tr>
<tr>
<td>1990</td>
<td>155</td>
<td>1.0</td>
<td>170</td>
<td>1.1</td>
<td>152</td>
</tr>
<tr>
<td>1991</td>
<td>155</td>
<td>0.9</td>
<td>170</td>
<td>1.0</td>
<td>170</td>
</tr>
<tr>
<td>1996</td>
<td>155</td>
<td>0.8</td>
<td>170</td>
<td>0.9</td>
<td>190</td>
</tr>
<tr>
<td>1997</td>
<td>155</td>
<td>0.75</td>
<td>170</td>
<td>0.8</td>
<td>206</td>
</tr>
</tbody>
</table>

# Planned Obsolescence of the Salary-Level Tests

## Table 5: Ratio of Short-Test Salary to the Minimum Wage, 1950-2004

<table>
<thead>
<tr>
<th>Year</th>
<th>Short-test salary ($/week)</th>
<th>Minimum wage ($/week)</th>
<th>Ratio of short-test salary to minimum wage</th>
</tr>
</thead>
<tbody>
<tr>
<td>1950</td>
<td>100</td>
<td>30</td>
<td>3.3</td>
</tr>
<tr>
<td>1956</td>
<td>100</td>
<td>40</td>
<td>2.5</td>
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<tr>
<td>1959</td>
<td>125</td>
<td>40</td>
<td>3.1</td>
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<tr>
<td>1961</td>
<td>125</td>
<td>46</td>
<td>2.7</td>
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<tr>
<td>1963</td>
<td>150</td>
<td>50</td>
<td>3.0</td>
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<tr>
<td>1967</td>
<td>150</td>
<td>56</td>
<td>2.7</td>
</tr>
<tr>
<td>1968</td>
<td>150</td>
<td>64</td>
<td>2.3</td>
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<tr>
<td>1970</td>
<td>200</td>
<td>64</td>
<td>3.1</td>
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<td>1974</td>
<td>200</td>
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<td>2.5</td>
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<td>1975</td>
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<td>250</td>
<td>134</td>
<td>1.9</td>
</tr>
<tr>
<td>1990</td>
<td>250</td>
<td>152</td>
<td>1.6</td>
</tr>
<tr>
<td>1991</td>
<td>250</td>
<td>170</td>
<td>1.5</td>
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<td>1996</td>
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<td>190</td>
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<tr>
<td>1997</td>
<td>250</td>
<td>206</td>
<td>1.2</td>
</tr>
<tr>
<td>2004</td>
<td>455</td>
<td>206</td>
<td>2.2</td>
</tr>
</tbody>
</table>

# Planned Obsolescence of the Salary-Level Tests

## Table 6: Long-Test Salary Thresholds Adjusted by the Consumer Price Index, 1938-2004

<table>
<thead>
<tr>
<th>Year</th>
<th>Executive/ administrative ($)</th>
<th>In 2004 $</th>
<th>Administrative/ professional ($)</th>
<th>In 2004 $</th>
</tr>
</thead>
<tbody>
<tr>
<td>1938</td>
<td>30</td>
<td>400</td>
<td></td>
<td>___</td>
</tr>
<tr>
<td>1940</td>
<td>30</td>
<td>403</td>
<td>50</td>
<td>671</td>
</tr>
<tr>
<td>1950</td>
<td>55</td>
<td>429</td>
<td>75</td>
<td>585</td>
</tr>
<tr>
<td>1959</td>
<td>80</td>
<td>517</td>
<td>95</td>
<td>614</td>
</tr>
<tr>
<td>1963</td>
<td>100</td>
<td>614</td>
<td>115</td>
<td>707</td>
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<tr>
<td>1970</td>
<td>125</td>
<td>606</td>
<td>140</td>
<td>678</td>
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<tr>
<td>1975</td>
<td>155</td>
<td>542</td>
<td>170</td>
<td>594</td>
</tr>
<tr>
<td>2004</td>
<td>155</td>
<td>155</td>
<td>170</td>
<td>170</td>
</tr>
</tbody>
</table>

Sources: Tab. 4; http://www.bls.gov

## Table 7: Short-Test Salary Threshold Adjusted by the Consumer Price Index, 1950-2004

<table>
<thead>
<tr>
<th>Year</th>
<th>Short-test salary ($)</th>
<th>In 2004 $</th>
</tr>
</thead>
<tbody>
<tr>
<td>1950</td>
<td>100</td>
<td>780</td>
</tr>
<tr>
<td>1959</td>
<td>125</td>
<td>808</td>
</tr>
<tr>
<td>1963</td>
<td>150</td>
<td>922</td>
</tr>
<tr>
<td>1970</td>
<td>200</td>
<td>969</td>
</tr>
<tr>
<td>1975</td>
<td>250</td>
<td>874</td>
</tr>
<tr>
<td>2004</td>
<td>455</td>
<td>455</td>
</tr>
</tbody>
</table>

Sources: Tab. 5; http://www.bls.gov
Chart 1: Ratio of Long-Test Salaries to the Minimum Wage, 1938-1997

- Exec/Adm Salary
- Adm/Prof Salary
- Minimum wage

Ratio Exec/Adm Salary to Min Wage (Right scale)

Ratio Adm/Prof Salary to Min Wage (Right scale)
Chart 2: Ratio of Short-Test Salary to Minimum Wage, 1950-2004
Chart 4: Short-Test Salary Threshold Adjusted by the Consumer Price Index, 1950-2004

In 2004 $
Employers Finally Get a Republican Administration with “Moxie”: The Proposed Regulations of 2003

"People aren’t evil; the rules are difficult."¹

What fundamentally set apart the public debates in 2003-2004 about revising the white-collar overtime regulations was that in earlier years—and especially in 1940 and 1949, the only occasions on which major changes were made other than raising the salary levels—both the Democratic WHD/DOL and employers, by and large, openly admitted that they were seeking to exclude more workers.² In contrast, in 2003-2004 the Republican administration and employer organizations went to elaborate lengths to convince the public that the substantive changes being proposed and adopted would actually produce a net transfer from the exempt to the non-exempt column.³ This counterintuitive outcome—that employers were advocating changes by means of a complex administrative law process that would require them to pay out more for overtime when they could have achieved the same end voluntarily without any amendments at all simply by treating additional employees as covered—was then explained away on the grounds that employers were primarily interested in clarifying the regulatory definitions and reducing the uncertainty and confusion that had led to proliferating litigation.

Although employers never expressly characterized the alleged net increase in the number of employees who would be covered by the overtime provision as their intention, the DOL and Republican members of Congress strongly implied that it


²What did not distinguish the 2003-2004 regulatory process from that in 1940 and 1949 was that on all three occasions Congress was also debating statutory amendments to the overtime provisions in the FLSA. See above chs. 10 and 14; William Whittaker, “The Fair Labor Standards Act: Overtime Pay Issues in the 108th Congress” (CRS, RL32215, Feb. 4, 2004).

³Nevertheless, the DOL was constrained to admit that congressional testimony in 2000 revealed that “business interests and employer groups advocated modernizing the regulations to exempt more classifications from overtime pay.” FR 68:15563 (Mar. 31, 2003).
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was at the very least the price that companies had to pay for greater certainty. In short, whereas in the past, analysis of the purpose and estimated results of their proposals to restrict coverage was facilitated by the relative openness and candor of the Democratic administrations and the employers that requested initiation of the amendatory process, in 2003-2004 the sheer density of the combined propagandistic fog disseminated by the DOL, employers organizations, and Republicans in Congress, despite its often risible implausibility, complicated assessment of the substance of the changes.  

The political processes that gave rise to the new regulations of 2003-2004 were uniquely and crucially shaped by the AFL-CIO’s exceptionally shrewdly conceived, ingeniously organized, and ferociously executed resistance to the Bush administration’s efforts to expand the exclusions of white-collar workers from overtime regulation—a campaign that was all the more remarkable given the labor movement’s drastically diminished strength in Congress over the last quarter-century. A principal reason for the AFL-CIO’s intensive involvement is straight-

5Typical was the explanation offered by Senator Michael Enzi (Rep. WY): “I can tell you small businesses realize it is going to cost them about $375 million a year in overtime. I don’t know how we can talk about a decrease in overtime when it costs them $375 million more in overtime, but to have the gray area cleared up they are willing to do that. Why are they willing to do that? Because right now that $375 million potential is for lawyers’ fees to decide gray areas. Who needs that? We would rather put the money in the workers’ pockets.” CR 150:S4796 (May 4, 2004).

6Compare Arthur Herzog, The B.S. Factor: The Theory and Technique of Faking It in America (1975). The evaluation in the text of employers’ and congressional Republicans’ propaganda does not mean that labor and congressional Democrats dispensed the truth and nothing but the truth. The relevant difference in this context between the substance of their propaganda styles lay in the fact that the former misrepresented their intentions and the qualitatively predictable outcomes (that is, whether more or fewer workers would wind up excluded from overtime regulation), whereas the latter at worst exaggerated the estimated number of workers who would lose their modicum of protection. This difference was in part a function of the fact that employers as the complainants proposed a radical expansion of the duties tests, about their motives for which they then dissimulated; in contrast, the AFL-CIO, as has always been the case with labor since 1938, acquiesced in the existing duties tests and applied a plausible cui bono? analysis to employers’ proposals.

6The AFL-CIO was also concerned about collective bargaining agreements: “And overtime for many white-collar jobs that are partially unionized—engineers’ assistants, for example—could be hard to win the next time contracts are negotiated. Similar problems arise for factory shift supervisors, whose overtime-earning jobs could fall under the new rules. ‘We’ve already been told by employers,’ says Kelly Ross, legislative representative for AFL-CIO, ‘that in the next round of discussions it’s going to be on the table.’” Jon
'The Proposed Regulations of 2003

forward: by 2003, more than half of the union membership was white-collared. From 1973 to 2003, unions' white-collar membership rose from 4,312,000, or a little less than one-quarter of the total, to 7,973,000 or 50.5 percent.1 Ironically, the increase in professional employees' unionization has been "driven by the decreasing possibilities for white collar workers to exercise independent judgment"—a development that directly contradicts employers' and the Bush administration's claims that the duties tests for professional and other workers have to be updated to reflect the growth in the number and proportion of workers in the modern workplace who exercise precisely such discretion and independent judgment.9

This dramatic increase in white-collar union membership may in part account for the AFL's and CIO's failure to have mounted similarly energetic campaigns in earlier years, though the fact that the most significant exclusionary expansions took place under the aegis of the Roosevelt and Truman administrations made it extremely unlikely that labor, or at least the CIO, would have engaged in an embarrassing public dispute with its patron. In 1952, a year after the appearance of his influential White Collar—which estimated that in 1948 white-collar employees

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1Department of Professional Employees, AFL-CIO, "Rising Tide: Professionals: The New Face of America's Unions" at tab. 2 at 19 (Sept. 2003), on http://www.dpeaflcio.org/pdf/2003_09_risingtide.pdf; US BLS, "Union Members in 2003" tab. 1 and 3 (Jan. 21, 2004), on http://www.bls.gov/news.release/union2.t03.htm. According to BLS data for 2003, 727,000 or 4.7 percent of 15,465,000 employees in management, business, and financial occupations were union members; 4,604,000 or 18.1 percent of 25,418,000 in professional occupations; 533,000 or 8.2 percent of 13,378,000 in sales occupations; and 2,109,000 or 11.1 percent of 18,945,000 in office and administrative support occupations. US BLS, "Union Members in 2003" tab. 1 and 3. Prior to 2003, BLS used somewhat different categories. According to BLS data for 2002, 1,005,000 or 5.8 percent of 17,296,000 executive, administrative, and managerial employees were in unions; of 19,674,000 professional specialty employees, 3,783,000 or 19.2 percent were union members; of 4,349,000 technicians and related support employees, 469,000 or 10.8 percent were unionized; only 496,000 or 3.6 percent of 13,810,000 employees in sales occupations were members, but there were 2,210,000 union members or 12.5 percent among the 17,607,000 administrative support (including clerical) employees. US BLS, BLS News: "Union Members in 2002" tab. 3 (USDL 03-88, Feb. 25, 2003), on http://www.bls.gov/cps/unionmem.pdf.

9Department of Professional Employees, AFL-CIO, "Rising Tide: Professionals: The New Face of America's Unions" at iv.

See below.
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composed 19 and 8 percent, respectively, of the membership of the AFL and CIO.10—C. Wright Mills may have confidently informed an American Management Association conference that unionization of office employees was almost inevitable,11 but according to the president of the Office Employees International Union fewer than two million of 15 million white-collar workers were union members that year12 and the following year Business Week estimated that only one million non-governmental white-collar workers were unionized.13 As late as 1957, the AFL-CIO, according to A. H. Raskin, the national labor reporter for The New York Times, agreed to make its first large-scale effort to organize 13 million unorganized white-collar workers, but there was little outward indication that its executive council members shared the organizing director's optimism that any substantial increase in present estimated total of three million members would be recorded in the near future. There were at the time four unorganized white-collar workers for every organized one, and nonunion white-collar workers represented more than half of all unorganized workers in the United States.14 Data based on the 1960 census revealed that while white-collar workers represented 44.2 percent of all potential union members (up from 38.8 percent in 1950), the 2.7 million white-collar unionists accounted for only 15.4 percent of all union members and only 13.0 percent of all white-collar employees who were potential union members compared with 56.4 percent of blue-collar workers.15 The National Industrial

10C. Wright Mills, White Collar: The American Middle Classes 315 (1967 [1951]).
11“Trend to Unions Seen for Offices,” NYT, Oct. 18, 1952 (30:6). Mills's talk was presumably based on his piece, “A Look at the White Collar,” which appeared in Electronics in the Office: Problems and Prospects (AMA, Office Management Series No. 131, Oct. 1952), which was, in turn, reprinted in C. Wright Mills, Power, Politics and People: The Collected Essays of C. Wright Mills 140-49 (Irving Horowitz ed., 1967 [1963]). In it he argued that the principal reason for lagging unionization had been unions' preoccupation with factory workers; all that was needed was for unions to make a "real decision to unionize the white-collar employees..." Id. at 148.
13"It May Be Gone Forever,” BW, Nov. 6, 1954, at 64-70, at 68. The total of 1,025,000 included 309,500 in white-collar unions, 240,000 in industrial unions, and 476,000 retail workers in various unions.

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The Proposed Regulations of 2003

Conference Board estimated that in 1968 3.2 million white-collar unionists accounted for only 14 percent of white-collar employees and 16 percent of all union members, but that the unionization rate had barely risen over the previous decade.16

From Clintonian Self-Paralysis to Bushian Regression

The new regulations trouble Wade Forsman, a Fort Worth labor lawyer who represents workers. He argues that big paychecks and well-honed job skills shouldn’t preclude engineers or other employees from collecting the overtime pay to which they’re now entitled.

“We’ve got a lot of engineers out of work,” he said. “Why is that any different from any other worker?” ...

“We are undoing more than half a century of labor law,” he said. “The mere fact that something was enacted in 1938 does not make it a bad policy. The regulations do not need changing.”17

During its eight years in office the Clinton administration undertook no public effort to update the obsolete and dysfunctional salary-level tests—let alone to begin dismantling the means-testing on which white-collar workers’ entitlement to protection from overwork had been conditioned since 1938. In the sharp but nevertheless causally unspecific words of three high-ranking DOL officials, the Clinton DOL, in spite of the Wage and Hour Administrator’s “earnest and persistent attempts” during the early 1990s, “declined to undertake rulemaking or public hearings, though it was strongly urged as the single most important and necessary, if predictably controversial, step that could be taken to protect U.S.

16Edward Curtin, White-Collar Unionization 2, tab. 5 at 4 (NICB Personnel Policy Study No. 220, 1970); Douglas Cray, “Unionizing Slow in Office Staffs,” NYT, July 20, 1970 (37:2). The NICB found that: “For reasons not completely clear, both labor and management spokesmen foresee increasing unionization of office, sales, technical, and professional employees. The facts of the situation, however, don’t square with the expectations.” Curtin, White-Collar Unionization (“Highlights for the Executive” [unpaginated]). While white-collar unions believed that eventually office and professional workers would all be unionized, employers by and large believed that in 10 to 20 years most of their white-collar employees would be unionized. Id. at 1.

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workers from the ongoing erosion of their workplace rights."\(^{18}\) The Deputy Wage and Hour Administrator during the first Clinton administration later stated that the WHA, Maria Echaveste, had prepared a proposal to increase the short-test salary threshold to 6.5 times the minimum wage—the level suggested by the House and Senate Labor Committees in 1989\(^ {19} \)—but that the DOL rejected it several times.\(^ {20} \)

This outcome was presumably a function of the administration’s lack of principle, which made it politically unthinkable to antagonize capital by raising the salary thresholds without the quid pro quo of the even more capacious duties tests and relaxed pay-docking rules that employers demanded.\(^{21} \) (The extent of that

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\(^{19}\)See above ch. 15.

\(^{20}\)Telephone interview with John Fraser, South Otselic, NY (July 14, 2004). Fraser did not know who at the DOL had rejected the proposal or why it had been rejected. However, since the Assistant Secretary for Employment Standards had, according to him, not been involved, it seems likely that Labor Secretary Robert Reich was the decision-maker. When asked whether he knew why the proposal had been rejected and why the salary levels had not been increased during the Clinton administration, Reich replied: “I don’t.” Email from Marc Linder to Robert Reich (July 14, 2004), and from Robert Reich to Marc Linder (July 19, 2004). A telephone message (July 14, 2004) to Echaveste requesting clarification went unanswered. A very different perspective was offered by a labor union informant, who stated that when asked in a private conversation in 2004 about what had gone on in the Clinton administration with the white-collar overtime regulations, Echaveste had characterized the AFL-CIO as “‘unreasonable’” for taking the position that the DOL should simply raise the salary threshold. She had believed that the regulation should have been “‘balanced’” and that there had been many needed “‘clarifications.’” From the conversation it appeared that Echaveste had indeed sent up a proposal that was blocked, but that it was blocked because the clarifications were overtime “‘takeaways.’” Email from union official to Marc Linder (Aug. 5, 2004). This account appeared largely consistent with that given by WHA Tammy McCutchen shortly after her resignation. McCutchen revealed that when she was WHA she had read memoranda that Echaveste had prepared (and that could not be obtained through a Freedom of Information Act request) that proposed changes (without laying out details) that were not so very different from what McCutchen herself eventually promulgated. Telephone interview with Tammy McCutchen, Washington, D.C., Sept. 16, 2004.

\(^{21}\)According to John Fraser, Acting Assistant Secretary for Employment Standards and Deputy Wage and Hour Administrator in the Clinton administration, Maria Echaveste, the WHA, did “her best” to raise the salary levels, but it was not politically possible to do so
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antagonism can be gauged by the fact that in 2003 the Bush DOL estimated that “increasing the salary levels without updating the duties tests” would cost employers $1.839 to $3.370 billion a year in increased payroll costs.)22 This unprincipled position was underscored by the fact that a major report that the Clinton DOL itself commissioned had concluded: “The changing occupational and industrial shifts do not point to the need for major revisions in the regulations governing EAP [executive, administrative, and professional] exemption. The new (or more predominant) jobs that exist today are readily analyzed in terms of the rules set down over 40 years ago.”23

In 2002, five years after having left her post as WHA, Echaveste confirmed—appropriately enough at the National Lawyers Convention of the right-wing Federalist Society—the foregoing account of the political basis of the Clinton administration’s failure to increase the salary thresholds. Although “reform” of the white-collar overtime regulations had been one of two items on Echaveste’s “‘to-do’ list” on taking office, she failed to achieve either one. She assigned as the main reason for the failure the “policy process...that if we tried to do negotiated rulemaking, we’d have to rent out RFK stadium because there’d be so many people interested in it.”24 But in terms of substantive grounds, Echaveste complained that:

Organized labor wanted us only to tackle the salary test and nothing else. We were

without dealing with employers’ complaints that in certain respects the duties tests and salary-basis rules were “not working.” Telephone interview with John Fraser (July 11, 2004). In 2003, in response to the Bush administration’s proposed regulations, the U.S. Chamber of Commerce acknowledged that the existing regulatory salary levels were “not realistic”; nevertheless, it was willing to support an increase only if “such a change is made in conjunction with significant reforms of the duties and salary basis test.” U.S. Chamber of Commerce, Comments on the Department’s Proposed Rule Regarding FLSA Exemptions for Professional, Administrative, Professional, Outside Sales and Computer Professional Employees” at 4 (June 30, 2003), on http://www.uschamber.com/NR/rdonlyres/enuuywuy6hl3kqop6d3nrghqtjirbg7vxezj6t37irglribr56svpx6qlctixd6obxvfy6s4oaappyy irbohyc2v4uxf/030630_541comments.pdf.


New Democrats and knew that there was no way that we would only take on the salary test. So, there was a lack of political will to tackle this issue.\textsuperscript{25}

Echaveste also referred to one further impediment to reform of the law governing overtime (including compensatory time off) during the Clinton administration:

\begin{quote}
When people work in the White House, as I eventually did, you are surrounded by people who actually do work 20 hours a day and aren’t complaining. And to have people around the table talk about the need to give comp time to workers...who have never worked an hourly job and have never watched the clock the way a lot of workers do, to me, was a very interesting challenge because there were people who potentially could make very important changes who actually don’t have that work experience. And I thought there were only a couple of us there who’d actually punched a time clock and knew what it meant to get overtime.\textsuperscript{26}
\end{quote}

This observation about (New) Democrat policymakers’ having lost touch with the real world of the working class, while piquant, by focusing on money rather than time, revealed that Echaveste herself had lost sight of the real purpose of mandatory hours regulation.

In an important sense, then, the Clinton administration held the increase of the fatally neglected salary levels hostage to its own failure of nerve.\textsuperscript{27} Thus it joined with the Reagan and George H. W. Bush administrations in racking up 20 years of inaction.\textsuperscript{28} Had the Clinton DOL at least raised the salary thresholds, it would have made it that much more difficult for its successor to portray revisiting the question.


\textsuperscript{27}The Bush administration WHA Tammy McCutchen essentially confirmed this view by stating that “since 1975, the regulatory process has been ‘bogged down’ by concerns about modifying the duties test. Once the new regulations are in place, that concern will be addressed, she said, predicting that in the future, the threshold salary once again will be revised every five to 10 years.” “Advocates for Workers, Business Speak Out on Overtime Changes,” \textit{LRR} 172:323-26 at 326 (July 7, 2003). Against this background, McCutchen’s claim on resigning in June 2004 that she had been naively “surprised by’...how political the overtime changes became” lacks credibility. Michael Triplett, “McCutchen Sees Stepped-Up Enforcement, Overtime Rules as DOL-Tenure Achievements,” \textit{DLR}, No. 112, June 11, 2004, at C-1.

\textsuperscript{28}Political paralysis and inaction on the part of Democratic administrations would, according to former WHA McCutchen, have continued indefinitely. Telephone interview with Tammy McCutchen.
of relaxing the duties tests as politically plausible, since the new Republican administration would have been deprived of the legitimation linked to its own updating of the salary-level tests. Being able to hide behind the bona fides generated by the indisputable fact that it had done for workers what no Democratic administration had done since the 1960s permitted the George W. Bush administration to initiate the process of overtime deregulation on behalf of employers which, having helped elect it, were determined to seize the opportunity of Republican control of the White House and both Houses of Congress for the first time in half a century finally to move in that direction.29

The outgoing Clinton DOL had in 2000, its last full year in office, once again gone through the motions of announcing twice, in April and November, in the Federal Register its plan for long-term action in revising the regulations. On April 24, it justified the need for action by reference to the fact that the salary level tests—about which it had done nothing during its seven-year incumbency—“are outdated and offer little practical guidance in the application of the exemption.” With some 23 million employees estimated to be within the scope of the regulations, the Labor Department expressed concern that “[l]egal developments in court cases are causing progressive loss of control of the guiding interpretations under this exemption and are creating law without considering a comprehensive analytical approach to current compensation concepts and workplace practices”—as if Congress, the Department, or the WHD had ever during the 63 years since the first draft of the FLSA bill surfaced in April 1937 engaged in a comprehensive analysis of the reasons for the exclusion of white-collar workers from hours regulation. The DOL then repeated its self-mesmerizing mantra that it “will involve affected interest groups in developing regulatory alternatives. Following completion of these outreach and consultation activities, full regulatory alternatives will be developed.” Promising that it “will continue to pursue revisions of the regulations as the appropriate response to the concerns raised,” the DOL stated (ungrammatically and almost incomprehensibly) that: “Alternatives likely to be considered include [sic;
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should be “range from”] particular changes to address ‘salary basis’ and salary level issues to a comprehensive overhaul of the regulations that also addresses the duties and responsibilities tests.30 Half a year later, the DOL rehearsed the same regulatory notice, the only noteworthy differences being the sharp increase from 23 to 32 million in the estimated number of employees within the scope of the regulatory exclusion of white-collar workers and deletion of the claim that court decisions were causing the loss of control of guiding interpretations: now they were merely “changing” those interpretations.31

It might have been imagined that employers would have aggressively pushed for revisions as soon as George W. Bush was elected president. However, in the immediate aftermath of the inconclusive election day, business lobbyists, chastened by the realization that “the slim GOP margins in the House and Senate limit the degree of change that may be achieved,” compiled a relatively modest “wish list.” Lobbyists for the NAM and the U.S. Chamber of Commerce both ranked amendment of the FLSA to authorize compensatory time off in lieu of overtime pay as their highest priority. Given the “‘razor thin’ Republican congressional majorities that rendered impossible ‘‘issues or actions in the extreme,’” employers purported to be aiming at specific rather than global changes in the white-collar overtime regulations such as exemption of funeral directors, licensed embalmers, certain inside sales workers, and additional computer professionals.32 If such limited expansions were in fact employers’ objectives, then what the Bush DOL ultimately bestowed on them must have been a very pleasant surprise.

Despite its deregulatory fervor, the new Bush administration’s first regulatory notice in May 2001 was not distinguishable from its predecessor’s.33 Not until December 2001 did the new Labor Secretary Elaine Chao (formerly a banker at BankAmerica and Citicorp) begin to lay out a more serious action-oriented approach. In order to “set a new course” for the achievement of the DOL’s three overall goals of enhancing opportunities for the workforce, promoting their economic security, and fostering safe, healthy [sic], and fair” workplaces, Chao decided to stress prevention and to rely on “common-sense standards of safety and fairness to protect workers before they are harmed physically or economically.” Of greatest relevance in the overtime context were two of the five “Secretarial

31FR 65:73303, 73411 (Nov. 30, 2000). On the basis for the upward revision in the estimate, see above ch. 1.
33FR 66:25679, 25687 (May 14, 2001). Nor was it two years later even after the Bush DOL had published its proposed revisions. FR 68:30552, 30558 (May 27, 2003).
priorities" around which the tools that the DOL would use to reach its goals revolved: "Guarantee an honest day’s pay for an honest day’s work" and "Protect workers from coercion and intimidation." Unsurprisingly, however, like all of its predecessors since 1938, the Chao DOL never addressed the question of how the exclusion of white-collar employees from any and all hours regulation could possibly help enforce that alleged guarantee or protect those workers from being coerced and intimidated into working a longer (honest or dishonest) workday than they wanted to work (with or without additional compensation). Nevertheless, Chao promised that the "DOL will craft proposals that are responsive to workers’ needs." At this time, however, all that she revealed was that the WHD’s initiative would clarify the criteria defining the executive, administrative, and professional exclusions and that the changes would “help employers meet their obligations voluntarily and enhance workers’ understanding of their rights and benefits.”—a craftily worded undertaking that fell short of promising to enhance workers’ rights.

Chao did not mention it, but data that her department later published disclosed that the volume of overtime that white-collar workers worked was enormous. In 2002, the DOL estimated, 10.5 million of them worked a total of 6.5 billion overtime hours or an annual average of 622 hours. Over the course of a 50-week year, they were thus working 12.4 additional hours a week or 2.5 additional hours a day. The Labor Department’s commitment to government protection was, in the context of such overwhelming unsocial working hours, equivocal. In rejecting the claim that “employers completely control the terms of employment and can at their sole discretion and without consequence convert millions of workers to exempt status to avoid paying overtime,” it applied the ad absurdum critique that under such circumstances employers could require workers “to work extremely long hours with no overtime [pay].” But: “Since this is not the situation in today’s labor market, it is a mistake to assume that employers are in complete control of the terms of employment.” Adopting an unorthodox position for the national enforcer of compulsory labor standards, the DOL argued that “[i]n fact, the economic laws of supply and demand usually dictate the terms of employment” so that “if employers offer too little compensation for the hours of work they demand they will not be able to attract a sufficient number of qualified workers to meet their needs.” Consequently, “exploiting workers by imposing unsatisfactory working conditions, such as excessive unpaid overtime, detracts from...firms’ overall competitive strategies,” counterproductively prompting its “displeased” employees to seek employment with other companies.

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36 FR 69:22212. The slipshod way in which the DOL presented the aforementioned
conceded that any white-collar workers are ever required to work overtime against their will, it did nevertheless “consider[ ] an exemption a strong signal that the worker is likely to work some overtime during the year.”

It is, from this perspective, unclear why the DOL would have believed that legislated labor norms were needed at all to interfere with supply and demand “in today’s labor market.” At the very best, the most tenable argument that it could have made would have been first to concede that not all white-collar workers were blessed with a favorable location in the labor market and then to hypothesize that the regulatory salary and duties tests were designed to identify the line separating the unблessed from the blessed, who could safely be left to the forces of supply and demand. This position suffers from two crucial defects. First, the DOL has never during its 66 years of administering the white-collar exclusions devised a theoretical framework for testing this hypothesis, let alone selected the appropriate empirical indicators. Moreover, the mere fact that so many millions of low-salaried white-collar workers subject to unlimited overtime work satisfy the salary and duties tests is prima facie evidence that the tests are not robust. And second, as with the matter of workplace safety, the labor-market-knows-best position ignores the reality that, since even highly paid and skilled workers in much demand may underestimate the long-term deleterious consequences of overwork (for themselves as well as for others who may be forced to work overtime), working hours must be regulated for all.

Even under the Bush administration regulatory revision was a slow process, which appeared to make little progress during 2002, with the end at first being announced for September of that year and then January of 2003. One reason for this pace was apparently the large number of meetings that the WHD and the new Wage and Hour Administrator had been holding with “stakeholder” organizations.

Although Tammy McCutchen, whose nomination as WHA was confirmed by the Senate on December 7, 2001, may have been “plucked out of political ob-

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37 FR 69:22213.
38 FR 66:61223; FR 67:33307, 33314-15 (May 13, 2002); FR 67:74057, 74170-71 (Dec. 9, 2002). The latter two regulatory notices reduced the estimated number of affected employees to 19 to 26 million (reflecting the GAO estimate discussed above ch. 1).
scurity to join the Bush administration,"40 she did have congenial credentials: in addition to having been senior corporate counsel at Hershey Foods Corporation,41 she had previously been a lawyer at the union-busting law firm Matkov, Salzman,42 and a high-profile member of the right-wing Federalist Society.43 Although, unsurprisingly, "McCutchen feels employers’ pain," on resigning as WHA in June 2004, she also declared: "'I'm not embarrassed to admit that I am most concerned about low-wage workers at the lowest levels of our economy...I grew up poor and lived in a trailer.'"44

By June 2002, McCutchen had concluded meetings with 80 groups,45 among which there were "'very opposing points of view,'"46 but she also found "'agreement that the [salary] thresholds need to be increased.'"47 Acknowledging the electoral constraints within which she was operating, McCutchen admitted that

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42"Matkov Salzman has extensive experience in providing hard-hitting and effective strategies for companies that seek to avoid union organizing or support decertification while avoiding the mine field of NLRB decisions that limit what an employer can do or say in those settings." http://www.matkovsalzman.com/practice_union.html.


47Billings, "Wage-Hour Chief Spearheads Effort to Revise, Make Public Investigation Manual."
"the environment for regulatory revisions will be conducive for only so long." In the event, however, even she apparently underestimated the intensity of the political-economic forces demanding still more severe restrictions on white-collar overtime regulation regardless of whether it cost Republicans votes: "If any new regulations are going to see the light of day, they will have to be out in 2003, McCutchen said, dismissing the likelihood of change in the 2004 election year" on account of "the attendant political posturing...." Nevertheless, McCutchen believed that the various forces were aligned and that "even her staff, many of them longtime liberals, is eager to modernize." She also opined that "corporations desperately want the agency to rewrite the so-called duties tests," and that they "[i]n return...are willing to give ground on a labor demand: an increase in the minimum weekly salary levels...." But on this point an as yet unbridgeable gap still separated labor and capital: whereas the AFL-CIO was demanding that the short-test salary threshold be fixed at $43,000 (the inflation-adjusted equivalent of $13,000 in 1974): "Business groups, according to McCutchen, indicate that $25,000 is the most they can stomach financially." And James Coleman, general counsel to the National Council of Chain Restaurants, "whose members have borne the brunt of the litigation crusade and, along with The National Restaurant Association, wield enough clout to doom any reform," insisted that $43,000 was "grossly excessive in our view...." However, if the salary levels went up, Coleman argued that it was "only fair that the duties test be revamped too." But conflict loomed on this front, too, since "plaintiffs’ lawyers and labor groups oppose any revisions to the duties test. To them, the reason that wage-and-hour cases have mushroomed in recent years has less to do with a lack of clarity than with greedy companies shortchanging workers in the pursuit of higher profits."51

One stakeholder meeting about which some information seeped out was held on May 30, 2002 by Eric Dreiband, the Deputy Administrator for Policy, WHD, with Allison Shulman, the Director of Government Affairs at the National Association of Convenience Stores, which represented 2,200 convenience store companies operating 70,000 stores employing 1.4 million workers. Some sense of

49Crawford, "Working on Overtime."
50Crawford, "Working on Overtime." Billings, "DOL Moving to Prepare by January Revision to FLSA White Collar Exemptions," also reported that McCutchen had stated that there was internal support from professionals within the WHD who agreed that the regulations were "vastly overdue for revision."
51Crawford, "Working on Overtime."
the apocalyptic tone struck by the NACS at the meeting is conveyed by Shulman’s summary of the points she made. First, she alleged that the potential liability that employers faced for failure to meet the salary basis test was so “enormous” that it was “not unreasonable to liken the situation to that which led to the passage of the Portal-to-Portal Act in 1947.” The NACS’s alarmist proclivities can be gauged by the fact that that legislation had been motivated by employers’ claims that unions had, within seven months, filed almost 2,000 class-action lawsuits demanding six billion dollars in damages (the equivalent of about $50 billion in 2002).

The NACS also attacked the 1999 GAO report as misguided for concluding that, merely because the salary-test levels had sunk to the minimum wage, they had to be increased to keep pace with inflation and provide the type of protection originally intended. On the contrary, in NACS’s view, whether the salary level was enough, fair, or a living wage was irrelevant; instead, it should be set exclusively by reference to distinguishing bona fide executive, administrative, and professional employees from those who should be covered. How these two criteria could possibly be at odds with each other Shulman did not reveal, but she added that NACS also opposed lock-step indexing on the improbable grounds that regulations should not be permitted to “stagnate.” Although she offered no evidence that the NACS had ever protested during the 27 years of salary-level stagnation, now that an increase appeared unavoidable, Shulman was quick to propose that the standard set for all industry “be sufficiently low that no undue hardship will be imposed on these industries. Setting an earnings test which essentially forced retailers to abandon the exemption clearly would run counter to the regulations’ intent.” She then went on to explain that earnings levels for most lower-level managerial employees in the industry were relatively low, with convenience store managers at an earnings level equating to about $475 a week (or $24,700 a year). To prevent creating a barrier to the exemption and unduly injuring the industry, the NACS proposed a threshold earnings level of $442-500 a week ($23,000-26,000 a year) and a “super salary” level of $600 ($31,000 a year), which would trigger exclusion of any employee who performed “an identifiable executive function” (which latter criterion the DOL essentially adopted). Finally, Shulman argued that: “In view of the fact that a high number of con-

54See above ch. 15.
convenience store managers receive earnings of approximately $470 per week, establishing a higher figure would create a ‘barrier to [the] exemption’ for many of them.” Unsurprisingly, the fact that, “[u]nlike the other industries, convenience stores still have relatively low salaries for managers ($23,000-$27,000 annually),” did not prompt her to question whether they deserved the lofty title of “executive.”

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The undersigned [Wage and Hour Administrator] hereby certifies that the rule will not adversely affect the well-being of families.

On March 25, 2003, McCutchen finally issued the long-awaited proposed revisions of the white-collar regulations, which Labor Secretary Chao had described as “literally ancient’ and ‘absurdly complex.” Two days later the proposals were summarized in DOL press releases and on the DOL website and discussed in the press. The regulations were published in the Federal Register on March 31, where they occupied 13 three-columned pages and were accompanied by a further 25 pages of explanatory material.

That the Bush administration Labor Department was upholding the 65-year tradition of drafting, administering, and enforcing the white-collar overtime reg-
lations within a purely technical framework totally divorced from the purposes of the statutory overtime provision was manifest in a seemingly innocuous statement on the very first page of the background material published in the Federal Register: "These exemptions have engendered considerable confusion over the years regarding who is, and who is not exempt."61 In other words, the proposed regulations dealt with the positivist problem of generating as automatically and frictionlessly as possible determinate outcomes from rules, but not at all with disputes over who should and should not be protected by the law or why anyone should or should not be protected. Thus the "confusion" to which the DOL was referring involved only the application, not the purposes, of the rules.62 While admitting that "[s]pecific references in the legislative history to the employee exemptions contained in section 13(a)(1) are scant"—a vast understatement—the DOL briefly but dogmatically asserted their premises by reference to the untenable and undocumented account of the Minimum Wage Study Commission.63 Ultimately, however, the DOL's fallacious understanding of the reasons underlying the white-collar exclusions was irrelevant and cosmetic because it never referred to them again and they played no visible part in its explanation of the proposed revisions.64

The central structural and substantive change made by the Bush administration was the elimination, for each of the three white-collar categories, of the long and short tests, including their salary and duties components, and their replacement by a "standard test" with a higher salary threshold and modified duties, as well as by a separate test for "highly compensated employees." The DOL set the standard salary test at $425 a week for all three white-collar categories,65 whereas since 1975 the uniform short-test salary had been $250 and the long-test salary $155 for executive and administrative employees and $170 for professionals. These increases far exceeded, in absolute or percentage terms, any that the WHD or DOL had ever proposed or promulgated before, but 28 years had also never passed by before without any increase. The DOL conceded that in 1999 the GAO had adjusted the salary levels for inflation, arriving at an updated long-test level for 1998 of $470/$515 and a short-test level of $757; similarly, the outgoing Clinton administration—which had never done anything actually to increase the levels—in

61 FR 68:15560.
62 See above ch. 2.
63 FR 68:15560-61. See above ch. 15.
64 In its introduction to the final regulations in 2004, the DOL merely repeated verbatim what it had already written about the MWSC's views on the rationale underlying the exclusions. FR 69:22123-24 (Apr. 23, 2004).
65 FR 68:15585, 15587, 15589, 15592 (proposed §§ 541.100 (a)(1), 541.200(a)(1), 541.300(a)(1), and 541.600(a)).
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2001 reported that 1999 Consumer Price Index data yielded long- and short-test salary levels of $480 and $774, respectively.\textsuperscript{66} By 2003, when the CPI-adjusted salary-test levels had risen to $530/$581 and $855,\textsuperscript{67} respectively, the Bush DOL rejected what it dismissively called "mechanically adjusting the 1975 salary levels for inflation" for several reasons.\textsuperscript{68} To be sure, the one reason that the DOL did not include was that inflation-indexing would, according to the 2001 report, have reduced the number of workers excluded from overtime regulation by two to seven million\textsuperscript{69}—a figure far in excess of the 1.3 million claimed by the Bush administration and thus presumably in its own right sufficient explanation for an openly pro-employer DOL to reject it.

The first reason adduced by the DOL was that the fact that the new standard duties test differed from the long and short tests allegedly rendered them inappropriate as salary-level models.\textsuperscript{70} However, even if the differences in duties were relevant to the salary levels, these differences could be accounted for. The ratios between the short-test and long-test salary levels during their entire existence from 1950 to 1975 varied within very narrow limits: 1.6 to 1.8 for executive-administrative employees and 1.3 to 1.5 for professional employees. The duties that had to be met for the employer to be exempt numbered five for the long test and two for the short test for executives, four and two for administrative employees, and four and two (or one) for learned (or creative) professionals. The new standard test prescribed three duties for executive, two for administrative, and one for professional employees. Thus, for example, the standard test for executives specified fewer duties than the long test but more than the short test (as the DOL proudly stressed). There was, therefore, no logical impediment to setting the standard salary level at the very least somewhere between the two salary levels, perhaps between $600 and $700. Whatever the appropriate updated dollar amounts were, it was clear that the level chosen by the DOL was closer to that of the long test,

\textsuperscript{66}FR 68:15570.

\textsuperscript{67}Calculations performed on the inflation calculator on the BLS website.

\textsuperscript{68}FR 68:15570. Just how extreme the Bush DOL's approach was can be gauged by the fact that in an advance notice of proposed rulemaking even the Reagan administration had solicited comments on whether the salary test levels should be based on a multiple of the FLSA minimum wage. \textit{FR} 50:47696, 47697 (Nov. 19, 1985).

\textsuperscript{69}Cohen and Grimes, "The 'New Economy'" (Executive Summary), tabs. 20-21. Inflation-indexing would have caused the salaries of two million workers to fall below the salary threshold level and those of five million workers to fall below the short-test level, thus triggering the application of the long-test duties, which some of them would not have satisfied.

\textsuperscript{70}FR 68:15570.
while the new standard duties were closer to those of the short test. As a result of this forced mismatch between salary and duties, "for the vast majority of workers," the proposal, in the words of three high-ranking former DOL officials, "expands the classes of exempt employees...presto!—the worker finds a walnut shell with no overtime under it...."71

The DOL's second reason, which was independent of the first, was its concern about the impact of inflation-adjusted salary levels on "certain segments of industry and geographic areas..., particularly in the retail industry and in rural areas of the South, which tend to pay lower salaries."72 This reason turned out to be no more tenable than the first. The DOL's own Preliminary Regulatory Impact Analysis revealed hardly any regional or industrial differences in the estimated impact of the proposed regulation. For example, incremental payroll costs as a proportion of payroll were estimated at 0.03 percent for the country as a whole and for the southern states; incremental payroll costs as a proportion of pre-tax profit were estimated at 0.11 percent for the country as a whole and 0.12 percent for the South.73 Similarly, incremental payroll costs as a proportion of payroll were estimated at 0.03 percent for the retail trade nationally and in the South, while incremental payroll costs as a proportion of pre-tax profit were estimated at 0.12 percent for the retail trade nationally and 0.09 percent for the South.74

The third reason advanced by the DOL for rejecting an inflation adjustment was arguably the weakest—namely, that "mechanically adjusting for inflation presumes that the salary levels set in 1975 are precisely the appropriate baseline...."75 If the DOL had its suspicions about the Ford administration's figure, surely it had no such reservations concerning the data worked up by the 1958 Kantor Report, by whose "prescient analysis" the DOL was "guided" in 2003.76

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71Fraser, Gallagher, and Coleman, "Observations on the Department of Labor's Final Regulations" at 14.
72FR 68:15570. According to Brian Tumulty, "Bush Team Pushes Big Overhaul of OT Pay," Gannett News Service, Mar. 28, 2003, WHA McCutchen "said her agency opted not to use inflation as a guide. Instead, the average wages of workers in the South and Midwest were used for the calculation so these regions where workers tend to be paid less than in other parts of the country would not be adversely affected."
74CONSAD Research Corporation. "Final Report" tab. 5.7 at 86-91.
75FR 68:15570.
76FR 68:15570.
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Its $80/$95 long-test salary was the equivalent of $506/$601 in 2003, while its $125 short test equated to $790.

The one respect in which the DOL admitted that it had departed from Kantor’s methodology was using the lowest 20 percent of actual salaries paid in the economy rather than the 10 percent used in the Kantor Report because of changes in short and long tests and “because the data included some salaried employees who would not meet the duties tests for exemption.” In fact, the DOL distorted the resemblance between its procedure and Kantor’s inasmuch as the latter’s salary survey was confined to administrative, executive, and professional employees whom the DOL had actually found to be exempt, whereas the DOL’s survey in 2003 included all salaried employees in every occupation, including those who by no stretch of the imagination could be regarded as administrative, executive, or professional or exempt.

Ultimately, the DOL’s dismissive attitude toward inflation adjustment boiled down to its judgment that it would cost employers too much, although nowhere did the Department examine what the financial consequences would be if firms reacted as Congress had intended by hiring additional workers instead of continuing to work existing employees more than 40 hours. Moreover, apart from the sheer arbitrariness of protecting only the lowest 20 percent of white-collar workers, it is unclear on what possible grounds the DOL believed that employees with salaries as low as $425 a week should be left exposed to overreaching employers anxious to work them unlimited hours.

The Bush DOL acknowledged that the regulatory salary levels had once been “viewed as the best indicator of exempt status,” but, not having been raised in 28 years, they no longer provided “employees or employers any help in distinguishing between bona fide executive, administrative, and professional employees and those who should not be considered for exemption.” If the DOL was aspiring to restore such bright-line status to the salary test, the choice of $425 as the threshold was ill

77 FR 68:15570-71.
79 FR 68:15582. Although the DOL contended that inflation adjustment “would be far too burdensome on small businesses,” the PRIA had disclosed that incremental payroll costs for small businesses would have amounted to only 0.04 percent of payroll and 0.16 percent of pre-tax profit. CONSAD Research Corporation, “Final Report” tab. 5.3 at 73-74.
80 Frederick Rueter, the principal author of the CONSAD report, conceded that it had not examined this possibility. Telephone interview (June 22, 2004).
81 FR 68:15562.
The Proposed Regulations of 2003 designed to achieve that objective. After all, it amounted to barely twice the FLSA minimum wage—and was able to attain even that ratio only because the minimum wage itself had not been raised since 1997. The real-world consequences that the DOL saw as flowing from the failure to have updated the salary test were curiously skewed: “the outdated salary tests and complex duties tests...cause employees to be erroneously misclassified as exempt and thus not paid properly.” Conveniently, the DOL neglected to mention that this state of affairs also meant that for many years employers had been getting away with wage theft. The DOL also impermissibly conflated the effects of the indisputably obsolete salary tests and the allegedly complex duties tests. Unless the Bush DOL was conceding that the failure to raise the salary thresholds had in fact rendered the regulations invalid, it was incorrect to state that they had resulted in misclassification of employees as exempt: so long as the legislative regulations were valid, the resulting exclusion of low-salary workers was lawful, inevitable, and predictably predestined to benefit only employers. Not so with the purported complexity of the duties tests: there was no plausible reason why it should per se lead to excessive exclusion of workers from overtime protection rather than excessive inclusion—unless employers were successfully manipulating the complexity to achieve that one-sided outcome. Thus, in any event, if employers were seeking simpler duties tests, it seems highly improbable that they were doing so in order to be compelled either to pay more employees for overtime work or to refrain from requiring them to work overtime.

The new test for “highly compensated employees” provided that an “employee who performs office or non-manual work and is guaranteed a total annual compensation of at least $65,000...is deemed exempt under section 13(a)(1)...if the employee performs any one or more of the exempt duties or responsibilities of an executive, administrative or professional employee....” Because the statute specifies that only these three categories of (white-collar) employees are excluded from overtime protection, the DOL had to supply some specific definition of them in order to prevent other categories of white-collar employees from being excluded.

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82 FR 68:15562.
83 FR 68:15592-93 (proposed § 541.601(a)).
84 The DOL nevertheless “invite[d] comments on the alternative of adopting a ‘salary only’ test for highly compensated employees. Under such an alternative, for example, employees performing non-manual or office work and earning a total annual compensation over a certain amount would automatically be considered exempt, without any reference to the employee’s ‘duties.’” Such a regulation would clearly be beyond the Secretary of Labor’s power to promulgate since it would, for example, disentitle relatively highly paid clerical employees. DOL also “invite[d] comments on the alternative of removing the salary tests from the regulations entirely and on how the regulations could be structured without the need for any specific salary amounts (relying only on duties tests, for
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Just how minimalist the resulting duties test was that such a white-collar employee had to meet was spelled out in the DOL’s example that a $65,000-a-year employee who “directs the work of two or more other employees, even though the employee does not have authority to hire and fire”—let alone the primary duty of management—would still be an exempt executive. The DOL justified this outcome on the grounds that: “A high level of compensation is a strong indicator of an employee’s exempt status, thus eliminating the need for a detailed analysis of the employee’s job duties.”85 The DOL’s opinion that a high salary is highly indicative of exclusion from protection nicely captures its circular reasoning cut off from any possible purposes of the overtime provision: since the law is designed to prevent or deter employers from overworking employees, the level of the latter’s salaries is irrelevant.86 In order to insure that as many employers as possible could take advantage of the exemption—which also applied pro rata to employees who did not work the whole year—the proposal provided that if the employee’s base salary and non-discretionary compensation failed to total $65,000 by the end of the year, the employer could nevertheless decide at year’s end whether it would be cheaper to top off the salary and thus retain the exemption by making up the difference in the first pay period of the next year.87 The DOL appeared oblivious of the enormous burden this procedure would impose on employees to keep track of their hours all year long just in case the employer failed to make up the difference or to pay the back overtime pay voluntarily; and even if the employer did opt to pay the back overtime to a worker to whom it had expected to pay more than $65,000, it was possible that it would not have kept any hours records.

The only explanation that the DOL offered for its fixing of the salary level was that it “looked to points near the higher end of the current range of salaries and found that the top 20 percent of salaried employees earned above $65,000 annually....” Driven, apparently, by some unexplicated objective of symmetry, it plumped for this quintile because it was “consistent with setting the proposed standard test salary level at the bottom 20 percent of salaried employees.”88 The figure was, in other words, arbitrarily chosen.

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85 FR 68:15593 (proposed § 541.601(c)).
86 At a May 7, 2003 teleconference and webcast, “New FLSA Regulations: A New World in Overtime Regulations,” plaintiff’s attorney Gregory McGillivary characterized the proposed $65,000 rule as “inconsistent with the intent behind the FLSA” without identifying that intent. “Attorneys Discussing Proposed FLSA Rules Speculate on Fate of Regs Before the Courts,” USLW 71(43):2713-14 at 2714 (May, 13, 2003).
87 FR 68:15593 (proposed § 541.601(b)(2)-(3)).
88 FR 68:15571.
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The test for highly compensated employees can be viewed as a much more abbreviated version of the short test, which, under the rubric "Special Proviso for High-Salaried Employees, had been recommended in 1949 by the Weiss Report as a short-cut to facilitate administration since the division's experience had shown that at such a salary those whose primary duty was the performance of work characteristic of bona fide executive, administrative, or professional employment met, with only unimportant exceptions, all the basic duties tests. Although Weiss's test did not quite capture the suggestion of the NAM (and several companies) that $300 per month be the sole criterion, provided that the employee performed the already existing regulatory duties "of the general character...even though he may not otherwise strictly qualify for exemption under all the specifications," the proposal in 2003 came much closer in terms of a skeletal duties test, but would have horrified the NAM of 1949 by setting the salary level at $65,000 a year or the equivalent of about $690 per month in 1949.

This proposal was not well received by labor. For example, the National Employment Lawyers Association opposed it with the following sarcastic remark: "We are surprised to see the Department adopting the Chamber of Commerce's proposal to base exemptions solely on compensation levels and effectively divorced from any duties analysis. [T]his proposal only demonstrates the Department's supine acquiescence to the employers' agenda to weaken overtime protections for American workers." To be sure, this attack overlooked the fact that in 1939-40 the Roosevelt administration had proposed excluding all (including blue-collar) employees receiving a salary of $200 a month or more, which in 2003 dollars did not even amount to one-half of $65,000.

With respect to job duties, the new standard test for executive employees dropped two of the long-test factors—(1) that of customarily and regularly exercising discretion and independent judgment, and (2) the crucially constraining

89See above ch. 14.


91The salary level did not, however, horrify the NAM in 2003, which enthusiastically supported the proposal. "NAM's Comments on Proposed FLSA White-Collar Exemptions" at 5 (June 26, 2003).

92National Employment Lawyers Association, "Comments on Proposed Rulemaking Re Executive, Professional and Administrative Exemption to FLSA Overtime, Submitted to U.S. Wage and Hour Administrator" at 10 (June 30, 2003).

93See above ch. 10.
and indisputably objective prohibition on devoting more than 20 percent, or, in the case of a retail or service store employee, 40 percent, of his hours of work to so-called non-exempt activities—and added one factor from the long test that had been absent from the short test: that of having the authority to hire or fire other employees or to recommend such action. The DOL justified deleting the long test's percentage restrictions on nonexempt work on the grounds that the long test itself had been practically nonoperative for years because of its outdated salary level. To be sure, this curious excuse (or perhaps self-fulfilling prophecy), which was a version of the practice of letting the criminal go because the constable had violated the law, could easily have been rendered superfluous by simply updating the long-test salary level. But the DOL refused to take this step because it "would add new...burdens [on employers] to the exemption tests." In other words, the DOL dismissed out of hand the application of a duties test that would protect additional workers and impose liability on additional employers.

The second reason that the Department offered for dropping the restrictions on the percentage of grunt work that supervisors could perform without causing their employers to forfeit their exemption was that retention would require time-testing managers by employers who are not required to keep time records on them. Thus, again, rather than imposing "new recordkeeping burdens" on employers, the DOL preferred making it easier for employers to impose overtime burdens on employees.

Finally, because judicial rulings in the early 1980s that bona fide executives could carry out managerial duties at same time that they were performing the same manual work as their subordinates made it more difficult to determine which activities were not inherently essential and necessary to executives’ duties, the DOL concluded that retaining the percentage restrictions was not a useful criterion for "defining the executive exemption in today’s work place." Thus virtually welcoming a court decision that stood the purpose of the overtime provision on its head, the DOL chose to hide behind judges in two federal circuits that had ruled in favor of employers. What made this third justification comically perverse was that not only had the DOL not been facing an insuperable legal barrier, but the court itself had expressly instructed the Secretary of Labor that its decision was “a result of the Secretary’s regulations,” and that: "If the Secretary believes that the underlying legislation was intended to cover employees such as Burger King’s Assistant Managers, or that employees doing identical work for an employer should have identical legal status as far as overtime is concerned, he should
reconsider the regulations as issued." 97 The Secretary did reconsider and even revise the regulations, but hardly in the manner in which the court 21 years earlier would have suspected.

In addition, the DOL undertook several specific changes in individual provisions making it easier to classify workers as excluded executive employees. For example, it specified that a department with as few as five full-time nonexempt employees could have up to two exempt supervisors if each customarily and regularly directed the work of two of those employees. 98 And because the DOL had freed employers from the constraining 20-percent rule, it also deleted the self-inculpating evidence of its own "experience...that a supervisor of as few as two employees usually performs nonexempt work in excess of the general 20-percent tolerance." 99

Similarly, under the proposed regulations, working supervisors were not executives if, instead of having management as their primary duty, the latter consisted of the same kind of work as their subordinates performed, ordinary production or sales work, or of routine, recurrent or repetitive tasks. 100 In contrast, under the old regulations, working supervisors were not executives if a substantial amount (meaning 20 percent or more) of their work was of the same nature as that of their subordinates. 101 And finally, the DOL conferred on retail employers the privilege that they most insistently sought: An assistant manager in a retail establishment whose primary duty included management functions such as scheduling employees, assigning work, overseeing product quality, ordering merchandise, managing inventory, handling customer complaints, or authorizing bill payments, "may be an exempt executive even though he spends the majority of his time on nonexempt work" such as serving customers, cooking food, stocking shelves, and cleaning. 102

In order to underscore the importance of this crucial relaxation of the restraining impact of the duties test on employers' power to extract unpaid overtime

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97 Donovan v. Burger King Corp., 675 F.2d 516, 520, 522 (2d Cir. 1982).
98 FR 68:15586 (proposed § 541.105(b)). At the same time it deleted the existing interpretive regulation stating that: "It cannot be said...that a supervisor drawn from a pool of supervisors who supervises employees assigned to him from a pool and who is assigned a job or series of jobs from day to day or week to week has the status of an executive. Such an employee is not in charge of a recognized unit with a continuing function." 29 CFR § 541.104(f).
99 29 CFR § 541.105(c).
100 FR 68:15586 (proposed §541.106).
101 29 CFR § 541.115(b).
102 FR 68:15587 (proposed §541.107).
work, the DOL revised its definition of "primary duty." To be sure, in order to avoid an exaggeration that the labor movement crafted in opposing the proposed regulations, it is important to note that the pre-2003 interpretive regulations had already conferred great discretion on employers to use supervisors for grunt work without jeopardizing their exemption:

The amount of time spent in the performance of the managerial duties is a useful guide in determining whether management is the primary duty of an employee. In the ordinary case it may be taken as a good rule of thumb that primary duty means the major part, or over 50 percent, of the employee's time. Thus, an employee who spends over 50 percent of his time in management would have management as his primary duty. Time alone, however, is not the sole test, and in situations where the employee does not spend over 50 percent of his time in managerial duties, he might nevertheless have management as his primary duty if the other pertinent factors support such a conclusion. Some of these pertinent factors are the relative importance of the managerial duties as compared with other types of duties, the frequency with which the employee exercises discretionary powers, his relative freedom from supervision, and the relationship between his salary and the wages paid other employees for the kind of nonexempt work performed by the supervisor.

The Bush administration, however, went even further and was much more specific in declaring that the "term 'primary duty' does not require that employees spend over fifty percent of their time performing exempt work." Returning to the example of the retail store assistant manager who performed the aforementioned types of exempt work, the DOL reiterated that he "may have management as the primary duty, even if he "spends more than fifty percent of the time performing non-exempt work such as running the cash register." Having just rejected the time-based presumption that favored worker protection, the DOL turned around and affirmed the time-based presumption favoring employers: "However, the amount of time spent performing exempt work can be a useful guide, and employees who spend over fifty percent of the time performing exempt work will be considered to have a primary duty of performing exempt work."

In redefining the notion of "primary duty" as "the principal, main, major or most important duty that the employee performs," the DOL radically subj ectivized it, especially as reinforced by the aforementioned elimination of the long-test's percentage limitation on nonexempt work. The consequence of these revisions was to confer much greater latitude on employers to describe employees' work.

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103 See below.
104 29 CFR § 541.103.
105 FR 68:15595 (proposed § 541.700).
106 FR 68:15595 (proposed § 541.700).
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primary duty in a self-serving manner. Thus, if asked in litigation, "to state which of several duties of an employee is primary," an employer, in the words of the high-profile former DOL officials, "will likely choose the one which results in the employee’s exemption...; and of course, the courts can be expected to defer to the employer’s characterization. [N]o disrespect intended, judges—whose job is decision-making—may well be more likely to find any decision-making an employee is authorized to do to be much more important than the cooking of hamburgers...even if 90 percent of the employee’s time is spent cooking...."107 Ultimately, then, the proposed reformulation of the primary duty test “invites employers and courts to find virtually any employee with any management or supervisory responsibilities to be an exempt executive.”108

Realistically, albeit distortedly, reflecting the senselessness that has bedeviled the exclusion of administrative employees since the FLSA’s enactment, the Bush DOL conceded that the duties test for them “is the most difficult to apply” and their exemption “the most challenging...to define and delimit....”109 The proposed “standard test” for administrative employees significantly deviated from the existing long and short tests by: deleting from the long test the requirement of exercising discretion and independent judgment, the prohibition on devoting more than 20 percent (40 percent in retail and service establishments) of employees’ time to non-exempt work, and the description of the three sub-groups of administrative employees; deleting from the short test the same requirement of discretion

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108Fraser, Gallagher, and Coleman, “Observations on the Department of Labor’s Final Regulations” at 18. The exclusionary result of this subjectivization is not confined to executive employees. An excellent example of the application of the narrow conception of “primary duty” to alleged professional employees even under the old regulations is Rutlin v. Prime Succession, Inc., 220 F.3d 737, 742 (6th Cir., July 20, 2000), in which a funeral director/embalmer argued that “even if a licensed funeral director and embalmer’s duties are considered professional, he spent only fifteen hours a week actually embalming bodies and directing funerals. Rutlin thus contends that his primary duties were not professional because those duties consisted of general upkeep of the funeral home. The district court disagreed, finding that even if Rutlin’s other, non-professional duties took more than fifty percent of his working time, “his professional duties were of principal importance to Prime Succession and, therefore, constituted his primary duties.” The appeals court agreed that it was “clear that Rutlin’s duties that were of principal importance to Prime Succession were those related to directing funerals and embalming bodies. Accordingly, these were Rutlin’s primary duties. The fact that Rutlin performed collateral tasks, even if those tasks took more time than his primary duties, does not change this fact.”
109FR 68:15566, 15567.
and judgment, and adding instead the requirement that the employee hold "a position of responsibility with the employer." In addition, while retaining from the long and short tests the requirement of having a "primary duty of the performance of office or non-manual work," it expanded the expansive exclusion even further by dropping the limiting terms "directly" and "policies" from the requirement that that work be "directly related to management policies or general business operations of the employer or the employer's customers."\textsuperscript{110}

The proposed regulations also diluted the categorical division between production and what the \textit{Weiss Report} had called "'servicing a business"\textsuperscript{111}: whereas the existing interpretation glossed this distinction as involving the administrative operations of a business, on the one hand, and production and sales work, on the other,\textsuperscript{112} the proposed regulation narrowed this non-administrative sphere to "working on a manufacturing production line or selling a product."\textsuperscript{113} Indeed, the DOL programmatically announced that the whole point of this exercise in redefinition was to blur this distinction, or, in its words, to "reduce the emphasis on the so-called ‘production versus staff’ dichotomy in distinguishing between exempt and non-exempt workers" because it was allegedly "difficult to apply uniformly in the 21st century workplace" and because it was "needed to reflect emerging case law...."\textsuperscript{114}

To be sure, some courts have promoted the evisceration of the "dichotomy,"\textsuperscript{115} but, as in other areas of white-collar overtime law, other court decisions have continued to uphold the distinction.\textsuperscript{116} The Bush DOL nevertheless chose to ignore the latter because they made it more difficult for employers to extract unpaid overtime from employees.\textsuperscript{117} To be sure, as in all other controversies over excluding

\textsuperscript{110}FR 68:15587 (proposed § 541.200); 29 CFR § 541.2.

\textsuperscript{111}Weiss Report at 63

\textsuperscript{112}29 CFR § 541.205(a).

\textsuperscript{113}FR 68:15587 (proposed § 541.201(a)).

\textsuperscript{114}FR 68:15566.

\textsuperscript{115}E.g., Reich v. John Alden Life Insurance Co., 126 F.3d 1 (1st Cir., Sept. 18, 1997); Shaw v. Prentice Hall Computer Publishing Inc., 151 F.3d 640 (7th Cir., Aug. 4, 1998); Piscione v. Ernst & Young, 171 F.3d 527 (7th Cir., Sept. 18, 1999).


\textsuperscript{117}To be sure, employers were still not satisfied with the proposed regulation because, by diminishing but nevertheless retaining the dichotomy, "the DOL has effectively codified what the courts were free to reject." "LPA's Comments on Proposed Rule Defining and Delimiting the Exemptions for Executive, Administrative, Profession, Outside Sales and
white-collar workers from overtime regulation, none of the participants—including judges and the DOL—has ever sought to explain why the distinction that § 541.205(a) draws between “those employees whose primary duty is administering the business affairs of the enterprise” and “those whose primary duty is producing the commodity or commodities, whether goods or services, that the enterprise exists to produce and market”\footnote{Dalheim v. KDFW-TV, 918 F.2d at 1230.} should, against the background of the underlying purposes of the overtime provision, in any way be relevant to determining the scope of coverage.\footnote{This stricture applies as well to Fraser, Gallagher, and Coleman, “Observations on the Department of Labor's Final Regulations” at 21, who criticize the final rule for “gutting the 'production versus staff' dichotomy that has been the linchpin of Labor Department enforcement.”} Moreover, ironically, even if employers were correct in asserting that workplace reality has been eroding the dichotomy, the consequence is a convergence of white- and blue-collar conditions that should prompt a greater scope of inclusion rather than exclusion of the former from overtime protection.

The DOL's principal definitional innovation with respect to administrative employees, “position of responsibility,” was so profoundly ambiguous that it is difficult to discern the grounds on which the Department could possibly have believed that this phrase would generate less uncertainty than the term “discretion and independent judgment” that it replaced, especially since the new term’s alternative sub-definitions were equally ambiguous: “the importance to the employer of the work performed or the high level of competence required by the work performed. To meet this requirement, an employee must either customarily and regularly perform work of substantial importance or perform work requiring a high level of skill or training.”\footnote{FR 68:15587 (proposed § 541.202).} Expansiveness, but hardly clarity or certainty, was attained by defining “work of substantial importance” as “by its nature or consequence” affecting the employer’s general business operations or finances “to a significant degree.”\footnote{FR 68:15587 (proposed § 541.203(a)). The term “work of substantial importance” was not a paragon of precision in the existing interpretive regulations either. 29 CFR § 541.205(a).} However, the DOL did, at the very least, seek to avoid the charge of having acted without statutory authority by noting that “work of substantial importance” excluded clerical and secretarial tasks as well as “other mechanical, repetitive, recurrent or routine work.”\footnote{FR 68:15588 (proposed § 541.203(c)).}
As an example of the kinds of occupations whose status had been judicially in dispute but that employers would now be free to exclude the DOL adduced insurance claims adjusters, who performed work of substantial importance so long as their duties included interviewing insureds and witnesses, inspecting damage, reviewing factual information to prepare damage estimates, evaluating coverage, negotiating settlements, or making recommendations about litigation. But the potentially most capacious sub-category that the DOL was able to shoehorn into the category of excluded administrative employees by means of "work of substantial importance" was the so-called team leader: "An employee who leads a team of other employees assigned to complete a major project for the employer (such as purchasing, selling or closing all or part of the business, negotiating a real estate transaction or collective bargaining agreement, or designing or implementing productivity improvements) performs work of substantial importance, even if the employee does not have direct supervisory responsibility over the other employees on the team." In specifying that an executive or administrative assistant to a proprietor or chief executive fulfilled the requirement of performing work of substantial importance if the employee "without specific instructions or prescribed procedures, has been delegated authority to arrange meetings, handle callers and answer correspondence" the Bush DOL was, to be sure, merely carrying forward one of the more anomalous conclusions of the Stein Report, Weiss Report, and existing interpretive regulations, but it nevertheless also overturned a deviant

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124 FR 68:15587 (proposed § 541.203(b)(2)). Some of this wording was taken from an opinion letter that WHA McCutchen had issued a few months earlier reaching the same conclusion as the regulation. WHD, USDOL, Opinion Letter, FLSA (Nov. 19, 2002), 2002 WL 32406601 (Westlaw FLB-WHOL); “DOL Issues Guidance on FLSA Coverage of Insurance Company Claims Adjusters,” USLW, Nov. 26, 2002, at 2344.

125 FR 68:15587 (proposed § 541.203(b)(3)). William Kilberg, the corporate lawyer who for years had been representing big business before Congress with respect to amending the FLSA, proposed at a Federalist Society convention in November 2002 that the executive duties test be revised “to reflect team and functional approaches to management so that a team leader of a group of employees, like a more traditional line manager of two or more employees, would be deemed to engage in management.” Federalist Society, National Lawyers Convention 2002: “The Fair Labor Standards Act: Keeping Time with the 21st Century?” at 50 (Nov. 14, 2002).

126 FR 68:15587-88 (proposed § 541.203(b)(4)).

127 See above chs. 13-14; 29 CFR § 541.208(d).
Clinton-era WHD opinion letter that characterized such work as clerical.\textsuperscript{128}

The other branch of the definition, "work requiring a high level of skill or training," meant "administrative work requiring specialized knowledge or abilities," but, as with the new definition of "professional" employee, that knowledge did not have to be acquired academically. In addition, to accommodate a frequent complaint by employers, this category was expressly broadened to "include work by employees who use a reference manual," but not to the aforementioned clerical, secretarial, "or other mechanical, repetitive, recurrent or routine work."\textsuperscript{129}

The DOL declared that its "goal" in revising the regulations pertaining to professional employees was merely "to clarify and simplify" the definitions, "while remaining consistent with the purposes of the FLSA,"\textsuperscript{130} which it unfortunately never revealed. For learned professionals the DOL made the duties test easier to meet by: deleting from the long test the requirements of the consistent exercise of discretion and judgment, that the work be predominantly intellectual and varied and that its output cannot be standardized in relation to a given period of time, and that the employee not devote more than 20 percent of her time to non-exempt work; deleting from the short test the requirement of the consistent exercise of discretion and judgment;\textsuperscript{131} and adding that the requisite knowledge no longer had to be acquired virtually exclusively by a "prolonged course of specialized intellectual instruction,"\textsuperscript{132} but could, instead, also "be acquired by alternative means such as an equivalent combination of intellectual instruction and work experience."\textsuperscript{133} Auspiciously suggesting to employers the source of a huge additional supply of professional employees who could be lawfully excluded from overtime protection, the DOL specified that "training in the armed forces" was one way to acquire the

\textsuperscript{129}FR 68:15588 (proposed § 541.204(a)-(c)).
\textsuperscript{130}FR 68:15567.
\textsuperscript{131}29 CFR § 541.3.
\textsuperscript{132}The existing legislative regulation specified that the knowledge be "customarily" acquired in this manner, but the DOL's interpretation observed that the "word 'customarily' implies that in the vast majority of cases the specific academic training is a prerequisite for entrance into the profession." 29 CFR § 541.301(d).
\textsuperscript{133}FR 68:15589 (proposed § 541.300(a)(2)(i)). The proposed regulation deleted the existing interpretation that the "word 'customarily'...makes the exemption available to the occasional lawyer who has not gone to law school, or the occasional chemist who is not the possessor of a degree in chemistry, etc., but it does not include the members of such quasi-professions as journalism in which the bulk of the employees have acquired their skill by experience rather than by any formal specialized training." 29 CFR § 541.301(d).
required knowledge.134

Perhaps the most interesting changes that the DOL made in the regulations concerning creative or artistic professionals involved journalists, whom publishers have been seeking to exclude from overtime regulation since the advent of the NRA codes of fair competition in 1933.135 Under the existing interpretive regulations, which Harold Stein wrote in 1940,136 the DOL advised that: “Obviously the majority of reporters do work which depends primarily on intelligence, diligence, and accuracy. It is the minority whose work depends primarily on “invention, imagination, or talent.”137 In a further interpretation, which Stein did not write but which also dated back to the 1940s, the DOL went on to state that: “Only writing which is analytical, interpretative, or highly individualized is considered to be creative in nature. ... Newspaper writers commonly performing work which is original and creative within the meaning of Sec. 541.3 are editorial writers, columnists, critics, and ‘top-flight’ writers of analytical and interpretative articles.”138

Far from contesting this bizarre conceptual framework, within which such literally prosaic writers were excluded from overtime regulation on the grounds that they were artistically creative,139 the Bush administration’s proposed regulation reversed the presumption of journalists’ entitlement to overtime protection: “Journalists may qualify as creative professionals if their work generally requires invention, imagination, originality or talent. Writers for newspapers, news magazines, television news programs, the Internet, and other media...generally perform work involving originality and talent.”140 The DOL’s surprising insistence, despite this inversion, that it did not intend to “make any material changes from the existing regulations” was based on its claim that it was merely reflecting recent case law, which distinguished between, on the one hand, non-artistic-professional employees of small newspapers gathering facts about routine local events and reporting them in a standard format, and, on the other, artistic professionals who researched facts, developed story elements, conducted interviews, and wrote...

134 FR 68:15589 (proposed § 541.301(d)).
135 See above ch. 7.
136 See above ch. 13.
137 29 CFR § 541.302(d).
138 29 CFR § 541.302(f)(1). The first sentence appeared in the interpretive bulletin that the WHD published in the wake of the Weiss Report, but did not originate in the latter, but rather in USDOL, WH and Public Contracts Divisions, Manual of Newspaper Job Classifications 4 (Apr. 1943). The second sentence was distilled from the much lengthier discussion in the latter publication.
139 See above ch. 13.
140 FR 68:15589 (proposed § 541.302(d)).
Although it was true that some cases in the 1990s had dichotomized journalists into those working for "major news organizations" and "small town" newspapers, it is worth emphasizing, as the Bush DOL—which shared those judges' bias in this regard—did not, that the leading case was guided by the court's misperception of "the purposes of the FLSA," which, being to "prohibit substandard conditions," were inconsistent with using the law as "a sword by which writers...at the pinnacle of accomplishment and prestige in broadcast journalism may obtain a benefit from their employer for which they did not bargain. Thus, while the plaintiffs should not be exempted solely on the basis that they are well paid, we think that the DOL interpretive guidelines should be read in an effort to promote the FLSA's purpose, not to frustrate it."  

To be sure, the DOL distorted the case law—and thus the discretion available to it, even if it voluntarily decided to subject its new regulations to judicial criticism of the old regulations—by failing to mention that in one of the very cases that it cited another federal appeals court, while adjudicating the claims involving small-town newspapers, accepted as generally true for journalism as a whole the testimony of the dean of the Graduate School of Journalism at the University of California at Berkeley—which the Reagan administration DOL had offered at trial—that "the majority of journalists do not meet the qualifications for professional exemption from the overtime provisions of the FLSA. ... He stated that there is no body of scholarly work which a journalist is required to know before he may practice. Rather, a journalist must be a skilled and accurate observer, have good judgment, and be able to write clearly." The dean also emphasized that journalists' work product did not depend "primarily on invention, imagination, or talent." Consequently, the First Circuit Court of Appeals concluded that "although the field of journalism has changed radically, these changes do not warrant

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141 FR 68:15568.

142 Freeman v. National Broadcasting Co., 80 F.3d 78, 85, 86 (2d Cir. 1996). Consistent with the court's exclusive focus on money, it did not discuss how extensive the overtime work was, although the trial court—whose ruling in favor of the employees the appellate court overturned—did present considerable information on hours worked. Freeman v. National Broadcasting Co., 846 F.Supp. 1109 (SDNY 1993). This decision was not the first dealing with reporters' overtime claims to express the view that the FLSA was designed to "protect those receiving the bare necessities of life whose health was injured by long hours of toil." Sherwood v. The Washington Post, 677 F.Supp. 9, 13 (D.D.C., Jan. 13, 1988), rev'd, 871 F.2d 1144 (D.C. Cir., 1989). To be sure, in its commentary on its final rule, the DOL did mention in passing that unions in their commentary had correctly noted that the Supreme Court had stated that "employees are not to be deprived of the benefits of the Act simply because they are well paid...." FR 69:22173 (citing Jewell Ridge Coal Corp. v. Local No. 6167, UMWA, 325 US 161, 167 (1945)).
modifying the Secretary’s view that most journalists do not qualify as exempt professionals under the FLSA. In his view, the focus of the majority of journalists is the same today as it was forty years ago: to report disciplined observations of public people and public events. This testimony essentially ends appellate review of the matter [i.e., the trial court judge’s upholding the validity of the DOL’s interpretive regulation].”

Remarkably, the proposals relating to the “salary basis” on which employers must pay all white-collar workers in order to be eligible to exempt them and to the associated issue of the permissible scope of pay-docking, which was reputedly the driving force in the 1990s behind employers’ demands for regulatory revision, turned out to be one area in which the Bush administration did not fully accommodate companies. In particular, the DOL declined, for reasons discussed earlier, to legalize pay-docking for partial-day absences. Its decision to refrain from granting employers all of their demands may in part have been rooted in the knowledge that the wording of the existing regulation had already given willing judges the means by which to relieve firms of liability for unlawful deductions and to afford firms much of the unfettered freedom they demanded to coerce white-collar employees by means of deductions. On the other hand, the very existence of such pro-employer judicial precedent could, as it had in other areas of the regulations, have served as a meta-political shield behind which the DOL could pretend that its regulations merely “reflect emerging case law” rather than its own agency to create new law.

144See above ch. 15.
146See above ch. 2.
147“[W]here a deduction not permitted by these interpretations is inadvertent, or is made for reasons other than lack of work, the exemption will not be considered to have been lost if the employer reimburses the employee for such deductions and promises to comply in the future.” 29 CFR § 541.118(a)(6).
148For example, a chain of fast food restaurants switched from deducting recurrent cash register shortages from managers’ bonuses to deducting them from their weekly salaries, in the exquisitely delicate words of one federal appeals court, “ostensibly to increase the managers’ responsiveness to the problem.” Moore v. Hannon Food Service, Inc., 317 F.3d 489, 491 (5th Cir., Jan. 20, 2003).
149FR 68:15566.
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On the other hand, the DOL was very accommodating to employers with respect to the linked issue of the so-called window of opportunity to make corrections for pay practices that were inconsistent with honoring the salary basis of employees' compensation. The DOL's major innovation was permitting employers to make deductions from pay for "unpaid disciplinary suspensions of a full day or more imposed in good faith for infractions of workplace conduct rules" that were imposed according to a "written policy applied uniformly to all workers." Such rules included policies prohibiting sexual harassment and violence. Because under the existing regulations employers failed the salary basis test and thus forfeited the exemption by making disciplinary deductions for other than "infractions of safety rules of major significance," the new regulation exposed a considerably larger universe of white-collar workers to the worst of both worlds—loss of the central marker of their salaried status without a concomitant grant of overtime protection.

With regard to the effect of improper pay-docking, the proposed regulation was even more accommodating to employers. It provided that an employer would lose the exemption only if it had a "pattern and practice of not paying employees on a salary basis" demonstrating that it "did not intend to pay employees in the job classification" on that basis. If the employer did have a policy of not paying on a salary basis, the DOL confined the employer's loss of the exemption to the period in which the deductions were made and to "employees in the same job classification working for the same managers responsible for the improper deductions." Finally, even if the employer made improper deductions, it would still not lose the exemption if it had a written policy prohibiting them, notified employees of that policy, and reimbursed them, unless the employer repeatedly and willfully violated the policy or continued to make such deductions after receiving complaints from

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150 FR 68:15594 (proposed § 541.602(b)(5)).
151 29 CFR § 541.118(a)(5).
152 FR 68:15594 (proposed § 541.603(a)). The Clinton administration had already set out in an amicus brief a position similar to the one adopted by this part of the proposed regulations. Klem v. County of Santa Clara, 208 F.3d 1085, 1091 (9th Cir., Apr. 3, 2000). The factors set forth by the new regulation to be considered in determining whether the employer did not intend to pay included the number of deductions, the time period involved, the number of employees, the number and geographic location of the managers responsible for the improper deductions, the employer's size, whether there was a written policy prohibiting improper deductions, and whether the employer corrected them. Fraser, Gallagher, and Coleman, "Observations on the Department of Labor's Final Regulations" at 38, pointed out that these factors generated "almost total uncertainty about the result which should be reached in a given case."
complaints. And just in case any subaltern DOL investigators or judges had not grasped how radically the regulations were intended to subvert the presumption of worker protection and to impose the burden on employers to prove that they were exempt, the Department added an astounding caveat that the section on employers' window of opportunity for making corrections 'shall not be construed in an unduly technical manner so as to defeat the exemption.'

As far as the impact of the proposed regulations was concerned, the DOL claimed that increasing the salary threshold from $155 to $425 a week would "increase the wages of 1.3 million lower-income workers," whereas 644,000 "hourly paid worker working overtime in occupations with exempt administrative and professional duties could be converted to salaried employees." The proposals would cost employers between $334.8 million and $895.5 million annually in recurring payroll costs. These claims proved to be exceedingly contentious.

The War of the Comments

Classifying an employee as exempt is really a way to assure that the employee earns less and works more.

Even before the details of what McCutchen claimed were "moderate and measured" revisions were known or had been analyzed, the antagonists had weighed in with their predictable reactions. Although they soon shifted the focus

153 FR 68:15594 (proposed § 541.603(c)).
154 FR 68:15594 (proposed § 541.603(d)).
156 FR 68:15580.
157 FR 68:15577, tab. 8 at 15579; CONSAD, "Final Report" tab. 4.1 at 46.
158 Karen Smith, "Comments on the Department's Proposed Revisions to Regulation 541" at 15 (June 2003).
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of their counter-campaign, union officials, who in the past had been unable to choose between a 40-hour week and the overtime pay that helped workers either make ends meet or sustain middle-class expenditure and consumption patterns, suddenly decided that “they would oppose any changes that would cause longer work weeks, arguing that required overtime pay is the only brake stopping many employers from demanding excessive work hours.” The AFL-CIO’s spokesperson, Kathy Roeder, expressed concern that the proposed rules “could weaken the tradition of the 40-hour work week”—as if it had ever been the tradition for those millions of white-collar workers who had never been protected by the FLSA. The United Food and Commercial Workers determined immediately that the new rule was “an absolute disaster for white-collar workers.... Anyone over the [salary] threshold is fair game.”

In contrast, the Chamber of Commerce of the United States, which had always asserted that the FLSA “was intended to protect people at the low end who are least able to bargain with their employers and protect their own interest,” was “encouraged by the fact that they [i.e., the DOL] set an upper-level salary test with a simplified duties test.” Given a little time to digest the details, employers began to verge on the giddy: at a teleconference sponsored by the American Bar Association Section of Labor and Employment Law on May 7, one management-side lawyer called the rather pedestrian revisions an “amazing intellectual feat.”

In its initial press release of March 27, the DOL, availing itself to the hilt of the legitimacy that would accrue to it for taking the step that no predecessor had (successfully) taken in 28 years, stressed that the $270-a-week increase in the salary test from $155 to $425 “would be the largest since Congress passed the FLSA in 1938.” While still basking in that glory—which was only slightly tarnished by

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160 Strope, “Proposal Extends Overtime to Low-Income Workers, Cuts Some Professionals’ Pay.”


165 US DOL, ESA News Release: “U.S. Department of Labor Proposal Will Secure Overtime for 1.3 Million More Low-Wage Workers” (Mar. 27, 2003), on
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the AFL-CIO’s revelation that $425 a week was only $71 above the poverty guideline for a four-person family, which might be eligible for food stamps up to an annual income of $23,920. WHA McCutchen dropped the other shoe: “[R]evising job duties required to qualify for the exemption to better correspond to the 21st century workplace realities...is long overdue—the types of jobs people do and the skills they need have changed, but the regulations have not.” However, lest theretofore protected white-collar workers fret over the impending loss of coverage, she added this superbly crafted euphemism for exposure to the full rigors of legally unshackled employer domination: “‘By recognizing the professional status of skilled employees, the proposed regulation will provide them with a guaranteed salary and flexible hours.’”

The following day the DOL fleshed out some of the particulars of the “Proposal to Strengthen Overtime Protection.” Ironically, the examples that it created to illustrate the advantages that would thenceforward flow to the newly covered included: “An employee working 50 hours per week managing a restaurant for $15,600 per year” and “A worker putting in 60 hours a week managing a department store for $18,000 per year.” The Department apparently felt no need to explain either how the free labor market could tolerate the kind of systemic overreaching that enabled employers to force employees to work 3,000 hours a year for six dollars an hour or why regulations inherited from Democratic administrations would dignify jobs subject to such conditions with the lofty title of “executive.” Nor did the DOL mention that even after its unprecedented salary-level increase, employers could continue to force such “executives” to work 60 hours a week all year round without additional compensation so long as they paid them the princely emolument of $425 a week, which would work out to $7.08 an hour for 60 hours. Moving on to the duties tests, the Labor Department pointed out, as if expecting that employees should be grateful to hear that the government had finally devised some wording to liberate them from protection against overwork, that the “proposal would eliminate the long-inactive ‘long-test’ rule restrict-


166 AFL-CIO, “Comments on Proposed Regulations (June 30, 2003), on http://www.aflcio.org (the annual figure worked out to $460 a week). In his comments the president of the AFGE observed that a $22,100 salary threshold would mean that all federal GS employees in a grade higher than GS-3/step 7 or GS-4/step 2 would satisfy the salary-level test. That only 1.1 percent or (14,000 of 1,219,441) federal employees would not meet the salary-level test was “simply indefensible.” Letter from Bobby Harnage to Tammy McCutchen at 6-7 (June 30, 2003), on http://www.afge.org.


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ing exempt employees from devoting more than 20% of time in a workweek performing non-exempt duties.” And the same counter-intuitive expectation underlay the disclosure that the “proposal recognizes as exempt ‘learned professionals’ certain employees who gain equivalent knowledge and skills through a combination of job experience, military training, attending a technical school or attending community college.”

Initiating a strategy that the Democrats would soon repeat with greater success, on April 9, barely a week after publication of the proposals, New Jersey House Democrat Robert Andrews offered an amendment to the Family Time Flexibility Act in committee that would have undone them. Along party lines, however, the House Education and Workforce Committee rejected it 26 to 21.

Once labor and capital had had enough time to digest the proposed regulations, their negative and positive polarization remained unchanged, but their analysis became somewhat more nuanced. According to a survey by the Bureau of National Affairs, employers’ lawyers and human resources administrators praised the proposals “as a major step that would reduce litigation and make it easier for employers to identify workers as exempt,” while union and plaintiffs’ lawyers maintained that they would thwart the FLSA’s protective purposes. One management attorney, who was candid enough to admit that it was “‘not surprising’” that a revision that was “‘a net positive for employers—probably in a big way—...came out of a Republican administration,’” remarked that the “‘proposal loosens up the exemptions and makes it easier to classify borderline employees as exempt....’”

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169“Committee Approves Comp Times, Clearing Way for House Floor Vote,” LRR 172:62, 63 (Apr. 21, 2003). The Democratic minority on the committee wrote in the report: “The most important employment protection in the day-to-day life of millions of workers is the family-friendly overtime provisions of the Fair Labor Standards Act (FLSA). At least 63 million private sector workers are required to be paid time-and-a-half for hours worked in excess of 40 hours a week. Millions of these workers depend on overtime pay to make ends meet. ... There is no single change that Congress could make to our labor laws that would do more to undermine the standard of living for Americans than to weaken or eliminate the FLSA overtime requirement.” Family Time Flexibility Act (H. Rep. No. 108-127, 108th Cong., 1st Sess., May 22, 2003). On Andrews’ earlier introduction of bills expanding the exclusions of white-collar workers, see above ch. 15.

170Linda Micco and Victoria Roberts, “Management, Plaintiffs’ Attorneys React to Overhaul of FLSA Regulations,” LRR 172:152-56, at 152 (May 19, 2003) (quoting Daniel Abrahams). Such openly political assessments were rare. Another example was the statement by a member of the American Corporate Counsel Association that “DOL may have ‘gone too far’ and ‘overreached’ in offering its proposals.” Michael Triplett,
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At this early juncture, the AFL-CIO took the position, in the words of its associate general counsel, that: "We would seriously consider challenging the secretary in federal court, since Chao clearly exceeded her authority. We think the proposal is terrible because proposed revisions to the...FLSA...regulations widen the exemptions way beyond the bounds Congress intended [in 1938]."\(^1\)

Much of the union and labor commentary focused on the new salary thresholds. Wasting not a word of criticism on the Clinton administration for having failed during its eight long years in power to increase the lower salary level by even one cent, the AFL-CIO public policy director Chris Owens complained that her organization had suggested $27,000, while Gregory McGillivary, a union-side lawyer, argued that more than $40,000 would have been required to adjust for inflation since 1975. Another plaintiffs' attorney objected to the DOL's having calibrated the lower salary threshold so as "not to disadvantage poorer employers in the South. Jac Cotiguala contended that this statistical methodology suggested that "the rest of the country should be as 'dirt poor' as the South," thus directly contradicting "the FLSA's intent to raise the standard of living for the poorest Americans...."\(^2\) As misguided as the salary setting may have been, he fell into the traditional error of regarding the overtime provision as a device for promoting overtime work and pay rather than for creating leisure and redistributing working hours more evenly.

As for the new $65,000 upper-level salary threshold, Owens argued that there was "'no precedent within the FLSA to exempt people from coverage because they have certain earnings,'” adding that it was "'questionable that this could be done by regulation.'” Since the FLSA’s laconicism regarding the white-collar exclusions potentially offers a formally legitimate basis for defining “bona fide” executive, administrative, and professional employees primarily by reference to their high salaries and only secondarily with respect to their duties—after all, many NRA codes imposed no duties test at all\(^3\)—the AFL-CIO’s position was weak, although there is no doubt that exclusion based solely on salary level would exceed the DOL’s authority since, strictly speaking, the exclusion would then lack any definition of the three categories, which the FLSA empowered the Labor Secretary

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\(^1\) Proposed Modifications to Salary Basis Test Gather Broad Critiques in Comments to DOL,” *LRR* 172:440-44 at 441 (Aug. 11, 2003).


\(^3\) Micco and Roberts, “Management, Plaintiffs’ Attorneys React to Overhaul of FLSA Regulations” at 152-53.

\(^3\) See above ch. 7.
to provide. In any event, the speculation by Alan Kaufman, another plaintiffs' lawyer, that the $65,000 threshold would "'cut[ ] off these court cases by relatively highly paid employees'" because "'[y]ou would be hard-pressed to find anyone making $65,000 and above who doesn't perform at least one exempt duty,'"\(^{174}\) appeared much more plausible. (Indeed, Administrator McCutchen herself agreed that white-collar workers with annual salaries over $65,000 were "'likely exempt, no matter what test you apply.'")\(^{175}\) One labor voice that was willing to venture onto this new conceptual terrain, Cotiguala, while not entirely opposed to an upper-level bright-line rule, argued that it should be higher than $65,000: "Skilled hourly workers and unionized tradesmen in metropolitan areas regularly earn $65,000 per year and higher, he pointed out. A salary around $150,000 or $200,000 that would rise with the consumer price index would be more fair...."\(^{176}\) Why only white-collar entitlements should be subject to means-testing Cotiguala failed to explain, but at least he had initiated the re-thinking of a dogma. Indeed, although the admission had no visible impact on the AFL-CIO's strategy, even Owens began to "question why white-collar workers are excluded from overtime pay. 'There's no

\(^{174}\)Micco and Roberts, "Management, Plaintiffs' Attorneys React to Overhaul of FLSA Regulations" at 153.

\(^{175}\)Taylor, "Employers Banking on Clearer Overtime Rule." On this point the WHA agreed with the Economic Policy Institute's conclusion that the "DOL would have difficulty identifying any white-collar employee earning $65,000 a year or more who will not meet at least one of these [duties] tests." Ross Eisenbrey, "The Department of Labor's False Claims About the Overtime Rule" at 4 (July 26, 2003), on http://www.epinet.org.

\(^{176}\)Micco and Roberts, "Management, Plaintiffs' Attorneys React to Overhaul of FLSA Regulations" at 154. In fact, the number of blue-collar workers earning more than $100,000 annually is minuscule. In March 2002, only 315,627 private-sector precision production, craft and repair and operator, fabricator, and laborer employees (or 0.99 percent of 31,854,569 such workers) had total money earnings of $100,000 or more, including 77,730 in construction trades and extractive occupations; 72,617 mechanics and repairers; 32,588 production supervisors; 30,163 in transportation occupations; 26,996 machine operators; and 14,111 carpenters. Even these figures are overstated because the incomes include all sources (and multiple jobs) including interest and thus do not identify blue-collar workers who earned $100,000 at one job. In contrast, 4,761,964 or 7.3 percent of 64,916,511 private-sector white-collar employees earned $100,000 or more, ranging from a low of 0.4 percent in financial records processing to 57.1 percent among physicians and dentists. US BLS and Bureau of the Census, CPS: March Supplement: Occupation of Longest Job in 2002, Total Money Earnings of People 15 and Older (Mar. 2002), on http://ferrett.bls.census.gov.
reason why a white-collar worker should be deprived of overtime pay.... The Labor Department may be taking us in the wrong direction."  

In conformity with the labor movement’s position on overtime since World War II, the AFL-CIO chose to base its campaign against the Bush administration’s expansion of the white-collar exclusions primarily on the presumptive loss of premium overtime pay, not on the loss of the 40-hour week, which it in principle had traded off for time and a half as far back as the 1940s. The unions’ position was, for example, faithfully reflected in the letter that more than a hundred Democratic members of the House wrote Labor Secretary Chao just as the deadline for comments on the proposed regulations expired, declaring that: “‘Millions...who have long depended upon overtime work to help make ends meet will face effective pay cuts.’” Or as George Miller, the California Democrat who was perhaps the AFL-CIO’s most loyal congressional supporter, put it even more starkly a few days later: “‘Overtime is not a luxury, it is a necessity for many American families.’”

The self-contradictory character of labor’s position was painfully on display in a letter from 43 senators to Chao on June 30 declaring that the 40-hour week was “vital to balancing work responsibilities and family needs” and adding that requiring employees to “work more hours for less pay” was “not family friendly”—as if payment of time and a half made overtime work family friendlier. Similarly, after correctly stating that time and a half discouraged employers from scheduling overtime by making it more expensive and thus made a difference in preserving the 40-hour week, the senators did an about-face by asserting that: “Millions of employees depend on overtime pay to make ends meet. ... Overtime pay often constitutes 20-25 percent of their wages. These workers will face an unfair reduction in their take-home pay if they can no longer receive their overtime pay.” Politicians apparently found it difficult to grasp that overtime pay of this

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179Steven Greenhouse, “Democrats Protest Changes to Overtime Rules,” *NYT* July 1, 2003 (A19:3-5). In fact, “enrichment of workers does not appear to have been a purpose of the authors of the FLSA where the overtime pay requirement was concerned....” William Whittaker, “The Fair Labor Standards Act: Exemption of ‘Executive, Administrative and Professional Employees’ Under Section 13(a)(1)” at 4 n.13 (CRS, RL 31995, July 17, 2003).


181*Proposed Rule on Overtime Pay: Hearing Before a Subcommittee of the Committee on Appropriations United States Senate* 23-24 (Special Hearing, S. Hrg. 108-233; 108th
magnitude not only did not promote, but could not be reconciled with preserving
the 40-hour week. Also forgotten was the lesson that the AFL had imparted to
Congress a century earlier: systematic and generalized overtime ultimately serves
to lower base wages.\textsuperscript{182}

Much more interesting and revealing than these abstract and stereotyped
shibboleths were the concrete and job-specific personal statements of real workers
that the AFL-CIO posted on its website. (And even if the union’s public relations
experts helpfully formulated them, they still reflected the union’s campaign
policy.) David Taylor, a highly skilled refinery worker in Houston was protected
by his collective bargaining agreement, but, if the proposed regulations took effect,
he and other oil industry workers might be “reclassified as ‘exempt’” and the
nonunion workers could lose their right to time-and-a-half pay after 40 hours of
work a week. And in future contract negotiations, union employers...probably
would try to take back overtime pay, says Taylor,...who estimates his gross income
would fall by about 25 percent without overtime pay.” He then got to the point:

“When my co-workers were hired, they were asked if they had any problem with
mandatory overtime, and then they based their futures and standard of living on that
overtime,” Taylor says. “The house you buy, whether your wife has to work, whether you
can send your kids to Texas A&M or they have to attend the community college—for
many of us, it’s all been determined by overtime, and now they want to change the rules
in the middle of the game.”\textsuperscript{183}

A policeman in Ohio, who said that he would lose about $2,000 a year in
overtime pay if the proposed rules were adopted, understandably resented that he
would no longer be able to put that money away for his daughter’s college
education. What was not so easy to grasp was his conclusion that: “‘This comes

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\textsuperscript{182}Linder, \textit{The Autocratically Flexible Workplace} 54-55. The subjective side of this
phenomenon was inadvertently captured in a 1968 report about Wall Street brokerage
houses where both employers and low-wage employees regarded overtime as a benefit:
“Every front-office man can tick off the many fringe benefits and bonuses offered semi­
skilled clerks, not to mention the unusually heavy overtime.” But with a basic wage of
$1.70-$2.00 an hour, many young employees told of friends earning $80-$90 week in
midtown Manhattan: “‘They don’t get the overtime,’ one Bronx girl said, ‘but they aren’t
carried out in fainting fits either,’” while another added: “‘As soon as the overtime ends,
13, 1968 (71:3-6, 74:6-8).

\textsuperscript{183}“Overtime Pay: What Workers Are Saying,” http://www.aflcio.org/yourjob
economy/overtimepay/profiles.cfm.
down to protecting the 40-hour workweek." How unions imagined that they were protecting the 40-hour week by promoting or acquiescing in the normalization of regular overtime work remained a mystery.

A related striking logical lapse characterized an op-ed piece by the president of the Hawkeye Labor Council AFL-CIO representing 8,000 workers in 38 locals in Cedar Rapids and eastern Iowa, who concluded from the fact that "[m]illions of workers depend on cash overtime to supplement their incomes" that [w]ithout this supplemental income, many workers would not be able to pay basic bills and might be forced to take a second or third job." This argument overlooked that such overtime was the functional equivalent of a second or third job in taking away jobs from the unemployed—precisely the result that the FLSA overtime provision was supposed to prevent.

Emboldened, perhaps, by their success in forcing House Republicans on June 5 to withdraw from a floor vote for lack of votes the Family Time Flexibility Act, which would have imposed employer-dominated compensatory time off in lieu of overtime pay on the private sector, labor and Democrats intensified the propaganda battle as the deadline for submitting comments approached. These twin statutory and regulatory campaigns shared the focus on 'making ends meet' that had become central to all union lobbying on the overtime issue. As AFL-CIO president John Sweeney said of the withdrawal of the comp time bill: "[T]he Republican leadership finally realized that not all of their members would blindly go along with unraveling the basic right to overtime pay, which could literally take billions out of the paychecks of working families."

The outstanding broadside in the propaganda war was the briefing paper of the Economic Policy Institute (a pro-labor research organization), which, on publication in late June, became (and remained throughout the debates) a lightning rod by virtue of having provided an estimate that instead of the 644,000 projected by the DOL, "2.5 million salaried employees and 5.5 million hourly workers will lose their right to overtime pay if the proposed rules are adopted." The EPI's figure

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184"Overtime Pay: What Workers Are Saying."
of eight million then crystallized as a mantra, which labor’s congressional supporters repeated ad infinitum as a debating point, while opponents such as Senator Judd Gregg, chairman of the Committee on Health, Education, Labor, and Pensions, and the Republicans’ congressional point man on overtime regulation, accused the EPI of “just simply fabricating the number in the sense that the number has no relationship to anything the regulation actually says.” Members of Congress rarely mentioned that the figure was both an underestimate—because it was based on an examination of only 78 of 257 white-collar occupations and the “total effect...is undoubtedly much greater”—and an overestimate—because whereas the authors affirmatively stated that “changes in the duties tests will cause an estimated 2.5 million salaried workers to lose their right to overtime pay,” they merely suggested that “an estimated 5.5 million hourly workers could meet the new exemption tests and lose their right to any pay for the overtime hours they work.” They added, however, that: “Employers will not have to convert hourly workers to salaried, but the financial incentive—the option to require that employees work overtime without having to pay for it—combined with competitive pressure will ensure that most will do so.”

the other end of the spectrum, employers’ Employment Policy Foundation offered, without any evidence whatsoever, the risible assertion that the DOL’s figure of 644,000 workers who might lose coverage was overestimated by 644,000 because “these employees worked in occupations with exempt administrative and professional duties under the current regulations and would meet the duties tests under the proposed regulations.” “3.4 Million Gain Overtime Rights Under Proposed FLSA Rule,” Backgrounder, at 1-5, at 5 n.1 (Sept. 9, 2003). The EPF asserted that: “No one who currently has a right to overtime under the current regulations will lose that right under the proposed rule.” Id. at 1. In a (presumably earlier but undated) critique of the EPI’s critique, the EPF had not criticized the DOL’s figure of 644,000. EPF, “The Facts on Who Gains or Loses Overtime Under the Proposed White Collar Regulations—644,000 or 8 Million” (undated), on http://www.epf.org.

189 Ross Eisenbrey and Jared Bernstein, “Eliminating the Right to Overtime Pay: Department of Labor Proposal Means Lower Pay, Longer Hours for Millions of Workers” (n.p.) (EPI Briefing Paper, June 26, 2003), on www.epinet.org. See also Ross Eisenbrey, “The Truth Behind the Administration’s Numbers on Overtime Pay” (Dec. 2003), on http://www.epinet.org (pointing out that the FLSA’s beneficiaries include “the million [sic] of workers who are not working overtime because the law discourages excessive hours by making employers pay a penalty for every hour beyond 40 they assign in a week”). This vitally important point marked one of the very few occasions on which the EPI focused on the basic purpose of the FLSA overtime provision rather than on the right to premium overtime pay. See, e.g., Ross Eisenbrey, “The Department of Labor’s False Claims About the Overtime Rule” at 1, 4 (July 26, 2003), on http://www.epinet.org.
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It is unnecessary to evaluate the EPI’s empirical critique of the DOL’s estimates because the EPI “used the same methodology”\(^{190}\) as the DOL and the GAO reports, which was earlier shown to be an irreproducible black box of dubious value.\(^{191}\) Unlike its critical-heterodox data analysis,\(^{192}\) however, the EPI’s

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\(^{191}\)See above ch. 1. As one example of the possibility that EPI’s data analysis may not have completely captured reality may be adduced dental hygienists, to whom the EPI devoted considerable attention as an illustration of an occupation many of whose practitioners would lose their entitlement to protection because the proposed regulation eliminated the requirement of graduation from a four-year academic course of specialized instruction. Eisenbrey and Bernstein, “Eliminating the Right to Overtime Pay”; WHD, Op. Ltr. WH-363, Nov. 10, 1975; Op. Ltr. WH-376, Mar. 5, 1976. According to one dental hygienist informant, who was the graduate of a four-year program, however, it would be very surprising if any significant number of dental hygienists worked overtime primarily because dentists do not. Moreover, she observed that there was a trend toward two-year degrees, and although some employers might prefer a dental hygienist with a four-year to one with a two-year degree, they all competed in the same labor market for the same jobs at the same wages/salaries. In short, she discerned no significant difference between them in terms of their professionality or labor-market power. Interview with Linda Ridenour, dental hygienist, University of Iowa Hospitals and Clinics (Aug. 27, 2003). For a related list of occupations, see EPI, “Occupations in Danger of Losing Right to Overtime Pay If Proposed DOL Rule Changes Are Passed” (undated), on http://www.epinet.org.

\(^{192}\)Later, in a letter to Representative Randy Cunningham, Eisenbrey stated that the EPI, like others, had “initially accepted uncritically DOL’s estimate that 1.3 million salaried employees” earning between $8,060 and $22,100 a year would be guaranteed overtime pay under the proposed regulations. Then former WHD investigators and “advocates for low-wage workers pointed out to us the implausibility that so many workers are legitimately exempt under current law....” Although it is unclear how such advocates could plausibly have extrapolated from the few hundred or perhaps thousand workers with whom they happened to come into contact (relatively few of whom were presumably white-collar employees) to be able to know whether the total number of affected workers nationally was one million or a few hundred thousand, Eisenbrey estimated that the total was at most 370,000. Letter from Ross Eisenbrey to Randy “Duke” Cunningham (Oct. 29, 2003), on http://www.epinet.org. The DOL did not, according to Eisenbrey, publish the data documenting the figure of 1.3 million, but when he ran the CPS outgoing rotation data, counting everyone who was salaried, worked overtime, and earned between $8,050 and $22,100, he found 700,000 white-collar and 600,000 blue-collar workers. Email from Ross Eisenbrey (June 22, 2004). In 2004, the DOL did publish data showing that 1.3 million
legal commentary accepted several orthodox tenets of the union movement. In addition to adopting the virtually ubiquitous and canonical argument that the FLSA's protections "should not be weakened" because "[m]illions of families count on overtime pay to make ends meet," the EPI based its global critique of the DOL's coverage-restricting revisions on an argument that can easily be turned against workers:

Congress, which has amended the FLSA many times over the years..., has not authorized any change in the white-collar exemption rules and has not directed the DOL to take overtime protection from millions of workers. ...

Some have falsely claimed that Congress enacted the FLSA 65 years ago and then forgot about it while the world changed. In 1985, almost 50 years after the FLSA was enacted, Congress reviewed the law and extended it to state and local governments, having made a decision that the white-collar pay exemptions were still appropriate. If Congress had determined that the executive, administrative, and professional exemptions or the Labor Department's implementing regulations were out of date or incompatible with the modern workplace, it could have and, presumably would have changed the exemptions at that time. Congress chose to leave the exemptions in place, unchanged. Twice since 1985, Congress added or amended other FLSA exemptions without changing section 13(a)(1) or directing any change in the regulations that implement these exemptions.

There is no reason to believe, therefore, that Congress has authorized the Department of Labor to dramatically reduce coverage under the FLSA, taking overtime protection away from millions of workers. Yet, as this analysis has shown, that is exactly what the Department of Labor has proposed.194

white-collar workers earned between $155 and $455 a week. FR 69:22252 (tab. A-4). Eisenbrey stated that the DOL was able to arrive at "the same number without counting blue collar workers by raising the threshold to $23,660 and by counting all salaried workers under the threshold as actually working OT [overtime], even though the CPS data shows that isn't the case." Email from Ross Eisenbrey (June 22, 2004). When asked whether the facts that employers' organizations such as the National Retail Federation had strenuously complained about raising the salary level to $425 and that court cases involving low-paid assistant managers at fast-food restaurants had made it so easy for employers to classify them legally as bona fide executive employees that the DOL had radically reduced its enforcement in such cases, suggested that total numbers must still be significant, Eisenbrey did not reply. Email from Marc Linder to Ross Eisenbrey (June 7, 2004). For the NRF's claim that $425 a week "would be a burden for small businesses in rural areas where supervisors and managers may make significantly less than...$22,100," see "Advocates for Workers, Business Speak Out on Overtime Changes," LRR 172:323-26 (July 7, 2003).

193Eisenbrey and Bernstein, "Eliminating the Right to Overtime Pay."
194Eisenbrey and Bernstein, "Eliminating the Right to Overtime Pay."
By the same logic, the DOL would be unauthorized to increase overtime coverage dramatically, a position that the EPI and the unions would presumably reject. Moreover, by the time Congress revisited the white-collar exclusions with respect to state and local government workers in 1985 and computer programmers and related workers in 1989-90 and 1996, the DOL had not updated the salary-level tests for 10, 15, and 21 years respectively. Yet only on one occasion (in 1989) did a congressional committee even mildly admonish the DOL for its failure to update the salary thresholds (which Congress itself failed to characterize as an irrational, arbitrary, and capricious administrative omission that should have sufficed to prompt a court to invalidate the regulations). Finally, the DOL has dramatically reduced coverage in the past without triggering any congressional reaction. In 1940 the WHD, as already explained, radically revised its original 1938 regulations by introducing a vastly expanded exclusion of so-called administrative employees (the source of today’s most senseless exclusions and worst abuses) in spite of the fact that while the Division was holding hearings on the subject Congress voted against legislated amendments. The revised regulations provoked no congressional reaction whatsoever. And in 1949 the WHD again reduced coverage by introducing the short test (the precursor of the Bush administration’s exclusion of highly compensated employees) without prior congressional approval or subsequent congressional criticism, let alone repeal. Thus, although the EPI was, given the scores of occasions on which Congress has revisited and amended the FLSA, certainly right in criticizing employers for pretending that Congress had wound up the FLSA clock in 1938 and never repaired it again, Congress had, until the AFL-CIO successfully lobbied it to intervene in 2003-2004, in fact taken a curiously hands-off position with regard to the white-collar exclusions, acquiescing in anything and everything that the DOL had done since 1940.

The EPI’s own recommendations to “clarify” the DOL’s overtime regulations were very sparse and modest. For example, the first of its four brief recommendations would merely have prevented employers from denying overtime pay to employees as alleged “learned professionals” who had not completed at least four years of academic training and a B.A. or equivalent degree in the relevant professional field. The EPI characterized the recommendation as “more in keeping

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195 See above ch. 15.
196 See above ch. 13.
197 A similar historical amnesia undergirded The New York Times editorial comment that “the Republican-controlled Congress has so far shown no interest in exercising oversight for such basic changes in a law designed to protect the rights of American workers.” “The Quiet Shift in Overtime,” NYT, July 3, 2003 (A24:1-2) (editorial).
with the original intent of Congress." Bracketing the question as to why the EPI was willing to acquiesce in depriving such degreed workers of all protection against overwork, the conclusion lacked a foundation because Congress had expressed no such (or any) original intent. Interestingly, the EPI did not lay claim to heightened consistency with congressional intent concerning its third and most specific and innovative recommendation: "To be exempt, an administrative employee must be a ‘salaried eligible employee who is among the highest paid 10% of employees employed by the employer within 75 miles of the facility at which the employee is employed.’ Executive exemptions would also be limited to the top 10% of salaried employees in an organization." As much as an improvement as the proposal might be vis-à-vis the scope of the existing exclusion of administrative employees, it is unclear why the EPI did not straightforwardly advocate a return to the original joint executive-administrative definition of 1938, which did not permit the exclusion of any non-bosses—especially since the Stein Report placed its imprimatur on it as lawful and consistent with the statutory language.

By the time that the 90-day comment period expired on June 30, 2003, the DOL had received 75,280 comments, which seemed like a huge volume that might well have required WHD staff to work considerable overtime to read and process, but more than 90 percent were "largely identical" form letters orchestrated by the AFL-CIO through its website. And even these circa 70,000 workers' comments, in light of the ease with which commenters could email their comments, hardly constituted a mass mobilization: they represented only 0.9 percent of unionized white-collar workers, fewer than 0.5 percent of all union members, perhaps fewer than one in 400 of all white-collar workers who were already excluded from the FLSA, and one one-thousandth of all white-collar workers. In all, according to the DOL, about 600 comments included substantive analysis of the proposals.

The complaints that employers organizations felt obliged to register despite the

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200See above ch. 13.
203FR 69:22125. The DOL speculated that "some letters and emails appear to be from individuals who clearly perform non-exempt duties and are not covered by the Part 541 exemptions." Id.
advantages that the proposed regulations conferred on firms are worth analyzing.\textsuperscript{204} The comments submitted by various big business groups uniformly supported the $65,000 upper-threshold exclusion, although some requested an even more capacious definition. The attitude of the National Association of Manufacturers was amply documented by its insistence that “the purpose of the FLSA [is] to insure a fair day’s pay for a fair day’s work”\textsuperscript{205}—thus effectively eliminating overtime regulation, which is not about employers’ obligation to provide a fair day’s pay, but a fair day (or week) in terms of working hours. It reinforced this inappropriate use of the shibboleth by adding this inapt, illogical, and undocumented piece of fabricated legislative history: “The white-collar exemptions to the FLSA were based on the belief that exempted workers were set apart from other workers by virtue of the fact that they typically earn substantially more than the minimum wage. Thus, such workers are not in danger of being exploited by being underpaid.”\textsuperscript{206} Since the overtime provision is not about insuring that workers are not underpaid, but that they are not overworked, the argument was irrelevant, but served big business’s purposes well by diverting attention away from the fact that relatively highly paid white-collar workers may need protection against excessive hours as much as their blue-collar counterparts. Against this background it was hardly surprising that the NAM enthusiastically supported the DOL proposal on the grounds that it would, inter alia, “curtail some of the most egregious ‘upside down’ results of FLSA litigation, in which well-compensated salaried employees reaped windfalls....”\textsuperscript{207}

The position of the LPA, the HR Policy Association, an organization of senior human resources officers of more than 200 of the country’s largest private-sector employers employing nearly 13 million workers or more than 12 percent of the

\textsuperscript{204}Where the source of the comments is not identified as the organization’s website, a copy was furnished by Barbara Somson, Deputy Legislative Director of the UAW, who had a copy made at the DOL, where the comments could be consulted. Somson also compiled a useful series of (undated) extracts summarizing the comments of various high-profile entities: “Clarification’ or Change?”; “Do Overtime Regulations Bring Clarity to Overtime Exemptions?”; “Employers Respond to DOL’s Invitation.” For a digest of employers’ comments responding to DOL’s invitation to specify which occupations should be treated as exempt, see EPI, “Top Employer Groups Name Specific Occupations and Activities to Be Ineligible for Overtime Under New Regulations” (undated), on http://www.epinet.org


\textsuperscript{206}“NAM’s Comments on Proposed FLSA White-Collar Exemptions” at 4.

\textsuperscript{207}“NAM’s Comments on Proposed FLSA White-Collar Exemptions” at 5.
private sector workforce,\textsuperscript{208} on the $65,000 ceiling is of great interest. The LPA had, as already discussed,\textsuperscript{209} proposed such a single-dimension exclusion test at congressional hearings in 1996 and 2000, throwing out the figure of $40,000. Then in 2001, responding to an invitation by OMB to identify regulations that should be revised, the LPA proposed the white-collar overtime regulations, its first listed proposed solution being exemption of all employees paid on a salary basis and earning more than a certain amount. OMB then included it on its short list of high-priority regulatory revision issues.\textsuperscript{210}

The LPA took the position in its comment that the DOL had the authority to delimit the white-collar exemption by imposing a compensation-only bright-line test for highly compensated employees not only without even a minimal duties test, but without any requirement that the work be office or non-manual (because some professionals such as dentists and dental hygienists must perform manual work).\textsuperscript{211} Although the LPA was correct that the proposal would simplify the test and create greater clarity (but not the "absolute clarity" it imagined),\textsuperscript{212} the organization's claim that the DOL had the authority to adopt it was clearly incorrect. The statute limits the exclusion to those employed in a bona fide executive, administrative, or professional capacity, whereas the LPA wished to extend it to any and all white-collar workers, including clerical workers. Consequently, Congress would have to amend the statute to permit such a change. If such a congressional debate ever took place, employers might reveal that they would also prefer not to pay time and a half to highly paid blue-collar workers (who have no union to insist on it even in the absence of a statute). Perhaps such a public discussion would expose the irrationality of imposing unlimited and uncompensated overtime work only on white-collar workers, although political forces might make it more likely that the result would be greater impositions on blue-collar workers than lifting them on white-


\textsuperscript{209}See above ch. 15.


\textsuperscript{212}"LPA's Comments on Proposed Rule Defining and Delimiting the Exemptions for Executive, Administrative, Profession, Outside Sales and Computer Employees, 68 Federal Register 15560 (Mar. 31, 2003)" at 53.
collar workers.

While supporting a duties-test-free, upper-level salary threshold, the U.S. Chamber of Commerce, perhaps because it represented smaller companies than the LPA, opposed the $65,000 level proposed by the DOL. Focusing solely on the monetary side and neglecting the time, freedom, health, and leisure dimensions, the Chamber of Commerce found it unnecessary to explain why "[t]here would seem to be little doubt that a top employee earning upwards of 60, 80 or 100 thousand dollars does not need the protections of" the FLSA. Finding coverage of such workers "absurd," 60 percent of the members surveyed suggested $50,000 as the cut-off point.213 Similarly at the lower salary threshold, whereas the LPA found $425 "reasonable,"214 a plurality of the Chamber's members thought that $425 was about right, but 39 percent viewed it as too high, as did 70 percent in agriculture and food and a majority in retail and distribution.215 Indeed, the organization's director of labor law policy told BNA that "many members have heartburn and concern" about the proposed $425 exemption level.216

A coalition of very large and medium-size employers employing more than 300,000 employees and represented by the corporate law firm of Morgan, Lewis & Bockius criticized the DOL's proposals for failing to "resolve many current ambiguities" and potentially creating others that would "prevent employers from

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213U.S. Chamber of Commerce, “ Comments on the Department’s Proposed Rule Regarding FLSA Exemptions for Professional, Administrative, Professional, Outside Sales and Computer Professional Employees” at 12-13 (June 30, 2003), on http://www.us.chamber.com/NR/rdonlyres/enuuywuy6hl3kqop6d3nrghq6jrbg7vxezj6t37rgrbr65svpx6qctxhdy6s4aappyyirbohc2v4uxf/030630_541comments.pdf. Curiously, just one year earlier, William Kilberg, the former solicitor of labor, testifying on behalf of the Chamber of Commerce in a House FLSA hearing, suggested covering all employees earning less than $25,000 a year, exempting all those earning more than $75,000, and applying duties tests to those earning between $25,000 and $75,000. Flexibility in the Workplace: Does the Fair Labor Standards Act Accommodate Today’s Workers? Hearing Before the Subcommittee on Workforce Protections of the Committee on Education and the Workforce House of Representatives 11 (Serial No. 107-48; 107th Cong., 2d Sess., Mar. 6, 2002).


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having confidence that their classification of employees complies” with the FLSA. The coalition supported the means- but not duties-tested salary threshold on the grounds that: “Employees who receive guaranteed compensation in excess of that paid to 80% of the full-time, salaried non-federal workers in the American workforce are clearly not persons Congress sought to protect from exploitation when it passed the FLSA. ... Eliminating the highest 20% of workers from the duties test would not be contrary to Congressional intent.” The coalition of employers sought to buttress this view by reference to Brooklyn Savings Bank v. O’Neil, a 1945 Supreme Court opinion which stated that “Congress intended FLSA to ‘aid the unprotected, unorganized, and lowest paid of the nation’s working population; that is those employees who lacked sufficient bargaining power to secure for themselves a minimum subsistence wage.”

To be sure, what the Supreme Court really said was that the “legislative debates indicate that the prime purpose of the legislation was to aid the unprotected, unorganized, and lowest paid....” In other words, protecting this group was, in the Court’s opinion, the chief, but not the sole purpose of the FLSA. The Supreme Court summarized the legislative history as showing an “intent on the part of Congress to protect certain groups of the population from sub-standard wages and excessive hours which endangered the national health and well-being. The statute was a recognition of the fact that due to the unequal bargaining power as between employer and employee, certain segments of the population required federal compulsory legislation to prevent private contracts on their part which endangered national health and efficiency....” The Court’s focus on protection against “excessive hours” indicates that time-and-a-half pay was merely a means and not an end in itself; therefore, if workers receiving non-sub-standard wages needed to be

218 One of the reasons the coalition adduced for abandoning the duties test was that: “Many highly compensated workers in today’s economy who have claimed that they do not meet the executive, administrative or professional duties test clearly perform jobs that...are subject to peaks and valleys of demand and effort that may span multiple work-weeks or even seasons of the year....” Morgan, Lewis & Bockius, “Comments Regarding Proposed Rule Defining and Delimiting Exemptions” at 13. This rather opaque language apparently embodied a request for ersatz-hours-averaging.

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protected against “excessive hours which endangered the national health and well-being,” they were every bit as much covered as the low-paid workers. The employers’ coalition would, presumably, have objected that, on the contrary, highly paid white-collar workers did not need government protection because they did not and do not suffer from “unequal bargaining power.” The problem with this counter-argument is that by the same logic employers could also maintain Congress did not mean to cover highly-paid blue-collar workers organized in strong unions. Yet, as much as employers might like to launch such a campaign, they know that it is much too late to achieve that exclusion by judicial let alone administrative interpretation. Moreover, as long as the highly paid white-collar workers are not expressly excluded from overtime regulation, it would contravene public policy to permit some of them to acquiesce in “excessive hours” in what they personally believe is an appropriate trade-off for the prospects of higher salary or promotions. What the Supreme Court held concerning damages in the very case that the coalition cited applies with equal force to maximum hours: “Prohibition of waiver of claims for liquidated damages accords with the Congressional policy of uniformity in the application of the provisions of the Act to all employers subject thereto, unless expressly exempted by the provisions of the Act. An employer is not to be allowed to gain a competitive advantage by reason of the fact that his employees are more willing to waive claims for liquidated damages than are those of his competitor.”

Yet another big business group welcomed the $65,000 test without “any duties requirements whatsoever....” The Fair Labor Standards Act Reform Coalition “is a group of leading national employers and trade associations who have been working together for sensible reform of FLSA exemption regs for almost ten years” and “represents employers with significant white-collar workforces in...aerospace, automotive, defense, engineering, insurance, logistics, retail and social services.” In comments written by the ubiquitous former Solicitor of Labor William Kilberg, this group of employers went even further than the others in proposing that not only should the threshold requirement of office or nonmanual work be dropped, but that the “exemption should simply exclude manual laborers who perform routine manual, mechanical or physical work.”


\[223\] "Comments of the Fair Labor Standards Act Reform Coalition Regarding the Department of Labor’s Proposed Rule Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees” at 1 (June 30, 2003).

\[224\] “Comments of the Fair Labor Standards Act Reform Coalition Regarding the Department of Labor’s Proposed Rule Defining and Delimiting the Exemptions” at 34.
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Unsurprisingly, retail employers, while supporting the introduction of an upper-level duties-free salary cut-off, counter-proposed much lower salaries at which employees could lawfully be forced to work unlimited hours without additional pay. The National Retail Federation (whose members represented an industry of 1.4 million retail establishments employing 23 million people)\textsuperscript{225} claimed that $65,000 was "prohibitively high for most retailers," whereas $50,000 "would be a fair indicator that the individual is very well compensated.... It is far more realistic."\textsuperscript{226} What the NRF meant by "prohibitively high" is unclear since the law would not have required any employer to pay any employee $65,000; after all, firms could simply hire an additional employee so that the formerly overworked employee would no longer work more than 40 hours.\textsuperscript{227} Moreover, the revisions that the DOL incorporated into the proposed regulations permitting supervisors in retail establishments to spend most of their time performing non-exempt work without depriving their employers of an exemption\textsuperscript{228}—revisions that the NRF wanted expanded so that "all time spent by an executive, administrative or professional employee multi-tasking" would be deemed "time spent on exempt activities as long as the primary duty is or can be performed simultaneously"\textsuperscript{229}—made it

\textsuperscript{225} "Comments of the National Retail Federation on the Proposed Regulations Under 29 CFR Part 541" at 1 (June 30, 2003).

\textsuperscript{226} "Comments of the National Retail Federation on the Proposed Regulations Under 29 CFR Part 541" at 15. Inexplicably, in advocating the deletion of duties tests, the NRF stated that employees paid at least $75,000 a year "are plainly not in need of the FLSA's overtime pay protections." \textit{Id.} at 16.

\textsuperscript{227} Or they could put the affected workers on an hourly wage. That the NRF contemplated such a possibility at the lower salary threshold was clear from its threat that an increase in the salary level to $425 "may...cause some employees who wish to be exempt to lose that status." "Comments of the National Retail Federation on the Proposed Regulations Under 29 CFR Part 541" at 2.

\textsuperscript{228} \textit{FR} 68:15586-87 (29 CFR § 541.107).

\textsuperscript{229} "Comments of the National Retail Federation on the Proposed Regulations Under 29 CFR Part 541" at 24-25. The NRF was hardly alone. The FLSA Reform Coalition "[s]trongly supports this common sense application of the primary duty rule, which recognizes the realities of the modern workforce"—namely, that assistant managers commonly performed "non-exempt customer service work while simultaneously directing the work of others and overseeing the operation of the business." Then in a totally unmediated fashion the FLSA Reform Coalition tried to justify the extraction of unlimited hours from low-level supervisors with the use of an irrelevant adverb: "Notably, these retail managers and assistant managers are paid at higher levels, reflecting their authority and increased responsibilities." The authority- and responsibility-reflecting compensation of the typical assistant retail store manager then turned out to be a princely median salary of $33,266
unlikely that any supervisory employees in retail stores with salaries anywhere near $65,000 would not already have been excluded from overtime regulation by virtue of the duties tests.

The NRF’s proposal regarding the exclusion of highly paid workers scarcely did justice to the overall extremist position that it staked out, which was best encapsulated in its depiction of the ruthless work world that it insisted it was the DOL’s obligation to promote through its FLSA regulations: “These comments...seek to underscore the fundamental reality that exempt employees in today’s work environment do ‘whatever it takes to get their jobs done.’ The final regulations should reflect this fact and eliminate any suggestion that courts should second guess decisions of managers and other exempt employees regarding the manner in which they allocate their time to accomplish their primary goals.”

And then in a subjectivistic flourish totally at odds with compulsory labor standards the NRF added: “Time should not be viewed as non-exempt when an exempt employee chooses to devote it to duties that the employee views as very important to accomplish the job’s goals.”

By far the hardest line was taken by the National Association of Convenience Stores, which adopted the position that the highly-compensated employee exemption should be fixed at $35,000-$36,000 by the “simple rationale” that it bore the same ratio to the lower threshold as suggested by the Kantor Report. If, however, the DOL deemed this amount “too low” from a subjective standpoint,” the NACS proposed identifying a salary “more in line with actual compensation practices,” mentioning the possibility of using twice the lower threshold or $44,200, which would not be “so out-of-reach as is the proposed figure for retailers....”

The NACS’s hostility to any regulation that would have made it unlawful for
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its members to impose unlimited unpaid overtime work on as many employees as possible was also reflected in its opposition to the proposed $425 lower salary threshold. Apparently chagrined that its run of good fortune was about to expire, the NACS sought to reduce the new salary threshold to as close as possible to the subminimum-wage level that 28 years of DOL inaction had brought about. To this end it suggested that the DOL “remain faithful to the wise principles of the Kantor Report” by using the lowest 10 (rather than 20) percent of salaried employees as the protected group and applying that percentage “to the salaries in the lowest geographical or industry sector (whichever of the two data sets is lower), rather than to composite figures which represent a combination of high-wage and low-wage geographical and/or industry sectors.”

Convenience store owners revealed their sensitivity to criticisms of the long hours and low salaries to which they subject their white-collar workers in the embarrassingly specious arguments that the NACS advanced to dismiss them. Of one of the factors used by the DOL to determine an employee’s “primary duty”—namely, “the relationship between his salary and the wages paid other employees for the kind of nonexempt work performed by the supervisor”—the NACS contended:

Over the years, some claimants have relied on this test to reduce a retail manager’s salary to an hourly rate on some basis which is then compared unfavorably to the hourly rates of nonexempt employees. Consider this illustration: The manager of a convenience store is paid a salary of $500 per week and is scheduled to work 55 hours a week. Assume that the typical hourly rate of a nonexempt store employee is $8.75. When the manager’s exemption status is called into question, the argument is made that, based upon his scheduled hours, the hourly equivalent of his salary is ($500/55 hrs.) = $9.09, not much more (the argument runs) than the typical clerk’s rate.

NACS contends that this sort of comparison is inappropriate. The factor itself calls for comparing ‘salary’ and ‘wages’—not rates. In addition, as the Labor Department has now recognized elsewhere in its Supplementary Information, employers are not required to (and usually do not) track the hours of their exempt employees hour-by-hour or retain records of the hours worked by employees for whom a white-collar exemption is claimed; hourly-rate-based comparisons are therefore both artificial and inherently speculative.

Just in case any convenience store owner, despite the overall relaxation in exemption requirements, remained inconvenienced by the application of the overtime provision, the NACS took the DOL up on its offer to comment favorably on

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233 NACS, “Overtime Exemption Comments to the Department of Labor.”
234 29 CFR § 541.103 (2003); proposed § 541.700 at FR 68:15595.
235 NACS, “Overtime Exemption Comments to the Department of Labor.”
The possible dilution of the requirement that a bona fide executive direct the work of at least two employees, supporting instead the almost infinitely malleable wording: "the customary or regular leadership, alone or in combination with others, of two or more other employees." The NACS was delighted to report that "such a change would also take into account modern management principles which have been developed since the exemption's supervision component was first promulgated almost 65 years ago. Current-day principles of 'team' management and 'matrix' management...can lead to perplexing questions about exactly who is 'the' supervisor in one setting or another, when the fact is that there are two or more individuals who are expected to guide subordinate employees at different times or in different capacities." With convenience stores employing on average a total of 10.9 workers during a 24-hour, three-shift operation, the NACS's recommendation was either irrelevant or a stratagem for transmogrifying co-workers into so-called leaders who can be led to longer hours without any constraints.

The Newspaper Association of America, the successor to the American Newspaper Publishers Association, extended its record to 70 years of demanding reporters' exclusion from hours regulation. It expressly endorsed the $65,000 threshold on the grounds that the mere fact of its being almost three times the $22,100 lower threshold "ensures that the availability of this exemption will not negatively impact employees whose earnings were at a level that Congress intended to protect by the FLSA." Other than by the circular argument that "payment at that level is highly indicative of exempt status" the NAA did not even purport to explain why employers should be free of all restraints to require such work-

236 NACS, "Overtime Exemption Comments to the Department of Labor" (quoting FR 68:15565).
237 NACS, "Overtime Exemption Comments to the Department of Labor."
239 See above chs. 7, 9, 11-13. The Newspaper Guild estimated that at least 70 percent of all media workers would lose overtime protection compared with 30 percent under current regulations. "Journalists' Status Under Proposal on Overtime Pay Creates Alarm," LRR 172:422-23 (Aug. 4, 2003). The arguments that publishers devised to justify their insistence that reporters were "professionals" were opportunistically inconsistent. In 2003, the NAA claimed that "'rewrite men' and 'leg men'...no longer exist. Instead, they have been replaced by journalism professionals who are part of a well-educated and highly creative workforce." "NAA's Comments on the Proposed Regulatory Changes to the White Exemptions of the Fair Labor Standards Act" at 2 (June 30, 2003). Yet in 1940 the ANPA asserted that all reporters were professionals even if they lacked a degree from a journalism school. See above ch. 12.
ers to work long hours, though it did propose that a lower threshold be set for non-urban centers.\(^{240}\)

In the welter of employers’ proposals the NAA arguably submitted the most brazen one when, “for clarity purposes,” it suggested that the DOL consider revising the title from “Executive” to “Supervisor,” to more clearly reflect the actual job duties of this exemption. NAA recommends that the Department consider defining executive as supervisory. The term executive does not provide any appropriate guidance as to the type of work performed by the worker. Given that working supervisors are often within the executive exemption, although they may not be treated as, or thought of as executives, this labeling of the exemption will continue to confuse the applicability of the exemption to a wide range of jobs.\(^{241}\)

The newspaper publishers’ illogic was breathtaking. First, the authors—including the chair of the Labor and Employment Law Practice Group of Seyfarth Shaw, one of the largest employer-side labor law firms in the United States\(^{242}\)—neglected to advise the Labor Secretary as to the source of her power to parlay her congressionally given authority to “define[ ] and delimit[ ]” the congressionally specified term “executive” into the authority to delete that term altogether from the statute and to replace it with one that happened to suit publishers better. Second, this innovative contribution to administrative law gained in audacity in light of the fact that “supervisory,” which Roosevelt’s drafters had included together with “executive” in the original bill, was deleted by Senator Black’s committee after the chief of the Children’s Bureau had specifically suggested that it be removed on the grounds that “[t]hese exclusions should be very carefully limited to bona fide executives.”\(^{243}\) Third, the NAA’s revisionism both contradicted and was driven by its open admission that the world at large did not regard working supervisors as executives. Fourth, in a stroke of opportunistic nominalism, the publishers, instead of questioning the appropriateness of classifying non-executives as executives, found it much simpler and more profitable to switch names. To be sure, the NAA did not devise this approach out of the blue: the WHD and DOL had made it de facto possible over the decades by diluting the statutory term “executive” until it

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\(^{240}\) NAA’s Comments on the Proposed Regulatory Changes to the White Exemptions of the Fair Labor Standards Act” at 9.

\(^{241}\) NAA’s Comments on the Proposed Regulatory Changes to the White Exemptions of the Fair Labor Standards Act” at 3.


\(^{243}\) See above ch. 9.
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encompassed low-level supervisory non-executives. Thus the publishers were in effect proposing that DOL admit that it had crafted an anti-procrustean executive bed that fit smaller sizes and instead rename it a supervisory bed that would also fit larger sizes.

Building on its success 63 years earlier in having persuaded Harold Stein to classify administrative employees separately and exclude them broadly, the NAM sought to expand the exclusion. It did not approve of the proposal to delete the criterion of exercising discretion and independent judgment and to replace it with holding “a position of responsibility,” which, in turn, was defined by reference to performing work either of “substantial importance” or requiring a “high level of skill or training.” The NAM feared that the DOL was merely substituting one ambiguous, vague, and subjective term for another, but whereas the existing one at least had the virtue of 65 years of application giving it meaning, the new one would trigger “a flood of litigation.” Ever desirous of devising yet more sub-groups of white-collar workers whose hours its members would be free to extend indefinitely and costlessly to themselves, the NAM suggested as a new sub-category of excluded administrative employee one “who has authority to represent and legally bind the employer without asking for permission....” The FLSA Reform Coalition was even more brazenly covetous of white-collar workers’ time: it was willing to accept the DOL’s indefinitely expansible “position of responsibility” in exchange for dropping the requirement of performing work “directly related to management policies or general business operations.” The drastic shrinkage of coverage that would result if the performance of responsible office or nonmanual work alone sufficed to exclude workers from overtime regulation is all too easy to imagine.

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244See above ch. 14-15.
246FR 68:15587 (proposed § 541.202).
247“NAM’s Comments on Proposed FLSA White-Collar Exemptions” at 17-18.
248“Comments of the Fair Labor Standards Act Reform Coalition Regarding the Department of Labor’s Proposed Rule Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees” at 10-12 (quoting 29 CFR § 541.2(a)(1)). This provision is the source of the so-called administrative/production dichotomy.
249Under this expansive classification neither the NAM nor the Chamber of Commerce would have to have been concerned about the executive requirement of the power to hire or fire (because this power was delegated to the human resources department) or supervising two or more employees (because senior staff did not supervise anyone). “NAM’s Comments on Proposed FLSA White-Collar Exemptions” at 15; U.S. Chamber of Commerce, “Comments on the Department’s Proposed Rule Regarding FLSA Exemptions for
On June 30, the end of the 90-day comment period, the labor movement held a rally and press conference on the Labor Department’s steps, at which Richard Trumka, the secretary-treasurer of the AFL-CIO, encapsulated the inconsistent and even incoherent approach that unions were taking in their campaign in these words:

“The 40-hour work isn’t just a perk,” Trumka said. Instead, he asserted, it is the “legacy of some of the greatest uprisings of workers in our history.” The Bush administration, he said, “wants to turn back the clock to the 1920s and 1930s” by reducing the number of workers entitled to overtime.

If, as one of labor’s leading lawyers observed in 1947, “the long struggle for the 8-hour day was not a struggle for 8 hours of work. It was a struggle for 16 hours away from work,” it was a fortiori the case that workers in those uprisings had not risked their lives to gain the right or privilege to work 50 or 60 hours a week at time and a half. At the same rally, a bakery manager with a salary of $40,000 a year who earned an additional $3,500 in overtime pay said that “he feared he would lose the overtime and simply be asked to work longer hours, which would, in turn, displace co-workers”—overlooking that his paid overtime work had exactly the same effect.

This incoherence was further illustrated by the position of the United Food and Commercial Workers, which stressed that at least 50,000 members in just four job classifications would be reclassified as exempt and lose an average of $2,000 annually in overtime pay for a total of 50 million dollars. After characterizing this loss as a “massive wealth transfer from workers to employers,” the UFCW did an about-face, asserting that the revised regulations “would boost unemployment as employers choose to increase hours for exempt workers rather than hire more workers.” “Advocates for Workers, Business Speak Out on Overtime Changes,” LRR 172:323-26 at 324 (July 7, 2003). The union seemed untroubled by the self-contradiction inherent in supporting paid overtime, which also increased unemployment.


Once the deadline for submitting comments had passed, labor’s congressional supporters undertook concerted efforts to block implementation of the proposed regulations. On July 8, Representative Peter King, a New York Republican, introduced the Overtime Compensation Protection Act of 2003, sponsored by seven other House members including three other Republicans, which would have amended § 13 to prohibit the Labor Secretary from “promulgat[ing] any regulation that has the effect of exempting from the requirements of section 7 any employee who is not otherwise exempted pursuant to regulations promulgated under this section that are in effect on the date of enactment of this subsection.” The bill then offered the Secretary positive reinforcement in the form of a reminder that nothing in the bill prohibited her from “reducing the number of employees who are exempt from the requirements of section 7 by regulations promulgated under this section.” The bill then offered the Secretary positive reinforcement in the form of a reminder that nothing in the bill prohibited her from “reducing the number of employees who are exempt from the requirements of section 7 by regulations promulgated under this section.” The House took no action on the bill, which was eventually sponsored by 54 representatives, but three weeks later Senator Edward Kennedy introduced an identical bill in the Senate, which was eventually sponsored by 20 senators, but also died in committee.

Two days after King had introduced his bill, Wisconsin Democrat David Obey and California Democrat George Miller offered an amendment to the Departments of Labor, Health and Human Services, and Education, and Related Agencies Appropriations Act, 2004, under which: “None of the funds provided under this Act shall be used to promulgate or implement any regulation that exempts from the requirements of section 7 of the Fair Labor Standards Act...any employee who is not otherwise exempted pursuant to regulations under section 13 of such Act...that were in effect as of July 11, 2003.” Democrats were already able to make effec-

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tive use of the EPI’s magic number, especially as linked to labor’s other propagandistic set-piece: “as many as eight million workers...who count on overtime as an essential part of their income could be denied the money.”\footnote{258} Or as Congressman Miller put it: “Overtime is not a luxury. [T]ragically millions of our American families cannot survive economically on working only 40 hours a week.”\footnote{259} Refreshingly, Republican Representative Ralph Regula in his sixteenth term presented a candid view of what both the existing and revised regulations were about that the administration and the Democrats had been and continued to be at pains to avoid. He called them “fair” because “the white-collar workers understand that that is part of the condition of the job, that they...have to work some extra time and not necessarily get time and a half.”\footnote{260}

That the amendment failed by the close vote of 210 to 213\footnote{261} was almost certainly not a function of the misinformation that some Democrats’ conveyed—such as that the new rule “paves the way for mandatory overtime,”\footnote{262} or that it would cause 79 percent of workers to lose their right to overtime pay,\footnote{263} or that the Bush administration was trying to cut overtime pay by “bureaucratic administrative rule instead of coming to Congress” in order to avoid public debate.\footnote{264} Rather, the vote, at a time when the DOL had just begun sifting through the comments on proposed regulations that would not become final for many months—McCutchten stated on June 30 that the final rule would not be published until the first quarter of 2004\footnote{265}—suggested the potential strength of labor’s congressional initiative. Fourteen House Republicans, largely from New York and

\footnote{258}{Carl Hulse, “House Defeats Democrats’ Bid to Thwart New Overtime Rules,” *NYT*, July 11, 2003 (A10:1) (Lexis).}

\footnote{259}{CR 149:H6569 (July 10, 2003).}

\footnote{260}{CR 149:H6568.}

\footnote{261}{CR 149:H6579.}

\footnote{262}{CR 149:H6570 (Rep. Rosa DeLauro, Dem. CT). In fact, the FLSA has always helped reinforce mandatory overtime.}

\footnote{263}{CR 149:H6572 (Rep. Lynn Woolsey, Dem. CA).}

\footnote{264}{CR 149:H6569 (Rep. George Miller). Perhaps Miller’s ignorance could be explained on the basis that in his 30 years in Congress the white-collar regulations had (with the exception of the minor matter of computer professionals in the 1990s) never been revised. In any event, the WHA carried out the major revisions of 1940 and 1949 without public congressional debate; nor did congressional Democrats ever do more than gently admonish the DOL for its failure to update the salary thresholds after 1975. See above ch. 15.}

\footnote{265}{“Advocates for Workers, Business Speak Out on Overtime Changes,” *LRR* 172:323-26 at 323 (July 7, 2003).}
New Jersey, had voted with Democrats despite the fact that the House leadership and the Bush administration had made the vote a loyalty test and the president had threatened to veto the spending bill if the amendment had passed. Republican Representative King, who had introduced his own independent bill to achieve the same result, argued that his party was making a political mistake in pursuing the new regulations because it would be "just handing an issue to the Democrats."266

Labor signaled an intensification of its efforts when Iowa’s Democratic Senator Tom Harkin announced on July 24 that he had enough votes to pass an amendment to the Labor Department appropriations bill to block the DOL from issuing the final regulations. Moreover, if that tactic failed, Democrats would consider using the Congressional Review Act, which permits Congress within a limited period of time to rescind an agency final rule after it becomes effective.267

Throughout the summer, labor’s congressional allies successfully interjected the debate over the white-collar regulations into whatever proceedings lent themselves to further subversion of the DOL’s regulatory initiative. At the Senate confirmation hearings on July 29 for Howard Radzely as Labor Solicitor, questioning revealed the Bush administration’s mind-set when, in the face of monolithic Supreme Court rulings holding that the FLSA’s exemptions were to be interpreted narrowly in order to maximize coverage under a labor-protective regime, Radzely testified that, legally, based on the authority that Congress had conferred, the Labor Secretary “could define” the white-collar terms “broadly.”268

Two days later, the Subcommittee on Departments of Labor, Health and Human Services, and Education, and Related Agencies of the Senate Appropriations Committee held a quickie 45-minute hearing on the proposed regulations. The subcommittee’s chair, Pennsylvania’s Republican Senator Arlen Specter, was taking a high-profile position in opposing the revisions in the run-up to his re-

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266Hulse, "House Defeats Democrats’ Bid to Thwart New Overtime Rules."


268Nomination of Howard M. Radzely: Hearing Before the Committee on Health, Education, Labor, and Pensions United States Senate 26 (S. Hrg. 108-328, 108th Cong., 1st Sess., July 29, 2003). At a Senate committee hearing two days later, Christine Owens, the director of the AFL-CIO’s Public Policy Department, stated that Radzely had testified that it would be consistent with the Labor Secretary’s authority to define the overtime exemptions broadly to exempt as many as 90 percent of all workers above the $22,100 salary threshold. Proposed Rule on Overtime Pay: Hearing Before a Subcommittee of the Committee on Appropriations United States Senate: Special Hearing 8 (S. Hrg. 108-233; 108th Cong., 1st Sess., July 31, 2003). Owens’ claim was, according to the published hearing transcript, incorrect: Senators Harkin and Kennedy asked him that question, but he never answered it.
election campaign in 2004. Its ranking minority member, Harkin, who was spearheading the Senate campaign against the Bush administration’s proposals, referred in his opening remarks to Radzely’s aforementioned judgment; but instead of criticizing it by reference to Supreme Court decisions, Harkin asserted that it could be refuted merely by looking at “history and what Congress intended.” By the latter he meant that Congress had designed time-and-a-half compensation “to increase jobs, and it included narrow exceptions”; the purpose of the hearing was to determine whether the proposed regulations reflected the congressional intent that “overtime protection and the 40-hour work week applies to all American workers with very few narrow exceptions.” With 20 to 30 million white-collar workers alone excluded from that protection under the existing regulations, Harkin presumably conceived of “narrow” broadly, especially since neither he in his almost three decades in Congress nor any of his colleagues had ever before identified these exclusions as problematic.

If the nature of the choreography of the hearing did not preclude developing an answer to Harkin’s question, the time constraint did. After WHA McCutchen astonishingly assured the subcommittee that “[w]e have no intent to expand the exemptions,” Lawrence Lorber, a Wall Street lawyer representing the U.S. Chamber of Commerce, tried to offer support in the Act’s legislative history for the very expansion that McCutchen had just forsworn. He testified that Congress “never intended that the boundaries of these ‘white collar’ exemptions would remain static. Indeed, the Congress in 1938 recognized that the Secretary of Labor would review the reach of the exemptions periodically and, in order to remain a vital part of our employment system, the regulations would need to be adjusted to reflect the dynamic changes in the workplace....” Not only is every empirical claim in these two sentences about congressional intent completely fabricated and bereft of even the slightest shred of textual authority, but, amusingly, in attribut-

269Although Specter needed and received labor support in a primary election against a right-wing opponent and wanted to retain that support for the general election, labor considered him a friend on many (but not all) issues. Email from Barbara Somson, UAW (June 26, 2004).

270Proposed Rule on Overtime Pay at 1.

271Embarrassingly for Harkin as the Democratic point man on the white-collar overtime issue, while attempting to interrogate the WHA, he had to be told by McCutchen that he was ignorant of something as basic as the existence for more than half a century of the short test for highly compensated employees. Proposed Rule on Overtime Pay at 22.

272Proposed Rule on Overtime Pay at 3.

273Proposed Rule on Overtime Pay at 11.

274Perhaps Lorber was ignorant of the fact that Congress did not add the phrase “from
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ing such prescience to Congress, Lorber opportunistically contradicted employers’ accusation, dating back more than 60 years, that Congress had been so shortsighted that it saddled business and the country with an overtime provision that became obsolete and dysfunctional once the depression was overcome and unemployment was no longer the overtowering socio-economic concern.275

More substantive was the testimony of the AFL-CIO’s director of public policy, Christine Owens, whose point of departure was the lack of any justification for any regulatory expansion of the number of workers excluded from overtime protections. On the contrary, given the FLSA’s unchanged purposes, the Supreme Court’s rulings that exemptions be narrowly interpreted, and recent increases in working hours and job losses, “changes in the overtime regulations must enhance rather than reduce overtime protections and extend them to more workers not fewer.”276 While apparently enunciating the principle that the DOL was not authorized ever to issue a regulation that restricted coverage beneath whatever level any previous regulation happened to have established, Owens implied that the Labor Secretary was empowered to expand coverage. At the same time, however, Owens admitted that “a declining percentage of American workers are protected by the FLSA, as more and more of them fall into the statutory exemptions for ‘executive,’ ‘administrative,’ and ‘professional’ employees.”277 Her acknowledgment that these exclusions were “statutory” suggested that the DOL was powerless to do anything to stem this trend. But the AFL-CIO did not propose any pertinent legislative amendments, and the only regulatory revision that Owens mentioned—labeling it “[t]he single most important step” that the DOL could take—was the very modest one of “adequately adjust[ing] the minimum salary threshold,” in conformity with its traditional procedure, to $31,720 for the long test.278

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time to time” (relating to the DOL’s authority to define and delimit the statutory terms) in § 13(a)(1) until 1961. Lorber’s unreliability was also on display in his assertion that former Labor Secretary Robert Reich had noted in a book that “beginning in 1870, the Census Bureau began categorizing jobs into executive or managerial functions, sales and administrative support functions and basic production or laborer functions.” Proposed Rule on Overtime Pay at 13. In fact, on the very page that Lorber cited Reich stated that the Census Bureau did not devise those categories until 1943. Robert Reich, The Work of Nations: Preparing Ourselves for 21st-Century Capitalism 173 (1991).

275Linder, Autocratically Flexible Workplace at 292-301.
276Proposed Rule on Overtime Pay at 7.
277Proposed Rule on Overtime Pay at 9.
278Proposed Rule on Overtime Pay at 10. In its written comments on the proposed regulations the AFL-CIO stated that they “‘would eviscerate an efficient and effective test’ and that the department ‘should withdraw these proposed revisions altogether.’” Michael Triplett, “Proposed Modifications to Salary Basis Test Gather Broad Critiques in
The day before Harkin offered his aforementioned amendment, the Senate discussed the issue. On September 4, Harkin, who purported to have done his own "research" on the history of the FLSA, set the tone by misinforming his colleagues that between 1940 and 1981 the regulations had been revised a dozen times, but: "In not one of these instances was the framework narrowed to exclude more people from overtime protections." In fact, the revisions of 1940 and 1949 did expand the exclusionary framework, while the Reagan administration's suspension of the Carter administration's last-minute salary-level increases effectively reduced coverage for a quarter-century. This action in 1981 underscored how Harkin's ignorance (or intentional misrepresentation) of history was deployed for blatantly partisan purposes: Harkin pointed out that the Bush administration's


279 For example, he asserted: "As I started doing more research into what happened with the FLSA, I came across an interesting item," which turned out to be that the Senate had passed a 30-hour bill in 1937, which was compromised into a 40-hour bill after business "ganged up." CR 149:S11067 (Sept. 4, 2003). The Senate did pass Black's 30-hour bill in 1933, which was of an entirely different character than the FLSA. See above ch. 6. "Senatorial courtesy" takes on a new meaning if colleagues do not burst into guffaws when, for example, a senator who just a few weeks before had revealed his fundamental ignorance of the regulations, suddenly boasts of doing his own research. In 2004, Harkin again claimed that "I...have done research. Every time I have been able to find in the past when we made changes to the Fair Labor Standards Act, Congress always had hearings, consulted with business, consulted with labor, and there was a process by which the public believed they had an input. This is not so this time." CR 150:S4745 (May 3, 2004). This claim made no sense at all: if Harkin meant statutory changes, Congress had not debated changes in the general exclusion of white-collar workers since 1940; if he meant regulatory changes, Congress had never coordinated its hearings with those of the WHD or DOL. Harkin repeated this assertion at a hearing the next day, adding that it was "to my information,...the first time that any administration" had issued "a final rule without the Congress having had any real input whatsoever." Final Rule on Overtime Pay: Hearing Before a Subcommittee of the Committee on Appropriations United States Senate: Special Hearing 2 (108th Cong., 2d Sess., May 4, 2004). Later in the hearing Harkin compounded his misinformation by expressing his conviction that "this should have gone through the normal legislative process" rather than a regulatory process "without really having a legislative hand in it from those of us who represent our constituents, both employees and employers. Again, it is just the wrong way to make these kinds of changes." Id. at 52. Harkin was, inadvertently, correct in arguing that the legislature should have either given the DOL greater guidance or deprived it of some of its discretionary powers, but in fact, apart from the isolated case of computer experts, Congress had never done so. 280 CR 149:S11106 (Sept. 4, 2003).
281 See above chs. 12-15.

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The proposed increase in the salary level to $22,100 was inadequate without admitting (if he was even aware of it) that a Congress controlled by Democrats (and the Clinton administration) bore responsibility for not having increased it at all in 28 years. The amendment that Harkin offered to the appropriations bill on September 5 was identical to the Obey-Miller amendment in the House. Ironically, that very same day the Senate agreed to a bipartisan resolution making it the sense of the Senate that “reducing the conflict between work and family life should be a national priority.”

On September 9, the Senate debated the Harkin amendment to the Labor Department appropriations bill. The one startling exception to the thoroughly pedestrian choreography—and without any doubt the most astonishing commentary by any participant in the course of the entire 2003-2004 debates—came from Senator Joseph Biden, a Delaware Democrat hardly known as a knee-jerk AFL-CIO supporter or even as professing a strong interest in labor issues. (Ironically, previously his chief concern with white-collar workers was legislation giving judges “the ability to impose meaningful sentences for white collar crooks.”) In this instance, however, the provenance is secondary if not irrelevant because no one in Congress or the DOL for that matter had publicly taken such a radical position on white-collar exclusions during the entire two-thirds of a century since the FLSA bill first surfaced in 1937 (even though Biden himself analyzed the question from the perspective of paying for overtime work rather than reducing working hours). Biden’s floor speech, which was all the more remarkable when viewed in the context of his colleagues’ excruciatingly repetitive, tedious, and cliche-studded oratory, deserves to be read in extenso.

Biden began by asking the Republicans’ point man on overtime, New Hampshire Senator Judd Gregg, a “rhetorical question”: “[S]ome of these things sort of

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283 The same partisan distortion was on display the following day when Rhode Island Democrat Jack Reed, while noting that the existing salary level was “artificially low,” failed to admit that Congress had done absolutely nothing in 28 years to remedy it, and instead faulted the Bush administration for leaving the $22,100 unindexed so that it “could be locked in concrete for years.” CR 149:S11148 (Sept. 5, 2003). An even lower note was struck by Senator Hillary Clinton, who praised her husband’s administration for having held 27 hearings on an ergonomics standard, while the Bush administration failed to hold any on the white-collar regulations. CR 149:S11267 (Sept. 10, 2003).
don’t pass the smell test. ... Does anybody in here believe this administration is changing work rules in order to be able to pay more people overtime? ... Does anybody believe the Secretary of Labor, this President of the United States, backed by the Chamber of Commerce and many other decent, honorable business people as their core supporters, is trying to change the law to give more people access to overtime?"287 Biden then proceeded to deliver his main speech:

I come from a corporate State. I come from a State where business is a great citizen and they are very active. I have never had one small businessman, I have never had one large businessman, I have never had one come and say: You know what the problem is here, Biden? You Democrats are denying people overtime. We want to expand that contract made in the thirties between labor and management to make sure our workers who are not getting it get overtime.

We made a deal as a nation. We said: Look, if you work more than 40 hours—those of you who do manual labor—you ought to be compensated time and a half for doing it. ... We said we are going to give people overtime if in fact they...don’t have control over their destiny. They do not get to determine the work rules. They don’t get to decide how much longer they will keep the lathes going. They don’t decide whether or not they work on Saturday or Sunday. It is about control. ...

But for those folks who have a say, and those folks who have some control—theoretically white-collar workers, people who get a room with a view, people who have some say on whether or not the boss starts the shift or opens the door at 8 in the morning or 4 in the morning or 10 in the morning, and those folks who are more like management—they have a say and we are not going to compensate them. Their compensation is in effect because they have a say.

As a former Governor of California used to say, there is psyche remuneration for being white collar. ...

My friend [Senator Gregg] said the world has changed. It is a different economy than it was in the 1950s and 1960s. That is right. But if it is based upon the premise of control, which is the underlying rationale for the Fair Labor Standards Act,...[t]he world has changed. But guess what. White-collar workers don’t have control now. As we move to a service economy and white-collar economy, we don’t have people digging ditches. ... They are still there, but we have white-collar workers who wear blue collars and who are in high-tech industries and industries that are in the service economy...who, in fact, still have no control. ... [W]hether they are a DuPont engineer or a chemist or an analyst at a brokerage house, they are all afraid they are going to show up one day and find that the company has been sold and they don’t have a job. They don’t have any control. Guess what. They don’t have much. ... I think the basic principle is if, in fact, you work in a circumstance where you do not have much control over your environment, and I ask you to work longer than 40 hours, you should have to be paid overtime. ... The nature of the economy has changed, but the nature of those who have control and do not have control

287 CR 149:S11205 (Sept. 9, 2003).
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has not changed. ...

For Lord’s sake, do not try to convince me this administration is seeking to change the overtime work rules so more people get overtime.288

No Republican rose to rebut Biden, nor, however, did any Democrat ever try to incorporate his logic into a counter-model of a rational overtime policy.289 Instead, when the debate resumed the following day, September 10, the Democrats’ debating tactics, beyond repeating the “make ends meet” argument,290 concentrated on projecting the existing regulations as the result of a golden age of agency reason. Harkin himself embellished his ignorant or falsified claim that the FLSA “has been modified a dozen times since 1938, but it has always been done sort of in consultation with Congress....”291 Carl Levin of Michigan asserted that since 1938 the regulations had contained only “narrow exemptions,”292 while Jeff Bingaman of New Mexico referred to the whole overtime system as “a perfectly reasonable bargain”: “Workers could still work longer hours if they chose to do so, or if they needed additional income,...but they could not be required to do so by their employers, and they could not be required to do so at the same wage level they earned during the 40-hour work week.”293 And, finally, for Barbara Feinstein: “For more than 65 years we have maintained an appropriate balance between family life and work life by forcing employers to pay certain workers time and a half....”294

In the end, the Senate voted 54 to 45 to bar the DOL from issuing the proposed regulations because six Republicans defied the party line, while only one Democrat broke ranks.295 The heavily lobbied question was significant enough that “in a

288CR 149:S11205-11207 (Sept. 9, 2003). To be sure, even Biden was not above the “making ends meet” argument, observing in addition that “many workers simply schedule themselves as much overtime as they can physically bear so that they can stay above water financially.” Id. at S11208.

289Nevertheless, Biden’s approach sparked interest within the AFL-CIO’s legislation department, prompting a rethinking and reconceptualizing of the duties test in the direction of asking questions such as: “Do you control your own hours? Your own workload? Staffing decisions? Can a new hire assume your duties?” Email from AFL-CIO to Marc Linder (Sept. 12, 2003).

290E.g., CR 149:S11268 (Sept. 10, 2003) (Senators Barbara Mikulski and Clinton); id. at S11265 (Levin).


295CR 149:S11269 (Sept. 10, 2003). The six Republicans were Campbell, Chafee, Murkowski, Snowe, Specter, and Stevens; Zell Miller of Georgia was the Democrat. See
rarity, all four of the Democratic presidential contenders arranged their schedules to be present.” But because the House had failed to block the regulations in July, congressional conferees would have to resolve the disagreement.296

Buoyed by this success, the very next day Senator Specter introduced a bill to establish an independent commission to study the white-collar overtime regulations and to make recommendations, inter alia, “to simplify the definitions of professional or managerial duties that exempt workers from overtime requirements so that they have a greater ability to know in advance what their expectations should be.”297 In explaining the bill on the Senate floor Specter made sure not to burn his bridges entirely to business supporters by stressing: “There is no doubt that the 1945 [sic] regulations on the Fair Labor Standards Act, that those regulations are vastly out of date and they ought to be revised.”298 The Senate, however, took no further action on the bill.

Three weeks later, however, “[o]rganized labor scored a rare victory in the Republican-led...House of Representatives”299 when, with 21 Republicans joining with the Democrats, the House, on a nonbinding vote of 221-203, backed Representative Obey’s motion to instruct the House conferees to insist on inclusion of the Senate-passed provision to block the proposed regulations.300 However, the press reported that: “House negotiators, under pressure from Republican leadership, may not comply, and the White House has already threatened to veto the entire bill if they do. Still, the House vote encouraged opponents of the proposed rule changes, and they called on the administration to abandon it.”301 Obey doubted whether President Bush had “the unmitigated gall” or “moxie” to veto the appropriations bill because it protected overtime pay,302 but in the course of the fall,

also Sheryl Stolberg, “Senate Democrats Block New Rules on Overtime,” NYT, Sept. 11, 2003 (A1:3-5, A17:1-6). Chafee and Snowe were “real moderate[s],” while Campbell was close to the Teamsters Union, for which the white-collar overtime issue was very important. Email from Barbara Somson, UAW (June 26, 2004).


298 CR 149:S11419 (Sept. 11, 2003).


300 CR 149:H9166 (Oct. 2, 3003).


his skepticism was put to the test.

On October 8, Representative Regula, chairman of the House Appropriations Subcommittee on Labor, Health and Human Services, and Education, who had managed the House appropriations bill for those agencies, suggested a compromise in the form of allowing the DOL to keep reviewing the 78,000 comments without taking immediate action on a final rule; Congress could then revisit the issue in 2004. Exuding self-confidence as a result of the "'really good vote" in the Senate and House, Harkin did "'not want to go for a "deal" on overtime yet."

Specter, who was to chair the conference committee and had indicated previously that he was willing to discuss a compromise on the overtime regulations, met with Regula and Harkin later in October, but they made no progress. Additional pressure to break the impasse came from 26 employers organizations, including the Chamber of Commerce, NAM, National Federation of Independent Business, National Restaurant Association, and National Retail Federation, which sent a letter on October 22 urging the conferees and the House and Senate leaders to delete the Harkin amendment from the final conference report on the grounds that the white-collar regulations were "'largely incompatible with today's workplace...."

In late October, Regula displayed his less compromising side in a letter to Obey stating that "he would not provide funds for projects in the districts of members of either party who voted against the [appropriations] bill," adding that "he had to make 'priority choices within available funds to secure at least 218 votes'...."

On November 21, the Bush administration, having demonstrated that it had more moxie and gall after all, Specter, who was facing a "'tough reelection in his heavily unionized state,...backed down" when House Republican leaders threatened to adopt an omnibus spending bill from which the Labor and Health and Human Services Departments would have been removed, thus continuing them on existing funding levels and devastatingly cutting Pell grants, and special education, medical research, and anti-AIDS programs. Harkin's press secretary complained on his behalf that: "'It's clear the White House would stop at nothing to take away the overtime pay protection of Americans...." Unlike the Democrats, the administration, according to Harkin, which "'seems to be unbending, unyielding on this,'" viewed the matter as "'nonnegotiable.'"

The turning point for Specter was the

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threat by Senate Appropriation Committee chairman Ted Stevens—one of the six Republicans who had voted in favor of Specter’s amendment—that he would take the Labor-HHS bill out of the omnibus spending bill and put it on a continuing resolution: “It wasn’t [even] a Hobson’s choice, I didn’t have a choice.” Harkin echoed these sentiments in explaining his own tergiversation: “If I’m faced with that choice, I’ll take the omnibus.” Nevertheless, Specter and Harkin vowed to continue their opposition in the second session of the 108th Congress, either by introducing a bill blocking the regulations or using the Congressional Review Act to rescind them.307

November 21 also marked the end of Specter’s and the Democrats’ resistance in 2003 because Specter realized that day that the Bush administration would not entertain his proposal to set up an independent commission to study the white-collar overtime regulations and to delay any action by the DOL until September 30, 2004.308 On November 21, in the course of his confirmation hearing for the post of Deputy Secretary of Labor, Steven Law was asked by Senator Clinton why the Bush administration did not find this approach an “appropriate resolution.” Law’s response was, especially for a nominee, not evasive:

The reason why we are not in agreement with the proposal that has been put forth is because we think that a blue-ribbon commission has already been convened, and that consists of the nearly 80,000 stakeholders who have already commented on our proposal. ... And we think that the best possible approach is, rather than have a commission that would debate broad policy and theoretical analyses, the blue-ribbon commission that has been convened essentially, by analogy, through the Administrative Procedures Act process has allowed huge numbers of stakeholders from all sides of the spectrum to offer comment on very specific proposals.309

In contrast, Clinton falsified or, at the very least, misstated the history of the white-collar overtime regulations by asserting that the Bush administration had taken an extraordinary and unprecedented step by revising them without congressional intercession: “I have not been around here as long as my colleagues, but my understanding is that the Congress has in the past assessed the impact and the need

308 S. 1611, § 1(c)(2)-(3).

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to modernize or amend the Fair Labor Standards Act, certainly overtime provi­sions. This comes really out of the normal course of events for the Labor Depart­ment to take this on itself. Indeed, as she could scarcely have been unaware, Congress also did nothing when her husband’s administration failed to update the regulatory salary thresholds. In any event, Law’s unambiguous rejection of Specter’s commission terminated the initiative.

Though ritualized in form, the opposition to the elimination of the provision blocking the overtime regulation from the omnibus appropriations bill by Obey and other Democrats on the House floor on December 8, which marked the conclusion of labor’s efforts during the first session of the 108th Congress, carried certain risks with it since representatives were, as Regula’s aforementioned letter had warned, “threatened with the loss of funding for projects for their constituents if they didn’t vote as the Republican leadership and Bush administration wanted.” Or as Obey put it: “he was forced to weigh the belief that the rule would ‘stiff workers on overtime’ against his district’s needs.” The House’s approval of the bill by a vote of 242 to 176 meant that the AFL-CIO would have to devise a new strategy for 2004, especially if the Bush administration, contrary to McCutchen’s original intuition and the speculation of some unionists, chose to go ahead and issue final regulations in a presidential election year. In any event, at the end of December the DOL announced in its regulatory plan that the final regulations were scheduled to be issued by March 2004.

310 Nomination of Steven J. Law (n.p.).
311 Downey, “Labor Dept. Plans to End Overtime Controversy in March.”
313 FR 68:72401, 72524 (Dec. 22, 2003). DOL also stated that the “ESA is carefully examining the issues raised by various interested parties. Changes to these rules will help employers meet their obligations and will enhance workers’ understanding of their rights and benefits.” FR 68:72523.
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The new rules...are expected to make it much easier to reclassify workers as ineligible based on their status as executive, professional, or administrative workers.¹

Already at the very beginning of 2004 Senator Specter announced his intention to hold another subcommittee hearing on the proposed regulations on January 20, the day Congress came back into session,² while the Assistant Secretary of Labor for Employment Standards, Victoria Lipnic, was hinting that they might be modified to reflect criticisms: “‘We’re certainly not deaf to Congress and to the debate in Congress and what members of Congress are hearing from their constituents.’” She even conceded that the debate had also “‘struck a chord’ with Americans who feel overworked.”³

The hearing that Specter held on January 20 may have failed to generate the clarity about the proposed regulations⁴ that he had sought—especially since Secretary Chao left before labor witnesses’s testimony could be confronted with hers—and he may have admitted afterward that he could do little to stop the Bush

⁴WHA McCutchen did reveal that the DOL had received “the most comments on the administrative exemption test,” and in written answers supplied after the hearing Secretary Chao disclosed that because the comments had shown that the DOL had not been “fully successful” in working out a new test, the final rule would “reflect significant changes from the proposal.” She added that it was not the DOL’s “intent to depart significantly from current law” (including federal case law). Department of Labor’s Proposed Rule on Overtime Pay: Hearing Before a Subcommittee of the Committee on Appropriations United States Senate 10, 21 (S. Hrg. 108-394, 108th Cong., 1st Sess., Jan. 20, 2004).
administration from implementing them, but it did furnish the opportunity to observe the essential continuity of capital's rejection of state-imposed labor standards in the form of the prepared statement by Ronald Bird, an economist with a doctoral degree who had been a college professor before becoming the chief economist at the Employment Policy Foundation, a research and propaganda entity affiliated with the big business organization LPA. The primitive, fantasy-like socioeconomic analysis of white-collar working hours, which culminated in the self-congratulatory assertion that exploitation and oppression had been banned—the NAM, too, had just a few months earlier intoned that "unlike some of their more unscrupulous Depression-era counterparts, today's employers cannot exploit a desperately poor labor pool willing to accept low wages for dangerous or dreary work"—was the spiritual successor to the testimony before the Senate and House Labor Committees in 1937 in opposition to the FLSA by the president of the Chamber of Commerce of the United States, who opined that he knew of no "extraordinary emergency" that would justify legislation as "extraordinary" as the wage and hour bill. Bird explained to the Senate appropriations subcommittee that:

Being exempt...means that the employee knows that working hours may fluctuate from week to week, and the employee's salary demand reflects the employee's expectations about both the expected average hours and the degree of fluctuation. In a well-functioning, competitive labor market, salaries will adjust to reflect the reality of expected average hours of work and weekly variance in hours. The disadvantage to the employee arises when the actual hours of work exceed the employee's expectation.

Sometimes discussions about FLSA status imply this disadvantage when it is said that the exempt worker is not "protected" from demands for extra hours or is not paid for the full amount of time committed to the job. However, this risk is tempered by the mobility of the employee in the labor market. Having education and skills that are in demand and being in a labor market where employment is growing and unemployment relatively low

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5Kirstin Downey, "Chao Refuses to Delay New Overtime Rule," WP, Jan. 21, 2004 (E1).
are important considerations that also protect employees from such risks. The main disadvantage is that the salaried employee may have to bear the transactions costs of renegotiation with the current employer or of seeking other employment to redress the balance between his or her time preferences and wages.

...For employees who are not exempt from the FLSA rules...weekly hours over 40 are paid at one-and-a-half times the basic rate. This arrangement has both advantages and disadvantages. The advantage is that the employee has less need to worry about fluctuations in required hours beyond the 40 limit. Unexpected work demands are either reduced or well compensated. The fifty percent overtime premium is designed to be large enough to ensure that most employees are compensated more than sufficiently for any extra hours required. The disadvantage to the employee is the down-side fluctuation in earnings when work is slack, and the possibility that the overtime premium may discourage employers from offering over 40 hours of work to any one employee—spreading the total amount of work over more individual employees. ...

The distinction between exempt employees and non-exempt employees is not a distinction between being paid fairly and being paid unfairly. It is misleading for anyone to imply that exempt employees are working unpaid hours as a general rule. The banishment of exploitation and oppression from the workplace was one of the great achievements of our nation in the 20th century, and there is no basis to fear their return in the 21st century. Both exempt and non-exempt workers are paid fairly. Indeed, some researchers have found evidence that they are paid equivalently—that the earnings of both categories average out to the same result over time in terms of total annual earnings and total hours worked after controlling for different characteristics of occupations, education and experience.9

At a Society for Human Resource Management conference in early March McCutchen disclosed that the final rule would be out before the end of the month and would respond to "'most of the concerns'" raised by public comments, Congress, and the media, thus making recourse to the Congressional Review Act unnecessary. She noted that various proposed rules would undergo substantive changes, mentioning in particular that whereas the DOL would have eliminated the requirement discretion and independent judgment for executives and replaced it with the power to hire or fire, "'[e]verybody hated it....'"10

In the meantime, Democrats continued to apply guerrilla tactics against implementation of the regulations. On March 24 the Republican majority failed to muster the 60 votes required to cut off debate and prevent the opposition from

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bringing up its amendment to the corporate tax and trade bill (quaintly titled the Jumpstart Our Business Strength (JOBS) Act) that both parties otherwise supported. In the wake of the 51-47 party-line cloture vote and Harkin’s determination not to allow the bill to progress without a vote on his amendment, Majority Leader Bill Frist pulled the bill rather than risk passage of the amendment. After a second cloture vote failed on April 7, Frist withdrew the motion to proceed, but stated on the Senate floor that debate would eventually be resumed and a vote on the overtime amendment would be permitted.

Despite some continued skepticism about whether the Bush administration would risk alienating large numbers of voters by issuing the final regulations before the presidential election, they reportedly remained among its highest priorities and on a fast track. Yet even in the days after the DOL submitted the final rule to the Office of Management and Budget for review on March 26,
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doubts persisted. Indeed, ironically, in spite of firms’ virtually unanimous clamor for regulatory revision, an on-line human resources publication reported on April 1 that:

Employers across the country are breathing a sigh of relief as the U.S. Department of Labor’s...self-declared deadline for issuing final regulations on the white-collar overtime exemptions has come and gone. In the long run, the regulations are considered to be good news for employers. But many aren’t looking forward to the work they will have to do on the front end to come into compliance under what is expected to be a quick deadline.

In recent weeks, the DOL had made repeated assurances that it would issue the final regulations by March 31, 2004. Instead, the agency has submitted the regulations to the Office of Management and Budget...for its review—a move that could delay their issuance. In general, federal law requires agencies to consider alternative approaches and analyze the benefits and costs of proposed regulations. The OMB reviews draft regulations before they’re finalized to ensure that agencies comply with that requirement.

So what effect does this development have on when the final regulations will be issued? The OMB states that its average review time in 2001 was 58 days. But there is a possibility that it will take much longer. The OMB is allowed up to 90 days—initially—to review the rules. Plus, either Secretary of Labor Elaine Chao or the OMB director may extend the review period even further. And if the OMB finds problems, it could return the rule to the agency for further review. In such cases, agencies frequently conduct further work on the draft and resubmit it for OMB consideration, at which time the process starts all over again.

In other words, it’s anybody’s guess when the final regulations will be issued. 18

In the event, DOL finally released the final rule on April 20. Even before anyone did or could have read what the national newspaper of record erroneously described as 500 pages of new rules 19—in fact, the regulations themselves took up only 14 triple-column pages, the rest of the very extensive materials being explanatory and background—pre-judgments were the order of the day. Although they had not yet seen the changes, Senators Harkin and Kennedy denounced them


19 Steven Greenhouse, “Labor Dept. Revises Plans To Cut Overtime Eligibility,” NYT, Apr. 21, 2004 (A14:5-6). Four months later the newspaper of historical record was still erroneously referring to “the hundreds of pages of new rules....” Steven Greenhouse, “Controversial Overtime Rules Take Effect,” NYT, Aug. 23, 2004 (A11:1). The error was common. For example, Senator Patty Murray twice referred to them as “this 400-page rule....” Final Rule on Overtime Pay: Hearing Before a Subcommittee of the Committee on Appropriations United States Senate: Special Hearing 57 (108th Cong., 2d Sess., May 4, 2004).
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as inadequate, Harkin vowing to continue offering his regulation-blocking amend-
ment to every bill in the Senate.20 Harkin’s epistemology was based on the insight
that the “‘Bush administration simply is not trustworthy on this issue, and I am
beyond skeptical about these so-called revisions.’”21 After a day’s reflection,
Harkin offered the more nuanced commentary that the Republicans had taken “‘a
rule that is profoundly terrible and made it just terrible’....”22 House Minority
Leader Nancy Pelosi merely repeated her party’s favorite slogan—that millions of
workers and/or “middle-class families” needed overtime pay “to put food on the
table, to make ends meet, to buy a home, and to send their children to college.”
But when she added that the “new rules discourage businesses from hiring new
workers because companies can now overwork their existing employees without
having to incur overtime costs,” she overlooked the fact that if overtime’s real
purpose of spreading employment were operating, her middle-class families would
not be able “to make ends meet.”23 Senate Minority Leader Tom Daschle took a
totally different, if not inconsistent, tack, hailing the changes: “‘[Had] we not
fought this effort so vocally and so aggressively, I don’t think we’d be where we
are today.’”24 Finally, the initial reaction of Ross Eisenbrey,25 the author of the
EPI’s estimate of eight million newly excluded employees, was that “it sounded
as though the department ‘had made some positive changes,’” but he reserved
judgment pending review of the final regulations.26 Indeed, already the next day
he judged that it was “‘a grudging improvement that won’t affect many peo-
ple’....”27

If labor had to walk the fine line between conceding that the Bush administra-

25Before working at the EPI, Eisenbrey had been, inter alia, Associate Director for Worker Protection Programs in the DOL’s Office of Congressional and Intergovernmental Affairs during the Clinton administration. http://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=NEWS_RELEASES&p_id=987
26Downey, “Plan Expands Eligibility for Overtime Pay.”
27Moritsugu, “Revised Overtime Rules Produce New Winners, Losers.”
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tion had changed anything to benefit workers and denying the movement’s ability to effect change, in contrast, employers’ representatives, perhaps in an effort to avoid what might seem like class gloating, tempered their enthusiasm for public consumption. The director of labor policy for the U.S. Chamber of Commerce, Michael Eastman, was “disappointed” that the DOL had lifted the salary floor from $65,000 to $100,000 for “highly compensated” employees (whose exclusion from overtime regulation was triggered by the performance of only minimal executive, administrative, or professional duties), but consoled himself with the thought that “politics is a process of compromise, and any changes over the current law are better than nothing.”

The National Restaurant Association was gratified that the new rules, in the opinion of its vice president, Robert Green, stated more clearly that restaurant managers and assistant managers—whose entitlement to overtime protection the existing regulation and the federal courts had already subverted—were not guaranteed overtime, but dissatisfied with an increase in the salary threshold that would cost some restaurants. “On balance,” the restaurant employers termed it merely “a fair proposal.”

Perhaps the least plausible claim about the final regulations came from Labor Secretary Chao herself, who, consistent with her even less plausible general position that substantively the changes favored workers, but that the increased amount of overtime that employers would be required to pay would be well worth the enhanced certainty of the new language, asserted on the DOL website that the “new rules end the confusion that has led to an explosion of class action lawsuits that failed to protect workers’ rights. With these changes, more workers will receive overtime pay and they’ll get it in real time when they earn it, not years later in federal court.” Chao’s contention made no sense because, if the new regulations succeeded in putting an end to the overtime suits on behalf of highly paid employees such as engineers and “rocket scientists” about which employers

28Downey, “Plan Expands Eligibility for Overtime Pay.”
29See above ch. 15.
30Moritsugu, “Revised Overtime Rules Produce New Winners, Losers.”
33“LPA’s Comments on Proposed Rule Defining and Delimiting the Exemptions for Executive, Administrative, Profession, Outside Sales and Computer Employees, 68 Federal Register 15560 (Mar. 31, 2003)” at 58 (June 30, 2003), on http://www.hrpolicy.org/memoranda/2003/03-83_Final_White_Collar_Comments.pdf. Contrary to LPA’s claim, the plaintiffs in Hashop v. Rockwell Space Operations Co., 867 F.Supp. 1287, 1296 (SD Tex, Nov. 9, 1994), were neither rocket nor any other kind of scientists, but merely instruc-
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propagandized endlessly, that outcome would certainly not be a function of "more generous" definitions that would render litigation unnecessary. On the contrary, it would come about because such workers would be more clearly defined out of their entitlement—at least as an initial procedural matter as far as employers and DOL investigators were concerned. Chao, however, had confused her success in expanding the overall scope of exclusions with the untenable implication that all the exclusionary definitions had been rewritten so unambiguously that lawsuits would become rare. In fact, even while certain of the new regulations unambiguously deprived large numbers (perhaps millions) of workers of an entitlement to overtime protection, other regulations displayed enough play in the joints to sustain voluminous litigation. In the realistic words of a corporate lawyer: "These guidelines themselves are not crystal clear.... So we are looking at enhanced and increased litigation until these guidelines are defined."35

In contrast to these party-line views, it is difficult to dismiss the more sober opinion of the Bureau of National Affairs that "DOL Scales Back Overtime Rules Changes."36 To be sure, overall less rather than more expansive exclusions were a surprising outcome in light of the rumors that had been circulating in employer and union circles almost since the day that the proposed regulations were published that it was possible that the final regulations would be even more favorable to employers.37 But it was difficult to gainsay McCutchen's valedictory assertion that "business groups did not find all the changes they had hoped for in the final regulations...."38 Why the Bush administration moderated some of the more

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34Downey, "Plan Expands Eligibility for Overtime Pay."


37Various email messages to Marc Linder (2003).

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blatantly exclusionary proposals was not publicly disclosed, but it is certainly plausible that the combination of the AFL-CIO's impressively well-organized counter-campaign and Republicans' fears of the potential impact of that relentlessly negative propaganda on millions of working-class voters during a presidential election campaign served to deprive the party in power of some of the freedom to act that it might have enjoyed had it waited until after the election. The DOL's reaction to labor's assault was nicely captured by one of its economists: "They hit us so hard...we backed off." Presumably, fears of losing that election and thus of losing control over the DOL prompted employers to prefer half a loaf in 2004 to the possibility of having to wait another 29 years for the right constellation of forces to secure all their demands.

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[T]he Department of Labor...significantly pared back, sifted off, sugared off their proposal....

The 138 triple-columned pages of explanatory and background material and data in support of the final rule that the DOL published in the Federal Register on April 23 constituted a colossal apparatus that dwarfed anything that it had ever produced previously in connection with promulgating or revising the white-collar overtime regulations—apart from the unpublished hearing transcripts from 1940

40Secretary Chao's claim, echoed by congressional Republicans, that the DOL's revisions resulted from its having "listened" to the public, in particular to the 75,000 written submitted comments, was, on the surface, consistent with the real political reasons mentioned in the text. However, since those comments and, in fact, virtually the entire public criticism of the proposal regulations, had been orchestrated by the AFL-CIO, whose campaign the DOL loudly and repeatedly characterized as misinformation, the claim made little sense on its own terms. Assessing the Impact of the Labor Department's Final Overtime Regulations on Workers and Employers: Hearing Before the Committee on Education and the Workforce House of Representatives (108th Cong., 2d Sess., Apr. 28, 2004), on http://edworkforce.house.gov/hearings/108th/fc/overtime042804/chao.htm (statement of Elaine Chao).
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and 1947-48.\textsuperscript{43} (In spite of labor's and Democrats' complaints, the most important deleterious consequence of the DOL's failure to hold public hearings lay not in the affront to democratic forms or in the dearth of submitted information—unions and their affiliated organizations could and did submit written comments—but in the inability of the DOL, and possibly labor, to question employers' agents, as for example Stein had done in 1940, in order to winnow out reality from puffery.) Especially the additional data work-up in the Preliminary Regulatory Impact Analysis\textsuperscript{44} exceeded in formal statistical sophistication any previous such effort. Nevertheless, even this overwhelming amount of material could not conceal the fact that the entire undertaking remained completely blind to and unaffected by the purposes of the congressional overtime regulation regime and of the exclusions of executive, administrative, and professional employees. The DOL's simplifying, clarifying, harmonizing, narrowing, and expanding of the regulatory definitions amounted to no more than groping in the dark by bureaucrats who were not even aware that their rules had taken on a life of their own totally divorced from any possible statutory purposes.

The DOL was able to justify its acting in 2004 on the firm administrative law grounds that: "Allowing more time to pass without updating the regulations contravenes the Department's statutory duty to 'define and delimit' the section 13(a)(1) exemptions 'from time to time.'"\textsuperscript{45} The DOL made an irrefutable case for raising the salary level, which, because it had not been adjusted in "almost 30 years," made it possible to classify as an "executive" an employee earning only $8,060 a year, while the statutory minimum wage of $5.15 an hour guaranteed all covered workers at least $10,712.

In contrast, however, the Labor Department disclosed no such startling tangible necessity for revising the duty tests. Revealingly, the only specificity that it offered inadvertently suggested that its real agenda was to expand the universe of excluded occupations: "The regulations discuss jobs like key punch operators, legmen, straw bosses and gang leaders that no longer exist, while providing little guidance for

\textsuperscript{43}See above chs. 11-14.

\textsuperscript{44}CONSAD Research Corporation, "Final Report: Economic Analysis of the Proposed and Alternative Rules for the Fair Labor Standards Act (FLSA) Regulations at 29 CFR 541: Prepared for: US Department of Labor Employment Standards Administration" (Feb. 10, 2003). After publication of the final rule, CONSAD submitted "Final Report: Tasks and Analyses Performed in Support of Development of the Regulatory Impact Analysis of the Revised Rules for the Fair Labor Standards (FLSA) Regulations at 29 CFR 541" (May 14, 2004); because it took the DOL five months, pursuant to a FOIA request and appeal, to supply the report, which coincidentally arrived the day the galley proofs of the book were due (Nov. 15, 2004), only limited use could be made of it. See above ch. 1.

\textsuperscript{45}FR 69:22122.
jobs of the 21st Century.” All four of these occupational titles—which were repeated ad nauseam by the DOL, Republican members of Congress, and employers to justify the revision of the duties tests—had been mentioned in the existing interpretive regulations as covered by the overtime regulations and specifically rejected as examples of exempt administrative, professional, or executive employees. Although the DOL insisted that “[r]evisions to both the salary tests and the duties tests are necessary to restore the overtime protections intended by the FLSA which have eroded over the decades,” it failed to refer to a single occupation that it had for decades been classifying as exempt but that by 2003-2004 should have been reclassified as covered. Moreover, three of those four occupations still did exist, though perhaps more frequently under other names. Amusingly, the DOL suppressed the fact that the regulation on working foremen (who perform the same kind of work as and alongside their subordinates) that used “strawbosses” and gang leaders” actually referred to “gang or group leaders”—the latter being conceptually very close to the team leaders that the DOL in 2004 wished to exclude as administrative employees.

The manifest purpose of the revisions of the duties tests was not to eliminate obsolete words, let alone obsolete occupations, but to insure that employers were legally able to extract unpaid overtime work from as many as possible of the tens of millions of white-collar workers who had been added to the labor force since Harold Stein and Harry Weiss had written the regulations at the beginning and end of the 1940s. Nowhere did the DOL try to explain how this drive to “modernize[]” the regulations to keep them in “step with the realities of the workplace,” which formed “the philosophical underpinnings” of its regulatory revisions, also “reflects the Department’s efforts to remain true to the intent of Congress....” Although the DOL admitted that the FLSA “contains no definitions, guidance

46 FR 69:22122.
48 29 CFR §§ 541.115(b) (strawbosses and gang leaders), 541.207(c)(7) (keypunch operators), 541.302(f)(2) (leg man).
49 FR 69:22122.
50 Keypunch operators are more often called data entry technicians, but the 2004-2005 web edition of the DOL’s own Occupational Outlook Handbook still uses it.
51 29 CFR § 541.115(b).
52 FR 69:22264 (29 CFR § 541.203(c)).
53 FR 69:22124.
or instructions as to the meaning of the exemptions, it rejected the AFL-CIO’s claim that the proposed regulations exceeded the Labor Secretary’s authority on the grounds that by broadening the exemptions, they were “not consistent with Congressional intent.” On the contrary, the DOL argued that by simplifying and clarifying definitions: “Rather than broadening the exemptions, the final rule will enhance understanding of the boundaries and demarcations of the exemptions Congress created. The final rule will protect more employees from being misclassified and reduce the likelihood of litigation over employee classification because both employees and employers will be better able to understand and follow the regulations.” To be sure, the argument and counter-argument were not necessarily mutually inconsistent: it was possible that fewer employees would be misclassified and more would understand the regulations because the DOL had both broadened and clarified the exclusions, making it easier for employers to impose unpaid overtime and discouraging workers from engaging in what the DOL and employers hoped would become hopeless litigation. In fact, in 2003 the DOL admitted as much when it stated that “an additional 1.5 million to 2.7 million employees will be more readily identified as exempt...because the updated duties tests will replace the current duties tests in determining their exemption. The large number of employees who could bring litigation under the current regulations and their relatively high levels of compensation indicate that the impact of revising the duties tests is probably substantial.”

In order to mollify, or at least to enlighten, the labor movement, which had allegedly fundamentally misunderstood the scope of the exclusions, the DOL added a new provision stating expressly, based on a dictionary definition of “manual” quoted by a judge, that the white-collar exemptions...do not apply to manual laborers or other ‘blue collar’ workers who perform work involving repetitive operations with their hands, physical skill and energy.” If this effort to construct a categorical wall between protected blue- and excluded white-collar workers was designed to dispel workers’ suspicions, the DOL’s insertion of “repetitive” and addition of “routine”—which neither the dictionary nor the court

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54 FR 69:22125.
55 Alternatively, even if the number of suits filed did not decrease, the “cost of defending...a case,” as one big business witness put it at a hearing, “may be less because the applicable rules are clearer and more on the surface.” Final Rule on Overtime Pay: Hearing Before a Subcommittee of the Committee on Appropriations United States Senate: Special Hearing 56-57 (S. Hrg. 108-542, 108th Cong., 2d Sess., May 4, 2004) (Ronald Bird).
56 FR 68:15580.
57 FR 69:22128.
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had used—may well have suggested a semantic ruse: after all, the work of some highly skilled blue-collar workers is neither repetitive nor routine (while that of many white-collar workers, such as typists, is). Indeed, whether the formulation was the result of artfulness or artlessness, the sense that the DOL may have been laying a trap for the unwary was reinforced by the example of “non-management production-line employees” as “entitled to minimum wage and overtime premium pay,” which raised the question: Were there perhaps surprises in store in the final regulations that might turn some blue-collar workers into “management production-line employees”?58

Arguably the most prominent scaling down of its wide-ranging pro-employer proposals undertaken by the DOL was increasing the salary threshold for highly-compensated white-collar workers from $65,000 to $100,000.59 Although the DOL agreed with the AFL-CIO’s comment that it lacked the authority to adopt a salary-only test,60 it denied that this provision lacked a duties component. Adding that no commenter had denied that the DOL had the authority to adopt a more streamlined duties test for higher salaried workers,61 the Department argued that the new rule was merely a reformulation of Weiss’s short-test. Moreover, the $100,000 salary “should be set high enough to avoid the unintended exemption of large numbers of employees—such as secretaries in New York City or Los Angeles—who are clearly outside the scope of the exemptions” and entitled to overtime protection. Asserting that “[v]irtually every salaried ‘white collar’ employee” at such a salary level “would satisfy any duties test,” the DOL noted that in any event only about 10 percent of “likely exempt employees” subject to the salary test earned $100,000 or more compared to 35 percent at the $65,000 level.62 Finally, it was difficult to gainsay the Department’s claim that although the duties test for the highly compensated was less stringent than the short test, it was more than sufficiently

58FR 69:22260-61 (§ 541.3(a)).
59FR 69:22269 (§ 541.601(a)).
60Sandra Boyd, vice president for human resources policy at the NAM, stated that the DOL had told the NAM that before proposals were issued, the AFL-CIO had categorically rejected any one-criterion salary-level test—not even at $150,000. Telephone interview with Sandra Boyd, Washington, DC (May 1, 2003). Deborah Greenfield, associate general counsel of the AFL-CIO, recalled “that we took the position in meeting that 2-tier test should be preserved. I do not remember that $150,000 was talked about, and if it was, it would have been for rhetorical purposes only.” Email from Deborah Greenfield to Marc Linder (May 1, 2003). The director of public policy at the AFL-CIO found it unimaginable that the organization would have categorically rejected such a proposal. Email from Chris Owens to Marc Linder (May 1, 2003).
61FR 69:22173.
off-set by the $87,000 increase in the salary level. In fact, it would presumably be difficult as a matter of administrative law to persuade a federal appeals court that, whereas the innovation of the short test in 1950, which reduced the long-test duties from five to two, while not even doubling the long-test salary, had been lawful, the highly-compensated-employee rule, which reduced the short-test duties from two to one, while almost octupling the salary level, would be beyond the DOL’s power.

The DOL seemingly made such a challenge more difficult by adding, in response to the comments of such organizations as the National Employment Lawyers Association that the rule could be interpreted to mean that if an employee performed one such duty once a year he would lose protection, the provision that an employee had to perform such an exempt duty “customarily and regularly...” Although the DOL asserted that it had “never intended to exempt as ‘highly compensated’ employees those who perform exempt duties only on an occasional or sporadic basis,” this modification lacked much force since it, in turn, was defined merely as “a frequency that must be greater than occasional....” Moreover, if the definition of an administrative employee were stripped down to such an extent that the employee merely had to perform a single exempt activity, namely, exercising “discretion and independent judgment with respect to matters of significance,” arguably that employee might not be a bona fide administrative employee since she would not have to satisfy the other duty of performing non-manual work directly related to the employer’s management or general business operations, but she would nevertheless pass the diluted duties test for highly compensated employees. To be sure, in this particular case, a court, in order to invalidate such a regulation on the grounds that the Labor Secretary had acted ultra vires, would have to determine what Congress meant by “administrative” employee.

In raising the standard-test salary level from $425 to $455 a week, the DOL was also forced by labor’s and employers’ comments to offer a more detailed justification than it had in 2003. Whereas some employers organizations (for example, the American Health Care Association and the U.S. Small Business Administration Office of Advocacy) had “strongly opposed” even the $425 salary,

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63 FR 69:22175.
64 FR 69:22173, 22269 (§ 541.601(a)).
65 FR 69:22173.
66 FR 69:22272 (§ 541.701).
67 FR 69:22262 (§ 541.200(a)(3)).
68 FR 69:22262 (§ 541.200(a)(2)).
69 FR 69:22269 (§ 541.600(a)).
and others such as the National Grocers Association had suggested lowering it to $400, unions had advocated raising the long- and short-test salaries to as high as $610 and $980, respectively, in large part by adjusting them for inflation since 1975. Although, bizarrely, the DOL was unable to discover any regulatory history concerning its own rationale for setting the salary level at $30 in 1938, for the period from 1940 to 1975, the only time that it used the Consumer Price Index to adjust the salary level was the interim (and last) setting in 1975. In the 1940s, Stein and Weiss used salary data, while in the 1950s and 1960s the DOL used actual salaries paid to exempt employees who met both the duties and salary tests. “In almost every case” the DOL then set the salary levels at “an amount slightly lower than might be indicated by the data.”

Prodded by the AFL-CIO’s comment that the DOL had misused Kantor’s methodology from 1958 because it had based its calculation on the salaries of all salaried employees, whereas Kantor had relied only on the salaries of employees actually found to be exempt, the DOL sought to justify its deviation on the grounds that it believed that the salary level of the lowest 20 percent of all salaried employees was the equivalent of that of the lowest 10 percent of exempt employees in part because of the changes that it had introduced in the long and short tests. Stung by the AFL-CIO’s charge of misuse, the DOL then sought to replicate Kantor’s methodology by modifying that of the GAO report to consider only salaried employees who were “likely qualify as exempt employees....” In terms of the results, the DOL regarded this approach as “very consistent” with Kantor’s as well as with the one it had adopted in 2003. (To be sure, the DOL failed to point out that it had no way of knowing what relationship its probabilistic method, based on guesses as to what percentage of various occupations would meet the duties tests, bore to the DOL’s in the 1950s and 1960s of actually conducting investigations and determining for itself what percentage of employees met the duties and salaries tests.) The DOL determined that the lowest 20 percent of all salaried employees generated a salary level of $450 in the South, $455 in retail industry, and $475 to $500 for all salaried employees, whereas the lowest 10 percent of likely exempt employees produced salaries of $475, $450, and $500,

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70 FR 69:22164.
71 FR 69:22165. See also above chs. 9, 12-13.
72 FR 69:22166.
73 FR 69:22167.
74 FR 69:22168.
75 FR 69:22167.
76 To be sure, the universe of investigated establishments had not been representative of all establishments covered by the FLSA. See above ch. 15.
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respectively.\textsuperscript{77}

Taking as its guideline Kantor’s “points near the lower end of the current range of salaries,”\textsuperscript{78} the DOL praised the new $455 salary level as representing the lowest 10.2 percent of “likely exempt” employees in the “lower-wage retail industry,” 8.2 percent of “likely exempt” employees in the South, and 6.7 percent of all “likely exempt” employees. The new salary level also represented 20.0 percent of all salaried employees in the retail industry, 20.2 percent of those in the South, and 16.8 percent of all salaried employees. More importantly, “based on the comments from the business community, the Department believes this increase is clearly at the upper boundary of what is capable of being absorbed by employers without major disruptions to local labor markets.” Finally, the new setting would also implement Kantor’s approach by “‘assist[ing] in demarcating the ‘bona fide’ executive, administrative and professional employees without disqualifying any substantial number of such employees.’”\textsuperscript{79}

The DOL’s self-congratulatory tone is difficult to appreciate. First of all, the notion that, based on salary level, only 16.8 percent of all salaried employees should be automatically protected against unfettered imposition of overtime makes no sense when $455 (for a workweek that exceeds 40 hours) is merely 2.2 times greater than the minimum wage for 40 hours. Although the DOL has never set the salary thresholds at levels that comport with the lofty titles of “executives” and “professionals,” the new ratio of 2.2 is lower than the ratio of the short-test to the minimum wage ever was between its introduction in 1950 and the last time the short-test salary was raised in 1975. Indeed, it is even lower than the ratio between the long-test and the minimum wage from 1938 to 1940 and the long test for professionals from 1940 to 1950 and again in 1959 and 1963.\textsuperscript{80} It is difficult to discern how this approach was consistent with “the Department’s long-standing recognition that the amount of salary paid to an employee is the ‘best single test’ of exempt status”\textsuperscript{81} or why it did not make a mockery of the DOL’s own declaration that: “Setting the exemption salary level at or near the wage levels paid to large numbers of nonexempt workers would fail the objectives of these regulations and the purposes of the statute.”\textsuperscript{82} Consequently, even the former DOL officials, during whose long tenure the Department had also neglected to raise the salary thresholds at all, noted that as a result of the increase to $455, in conjunction

\footnotesize{\textsuperscript{77}FR 69:22168, tab. 3-4 at 22169-70.  
\textsuperscript{78}See above ch. 15.  
\textsuperscript{79}FR 69:22171.  
\textsuperscript{80}See above ch. 15, tab. 4-5.  
\textsuperscript{81}FR 69:22172.  
\textsuperscript{82}FR 69:22238.}
with eliminating the long test and diluting the short test: "Only a fraction of the employees who have become exempt only through the erosion of the salary level over the past 30 years will be returned to nonexempt status..."83

Second, the DOL’s acquiescence in employers’ self-serving comments about "major disruptions to local labor markets" was astonishing, especially since the DOL’s own Preliminary Regulatory Impact Analysis revealed that the impact on profitability was infinitesimal84 and the final Regulatory Impact Analysis characterized the economic impacts as "clearly affordable" for all major industry sectors and as well as for small businesses in them.85 Finally, if instead of extracting free overtime labor employers were forced to hire additional workers in order to avoid having to pay penalty overtime wages, the increased cost would merely reveal the social costs that employers (and or consumers) had been able to externalize in the past and that it is one of the purposes of mandatory labor standards to require employers to internalize.

Using Congress’s own failure to index the minimum wage—as a result of which its inflation-adjusted value in 2004 was lower than it had been in any year in which the minimum wage had been increased since 195086—as an excuse for not indexing the salary thresholds, the DOL assured those commenters who feared that another 29 years might pass before another increase that it “intends in the future to update the salary levels on a more regular basis, as it did prior to 1975, and believes that a 29-year delay is unlikely to reoccur.”87 Indeed, the only significant accommodation that the DOL denied employers in this area was the request by the National Association of Chain Drug Stores to exempt pharmacists—like physicians—from the salary test altogether.88

The DOL refused to consider applying the CPI as an alternative method for updating the salary level, but it failed to deal with the immovable fact that, adjusted for inflation, $455 in 2004 equaled only 58 percent of the short-test salary at its lowest level in 1950 (when the $100 setting was the equivalent of $780 in 2004)

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84See above ch. 16.
85FR 69:22228-29.
87FR 69:22171.
88FR 69:22172,
and only 47 percent of the short-test salary at its highest level in 1970 (when the $200 setting was the equivalent of $969 in 2004). Indeed, it even fell significantly below the long-test salary for professionals from 1940 to 1975 and the long-test salary for executive and administrative employees from 1959 to 1975. With regard to the duties tests, the DOL made no significant changes in them for executive employees, rejecting some employers’ suggestion that the requirement of the power to hire or fire be dropped. It admitted that this requirement might convert some small number of exempt into nonexempt employees, but, recurring to Stein’s dictum, it could not conceive of bona fide executives without such power. Although the DOL’s claim that the new standard test for executives provided more protection for workers than the existing short-test was based solely on its retention from the long test of the power to hire or fire, the DOL subverted its own position by conceding that the additional duty was merest window dressing: “Although this new requirement may exclude a few employees from the executive exemption, the Department has determined that it will have a minimal impact on employers.”

Unsurprisingly, the DOL dismissed comments by the National Employment Law Project and others requesting that it reconsider its proposed rule exempting employers of fast-food managers who devote most of their time to non-executive or -administrative work. The DOL argued that the new regulations were “consistent with current case law,” which permitted managers to devote as much as 90 percent of their time to “routine non-management jobs” without depriving their employers of the exemption. In order to reinforce this position, it added a new provision on “concurrent duties,” which expressly specified that an “assistant manager can supervise employees and serve customers at the same time without losing the exemption.”

There can be no doubt that for at least two decades prior to 2003-2004 the federal judiciary had been issuing decisions that vastly expanded the scope of lowest-level store managers who could be deprived of overtime protection virtually regardless of how much time they devoted to what the Eighth Circuit dismissively characterized as testimony by plaintiff managers “[s]eking to demean or minimize the importance of the manager’s position,...that most of their time was spent on routine non-management jobs such as pumping gas, mowing the grass, waiting on

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89See above ch. 15, tab. 6-7. The comparisons refer to each year in which the salary tests was increased.
90FR 69:22131.
92FR 69:22262 (§ 541.106(b)).
The DOL failed to explain was its cavalier remark that it "continues to believe that this case law accurately reflects the appropriate test of exempt executive status...." Moreover, in an effort to accommodate the claims of such employers organizations as the National Retail Federation that employer-imposed "multi-tasking" by lowest-level managers "should also be considered exempt work," the DOL went even further than the courts and "state[d] clearly that there is no strict percentage limitation on the performance of non-exempt work." 94

The DOL reinforced this stance by arguing that unions were "simply wrong in asserting that the current law defines 'primary duty' by a bright-line 50 percent test." 95 As with the "inflexible 20-percent rule," which it had already eliminated, it also rejected an "inflexible 50-percent rule" because it would impose monitoring and record-keeping burdens on employers.96 The only concession that the DOL made to labor in this area was the additional caveat that if assistant managers in retail stores "are closely supervised and earn little more than the nonexempt employees," they "generally would not satisfy the primary duty requirement."97

In order to appreciate the real-world consequences for alleged "executive employees" of "current case law" and the DOL's conception of "exempt executive status" it is well worth examining the work life of the manager of an Au Bon Pain bakery cafe in Boston as perceptively portrayed in a 1996 front-page Wall Street Journal article appropriately titled, "In Name Only: For Richard Thibeault, Being a 'Manager' Is a Blue-Collar Life." Thibeault worked from 3 a.m. to at least 3 p.m. Monday through Friday, 2 p.m. to 9 p.m. Saturdays, and at one point 24 straight days without a day off; his pay of $34,000 he estimated came out to $7.83 an hour or 83 cents more than the part-time students who also worked there. Wheeling a rack of pastry across the street before dawn, baking pastry, and preparing soups, left him dirty at the end of the day. In all these respects his work was typical of a large proportion of swiftly increasing number of jobs "classified as 'managers'...." 98 Most of them, as the newspaper recounted, were

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94 FR 69:22137.
95 FR 69:22185. The DOL correctly added that unions' charge of "an outcome-oriented double standard" was applicable to existing § 541.103, which also created a presumption of executive status for those spending more than 50 percent of their time on management activities, but created no presumption for those devoting less than 50 percent of their time to such activities. FR 69:22186.
96 FR 69:22186.
97 FR 69:22272 (§ 541.700(c)).
98 Jonathan Kaufman, "In Name Only: For Richard Thibeault, Being a 'Manager' Is
far from the white-collar status positions normally associated with the term "manager." They are high-pressure, dead-end jobs with little status and low pay: the harried store manager at a fast-food restaurant; the assistant manager at a discount drug store; the manager at a travel agency; the bank-branch head.

These people carry the title manager, but they lead a blue-collar life—working long hours, often doing the same tasks as those they employ and carrying out orders from above. Their autonomy is tightly circumscribed by corporate headquarters. ... With the shrinking of middle management, they have more responsibilities...but less chance to move up.99

Just as surely as Thibeault satisfied all the criteria of the old short test and new standard test, he demonstrated none of the features that the DOL imagined that Congress had in mind for bona fide executive employees. What, consequently, the justification was for enabling his employer and its many competitors to take such advantage of lowest-level managers is not a question that the DOL has ever raised, let alone answered, because it has never framed the FLSA’s purposes as a touch-stone for distinguishing between those who should and should not be protected.

If the Bush DOL’s revisions were to be judged by their success in making sense of the most beleaguered definition of all, that of bona fide “administrative” employees, they would have to be regarded as an abject failure. As should have been expected, because the NAM and other employer organizations pilloried the DOL’s most salient innovation—the “position of responsibility”—as vague, ambiguous, and subjective, the DOL deleted it, reinserting “the exercise of discretion and independent judgment,”100 bulked up by the additional phrase, “with respect to matters of significance.”101 Forced to concede in retrospect that the proposal had failed to enhance clarity and certainty, the Department could not resist chiding its critics for having failed to make their own suggestions to achieve that goal. Surprisingly, the DOL also justified withdrawal of the proposal by reference to many commenters’ belief that it “greatly expanded the scope of the exemption, a result which the Department did not intend.”102 (As Ross Eisenbrey had skeptically observed in 2003: “If the Labor Department doesn’t want the new language to exempt large numbers of employees, ‘then why is the language being

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99 Kaufman, “In Name Only.”

100 FR 69:22138.

101 FR 69:22262 (§ 541.200(a)(3)).

102 FR 69:22139. Similarly, the word “directly” was reinserted in “work directly related to management or general business operations” because (oddly) DOL had not intended its deletion to be interpreted as sanctioning the exemption of employees whose primary duty was only “remotely or tangentially related to exempt work.” Id. at 22137, 22140.
changed at all?’”103 Finally, the Labor Department resisted some employers’ suggestion to eliminate the production/administration dichotomy altogether.104

With regard to the definitions of “professional” employees, the DOL, based on comments from employer groups, added whole occupations to the category of excluded professionals in what, according to former Deputy WHA Fraser and his colleagues, “must be seen as a blatant (if incoherent) effort to achieve particular results serving certain special interests.”105 The DOL had in fact “invite[d] comments” in March 2003 “on occupations the exempt status of which has been the subject of confusion and litigation including but not limited to pilots, athletic trainers, funeral directors, insurance salespersons, loan officers, stock brokers, hotel sales and catering managers, and dietary managers in retirement homes.”106 Most blatantly the DOL exempted employers of athletic trainers and licensed funeral directors and embalmers largely on the basis of employers’ self-serving claims without independently confirming that an advanced specialized degree was customarily required to enter the profession, despite the DOL’s declaration that “only occupations that customarily require an advanced specialized degree are considered professional fields under the final rule.”107 The employers of athletic trainers, had a strong financial incentive to persuade the DOL to reverse its predecessor’s “position that athletic trainers are not exempt learned professionals” and relieve them of burdensome time and a half obligations: after all, “athletic trainers are on call 24 hours a day”108 and, in the one case in which the judges ruled in favor of employers—to which the DOL deferred—the court noted that the trainers worked 60 hours a week.109 The commenters (whose identity the DOL failed to reveal) on whom the DOL relied asserted that trainers were nationally certified and that “a specialized academic degree is a standard prerequisite for entry into the field.”110 Yet the DOL did not even purport to have scrutinized this allegation. Remarkably, in the case to which it deferred the court had found that

104 FR 69:22140-41.
106 FR 68:15564.
107 FR 69:22149.
108 FR 69:22155.
110 FR 69:22155.
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athletic trainers were learned professionals merely by virtue of having a bachelor’s degree in any field plus five three-hour college-level courses in anatomy, athletic training, and other subjects. In response to the workers’ argument that a “a mere fifteen credit-hours” could not be compared to the academic requirements for lawyers, doctors, and teachers, the court declared that “brevity of the trainers’ course of specialized study does not preclude its inclusion under the ‘learned’ prong.”

Ironically, the court rested this claim on its earlier decision in a case holding that airplane pilots were learned professionals, which even the Bush DOL had rejected in one of its rare denials of an exemption to employers.

The Bush DOL also broke with its predecessor over funeral directors’ and embalmers’ entitlement to overtime protection. The Clinton DOL—which in 1999 had issued an opinion letter stating that funeral directors and embalmers with less education than a bachelor’s degree were typically not professionals—appeared as a friend of the court supporting a private action by a funeral director/embalmer, whom the Sixth Circuit held to be an exempt professional whose work required “knowledge of an advance type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study” by virtue of the fact that he had attended college for two years and one year at mortuary science school, where, however, he took only one course in handling embalming chemicals and none in grief counseling. The dissenting judge consequently regarded the plaintiff as merely a skilled technician or technical specialist.


114 Rutlin v. Prime Succession, Inc., 220 F.3d 737, 742, 745-47 (6th Cir., July 20, 2000). Amusingly, the senior vice president for advocacy of the National Funeral Directors Association, whose “average member” was “an independently owned and operated business with fewer than 10 employees,” in a self-serving effort to bolster the professional status of those employees’ “unique profession,” informed a congressional committee that their “instruction...includes a broad intellectual education in such disciplines as chemistry, sociology, psychology, history and communication gained by attending an accredited mortuary science school.” Overtime Regulations[’] Effect on Small Business: Hearing Before the Subcommittee on Workforce, Empowerment and Government Programs of the Committee on Small Business House of Representatives (108th Cong., 2d Sess., May 20, 2004) (Lexis Federal Document Clearing House Congressional Testimony) (prepared remarks of John Fitch). Undertaker-employees are not highly paid: “Median annual earnings for funeral directors were $43,380 in 2002. The middle 50 percent earned between $33,540 and $58,140. The lowest 10 percent earned less than $24,950....” BLS, Occupational Outlook Handbook, on http://www.bls.gov/oco/ocos 011.htm. Still essen-
Reliance on judicial decisions was not employers’ sole recourse for extracting unpaid labor from undertakers and embalmers. Going back at least to the 1990s, congressional supporters had been introducing bills to amend the FLSA to create a clear statutory exemption for licensed funeral directors and later for licensed embalmers that would not be subject to the DOL’s § 13(a)(1) white-collar regulations. In 1998, Senator Lauch Faircloth, a North Carolina Republican, introduced a bill to exclude licensed funeral directors categorically. On the Senate floor, Faircloth justified the exclusion on the grounds that:

Under current law, licensed funeral directors do not meet the test for the “professionals”’ exemption under the regulations of the Fair Labor Standards Act. Consequently, they are not exempt from minimum wage and overtime requirements. Given the nature of their work—on-duty or on-call 24 hours a day, 7 days a week, 365 days a year—this requirement places an economic hardship on small funeral homes and the families of licensed funeral directors. With erratic and unpredictable work hours, most licensed funeral directors would prefer the option of comp time in lieu of overtime pay in order to spend more time with their families.

Requiring licensed funeral directors to be paid for overtime work forces small business owners to allocate revenues for that purpose, thereby inhibiting salaries and bonuses. To avoid the financial strain, some even resort to using only part-time funeral directors. ... I strongly believe that small businesses, such as funeral homes, must be given flexibility to provide their key employees with the options for alternative overtime compensation in order for them to survive, grow, and remain the premier source of employment in our communities. [O]n behalf of your local funeral homes and their licensed funeral directors, I urge my colleagues to support this legislation.

Ironically, even while Faircloth was bemoaning the burdens of overtime regulation imposed on the owners of small funeral establishments, the industry, according to then acting WHA Fraser, had “undergone a significant restructuring...as corporations...consolidated what used to be family-owned, private busi-

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CR 144:S9562 (July 31, 1998).
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nesses staffed by those considered self-employed.118 Thus large chains were buying up those local funeral establishments and converting those very owners into employees who would thenceforward be deprived of the overtime protection that they had wanted the government to help them take away from their erstwhile employees.119 These amendatory efforts continued during the 108th Congress (2003-2004) while the DOL was struggling with its proposed and final regulations.120

Unimpressed by the comments submitted by the Teamsters Union that most licensed funeral directors and embalmers would wind up being deprived of protection,121 the DOL fashioned a rule under which those who were licensed by


121FR 69:22155. In his letter to McCutchen, Teamsters President James Hoffa focused exclusively on time-and-a-half pay: “A majority of funeral directors and embalmers rely on their overtime to provide for their families. ... If these workers are given a pay cut by the Department, we can expect a mass exodus from the profession as they look for better paying jobs. In essence, according to one Local Union leader, we will be burying our loved ones ourselves because there will be no one willing to do it for us.” Since the DOL was, according to the AFL-CIO and the Teamsters, simultaneously depriving millions of other workers of their time-and-a-half pay, it was unclear where the exiting undertakers and embalmers would still be able to find covered employment once they left what Hoffa curiously insisted on calling a “profession.” Letter from JPH to Tammy McCutchen (n.d.
and employed in states requiring four years of academic pre-professional and professional study, including graduation from an accredited college of mortuary science, would generally satisfy the duties requirements of an exempt learned professional.\textsuperscript{122} The bizarre result of this bifurcated rule was that instead of a regulation of national applicability, the DOL, by violating its own guideline of requiring an advanced specialized degree as customarily required for entry into a profession, had created a situation in which, as former Deputy WHA Fraser and his colleagues pointed out, “some people doing a given job in a given place with a given educational background will be exempt, while others with exactly the same education and doing exactly the same job, but who are located in a different State, are not exempt, based entirely on the State’s licensure requirements.” Here Fraser, Gallagher, and Coleman, referring to the aforementioned consolidation process, could not refrain from asking whether such a rule was merely a “distortion leading to a desired result”—namely, that the“industry obtains at least partial success through this final rule.”\textsuperscript{123}

In the welter of these conflicting views of the requisite elements of the professional exemption it should not be overlooked that no one—neither the courts, nor the Clinton or Bush DOL, nor the private litigants, nor the regulatory commenters, nor Fraser and his colleagues—ever raised, let alone answered, the question as to why the number or kinds of college courses that an employee attended, or even whether he was a skilled technician or a professional, was in any way relevant to whether he should be deprived of all protection against overwork.

Vis-à-vis the proposed regulations, the DOL did, however, make a number of concessions to the AFL-CIO, especially with respect to the role of work experience as an alternative method of acquiring professional knowledge.\textsuperscript{124} Thus it de-

\textsuperscript{122}FR 69:22266 (§ 541.301(e)(9)). According to John Fitch, senior vice president for advocacy, National Funeral Directors Association, the final regulation (which required more formal education than did the Sixth Circuit in \textit{Rutlin}), was a compromise between the WHD, which was willing to codify Rutlin, and the DOL solicitor’s office, which opposed any exemption at all. Telephone interview with John Fitch, Washington, D.C. (Aug. 10, 2004).

\textsuperscript{123}Fraser, Gallagher, and Coleman, “Observations on the Department of Labor’s Final Regulations” at 26, 54.

\textsuperscript{124}To propitiate the AFL-CIO, the DOL also reinserted, from the existing regulations, the requirement that work require the “consistent exercise of discretion and judgment,”
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leted—once again because it allegedly had not intended "a significant expansion of the learned professional exemption"\(^{125}\)—both the proposed language that the requisite advanced knowledge could also be "acquired by alternative means, such as an equivalent combination of intellectual instruction and work experience," and the specific references, even where in occasional cases alternative means are permissible, to "training in the armed forces, attending a technical school, attending a community college...."\(^{126}\) Although the DOL did not believe that the original proposal would have brought about an expanded exemption, it nevertheless made the deletions to insure that the regulation not be "interpreted to exempt entire occupations previously considered nonexempt by the Department...."\(^ {127}\)

This more restrictive position on work experience was on display in the case of chefs: the DOL rejected the National Restaurant Association's suggestion that "the regulations should broadly allow work experience to substitute for a four-year college degree in the culinary arts because it would inappropriately expand the scope of the learned professional exemption." Consequently, and once again protesting that it had had "no intention of departing from current law that ordinary

although it was unable to identify any occupation that could otherwise satisfy the primary duty test for professionals but not require such discretion and judgment. \(FR\) 69:22151. At the same time, however, the DOL, agreeing with employers' complaints that that over-literal interpretation of that phrase had led to "the absurd result" that a judge held employees who instructed Space Shuttle ground control personnel on communications not to have exercised sufficient discretion and judgment because their responses to malfunctions were listed in a manual, also fashioned a new provision on the use of manuals designed to preclude such rulings. Hashop v. Rockwell Space Operations Co., 867 F.Supp. 1287 (SD Tx., Nov. 9, 1994); \(FR\) 69:22151-52; id. 22273 (§ 541.704) (modifying proposed § 541.204 (b) at \(FR\) 68:15588). It should be noted, as the DOL did not, that the judge on independent grounds found that the plaintiffs had not consistently used discretion because they lacked "the authority to make basic decisions that affect the fundamental operation of the enterprise...without seeking guidance from superiors as a matter of course." Hashop at 1298. Moreover, since the workers were not even required to have college degrees, \(id\). at 1297, the DOL was wrong in calling them "learned professional scientist[s]...." \(FR\) 69:22152. Finally, apart from the debate over the more logical interpretation of the purposeless regulation, neither the DOL nor the complaining employers ever explained why it would be absurd for such employees to be subject to overtime regulation. Like so many decisions, this one too included no information on the plaintiffs' salaries or the extent of their overtime work.

\(^{125}\) \(FR\) 69:22148.

\(^{126}\) \(FR\) 68:15589 (proposed §§ 541.301(a) and (d)); \(FR\) 69:22265 (§§ 541.301(a) and (d)).

\(^{127}\) \(FR\) 69:22150.

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cooks are not exempt professionals," the DOL not only required that chefs attain a "four-year specialize academic degree in a culinary arts program," but specified that the "learned professional exemption is not available to cooks who perform predominantly routine mental, manual, mechanical or physical work."128

In addition to rejecting the suggestions of the Newspaper Association of America that it consider including journalists in the learned professional exemption "at this time" because it lacked sufficient information about the profession's requirements129 and that it classify all community newspaper reporters as creative professionals,130 the DOL programmatically declared that it "did not intend to create an across the board exemption for journalists." In particular, it reversed the new presumption of the proposed regulation by stressing that: "The majority of journalists, who simply collect and organize information that is already public, or do not contribute a unique or creative interpretation or analysis to a news product, are not likely to be exempt."131 The final rule itself added the potentially significant restriction that: "Reporters also do not qualify as exempt creative professionals if their work product is subject to substantial control by the employer."132 Despite these concessions, however, the unexplicated notion of reporters and editors as creative artists remained anchored in the regulations.

Although the DOL did not make important changes to the salary basis test proposals, it did with regard to the linked issue of the effect of improper salary deductions. These changes should be viewed against the background of the DOL's rejection of the suggestion by some employers' representatives, such as the NACS, that the salary basis test be abandoned altogether on the grounds that its imposition as a quid pro quo for not receiving overtime pay was "an inappropriate regulation of the compensation of an otherwise exempt employee."133 The DOL dismissed this suggestion out of hand because the nearly universal practice of paying executive, administrative, and professional employees on a salary basis "reflects the widely held understanding that employees with the requisite status to be bona fide executives, administrators or professionals have discretion to manage their time...and...receive compensatory privileges commensurate with exempt status."134

To be sure, the DOL has never operationalized such self-time-management or

128 FR 69:22266 (§ 541.301(e)(6)).
129 FR 69:22152.
130 FR 69:22157.
131 FR 69:22158. The final regulation, which this statement tracked, did not use the phrase "The majority." FR 69:22266 (§ 541.302(d)).
132 FR 69:22266 (§ 541.302(d)).
133 FR 69:22176.
134 FR 69:22177.
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receipt of such privileges as prerequisites for depriving white-collar workers of overtime protection.

With regard to salary deductions, the Department had available to it the suggestion of several high-profile employers organizations to limit the effect of improper deductions to those individual workers who had been “actually subjected” to them. Employers had also criticized the Supreme Court’s decision in Auer v. Robbins for having failed to overrule the interpretation that unlawful deductions from the salaries of a few workers could cause firms to forfeit the exemption for whole classes of employees. In contrast, the AFL-CIO had urged the DOL to modify the proposed regulation to require loss of the exemption even if there was no actual deduction, so long as employees were subject to a policy permitting improper deductions. Unsurprisingly, the DOL chose to depart from the position that the Clinton DOL had successfully taken in Auer—namely, that employers had failed to pay workers on a salary basis and therefore forfeited the exemption where there was “either an actual practice of making such deductions or an employment policy that creates a ‘significant likelihood’ of such deductions.”

Although the DOL had repeatedly justified its broad interpretations of exemptions in the final regulation on the grounds that it was merely acquiescing in judicial rulings (even when it could have opted for other, narrower rulings, or even ignored all rulings and begun afresh with new regulations unencumbered by judicial interpretations), here, where the DOL was dealing with an otherwise authoritative Supreme Court decision, it chose to ignore this ruling because it had the power to rewrite the regulation altogether, thus rendering the Court’s interpretation moot. The DOL defended retention of the proposed provision in the final rule that the exempt status of employees in different job classifications working for different managers was not affected by improper deductions: “Any other approach...would provide a windfall to employees who have not even arguably been harmed by a ‘policy’ that a manager has never applied and may never intend to apply....” By the same token, the DOL disagreed with employers’

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136 John Fraser, Acting Assistant Secretary for Employment Standards and Deputy Wage and Hour Administrator in the Clinton administration, stressed this latter possibility. Telephone interview (July 11, 2004).
137 The Supreme Court had ruled that: “Because the salary-basis test is a creature of the Secretary’s own regulations, his interpretation of it is, under our jurisprudence, controlling unless ‘plainly erroneous or inconsistent with the regulation.’” Auer v. Robbins, 519 US 452, 461 (Feb. 19, 1997). The DOL then concluded that “nothing in Auer prohibits the Department from making changes to the salary basis regulations after appropriate notice and comment rulemaking.” FR 69:22180.
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comments urging that loss of exempt status should not extend beyond those workers suffering actual deductions: "An exempt employee who has not suffered an actual deduction nonetheless may be harmed by an employer docking the pay of a similarly situated co-worker. An exempt employee in the same job classification working for the same manager responsible for making improper deductions...may choose not to leave work early for a parent-teacher conference for fear that her pay will be reduced, and thus is also suffering harm as a result of the manager’s improper practices." Nevertheless, the final rule’s temporal relaxation “reduced the economic risk...by a huge amount, and thus made questionable salary deductions a much more attractive gamble.”

At the unusual request of both employers and the AFL-CIO, which were concerned that it was ambiguous, the DOL dropped the language in the proposed regulation that the employer had a “pattern and practice of not paying employees on a salary basis,” replacing it with “actual practice.” And at the request of the Small Business Administration Office of Advocacy, which claimed that it might be prejudicial to small firms, the DOL also dropped the requirement that the employer’s policy prohibiting improper deductions be in writing. And even after the final rule made the employer’s use of the window of opportunity contingent on affording employees a complaint mechanism and making a “good faith commitment to comply in the future,” Fraser, Gallagher, and Coleman—who, to be sure, exaggerated the stringency of the existing regulation—regarded the changes as rendering the entire salary basis requirement “for all practical purposes inoperative.” Indeed, as far as they were concerned, the overall effect of the final rule concerning the so-called window of opportunity for making corrections was that “the limitations placed on the inferences to be drawn from deductions inconsistent with the salary basis of compensation make the continued inclusion of the salary basis requirement largely meaningless.”

Th upshot of all the changes in the duties and salary tests was, according to the DOL’s estimates: (1) 1.3 million salaried white-collar workers with weekly salaries

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138 FR 69:22180.
139 Fraser, Gallagher, and Coleman, “Observations on the Department of Labor’s Final Regulations” at 39.
140 FR 69:22179.
141 FR 69:22180.
142 FR 69:22271 (§ 541.603(d)).
143 Fraser, Gallagher, and Coleman, “Observations on the Department of Labor’s Final Regulations” at 36.
144 Fraser, Gallagher, and Coleman, “Observations on the Department of Labor’s Final Regulations” at 36.
between $155 and $455 who were exempt would become protected and no worker earning less than $455 would lose protection; (2) the final rules were as protective as the existing regulations for 57 million hourly and salaried employees with annual earnings between $23,660 and $100,000;145 (3) the new standard duties tests for administrative and professional employees’ were as protective as the existing short test, while the executive duties test was more protective;146 (4) 107,000 employees earning more than $100,000 might lose their protection;147 and (5) to employers the annual cost in the form of greater overtime pay or higher base salaries (to avoid overtime liability) would be about $375 million.148 This last amount, set in relation to the 1.3 million workers who would become newly protected, was the equivalent of only $288 per year per worker—a seemingly minuscule amount of money to have prompted such a major political-economic collision. Finally, compared to the estimates based on the proposed regulations in 2003, the number of low-salaried workers who would gain protection was exactly the same, while more than half a million fewer white-collar employees might become exempt.149 That the former number (1.3 million) remained identical in spite of the fact that the DOL used a radically different methodology to generate it was, Ross Eisenbrey agreed, an “astonishing coincidence.”150

In contrast, a sober analysis by three former career DOL officials who worked under Republican and Democratic administrations—a Deputy Wage and Hour Administrator, an Associate Solicitor for Fair Labor Standards, and a Deputy Associate Solicitor for Fair Labor Standards—arrived at a radically different assessment of the final regulations: “[I]n every instance (with the sole possible exception of the ‘salary level’ test) where the Department has made substantive changes...it has...expanded the reach and scope of the...exemptions. [T]he proposition that the Department is not ‘broadening the exemptions’...warrants little attention except for its propaganda value.”151

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146 FR 69:22193-94. How this result was possible given the DOL’s more expansive interpretations of the duties tests, especially its adoption of the most pro-employer judicial interpretations available, is difficult to grasp.
149 See above ch. 15.
150 Email from Ross Eisenbrey (June 22, 2004). In 2004 the DOL did not count blue-collar workers, raised the threshold to $23,660, and counted all salaried workers under the threshold as working overtime in spite of the fact that the CPS data do not warrant such an assumption. Id.
151 Fraser, Gallagher, and Coleman, “Observations on the Department of Labor’s Final
The intent of Congress in passing the FLSA in 1938 wasn’t to boost workers’ paychecks—it was to penalize employers who worked people more than 40 hours a week, which the law considered “an oppressive labor condition.” The overtime penalty was meant to promote 40 hours as the workweek norm, and a second goal was to create jobs by spreading out the work among more employees. \(^{152}\)

If Senator Judd Gregg, the chairman of the Senate Health, Education, Pensions, and Labor Committee, believed that the executive branch’s decision to revise the rules “‘takes the wind out of the sails of the opposition,’”\(^{153}\) the AFL-CIO’s counter-campaign juggernaut must have quickly disabused him of this illusion. Nevertheless, the very day that the DOL released the regulations, the Republican leadership of the House Workforce Committee announced that it would hold a hearing on them a week later, when it doubtless expected to continue to “commend[]” the Department,\(^ {154}\) but in fact ran into labor’s resistance movement.

The potential fruitfulness of that two-hour and 40-minute hearing\(^ {155}\) was, however, undermined by Chao and McCutchen’s departure as soon as the committee had finished questioning them; as a result, a direct confrontation between the one witness who was critical of and, unlike even the Democratic committee...
members, conversant with the regulations and the Wage and Hour Administrator—who, unlike the Labor Secretary, was versed in their details—could not take place. Instead, each side was able to present its position largely unchallenged, except insofar as the committee members happened to have been prepped to ask stock questions on particular points, which, however, their overall lack of familiarity with the regulations made it impossible for them to follow up on. Though hardly unique or even unusual, this pattern of choreography devalues the legislative fact-finding process into a charade. To be sure, even if the DOL officials had remained to debate, a fundamental discussion of the underlying purposes of overtime regulation or of the exclusion of white-collar workers would not have taken place anyway, since those questions transcended the political, historical, and intellectual horizons of all the participants, whose framework was confined to comparing the technical details of the scope of coverage of the existing, proposed, and final regulations without contesting the legitimacy of the exclusion itself. This narrowness was almost painfully on display when the ranking minority member of the committee, Representative George Miller, labor’s best friend in the House, instead of using the opportunity to question a policy that has remained unfounded for 67 years, could do no better than allow as “we” have a “love-hate relationship” to overtime: we love the money on our W-2 at the end of the year, but we hate working late Friday night. This lament missed the whole point of maximum hours legislation both by focusing on the premium wages—payment of which represents a failure, not a goal, of overtime regulation—and overlooking mandatory overtime work imposed on workers who do not want it at all.

In addition to the two administration witnesses, Chao and McCutchen, three non-governmental witnesses appeared, two of whom—an economist at a big-business think-tank and an employer-side corporate lawyer—unsurprisingly presented testimony non-objectively on behalf of employers. Ronald Bird, whose crude ideological arguments have already been quoted at length, forfeited whatever credibility he was otherwise entitled to by citing his own biographical experience as an economist with a doctoral degree to prove that in “today’s labor market, many employees have more bargaining power than was typical 50 years ago.” His objectivity then suffered a fatal self-inflicted blow when, without any evidence whatsoever—but in the face of decades of precisely such employer conduct and the venerable labor standards enforcer’s admonition that “moments are the elements of profit”—he concluded that an “employer who would change an

156 Assessing the Impact of the Labor Department’s Final Overtime Regulations on Workers and Employers.

157 See above ch. 17.

158 Reports of the Inspectors of Factories for the Half Year Ending 30th April, 1860, 970
employee's status to shave a few cents off the payroll would do so at his peril and likely lose a valuable worker to a competitor.” Inadvertently, however, he did point up why so much more profit is potentially there for the shaving for employers in 2004 than in 1938: “changes in the occupational structure” associated with the absolute and relative growth of white-collar jobs “mean that many more jobs today than in the past pay qualify for exemptions.”

The lawyer, David Fortney, the acting and deputy Solicitor of Labor in the first Bush administration and co-author of the NAM’s comments on the 2003 proposed change, asserted that the increase in the salary threshold to $455 a week marked “a return to the original exemption criteria that require a salary of sufficient magnitude in order for an employee to be classified as exempt.” He also found it “particularly useful” that the DOL listed examples of administrative employees who would typically be excluded from overtime regulation (such as insurance claims adjusters and financial services industry employees who advise customers on the advantages and disadvantages of their employers’ products), arguing that these exclusions “essentially codify the major court rulings” without disclosing that where courts had ruled in various ways, the DOL had chosen to adopt the most pro-employer outcomes.

The third witness, whom the committee’s minority Democratic choreographers were presumably permitted to select, was of a markedly different character. The AFL-CIO prudently refrained from sending one of its own officials or someone otherwise linked to it; instead, the witness, Karen Smith, was a former Wage and Hour investigator, who, on leaving the DOL after 12 years in 1999, opened her own profit-making business as a consultant, “primarily for employers...corporate America, small business” “and their attorneys,” performing the very kind of cooperative consultation (rather than confrontational-punitive investigation) that employers have come to demand and in part to obtain from enforcement agen-


161 Assessing the Impact of the Labor Department’s Final Overtime Regulations on Workers and Employers (statement of David Fortney).

cies. Her expertise thus certified by the WHD and lacking any taint of association with the labor movement, Smith proceeded to administer impassioned criticism and angry (almost emotional) denunciations of selected provisions of the final regulations.

She opened her testimony by accusing the DOL of having crafted wording that “artfully weakens the current regulation in very subtle, but significant ways that will surprise employers and employees....” From the rest of her testimony it emerged that uniformly the former would be pleasantly and the latter unpleasantly surprised. With much greater specificity than the other witnesses she highlighted several of the new exemptions. Nursery school teachers would lose coverage because the new rules did not require “independent discretion and judgment.” Registered nurses’ overtime protection was jeopardized because the final rule added to § 541.604(b) the word “hourly” to indicate the possibility of paying all of an employee’s guaranteed salary on an hourly basis, thus “bel[ying] the idea that exempt employees have discretion to manage their own time and are not answerable for the number of hours they work. And, finally, working foremen were covered under the existing regulation, but under the new rule the concurrent performance of exempt and nonexempt work would permit exclusion of an employee as an executive if management was his primary duty.

163Employers, call on Karen Dulaney Smith if a Wage and Hour Investigator or a plaintiff’s attorney has contacted you or if your own attorney or accountant has advised you that your pay practices need revision in order to reduce liability. If you are under investigation, Karen Dulaney Smith can meet with Wage and Hour representatives. She has extensive skill and experience in conducting speedy and thorough research into all Wage and Hour laws, reviewing payroll and personnel records, making transcriptions and back wage computations, explaining employer and employee rights and obligations in terms that make sense, and finding ways to make compliance cost effective and fair. If a suit has been filed against you, Karen Dulaney Smith maintains excellent relationships with many qualified labor attorneys to whom she can refer you. She can work with your present lawyer, who may or may not be a specialist in the area. In coordination with your attorney, Karen Dulaney Smith can greatly streamline document preparation and act as an expert and consulting witness in litigation or mediation.” http://www.karendulaneysmith.com/referrals.htm.

164To be sure, it seems most improbable that the AFL-CIO was uninvolved in her selection as witness. After all, the authors of the EPI report thanked “Smith for her generous and invaluable assistance in understanding the many complexities of the proposed rule, for her insights into the current enforcement of the overtime regulations, and for her truly inspirational spirit of public service.” Eisenbrey and Bernstein, “Eliminating the Right to Overtime Pay.”

165Assessing the Impact of the Labor Department’s Final Overtime Regulations on
It is very improbable that Smith’s testimony changed the views of any committee member, but, remarkably, by the next day the AFL-CIO had posted on its website an analysis of the new duties tests that largely overlapped with Smith’s.\textsuperscript{166} Conceding the Bush administration almost nothing, the unions charged that it appeared that it had “dealt with a public relations problem by addressing the overtime concerns of the most highly visible workers—like firefighters and police—while...including new provisions that strip overtime rights from less visible workers.” The AFL-CIO also pointed out that for the first time the regulation “effectively places...an income cap on overtime eligibility” that was not indexed for inflation and thus would over time deprive more workers of that right.\textsuperscript{167}

Having apparently decided that the importance to employers of finally being able to exclude even more workers from overtime regulation was worth the risk of alienating working-class voters in the midst of a presidential election campaign, the Bush administration was clearly not amused by the vigorous campaign that the AFL-CIO launched to puncture the legitimacy of the new regulations. In a counter-stroke, on May 3, Secretary Chao named a new WHD enforcement task force to “maximize protection of workers’ pay right under new Overtime Security rules.” Without identifying the AFL-CIO by name, she nevertheless cleverly warned it that, perversely, its propaganda might boomerang: “The other reason for creating this enforcement task force is our concern that the massive misinformation campaign against the new Overtime Security rules could undermine efforts to make employers live up to their new obligations under the rule and jeopardize workers’ overtime pay protections.”\textsuperscript{168}

The Democrats were not chastened.\textsuperscript{169} The very same day, Harkin proposed an amendment to the aforementioned corporate trade and tax bill adding a provision to § 13 of the FLSA, under which

\begin{itemize}
  \item any portion of the final rule promulgated on April 23, 2004, revising part 541 of title 29,
\end{itemize}

\textit{Workers and Employers} (Statement of Karen Dulaney Smith).

\textsuperscript{166}AFL-CIO, Myths and Facts on the Bush Administration’s New Overtime Regulation, on www.aflcio.org/yourjobeconomy/overtimefactsheet.cfm (visited Apr. 29, 2004).


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Code of Federal Regulations, that exempts from the overtime pay provisions of section 7 any employee who would not otherwise be exempt if the regulations in effect on March 31, 2003 remained in effect, shall have no force or effect and that portion of such regulations...that would prevent such employee from being exempt shall remain in effect. Notwithstanding the preceding sentence, the increased salary requirements provided for in such final rule at section 541.600...shall remain in effect.170

Although presumably hardly any of his colleagues on the Senate floor were paying attention to what he was saying and no one’s vote would have been changed had anyone actually been listening, Harkin tried to buttress his amendment by an analysis of the final regulations. His brief references to some of the changes in the duties tests were often accurate, but much of his speech verged on the incoherent. Thus he declared that since the FLSA’s enactment in 1938, “overtime rights and the 40-hour work week have been sacrosanct....”171 He reinforced his confused belief in the mutual compatibility of the 40-hour week and the right to extra pay for hours beyond 40 by asserting that for “65 years, the 40-hour week has allowed workers to spend time with their families instead of toiling past dark and on weekends,” and turning around and observing that overtime accounts for 25 percent of the total income of those who work overtime.172 Finally, Harkin asserted that raising the salary threshold to $23,660 “should have been done a long time ago” and that the white-collar rules in general should have been revised by Congress after holding committee hearings.173 He failed, however, to explain why Congresses controlled by his own party had never undertaken such an effort since 1940 (when the unsuccessful initiative had been designed to shrink coverage) or why Congress had never done anything but express mild concern during the

170CR 150: S4742 (May 3, 2004). This amendment was designed to differ from the text of the earlier Harkin amendment by virtue of being both prospective and retrospective; in other words, it voided any part of the rule, even after implementation, that took away overtime protection. Consequently, it would make recourse to the Congressional Review Act unnecessary. The labor movement believed that it could probably get and win a vote in the Senate invalidating the changes in the duties tests, but that House Majority Leader Tom DeLay would not permit a vote in the House; consequently, the AFL-CIO downplayed the CRA as an option. Email from Barbara Somson, UAW, Washington, DC (June 22, 2004).


DOL’s 29 years of inaction on updating the salary levels,\textsuperscript{174} let alone taken matters into its own hands.

To the chagrin, no doubt, of the relentless AFL-CIO and Democratic campaign against the final regulations, on May 4 the \textit{Washington Post} editorialized in favor of Congress’s holding off on blocking the rules; instead, it urged that the courts should decide whether they were consistent with the FLSA, and in the meantime they would offer significant benefits for workers.\textsuperscript{175} The debate on Harkin’s amendment resumed that afternoon, but, first, that morning the Labor Subcommittee of the Senate Appropriations Committee, of which Specter was the chairman and Harkin the ranking minority member, held an hour and a half hearing on the overtime final rules.\textsuperscript{176} In his opening statement Specter announced that the hearing would focus on the differences between the old and new regulations’ definitions of “administrative” and “professional” and how the new definitions enhanced “clarification to avoid the complexities of litigation, which is the primary objective of the new regulation.” Already at this point he appeared to be skeptical that such “very similar” definitions could achieve that objective.\textsuperscript{177}

In an opening statement that stretched credulity to the snapping point, WHA Tammy McCutchen declared that the DOL “has been consistent in what it wanted to achieve with this update. The primary goal remains to protect low-wage workers. ... We at the Department of Labor are very proud of the updated rule.... America’s workers deserved action. They now have a strengthened overtime standard that will serve them well for the 21st Century.”\textsuperscript{178} Hiding, once again, behind the increase in the salary threshold that the Clinton administration’s inaction had made possible, McCutchen proudly reported that the low-wage workers who would be likely to gain overtime compensation were predominantly married women without a college degree living in the South.\textsuperscript{179}

In his questioning Specter made little headway in trying to extract an answer from McCutchen as to how her new definition of “administrative” employee would help “avoid the vagaries of litigation....”\textsuperscript{180} Ultimately, she was able to come up with no better excuse for the vagueness of the new definition than shifting the blame to the “commenters”: “We would have liked to have clarified it even further,

\textsuperscript{174}See above ch. 15.
\textsuperscript{176}``Final Rule on Overtime Pay” at 1, 61.
\textsuperscript{177}``Final Rule on Overtime Pay” at 1-2.
\textsuperscript{178}``Final Rule on Overtime Pay” at 7, 9.
\textsuperscript{179}``Final Rule on Overtime Pay” at 7.
\textsuperscript{180}``Final Rule on Overtime Pay” at 10.
but we did not receive any comments with any better ideas.” The “grave reservations” that Specter registered appeared to have less to do with the substantive class bias of the new definitions and more with his perception that the revised regulations did not constitute an exception to his universal experience that he had “yet to see a regulation which does not require a lot of analysis and lot of legal interpretation....”181 Little wonder that a BNA reporter observed that Specter and Harkin had reacted to McCutchen’s testimony, for example regarding the prospects for reducing the number of class action lawsuits, “with varying degrees of skepticism.” In particular, they “expressed disappointment that there is ‘no basis for coming to closure’ and ending the legal wrangle over who is or is not exempt....”182

With Specter’s interrogation confined to the new definitions’ litigation-dampening impact, exploration of their substance was left to Harkin, whose effectiveness, as throughout the campaign, was handicapped by his ignorance of the fundamentals of the regulatory scheme. This deficiency re-emerged most prominently in connection with his question about the exclusion of the new category of so-called team leaders. Disabled by his ignorance from confronting McCutchen over her breathtaking prevarication that it “is actually a pro-employee change from the current language,”183 Harkin, latching on to the new language that such a team leader did not have to “have direct supervisory responsibility over the other

181 Final Rule on Overtime Pay at 11.
183 Final Rule on Overtime Pay at 13. McCutchen based this false claim on the assertion that the “current language” it changed was § 541.205(c), which “says that the administrative exemption applies” to “‘a wide variety of persons who either carry out major assignments in conducting the operations of the business, or whose work affects business operations to a substantial degree....’” McCutchen then went on to claim that: “We have limited that definition of an administrative employee to limit it only to the person who leads the team who works on major projects.” Id. What McCutchen suppressed (and Harkin did not know enough to mention) was that the current language did not constitute the definition of an “administrative employee,” but merely illustrated one of the sub-definitions—namely, that the employee’s work be “directly related to management policies or general business operations....” There was in fact nothing in the new regulations that prohibited classification of non-leader members of the “team of other employees assigned to complete major projects” as excluded administrative employees, provided that they met the minimal requirements of the category. All that the new regulations accomplished was to identify a theretofore regulatorily unknown occupational group that would henceforth “generally meet[ ] the duties requirements for the administrative exemption....” FR 69:22264 (§ 541.203(c)).
employees on the team,"¹⁸⁴ interjected that "I thought it is interesting that they put that thing in there, that they do not even have to have supervisory authority." This public self-disclosure of yet another gaping hole in his modest knowledge of the regulations—the detachment of the non-supervisory administrative employee from the supervisory executive in 1940, by far the most important revision of the regulations between 1938 and 2004, had somehow eluded the self-proclaimed senator-researcher—provided McCutchen with an opportunity to undermine his authority by pointing out that: "This is the administrative exemption, and the executive exemption is the exemption that is designed for managers and supervisors."¹⁸⁵

In spite of Specter’s direct request, after the committee’s questioning of her, that she remain for the rest of the hearing so that it could have her comment on other witnesses’ testimony, McCutchen replied that she “had to step out for another event” because she had been “previously scheduled” for it. Specter’s admonition failed to dissuade her: “When we schedule these hearings, we really expect witnesses to be able to stay. We had an experience with the Secretary last time which was difficult for the subcommittee. So we expect you to stay.”¹⁸⁶

Labor’s first witness, Craig Becker, the AFL-CIO’s associate general counsel, pointed out that new § 541.604 diluted the salary basis test by permitting employers to compute an exempt employee’s earnings “on an hourly, a daily or a shift basis, without losing the exemption or violating the salary basis, if the employment arrangement also includes a guarantee of at least the minimum weekly required amount paid on a salary basis regardless of the number of hours, days or shifts worked, and a reasonable relationship exists between the guaranteed amount and the amount actually earned.” Under this provision, according to Becker, “employers will be able to both closely control employees’ time, requiring them to punch a clock, and at the same time deny them overtime compensation.”¹⁸⁷

¹⁸⁴ "FR 69:22264 (§ 541.203(c)).
¹⁸⁵ "Final Rule on Overtime Pay" at 14.
¹⁸⁶ "Final Rule on Overtime Pay" at 16. Those who attended the hearing reported that Specter had been very angry. Email from Kelly Ross, AFL-CIO lobbyist, who attended the hearing (June 14, 2004).
¹⁸⁷ "Final Rule on Overtime Pay" at 20. Becker also sought to show that the team leader exclusion had no parallel in the existing regulations for employees carrying out “special assignments.” Becker insisted that a “‘special project’”—it is unclear why he used this term and put it in quotation marks although it does not appear in the regulations—was “far different from” the new “major project” because the former was outside the employer’s ordinary work, whereas a “major project” was simply an important one. Consequently, according to Becker, newly exempt team leaders could “work on a major project on a continuous basis as an integral part of the employer’s business.” Id. at 22. Although the team leader exclusion was an innovation, Becker misunderstood Harold Stein’s notion of
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Testifying again, David Fortney, lauded the final regulations (in a syntactically impaired expression) for “introducing clarity and common sense to the highly-compensated white-collar employees” earning $100,000 or more. This euphemism for virtually guaranteeing their total exclusion was, according to Fortney, “consistent with the underlying purposes of the FLSA, which are to protect overtime for those workers who earn the least, and presumably are least able to negotiate adequate compensation arrangements.” Whatever justification he was able to conjure up for these mass exclusions of relatively high-paid workers derived from his exclusive focus on time-and-a-half pay and complete neglect of the imposition of unsocially long hours, which can be as oppressive for high- as for low-paid workers. Fortney’s commentary on the final regulations culminated in the claim that the “current regulations are not serving anyone’s interests except those of class action lawyers”—an astonishing contention in light of the structurally lopsided advantages that have accrued to employers of white-collar workers since 1938 and especially since the virtual demise of the salary-level test during the 1980s.

Unlike McCutchen and Fortney, the two witnesses appearing on behalf of the labor movement indulged less in global ideological claims, instead presenting detailed criticism of specific regulatory innovations. Ross Eisenbrey of the EPI pointed out that low-level working supervisors would be reclassified as executives “just as fast food assistant managers already have in some jurisdictions, even though they spend 90 percent or more of their time doing routine, production-line work such as flipping burgers and taking customer orders.” The final rule was able to bring about this result by “[r]elying on poorly reasoned cases interpreting the current regulations, most notably the Burger King cases from the First and Second Circuits....” Eisenbrey underscored that the implications of the new § 541.106 on “concurrent duties,” which expressly provides that an “assistant manager can supervise employees and serve customers at the same time without losing the exemption,” were “far greater than the Department admits. While claiming to conform the regulations to current case law, in fact the Department is rejecting the better-reasoned cases and extending the worst case beyond retail to the rest of American industry.” Although Eisenbrey’s specific claim that “Burger King and the other cases that have permitted employees to do unlimited amounts of menial work while still being held to be exempt executives are not the law in every special assignments carried out by bona fide administrative employees, who performed this work permanently. See above ch. 13.

188 Final Rule on Overtime Pay at 29.
189 Final Rule on Overtime Pay at 34.
190 Final Rule on Overtime Pay at 36.
191 Final Rule on Overtime Pay at 38.
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judicial circuit, and they have not been extended outside of the fast food and retail industries" was contradicted by the findings of the GAO white-collar overtime report and the complaints that unions conveyed to the GAO, his larger point—that the DOL’s claim that its new regulations were solidly rooted in prevailing case law and did not represent an expansion of exclusions beyond that already recognized by existing law was a distortion inasmuch as the case law was not monolithic and the DOL had systematically selected the pro-employer decisions—was arguably his most salient criticism of the substance of the regulations and the bona fides of the procedure that the Labor Department applied to craft them. A congressional committee really interested in getting to the bottom of the dispute between the DOL and the AFL-CIO over the nature of the regulations would have made certain that Eisenbrey and McCutchen confronted each other over this very point. To be sure, even if McCutchen had stayed at the hearing, the extraordinarily limited time that each senator was apportioned for questioning and the inveterate custom of not even calling attention to officials’ evasive non-responses made it very unlikely that a useful dialog would have unfolded in any event.

In the event, the confrontation was circuitous and diluted. Specter inadvertently broached the issue in asserting, after McCutchen’s departure, that she had

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192 Final Rule on Overtime Pay at 39.
193 The GAO in a survey of 32 cases decided between 1994 and 1999 “included hardly any instances in which a court overturned an employer’s classification of a lower-income supervisor as an exempt executive.” The cases included non-retail workplaces (such as an aquatics director of a community swimming pool and a dietary manager of a nursing home) and all the employees involved “claimed that their jobs consisted primarily of nonmanagerial work....” The consequence on a national level was that the Clinton administration DOL had initiated little litigation over the executive status of supervisory employees. GAO, Fair Labor Standards Act: White-Collar Exemptions in the Modern Workplace 29-30 (GAO/HEHS-99-164, Sept. 1999). For a case even more extreme than Burger King, see Murray v. Stuckey’s Inc, 939 F.2d 614, 617-18 (8th Cir. July 25, 1991).
194 As John Fraser, Acting Assistant Secretary for Employment Standards and Deputy Wage and Hour Administrator in the Clinton administration, emphasized, the DOL would also have been free to ignore all judicial interpretations—except Supreme Court rulings that the Secretary of Labor had exceeded her authority—and to write new regulations on a blank slate. Telephone interview (July 11, 2004).
195 The committee should, for example, have questioned McCutchen about the DOL’s claim that its retention in the final rule of terms from the current administrative employee rule “that have been the subject of numerous clarifying court decisions...made the standard duties test for administrative employees in the final rule as protective as the current short test.” FR 69:22214.
"raised a good point when she said that regs do make a selection of the cases and give the parties some detailed information as to which cases are to be followed. Implicitly in that, cases were rejected if they are not included."196 Although McCutchen had in fact stated that the final rule with respect to the permissible amount of exempt work had “adopted the case law in the Burger King and Dairy Queen cases,”197 she had not only not admitted that the DOL had rejected opposing case law, but had in fact suggested that the final regulations had adopted monolithic case law.198 Specter was not interested in this issue, but rather in the question of whether it was a “significant improvement” to have incorporated the case law into the regulations “so that people who are trying to figure out what these words mean” would “have the case law readily at hand....” Eisenbrey, persisting in his strategy of not acknowledging anything positive in the Bush administration regulations, denied that the inclusion was a “substantial help,” but then directed Specter’s attention to the vastly more important matter that “the Department chose the cases to put in here very selectively.” After Eisenbrey had pointed out class bias involving insurance claims adjusters, Specter promptly explicated the point: “So they made a selective basis which you think undermines their credibility.”199

Eisenbrey went on to observe that by making it sufficient that an exempt executive manage a “grouping or team,” the final rule reduced to a “new and embarrassing level of absurdity” the requirement that she manage an enterprise or customarily recognized subdivision. He predicted that department stores, for example, would begin arguing that “an employee ‘in charge of’ the perfume counter is an exempt executive because she has the ‘authority’ to suggest shift assignments for two other employees.”200 Finally, Eisenbrey charged that the DOL had “opened an enormous loophole” applicable to as many as two million workers with its “new exemption” for “team leaders,” a term widely used in industry to describe “a non-management employee responsible for calling meetings and directing a group of front-line employees who have been given an important task of a kind that historically was reserved to management, such as” improving efficiency, pro-

196Final Rule on Overtime Pay at 51.
197Final Rule on Overtime Pay at 14.
198McCutchen had testified earlier in the hearing that “the changes that we made to the duties tests...are all adopting current Federal case law, current Wage and Hour opinion letters, or the current Wage and Hour field operations handbook. So although it is a change in the language of the regulation, it is not a change in the current law that is being applied in the courts today.” Final Rule on Overtime Pay at 12 (italics added).
199Final Rule on Overtime Pay at 51. In fact, the DOL had for decades included case law in its interpretive regulations §§ 541.117(d) and 541.207(a).
200Final Rule on Overtime Pay at 36.
ductivity, customer service, information technology, safety, and employee morale.\textsuperscript{201}

The final witness, Ronald Bird, repeated the testimony that he had presented to the House Workforce Committee a week earlier. In the retelling, he further subverted his credibility by embellishing his use of his own career as an economist with a doctoral degree to illustrate that “[t]oday the fundamental competitive conditions of the labor market are very different” than they were in 1938. With the unemployment rate at 5.7 percent rather than 19.1 percent, “the relative scarcity of potential replacements gives me power, power to make demands about wages, hours, and working conditions that my grandfather in 1938 would have never dared make.”\textsuperscript{202} Naming numbers, Bird asserted that if one of his previous employers had changed those conditions “against my wishes, I would have quit because there were six other people willing to hire me.”\textsuperscript{203}

Bird’s tale prompted Senator Specter to ask the witness (perhaps archly) whether the thrust of his testimony was that workers’ improved labor market status made it “a situation where it does not matter a whole lot what the technicalities are of the regulation in effect....” Bird’s response that the FLSA was needed to “protect the people it was designed to protect” without, however, identifying who those people were apparently provoked Specter into calling Bird’s bluff and requesting concrete policy conclusions from his autobiographical approach to labor economics: “So it might not make a whole lot of difference what the definitions are if the employee can walk away from the job and find a new one if he is not being treated fairly. Maybe we are making a [sic] too much of a fuss about the semicolons.” Trapped by his own vacuous rhetoric, Bird stumbled into evasive incoherence: “Right, yes, sir. I appreciate that question because it really does illustrate I think the problem that we have encountered in the discussion about the old rule versus the final new rule. We see in that discussion a lot of jumping to conclusions, I think.”\textsuperscript{204}

That afternoon, Specter summarized on the Senate floor what he had learned from the hearing testimony: “there is no indication that this new regulation is going to clarify anything at all.”\textsuperscript{205} When the Senate floor debate resumed on the

\textsuperscript{201}Final Rule on Overtime Pay at 40.  
\textsuperscript{202}Final Rule on Overtime Pay at 41.  
\textsuperscript{203}Final Rule on Overtime Pay at 42. Bird was referring to a job in which he preferred to be paid hourly and overtime, although legally his employer could have paid him a salary and not been liable for overtime pay. Bird did not explain why he preferred this arrangement.  
\textsuperscript{204}Final Rule on Overtime Pay at 50.  
\textsuperscript{205}CR 150:S4802 (May 4, 2004).
The Final Regulations of 2004

afternoon of May 4, five-term Republican Senator Orrin Hatch sought, as employers had been doing since 1938, to cast the overtime provisions as "meant to safeguard low-income workers from employers who would take advantage of them."\textsuperscript{206} As for the 107,000 employees earning more than $100,000 who would, under the final regulations, "no longer automatically be eligible for overtime," he detected a Democratic electioneering ploy: "It doesn't take a particularly clever politician to see that you might win votes if you fight to make these high earners higher earners and otherwise carry on as if a Republican business-friendly Administration cannot be trusted to do right by employees."\textsuperscript{207}

At this point Senator Gregg, the chairman of the Health, Education, Labor, and Pensions Committee, apparently acting on his own\textsuperscript{208} but "with the acquiescence of the administration,"\textsuperscript{209} offered an amendment designed to dissuade at least several of the six Republicans who had voted for Harkin's amendment in 2003 from doing so again. He charged that Harkin's approach would create a "class ceiling" because no employer would be "willing to move anybody into any position of any responsibility from where they already are because they aren't going to know what effect that is going to have on that individual's overtime. They are going to be buying a lawsuit. ... That business...is going to say, we don't need that lawsuit. We are going to go out and hire a new person to do these duties who we know won't be subject to any sort of issues relative to overtime." To be sure, Gregg's reasoning was opaque in the sense that the same alleged uncertainty that attached to the overtime status of the position objectively remained whether it was filled by someone already on the firm's payroll or a newly hired employee. The only sense that it could plausibly make was that the "clerk" who "suddenly start[s] to be promoted into a position of maybe taking over some responsibility and making decisions on who gets what or who doesn't get what" and who is "going to immediately be putting that business...into the issue of whether you have a right

\textsuperscript{206} CR 150:S4788 (May 4, 2004).

\textsuperscript{207} CR 150:S4789. Hatch's Republican colleague, Michael Enzi of Wyoming, cast doubt on the cleverness of the ploy by asking: "Could our [Democratic] colleagues be willing to deny overtime pay for an additional 1.3 million low-wage workers in order to protect the overtime for the 107,000 workers earning above $100,000?" Id. at S. 4797.

\textsuperscript{208} Email from Kelly Ross, AFL-CIO lobbyist (June 15, 2004). The press reported that "Gregg said he had spoken with Labor Department officials before offering the provision. 'They don't see it as necessary, but I think they understand the politics of it,' he said." "Senate Adopts Amendment To Block New Overtime Rules," Emily Heil, National Journal's CongressDaily, May 5, 2004 (Lexis).

\textsuperscript{209} David Espo, "Senate Demands Overtime Pay For Eligible Workers," Legal Intelligencer, May 10, 2004 (Lexis).
any longer to overtime"\(^{210}\) in fact did not agree that the assumption of some additional responsibility should also subject her to unlimited involuntary overtime work without compensation.\(^{211}\)

Regardless of the untenable substantive (or perhaps merely pretextual) reason that Gregg adduced for his amendment, his remarkable and unprecedented proposal did make some sense from the point of view of protecting workers' coverage and reducing interpretive ambiguity. For the first time, Congress would have fixed the salary threshold itself—at a level, to be sure, even lower, adjusted for inflation, than that of the notoriously anti-worker Barden bill of 1939-40.\(^{212}\) His method for clarifying coverage "once and for all" was straightforward: "[A]bout 55 groups...have come to us and said they feel they may be an issue. We don’t think most of them are because we think the regulation is pretty clear for most of these groups that they basically retain their right to overtime. But just so there can be no question about it, this amendment specifically names every one of those groups and says they have the right to their present overtime situation. If the new law...puts them in a better position, they have a right to that."\(^{213}\)

Specifically, Gregg proposed that:

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Section 13 of the Fair Labor Standards Act of 1938 (29 U.S.C. 213) is amended by adding at the end the following:

(k)(1) The Secretary shall not promulgate any rule under subsection (a)(1) that exempts from the overtime pay provisions of section 7 any employee who earns less than $23,660 per year.

(2) The Secretary shall not promulgate any rule under subsection (a)(1) concerning the right to overtime pay that is not as protective, or more protective, of the overtime pay rights of employees in the occupations or job classifications described in paragraph (3) as the protections provided for such employees under the regulations in effect under such subsection on March 31, 2003.

(3) The occupations or job classifications described in this paragraph are as follows:
   (A) Any worker paid on an hourly basis. (B) Blue collar workers. (C) Any worker provided overtime under a collective bargaining agreement. (D) Team leaders. (E) Computer programmers. (F) Registered nurses. (G) Licensed practical nurses. (H) Nurse midwives. (I) Nursery school teachers. (J) Oil and gas pipeline workers. (K) Oil and gas
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\(^{210}\)CR 150:S4791.

\(^{211}\)Why the brand-new employee might not come to the same conclusion was also unclear.

\(^{212}\)The Barden bill’s salary threshold of $1,800 a year in 1939 was the equivalent of $24,565 in 2004. See above ch. 10.

\(^{213}\)CR 150:S4792.
The Final Regulations of 2004


(4) Any portion of a rule promulgated under subsection (a)(1) after March 31, 2003, that modifies the overtime pay provisions of section 7 in a manner that is inconsistent with paragraphs (2) and (3) shall have no force or effect as it relates to the occupation or job classification involved.214

The list was woefully inadequate, but it did encompass a number of the occupations about which labor had specifically complained, and tentatively it was an intriguing approach. The Democrats, however, lacked the flexibility to engage the proposal. Senator Kennedy, the first Democrat to speak substantively after Gregg, appeared to have been caught off-guard. On the one hand he urged his colleagues to vote for the amendment, but on the other he claimed that it was “not much to bargain” on the grounds that, instead of providing clarification, listing occupational categories would “provide additional litigation because” the DOL’s test “refers to the duties and not to the professional names that are being used. So if you have a cook or a chef, does that apply to somebody just cooking the food or someone at the salad bar who also considers themselves to be included? Plus, there are additional people who have not been included as well. This is a continuation of a misguided policy.”215 These remarks, which could not even qualify as competent debaters’ points, became incoherent when coupled with Kennedy’s declaration that he was going to vote for the amendment “because...it is an attempt at least in those 55 areas to make sure they are protected.”216 He inadvertently revealed the Democrats’ inability to engage when he added: “We are not sure what this is all

214CR 150:S4792-93. The ungrammatical structure of §(k)(2) makes it difficult to discern exactly what Gregg meant, but presumably the phrase “at least” should have preceded “as protective” and “than” should have been inserted somewhere after “more protective.”

215CR 150:S4793.

216CR 150:S4794.
about. We know there is going to be a cut in overtime for hard-pressed working families.... That is what will be the result." Kennedy appeared not to have grasped that Gregg was potentially undermining much of what the Bush administration’s new regulations had accomplished for employers in terms of restricting overtime coverage. But instead of calling Gregg’s bluff and demanding that still more occupations be added to the hold-harmless list, Kennedy appeared to believe that he was delivering a fatal blow by noting that insurance adjusters, cashiers, and bookkeepers were absent from the list.

Although he too failed to engage Gregg’s amendment, Wisconsin Democrat Herbert Kohl was the only member of Congress during the entire 2003-2004 debates to admit openly that the FLSA overtime provision had not achieved its purpose:

In passing the FSLA, Congress hoped that the required “time and a half” for overtime work would be an incentive to employers to stick to a 40-hour work week. Today, that goal is still distant as companies routinely require workers to work more than 40 hours. American workers work more hours than any other industrialized nation, except South Korea. And the overtime pay, rather than being a disincentive to employers, has become a necessary income source for many American families. ... Like in our past, the worker’s choice is a harsh one—earn the extra income needed to meet a family’s material needs, but sacrifice the family time that meets their emotional needs.

Curiously, however, instead of proposing to revamp the FLSA to create a real maximum 40-hour week, Kohl was so preoccupied with attacking the Bush administration’s retrograde regulations that he characterized the existing rules, which he had just held responsible for making possible overly long working hours, as “designed to fairly compensate workers for onerous overwork....

In the closing minutes of the debate Harkin had an opportunity to call Gregg’s bluff, but, like Kennedy, he preferred to score debaters’ points instead. After noting that Gregg’s amendment was a “real acknowledgment” that workers in many occupations risked losing their entitlement to overtime pay, he criticized it for listing too few occupations, but did not bother to demand the inclusion of specified others. Harkin then faulted the amendment for its lack of definitional precision: it included refinery workers, but did not make it clear whether the term covered ethanol plants in Iowa—a trite objection to a deficiency that could have

\[217\] CR 150:S4793.
\[218\] CR 150:S4794.
\[220\] CR 150:S4799.
been easily remedied had Harkin so wished. Finally, changing directions, Harkin opposed the Gregg amendment on the grounds that it was "a drastic change" in the FLSA because "for 50 years...whether or not you get overtime is based upon the job you do, not upon what you are called. Senator Gregg now wants to say you will get overtime or not depending upon what you are called, not upon what you do. That is a big change." It was almost amusing that in his partisan zeal a self-professed liberal advocate of progressive change could find no better argument than fear of change itself without offering any explanation as to why de-emphasis of the abstract duties tests, which in 66 years had never embodied a rational basis for excluding workers, might not signify a step toward greater transparency. Moreover, the introduction of concrete occupational designations performed the purely negative function of insuring coverage of their incumbents, leaving the duties tests intact for the other occupations. Indeed, Harkin himself seemed to recognize this fact when he declared that he would vote for Gregg's amendment because it was not "that big a deal. It is kind of ridiculous to list 55, but I will vote for it and move the process along." Why he did not want to move the process even further along by increasing 55 to a less ridiculous larger number, he did not disclose. To be sure, Gregg did not enhance his bona fides by falsely asserting that he had listed "[e]very group that has been allegedly negatively impacted...."

Gregg's amendment was apparently a rare illustration of the collapse of congressional choreography—especially in a Congress controlled by the same party that was in control of the executive branch. Gregg had offered his amendment in an effort to lure away enough Republican votes to defeat the Harkin amendment. However, he apparently lacked the time during debate on the Senate floor to ask the six renegade Republicans whether his amendment would in fact prompt them to abandon Harkin. Gregg's amendment boxed in the Democrats, who in turn called Gregg's bluff by voting for it, together with the Republicans, unanimously, so that it passed 99 to 0. The Senate again passed Harkin's amendment 52 to 47, the Democratic presidential nominee John Kerry being the only senator not voting. Despite having garnered all the Democrats' votes for his amendment, Gregg nevertheless failed to achieve his immediate political purpose of dissuading at least three of the six Republicans who had voted for Harkin's amendment the previous time to oppose it: in the event, only one (Stevens) voted No; in particular, Specter and Murkowski were constrained by their closely contested reelection

221 CR 150:S4803. In contrast, Specter viewed Gregg's amendment as "a step in the right direction." Id. at S4802.

222 CR 150:S4805.

The Final Regulations of 2004 campaigns.\(^{224}\) Now that it was clear that Gregg’s stratagem, despite the unanimous vote, had failed to achieve its purpose because Harkin’s amendment passed anyway, Gregg was saddled with his amendment, which substantively neither he, the Democrats, nor the Bush administration wanted.\(^{225}\)

The Democrats had “begrudgingly” supported the Gregg amendment because it failed to cover more than 800 other job classifications also at risk of exclusion from overtime regulation\(^{226}\)—a limp argument since the proposal would not, in any event, injure the specifically named workers’ interests. Gregg told reporters after the vote that he would be glad to add to the list of overtime-protected workers and would also consider including a list of duties to clarify the issue,\(^{227}\) but Democrats, who had complained during the debate that hundreds of other occupations had been left out, failed to take him up on his offer. In spite of having prevailed on the vote, Harkin anticipated that his amendment could be stripped in conference and expected the overtime regulations to become an issue in the presidential election issue if Kerry made them one.\(^{228}\) A week later, on May 11, the Senate passed the bill 92 to 5 with Gregg’s and Harkin’s amendments intact.\(^{229}\)

Keeping up the pressure in the propaganda war, on May 11, Howard Radzely, the Solicitor of Labor, announced the establishment of an “‘overtime security amicus program’...to counter what he referred to as an ‘unprecedented

\(^{224}\)Carl Hulse, “Senate Blocks New Rules on Pay for Overtime Work, NYT, May 5, 2005 (A16:5-6). Had his vote been needed, Stevens would have voted for the Harkin amendment, but since it was not, “Harkin let him go,” especially since as chair of the Appropriations Committee during appropriations season he would probably have preferred not to “cross” his party’s president. Email from Barbara Somson, UAW (June 26, 2004).

\(^{225}\)Email from Kelly Ross (June 15, 2004). Nor were employers enthusiastic about it. According to Sandy Boyd, vice president for human resources policy at the NAM, the Gregg amendment "could ultimately confuse things even more." Andrew Mollison, “Senate Votes to Gut Bush Administration’s Overtime Changes,” Cox News Service (May 4, 2004) (Lexis). Boyd referred to Gregg’s amendment as setting up “a two tiered system based on job titles (always a no-no in this area of the law...).” Workplace Watch (May 4, 2004), on http://www.nam.org/s_nam/doc1.asp?TrackID=&SID=1&DID=231073&CID=97&VID=2&RTID=0&CIDQS=&Taxonomy=False&specialSearch=False.


\(^{228}\)Johnson, “Senate Approves Overtime Amendment Limiting Portion of DOL’s Final Rule.”

\(^{229}\)CR 150:S5218 (May 11, 2004). The amendments were § 489 and § 490, respectively, of S. 1637.
misinformation campaign." The solicitor's office would review each overtime eligibility case brought to its attention to determine whether to file an amicus brief to inform judges "how the new rules should be properly applied." The purpose of the program, according to Radzely, was "to ensure that the intent of the new rules—to provide stronger, clearer overtime protections for workers—is reflected in the courts." 230

In the interim before the House took up the so-called JOBS Act to which the Senate had attached the Gregg and Harkin amendments, labor's supporters there continued to engage in sporadic guerrilla warfare. On May 12, Representative George Miller introduced a motion to instruct the conferees on the bill to insist on reporting out an amendment to prohibit the DOL from using any funds to implement a regulation that would make any employee ineligible for overtime pay who would otherwise qualify under the regulations in effect on September 3, 2003, except that the increase in the salary regulation promulgated on April 23, 2004 was not affected. Although it was defeated 222 to 205 and 216 to 199 on May 18, 231 this creative parliamentary move was notable because, although the bill was technically still in conference, the Labor Department's appropriation had already been included in the bill that had been passed. 232

On May 20, at yet another congressional hearing on the final regulations, this time before the Subcommittee on Workforce, Empowerment and Government Programs of the House Committee on Small Business, 233 Deputy Wage and Hour

231 CR 150:H2836-37 (May 12, 2004), H3106-3107 (May 18, 2004).
232 "Miller offered a motion to instruct conferees on the FY04 Labor-HHS appropriations bill to retain in the final bill a Senate-passed amendment that would block some of the new overtime rules. That bill has already passed, since it was rolled into last fall's omnibus spending bill, but the conference on the Labor-HHS spending bill was never officially dismissed, which means motions to instruct its conferees are fair game—even if they will never meet again. That fact 'opened up an opportunity that they weren't aware of,' the Miller aide said of Republican leaders. The House already has voted to instruct Labor-HHS appropriations bill conferees on the overtime pay issue, but the 221-203 vote to oppose the proposed regulations took place last October, and the Labor Department rewrote them earlier this year. House Republican leaders have refused to allow a vote on the revised regulations, and so Democrats see this as their chance." Emily Heil, "Miller Seeks To Force House Vote On Latest Overtime Rules," National Journal's Congress Daily, May 12, 2004 (Lexis).
233 At this hearing the ubiquitous Ronald Bird yet once again repeated his testimony. Overtime Regulations['] Effect on Small Business: Hearing Before the Subcommittee on Workforce, Empowerment and Government Programs of the Committee on Small Business
Administrator Alfred Robinson, apparently saw no contradiction between his boast that “workers win under this final rule” and his admission that the DOL had accommodated small business by methodologically taking into consideration the salaries actually paid in such firms and in the lower-wage South in setting the salary threshold. Despite having no more knowledge of congressional intent than any of his predecessors, Robinson glibly and meaninglessly assured the committee that the DOL’s approach “was designed specifically to achieve a careful and delicate balance—mitigating the adverse impacts of raising the salary threshold on smaller businesses...while staying consistent with the objectives to clearly define and delimit which workers qualify for exemption as Congress intended, while at the same time helping to prevent the misclassification of obviously nonexempt employees.” Later, Robinson was asked by California Democrat Linda Sanchez whether an employer could stop paying overtime to a quality team leader pursuant to the new provision in the regulations classifying as a bona fide administrative employee an “employee who leads a team of other employees assigned to complete major projects for the employer (such as purchasing, selling or closing all or part of the business, negotiating a real estate transaction or a collective bargaining agreement, or designing and implementing productivity improvements)...even if the employee does not have direct supervisory responsibility over the other employees on the team.” Instead of directly dealing with the relevant regulatory language concerning “productivity improvements,” Robinson’s evasively glossed “major projects”: “‘We’re talking about buying, selling, [and] closing parts of factories, not buying and selling office supplies.’”

In contrast, Ross Eisenbrey of the Economic Policy Institute presented a much more plausible scenario of how the new regulation on team leaders could be interpreted, pointing out that teams dealing, for example, with safety, morale, diversity, and customer service were all arguably involved in “major projects,” thus exposing their leaders to unprotected overtime work. Workers’ loss of protection was not, however, the burden of Eisenbrey’s remarks. Rather, keying his testi-

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234 On June 2, Secretary Chao announced that effective June 14 Robinson would become the Acting WHA in the wake of McCutchen’s departure. http://www.dol.gov/esa/media/press/whd/whd20041011.htm.

235 Overtime Regulations[''] Effect on Small Business (prepared remarks of Alfred Robinson).

236 FR 69:22263-64 (Apr. 23, 2004) (to be codified at 29 CFR § 541.203(c)).

mony to the problems of small businesses over which the committee has jurisdic­tion, he sought to persuade them that the new regulations were “so ambiguous and internally inconsistent” that the resulting lack of clarity would not bring about the reduction in litigation that was the chief justification for the revisions. In this context he contended that the new rule “eliminates key objective tests that provide clarity in the current regulations” and “has removed many of the existing bright line tests” such as the 50-percent rule of thumb for determining whether an employee’s primary duty is management, replacing them with terms requiring case-by-case analysis. Without identifying any legitimate socioeconomic reason under current law for forcing half-time managers to work unlimited overtime without additional compensation, Eisenbrey simply noted that under the new rule there was “no minimum amount of exempt work that an employee might do and still be found to be exempt.”

Eisenbrey further illustrated the uncertainty embedded in the new regulations by reference to a provision stating that they “do not apply to manual laborers or other ‘blue-collar’ workers who perform work involving repetitive operations with their hands, physical skill, and energy.” But it then went on to state that only “non-management production-line employees and non-management employees in maintenance, construction and similar occupations...are entitled to...overtime pay....” Eisenbrey cautioned the subcommittee that: “The rule gives no clue about how to distinguish a management production line employee from a non-management production line employee, or a management maintenance employee from a non-management maintenance employee. No one in the Department of Labor, including the deputy wage and hour administrator who is testifying today, can tell you at what point a non-management blue-collar worker is transformed into a management blue-collar worker. How much administration or supervision is required to become exempt? If a supervisor spends eight hours of his nine-hour workday alongside a crew of carpenters, sawing wood and pounding nails with them, is he blue collar? Is he exempt or non-exempt?”

As with the first illustration, Eisenbrey, by taking Chao and McCutchen at their word that their principal purpose was to clarify and not to exclude more workers, failed to mention that employers might well conclude that the cost of a little ambiguity was far exceeded by the benefit of even more capacious exclusions.

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238 The Department of Labor’s Overtime Regulations['] Effect on Small Business. To be sure, although Eisenbrey stated that the 50-percent rules was “not iron-clad,” he failed to disclose to the subcommittee just how favorable to employers the existing 29 CFR § 541.103 (2003) already was. See above ch. 16.

239 FR 69:22261 (to be codified at 29 CFR § 541.3(a)).

240 The Department of Labor’s Overtime Regulations[’] Effect on Small Business.
resulting in the appropriation of even more unpaid labor—especially when that ambiguity was necessary in order to avoid the political costs of deligitimation associated with unambiguous outright exclusions.

Representatives of employers in two industries on which the DOL had bestowed the exemptions that they had requested put in quasi-victory-lap appearances before the Small Business Committee. Despite having attained its ostensible goal of securing classification of undertakers and embalmers as learned professions, the National Funeral Directors Association complained that the DOL’s “guidance needs clarification” since its discussion of the exemption in the Federal Register was, in the NFDA’s view, not so expansive as the court decision on which it was based.241 The National Association of Mortgage Brokers displayed more gratitude. What it failed to show, however, was any reason that mortgage loan officers should be forced out of the overtime regulation regime merely because they collect and analyze information on consumers’ financial situation or “assist the consumers in...assessing how particular products fit with their needs and abilities.”242 But then neither had the DOL itself (or the AFL-CIO for that matter).

On June 17, the House passed the corporate tax and trade bill to which the Harkin amendment had been attached in the Senate, but under a closed rule that

241Overtime Regulations['] Effect on Small Business (prepared remarks of John Fitch, senior vice president for advocacy, NFDA). Fitch claimed that funeral industry employees had urged it “to continue its efforts to gain this exemption” because it would secure them “higher and more predictable wages”: “Because funeral service is dictated by forces outside the control of funeral directors, work hours are unpredictable. As a result of being classified as nonexempt, the pay of licensed funeral home employees varies greatly from week to week. In addition, to reserve against overtime, hourly pay rates are lower than they could be.” Id. Fitch did not explain how nonpayment of overtime work could produce higher wages. In a later interview, Fitch conceded that shifting to salaried exempt status would not increase workers’ annual income, but only even it out. Fitch also criticized that the DOL, by requiring four academic years of pre-professional and professional study, exceeded that required by the Sixth Circuit in Rutlin; as a result, he argued, licensed directors and embalmers in only as few as two states might qualify as learned professionals. Telephone interview with John Fitch, Washington, D.C. (Aug. 10, 2004). Moreover, unionized employees, organized by the Teamsters, definitely did not urge employers to exclude them from the FLSA: the union had been opposing the NFDA’s legislative and regulatory lobbying efforts for years. Telephone interview with Jan Oliver, Govt. Affairs Dept., International Brotherhood of Teamsters, Washington, D.C. (Aug. 9, 2004).

242Overtime Regulations[ ’] Effect on Small Business (prepared remarks of Neill Fendly, government affairs committee chair and past president, National Association of Mortgage Bankers).
permitted no amendments. Labor and its Democratic supporters’ most probable strategy at that point focused on obtaining a motion to instruct House conferees to insist on the Senate amendment, but the minority party was entitled to only one instruction and it was not clear whether it would choose that one. Moreover, it was possible that the Republicans would intentionally slow down the process in order to avoid yet another vote on the overtime regulations. With Congress scheduled to recess on July 23 and the regulations to go into effect exactly one month later, maneuvering room for the labor movement’s efforts to reverse or blunt the regulations grew scarce. Although some in the unions had earlier discussed judicially contesting the validity of the new regulations if all else failed, as their effective date approached, “[m]ost of the union lawyers who have weighed in seem to think that the DOL can do what it wants with the grant of authority from Congress to define” the three exempt categories. Even if such pessimism went too far, it seems improbable that a federal appeals court would, for example, invalidate the $100,000 threshold plus one exempt activity: after all, the short test—whose validity unions had never contested—when introduced in 1950 cut down the number of exempt duties from five to two while not even doubling the salary level, whereas the new exclusion of highly compensated employees either left the number of short-test duties constant or increased or decreased it by one, and octupled the salary level.

On leaving her post as WHA in June 2004 after having promulgated the new regulations, McCutchen surprisingly observed that “the positive benefit of the debate was that many more workers are asking questions about their rights to overtime....” Although neither McCutchen nor the AFL-CIO raised it, the one question it was unclear whether workers were discussing was why white-collar employees should be treated any differently than those in blue-collars.

In the waning days before Congress recessed, the EPI and Eisenbrey undertook yet another effort to mobilize public opinion and Congress by publishing an updated estimate of the number of additional white-collar workers the final regula—

243 http://thomas.loc.gov/cgi-bin/bdquery/z?d108:HR04520:@@@X (H.R. 4520). The same pro-labor House Republicans who unsuccessfully requested that the Speaker permit an up-or-down vote on the Harkin amendment also rejected the AFL-CIO’s request that as a protest they should vote against a rule on H.R. 4520. Fawn Johnson, “Pro-Labor House Republicans to Appeal to Speaker Hastert for Vote on Overtime Rule,” DLR, No. 115, June 16, 2004, at A-10.

244 Email from Barbara Somson, UAW (June 22, 2004).

245 Email from Barbara Somson (June 23, 2004).

tions would exclude from overtime protection. Eisenbrey estimated, on the basis of the standard and highly compensated salary thresholds and changes in duties tests affecting eight occupational groups, that almost six million employees would no longer be subject to wage and hour regulation. The impact of the numerous other exclusionary revisions the EPI was unable to quantify. While 384,000 (rather than the 1.3 million asserted by the DOL) employees with weekly salaries between $155 and $455 would initially gain protection, more than 400,000 paid more than $100,000 would lose it. In descending order of impact, the eight occupational groups encompassed: 2.3 million team leaders; 1,948,000 low-level supervisors; 900,000 non-degreed professional employees; 160,000 mortgage loan officers; 130,000 chefs; 87,000 computer employees; 30,000 nursery school teachers; 2,000 funeral directors and embalmers.

In yet another last-ditch effort, aides to Representative Obey, the ranking Democrat on the House Appropriations Committee, stated on July 13 that he would offer an amendment to the 2005 DOL spending bill to deny funding to enforcement activity that could cause workers to lose overtime protection. However, on July 14 the amendment failed on a 31 to 29 party-line vote with every Democrat and no Republicans voting for it. Obey announced that he would try to block the overtime regulations when the bill came up for a vote on the House floor. Harkin announced similar plans in the Senate, which, however, was not scheduled to deal with the appropriations bill until after the new regulations went into effect on August 23. Nevertheless, Harkin vowed to "try to roll them back" after Labor Day. In an unusual step, Harkin was named a Senate conferee on the trade and tax bill, although he was not a member of the Finance Committee. With no other congressional vehicles of resistance available to it, and Congress’s adjourning on July 22 (until September 7) without having resolved the differences between the Senate and House trade and tax bills, the Senate version of which had passed with

247Ross Eisenbrey, “Longer Hours, Less Pay: Labor Department’s New Rules Could Strip Overtime Protection from Millions of Workers” (July 14, 2004), on http://www.epinet/briefingpapers/152/bp152.pdf. Curiously, despite the use of the conditional in the subtitle, the quantitative estimates in the paper were all phrased in terms of the unconditional “will.” The estimate of six million was gross and did not take into account the 384,000 low-salaried employees who would gain protection.


249“Obey Preparing Amendment to Halt Enforcement of DOL’s Overtime Rule,” DLR, No. 134, July 14, 2004, at A-13. Under Obey’s approach the regulations would still have gone into effect and workers would have been entitled to file private suits over denial of overtime protection under the new regulations.

250Email from Barbara Somson (July 16, 2004).
Harkin’s and Gregg’s amendments, the AFL-CIO was unable to prevent the new regulations from going into effect on August 23, 2004.251

And even if the Democratic candidate Senator John Kerry were elected president in November, the labor movement believed that the best that it could hope for from the new administration would be initiation of new rulemaking to undo some or most of the Bush DOL’s exemption-expanding regulations, thus splitting the difference.252 Nevertheless, on July 13, in connection with the aforementioned Fraser report, the Kerry campaign issued an adamant-sounding statement: “The Bush administration’s new overtime regulations represent a shameful assault on the paychecks of hard-working Americans at a time when they are already putting in more hours, paying more for every day costs and saving less than ever before. Getting paid for an honest day’s work has been a bedrock principle in America for nearly 70 years. Workers should be paid what they deserve when they take time away from their families and put in more than 40 hours a week. That is why a Kerry-Edwards administration will waste no time in reversing this affront to millions of workers, and in restoring their fundamental right to get overtime pay whenever they work more than 40 hours a week.”253 Whether Kerry would actually implement such a reversal seemed questionable in light of a campaign strategy of “labor[ing] hard for support from business executives who formerly backed Mr. Bush” by “reassur[ing] moderate voters that Mr. Kerry isn’t the liberal caricature that Mr. Bush’s campaign would like to make him.”254 Moreover, nothing in Kerry’s past suggests that as president he would undertake any steps to break with his Democratic predecessors’ unbroken tradition, going back to 1938, of discriminating against white-collar workers by conferring on their employers a huge exemption from national hours regulation.

The AFL-CIO’s irrepressible campaign resumed after the regulations had gone into effect. Obey, arguing that with a “resurrection of inflation...[w]orking families


252Email from Barbara Somson (July 12, 2004).


need every dollar in their take-home pay that they can possibly get,"255 offered his aforementioned amendment to the Departments of Labor, Health and Human Services, and Education and Related Agencies Appropriations Act, 2005,256 on the House floor on September 9. Without any Democratic defections and with 22 Republican cross-over votes, the House voted 223 to 193257 to prohibit the use of congressional funds to administer the DOL final rule except for the increase in the weekly salary threshold to $455.258 To be sure, Republicans insisted that they would eventually eliminate the amendment.259 And even if the Obey amendment survived, it (unlike the Harkin amendment to the corporate tax and trade bill) would not invalidate the new rule, on which employers could rely and which courts could interpret and enforce.260 On September 15 the AFL-CIO inflicted yet another embarrassing defeat on the Bush administration when the Senate Appropriations

255 CR 150:H6922 (Sept. 9, 2004).
256 H.R. 5006 (108th Cong., 2d Sess.).
257 CR 150:H69511.
258 "None of the funds provided in this Act may be used by the Department of Labor to implement or administer any change to regulations regarding overtime compensation (contained in part 541 of title 29, Code of Federal Regulations) in effect on July 14, 2004, except those changes in the Department of Labor’s final regulation published in the Federal Register on April 23, 2004 at section 541.600 of such title 29." CR 150:H6922 (Sept. 9, 2004). Rep. Steven LaTourette, one of the Republicans who voted with the Democrats, offered a last-minute compromise (similar to the Gregg amendment in the Senate) protecting some 40 occupations from loss of overtime protection, but Republican leaders rejected it when they realized that they could not vote down Obey’s amendment. “House Passes DOL Funding Bill with Limits for FLSA Overtime,” LRR 175:176-78 at 278 (Sept. 20, 2004).
260 On the speculative dispute over the legal effect of enactment of the Obey amendment—especially whether it would lead to a situation in which private parties but not the DOL could sue under the new regulations—see, CRS Memorandum: From T. J. Halstead, Legislative Attorney, American Law Division, to House Appropriations Committee, Subject: Administrative Procedure Issues Pertaining to Proposed Appropriations Limitation (Aug. 11, 2004) (copy furnished by Barbara Somson); Michael Triplett, “Congressional Analysis Is at Odds with Solicitor View on Overtime Amendment,” DLR, No. 176, Sept. 13, 2004, at A-9. Although by September it had become less likely that Congress would appoint conferees to the FSC/ETI before the November election, it was reported that if it did, Congressman Miller would offer a motion to instruct the conferees to agree to the Harkin amendment (already attached to the Senate version of the bill). Email from Barbara Somson (Sept. 10, 2004).
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Committee voted 16 (including Republicans Specter and Campbell) to 13 to include in the DOL appropriations bill a provision offered by Harkin embodying the same rider that the House had just passed as well as an additional section explicitly reinstating the DOL regulations in effect as of July 14, 2004 except for the higher salary threshold. Although the Bush administration threatened to veto the appropriations bill if the provision survived, the chairman of the House Appropriations Committee contended that Senate and House conferees would remove it.261 However, passage of a continuing resolution on September 29 to fund federal agencies at existing levels until November 20 meant that no further action would be taken on the bill until the lame-duck session of Congress convened after the election.262

Labor's other vehicle for resistance, the export tax bill, suffered a further blow on October 6 when congressional conferees refused to include Harkin's amendment in their report: the House group rejected it by a vote of 6 to 3 after its Senate counterpart had voted 12 to 11 for inclusion. Harkin's failure even to offer Gregg's amendment in conference suited Gregg, who considered his own "redundant" proposal "sort of moot" because after the new regulations had been in effect for more than a month "no one has found one worker who has lost their overtime."263 In the Senate, in exchange for Democrats' desisting from holding up final action on the tax bill, Republicans on October 10 permitted Harkin's amendment to be passed on a voice vote as a stand-alone bill (S. 2975), which it was unlikely the House would act on264 after the Republican election victory on November 2.

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261 Alan Fram, "Senate Panel Votes to Derail New Overtime Rules" AP (Sept. 15, 2004); Fawn Johnson, "Committee Approves Amendment Barring Most DOL Enforcement of Overtime Rule," DLR, No. 179, Sept. 16, 2004, at AA-1. In fact, this appropriations bill might never reach the Senate floor if, as in the previous year and was expected again in 2004, it was merged into an omnibus appropriations bill after the election. This process had prompted Harkin and Specter to abandon their opposition in 2003. See above ch. 16. On September 8, OMB announced that "the President's senior advisors would recommend that he veto the final version of the bill if it contained any provision prohibiting or altering the Labor Department's enforcement of the final overtime security bill." OMB, "Statement of Administration Policy: H.R. 5006—Labor, Health and Human Services, and Education, and related Agencies Appropriations Bill, FY 2005" at 4 (Sept. 8, 2004).


A Parallel Universe of White-Collar Overtime Pay: The Federal Government

Q. [Sen. James George, Dem. MS] The Government employs clerks at good salaries, who work short hours; but has that had the effect of reducing the hours of labor of clerks in private employments, or of increasing their salaries?¹

Mr. [Sen. John] Reagan [Dem. TX]. There are thousands of bills that get through on the same old plea, that everybody in office wants something more than he has got, more time to himself, less time for work.²

¹Report of the Committee of the Senate [on Education and Labor] upon the Relations Between Labor and Capital, and Testimony Taken by the Committee 1:299 (1885 [Aug. 16, 1883]).

²CR 18:2564 (Mar. 31, 1888) (former postmaster general of the Confederacy, temporarily blocking debate on an eight-hour bill for letter carriers).
Q. [Sen. Wilkinson Call, Dem. FL] You would make it penal upon any officer of the Government to exact more than eight hours’ work from a man. That we understand. But suppose the man were willing to work more than eight hours; would you prohibit that?—A. [P.J. McGuire, General Secretary Brotherhood of Carpenters and Joiners] I should. I am aware that human greed enters into the composition of the workingmen as much as it does into the composition of the capitalists; and I am aware that many of them will work as long as they are allowed; but when their officers, their foremen, and overseers, refuse to allow them to work any longer that ends the matter. ... I don’t know whether you understand the purpose which we have in view.

Q. You have in view...to limit a man to eight hours’ work, because you think to work longer than that would be an injury to him.

THE WITNESS. Very good.¹

At the same time that Congress has excluded tens of millions of private-sector and state and local government white-collar workers from whatever modicum of protection the FLSA offers against unilateral employer imposition of overtime work, it has also created a parallel system of protection for federal government employees. This chapter examines the pre-history of federal overtime regulation during the nineteenth century, while the next two chapters account for the origins of the present system during World War II and its development during the postwar period.

Congress has expressly regulated federal government white-collar employees’ hours and overtime pay since at least 1888, when it declared that “eight hours shall constitute a day’s work for letter-carriers’ in cities... , for which they shall receive the same pay as is now paid as for a day’s work of a greater number of hours. If any letter-carrier is employed a greater number of hours per day than eight he shall be paid extra for the same in proportion to the salary now fixed by law.”² In order to appreciate the context in which Congress took this step, it is necessary to

¹Report of the Committee of the Senate [on Education and Labor] upon the Relations Between Labor and Capital, and Testimony Taken by the Committee 1:328-29 (1885 [Aug. 17, 1883]).

²An Act to limit the hours that letter-carriers in cities shall be employed per day, ch. 308, 25 Stat 157 (May 24, 1888).
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examine the origins of the eight-hour law for blue-collar federal workers that Congress enacted soon after the Civil War and the desuetude into which it promptly fell.

That contemporary officials in the postal service who opposed inclusion of carriers in the federal eight-hour law for government laborers, workmen, and mechanics opportunistically claimed that they were more like clerks than manual laborers is hardly surprising. That exactly half a century later the U.S. Bureau of the Census agreed that letter carriers were white-collar workers, is more difficult to understand. (In contrast, by the 1930s, the British Minister of Health had classified them as “employed by way of manual labour” for purposes of coverage under the national insurance acts.) Nevertheless, in 1938, Alba Edwards, the creator of the Census Bureau’s social-economic classification of gainful workers, grouped the 1,129 female and 120,204 male mail carriers enumerated at the 1930 census as among the “clerks and kindred workers...the so-called white-collar workers.”

Edwards contended that although it was “plainly impossible to draw a hard and fast line between those occupations characterized principally by the exercise of muscular force or manual dexterity and those characterized chiefly by the exercise of mental force or ingenuity—or between hand workers and head workers—such a line of demarcation probably may be made sufficiently exact for our purpose.”

Despite the fact that as late as 1970 the DOL stated that applicants for letter-carrier jobs “must be able to stand for long periods, lift and handle sacks of mail weighing

3In the mid-nineteenth century “clerical” work “included the keeping of accounts and their settlement by auditors and comptrollers. ‘Clerk’ was still the universal designation of government employees... [M]ost government work was paper work, performed by persons designated as clerks.” Leonard White, The Jacksonians: A Study in Administrative History: 1829-1861, at 548-49 (1965 [1954]).


5Alba Edwards, A Social-Economic Grouping of the Gainful Workers of the United States tab. 1 at 4, 2 (Bureau of the Census, 1938). A study of blacks in Chicago, for example, found that letter carriers were the white-collar occupation in which black men were most heavily represented. St. Clair Drake and Horace Cayton, Black Metropolis: A Study of Negro Life in a Northern City 1:tab. 5 at 220 (rev. ed. 1962[1945]). Overall and nationally, black men and women were considerably underrepresented in the white-collar occupations: in 1930, only 2.1 percent were professional employees; 1.0 percent non-farmer and wholesale/retail proprietors, managers, and officials; and 1.5 percent clerical workers. Edwards, A Social-Economic Grouping of the Gainful Workers of the United States tab. 3 at 10.

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as much as 80 pounds, and walk considerable distances,"7 Edwards nevertheless classified them in the white-collar group (as the only occupation doing hard physical labor).8 In a short article that he published at the same time in DOL's *Monthly Labor Review*, Edwards displayed a somewhat greater degree of epistemological humility in conceding that:

while the phrase “white-collar workers” is now widely current, there seems to be no generally accepted concept of just what workers the white-collar group includes. It is difficult to formulate a satisfactory definition, for the group includes persons in many different occupations, pursued, sometimes, under considerably different conditions; and the salaries of these persons, as well as their duties, vary widely. But, notwithstanding differences in work and pay, the white-collar workers together do form a group that is in many respects homogeneous. ... Perhaps the white-collar worker may be roughly defined as those engaged in clerical and kindred work. This definition excludes, on the one hand, proprietors, managers, officials, and professional persons; and it excludes, on the other hand...manual workers. The white-collar workers...are the clerical assistants to our executives, our officials, and our business and professional men. They do the office work, type the letters, keep the records and accounts, and answer the telephones. They tend the stores and the shops, sell insurance and real estate, carry the mail, and transmit messages by telegraph, telephone, and radio.9

What Edwards’s white-collar classification, then, boils down to is the performance of non-production work by non-supervisory and non-professional workers. Why Edwards did not classify letter carriers together with, for example, semi-skilled non-manufacturing workers such as truck drivers and bakery, store, and laundry deliverymen,10 is unclear—perhaps because he viewed them as part of the distribution network of the less tangible products of the (non-profit, government-owned) communications industry.11

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7BLS, *Occupational Outlook Handbook* 821 (Bull. No. 1650, 1970-71 ed.). In the early 1990s, the DOL was still advising that carriers may carry heavy loads of mail and must lift heavy sacks. BLS, *Occupational Outlook Handbook* 258, 259 (Bull. No. 2400, 1992-93 ed.).


11Prior to Edwards’s classification, the Census Bureau grouped mail carriers within
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The Eight-Hour Law of 1868

[T]he eight-hour rule...is un-American.... Frivolity will dominate over frugality. Billiard-rooms, base-ball clubs, and groceries will be furnished with new recruits. Lucifer will grin with delight at the prospect of fresh battalions of loungers entering his services. ...

It is sad to think how infinitely small are the benefits which can be conferred upon the laboring man by even the wisest and most philanthropic legislation. ...

How many railroads to the Pacific could we hope to build under an eight-hour rule?12

The conditions that have long made this [shorter hours] a commanding question in European countries, and which have resulted in the almost universal organization of the industrial classes of those countries into guilds and trade and labor unions, with the view of obtaining through the coercive force of such organizations that redress of grievances and amelioration of conditions which the citizens of this Republic should be taught to seek to obtain only by the force and sanction of public law, have but recently begun to develop in this country and to assume proportions demanding legislative action.13

Against the background of widespread labor agitation for the eight-hour day

the subgroup of express, post, radio, telephone, and telegraph under the rubric of transportation. Bureau of Foreign and Domestic Commerce, Statistical Abstract of the United States: 1938, tab. 51 at 63 (1939). The Division of Occupational Analysis of the U.S. Employment Service later classified mail carriers under “clerical and kindred occupations,” which are “concerned with the preparation, transcribing, transferring, systematizing, or preserving of written communications and records in offices, shops, and other places of work where such functions are performed. Other occupations such as...telegraph messengers...and mail carriers, although not strictly of this character, are included because of their close relationship to these activities.” Federal Security Agency, Dictionary of Occupational Titles, Vol. II: Occupational Classification and Industry Index 33 (2d ed. 1949 [1939]). Mail carriers were grouped directly after post office clerks. Id. at 46. The most recent edition of this work still classifies mail carriers as clerical, but under the subgroup “information and message distribution: hand delivery and distribution,” whereas mail clerks and sorters are classified under the subgroup “stenography, typing, filing, and related occupations.” U.S. Employment Service, Dictionary of Occupational Titles 1:205, 181 (4th ed. 1991).


in the years immediately following the war, the labor movement prevailed upon several members of Congress to introduce bills limiting the day’s work of the federal government’s own mechanics to eight hours.14 Thus as early as February 1866 such a bill declared: “That eight hours shall constitute a day’s work, for all laborers, workmen, and mechanics...employed...by or on behalf of the government of the United States....”15 Similar bills were introduced in March 1867.16 The House did pass a bill without debate on March 28,17 but when the Senate took it up that same day, its initial skeletal debate revealed what would become the underlying theory of the shorter hours campaign. As Senator John Conness (Republican from California) explained: “A personal experience enables me to say that I could myself perform more labor in eight hours than in ten, taking any given week for the average, and then it gave me more hours of study.” His Republican colleague from Massachusetts, Henry Wilson (who was to become Grant’s vice president) spoke in favor of the bill, stressing that “I am ready...to try in the public works the experiment, and if it shall fail, we shall speedily discover it....” And George Edmunds, Republican of Vermont, underscored the empirical nature of the demand by pointing out that “it is quite a problem to know whether you can justly get ten hours’ pay for eight hours’ work....”18 After the bill died in committee, an identical bill was introduced in the next session,19 followed by much more thorough debate.

First, however, the House debated the bill on January 6, 1868,20 from a fundamentally different perspective than had prevailed in the Senate the previous
March and would prevail there the following June—namely, "more time for culture, for improvement, for reading, for attending the evening schools...."

The bill’s sponsor, Nathaniel Banks, a Radical Republican from Massachusetts, actuated by the nationwide business depression, sought support on the basis of the great distress then affecting workers. The bill’s most vocal opponent was Frederick Pike, a moderate Republican from Maine and chairman of the Naval Affairs Committee, who the previous November had offered a resolution that it was the judgment of the House that it was unnecessary at that time to proceed further with building or equipping ships of war. A resolution was offered a month later to modify that earlier resolution by adding that it was not to be construed as an expression of the opinion of the House favoring discharge of mechanics or laboring men from the navy-yards during the coming winter months, but it was not adopted.

During the January 6 debate, Pike, referring to his resolution, asserted that half of the 10,000 workers in the navy yards at Portsmouth, Boston, New York, Philadelphia, Washington, and elsewhere—which in his view should not be eleemosynary institutions—were not needed and less than one third had been discharged. In response, Banks unabashedly designated work-sharing as the object of his bill, which was designed to deal with the fact that, by order of the House, work had been discontinued and a considerable number of workers had been discharged;

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Montgomery, *Beyond Equality* at 316, ignored this crucial aspect of the debate.

CG, 42 Cong., 2d Sess. 123 (Dec. 14, 1871) (Sen. Orris Ferry, Rep. CT, explaining what the eight-hour law’s advocates had advanced as its advantages for labor).

On Banks’s conversion to the eight-hour movement, see Montgomery, *Beyond Equality* at 244-45.


Journal of the House of Representatives of the United States: Being the First Session of the Fortieth Congress 266 (1867); CG, 40th Congress, 1st Sess. 792 (Nov. 25, 1867). Although the amending resolution of Dec. 20, 1867 and Pike and Banks during the House debate on January 6, 1868 stated that the resolution had been adopted, according to the *Journal* and *Congressional Globe* no vote was taken and it was merely referred to Pike’s Naval Affairs Committee.

CG, 40th Cong., 2d Sess. 260, 317, 333 (Dec. 18 and 20, 1867, Jan. 6, 1868). Samuel Randall, a conservative Democrat from Pennsylvania, offered the amendment on behalf of constituents in his district at the Philadelphia navy yard. *Id.* at 334.


It is unclear how the House of Representatives alone could legally have had the power to issue such an order.

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since the national business depression had prompted a decline in wages and by law the Navy Department had to make wages correspond to those outside the navy yards, the bill would have enabled the federal government to employ more men without incurring an increase in costs. Such arguments apparently persuaded a majority of the House, which passed the bill.

The Senate, in contrast, had to deal with the amendment offered by John Sherman, a centrist Republican from Ohio, who proposed attaching to the eight-hour bill a proviso that “the rate of wages paid by the United States shall be the current rate for the same labor for the same time at the place of employment.” Although Sherman purported not to object to an eight-hour law, provided that wages were reduced in tandem with hours, in fact he harbored strong economic and moral objections. Thus while he was convinced that such a law would not “control the higher law of supply and demand,” he also maintained that: “A man to succeed in anything he undertakes must generally work more than eight hours a day.” Ostensibly his amendment was merely an effort to prevent conferring privileges “on a man simply because he works for the Government” and to mimic the private labor market, in which he had “no doubt private individuals would reduce the rate of wages if their employés worked a less number of hours, unless there was great demand for that particular work,” by reconciling the bill with a Civil War-era statute that “the hours of labor and the rate of wages of the employees in the navy yards shall conform, as nearly as is consistent with the public interest, with those of private establishments in the immediate vicinity of the respective yards....”

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29 Ten years later, during yet another House debate on creating an enforcement mechanism for the law, Banks rewrote and doubly falsified history by asserting: “As I presented this law originally I want to state the reason on which it was presented, and which to some extent at least influenced the Congress by which it was approved and passed. It was based upon the philosophical and scientific fact that upon the most careful and thorough investigation of the amount of labor that can be endured by man or beast, upon the result of which investigation has been rated what is called ‘horse-power,’ it was discovered that a sound and strong horse could not be required to perform labor for more than eight hours without diminishing his power, and that the force developed in less than that period of time would be less than his full power. It is on the basis of such experiments, made by the ablest and most careful scientists and engineers, such men as James Watts and other men of different countries, that the forces of all motive power...have been and are still calculated. It is a complete vindication of the theory of the present enlightened law of labor....” CR 7:3324 (May 9, 1878).

30 CG, 40th Cong., 2d Sess. 335-36.

31 CG, 40th Cong., 2d Sess. 3424 (June 24, 1868).

32 Act of July 16, 1862, ch. 184, 12 Stat. 587. This statute amended Act of Dec. 21, 1861, § 8, 12 Stat 329, 330: “the hours of labor in the navy yards of the United States shall
Refuting the basis of Sherman’s amendment compelled the bill’s supporters to explain why paying the same total wages for eight hours as previously for ten would in fact not disadvantage the federal government vis-à-vis private employers. For example, the Radical Republican Conness insisted that “every man who labors knows very well, by experience, that he can perform as much labor in eight hours as he can in ten, taking the average of the season through. There can be no doubt of that. He comes to his labor each day with renewed vigor in consequence of the lesser number of hours that he has spent in delving at his employment.” After 40 to 50 years of advances in production by inventions and steam power, “by which the capital of the world has been aggregated and increased many fold, I think it is time that the bones and muscles of the country were promised a small percentage of cessation and rest from labor as a consequence of that great increase in the productive industries of the country.”

Numerous other senators returned to the same themes. Another Radical Republican, Oliver Morton of Indiana, agreed that “this bill...is a good way to try the experiment which is now being discussed throughout the United States, and has been for some time. In the first place, the fundamental proposition on which this proposal is based is, that in regular mechanical employments men will perform as much labor in eight hours per day as they will in ten hours. It is claimed that the rest, and the intellectual vigor and freshness imparted to operatives, will enable them to perform as much labor in eight hours as in ten. That is an experiment which can be very well tested in the Government workshops; for instance in the navy-yards and arsenals. ... If the Government gets as much labor performed in eight hours as in ten the Government can afford to pay just the same price.” If not, then the question was decided against eight hours unless laborers were able to afford to lose 20 percent of their wages and still support families and live comfortably.

Other Radical Republicans introduced non-efficiency grounds for the eight-hour regime. William Stewart of Nevada noted that in the course of his life, a man would accomplish more within eight than ten hours a day: “they will not wear out so soon, and if there is any object in prolonging human life and increasing the aggregate of human happiness the argument would be in favor of this bill.” Cornelius Cole of California added that “unless the people are provided by law be the same as in the private ship yards at or nearest to the post where such navy yard is established, and the wages to be paid to all employés in such yards shall be, as near as may be, the average price paid to employés of the same grade in private ship yards or workshops in or nearest to the same vicinity....”

\(^{33}\)CG, 40th Cong., 2d Sess. 3424 (June 24, 1868).

\(^{34}\)CG, 40th Cong., 2d Sess. at 3425.

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with some protection against the requirement which is now put upon them by the exorbitant demands of capitalists, they will not be so well prepared to perform the duties of American citizenship."\textsuperscript{35} And Wilson—who looked only to the interests of labor because “capital needs no champion; it will take care of itself”—though not convinced that toiling men could accomplish as much in eight as in ten hours, nevertheless recognized that if the reduction in hours was not in the permanent interest of the people “who have nothing but their labor to sell,” they would readily abandon an experiment that had failed.\textsuperscript{36}

Glorification of rugged individualists’ contracting in morally just markets furnished the underpinnings for opposition to the bill. Justin Morrill, a Vermont Republican, opposed the bill not only on empirical grounds—a worker working eight hours on a machine that could not be operated beyond a certain speed could not produce as much as in ten—but also because it was “a degradation of the working men of this country to deprive them of the privilege of making contracts to work for just whatever sum and for whatever time they please.”\textsuperscript{37} William Fessenden, a conservative Republican from Maine, believed not only that “the law of supply and demand regulates all those matters,” but also, that, contrary to Senator Cole’s contention, the question of intellectual improvement should also be left to competition, from which “you obtain far more than you do by attempting to legislate men into intellectuality.” And in the only nod to white-collar workers that the debate generated, Fessenden asked rhetorically: “How many hours do professional men work, and is their labor less exhausting than mechanical labor? Is the labor that we perform in our offices less exhaustive? And yet nobody thinks of providing hours by law for labor of that description.”\textsuperscript{38}

Ultimately Sherman’s amendment was rejected 16 to 21 and the bill passed 26 to 11,\textsuperscript{39} in the words of the hostile \textit{New-York Times}, “[a]fter a great deal of claptrap and buncombe about the rights of labor and the necessity for the mental improvement of the laborer....”\textsuperscript{40} And thus it seemed to become the law that “eight hours shall constitute a day’s work for all laborers, workmen, and mechanics employed

\textsuperscript{35}CG, 40th Cong., 2d Sess. at 3425.
\textsuperscript{36}CG, 40th Cong., 2d Sess. at 3425-26.
\textsuperscript{37}CG, 40th Cong., 2d Sess. at 3426.
\textsuperscript{38}CG, 40th Cong., 2d Sess. at 3427-28.
\textsuperscript{39}CG, 40th Cong., 2d Sess. at 3429. To Sherman’s suggestion that the “title of the bill ought to be changed...to read: A bill to give to Government employés twenty-five per cent. more wages than employés in private establishments,” Conness rejoined: “That is an eccentricity of the honorable Senator from Ohio. The bill has a very good title as it stands.” \textit{Id.}
\textsuperscript{40}“Washington,” \textit{NXT}, June 25, 1868 (1:1).
by or on behalf of the government of the United States."\(^41\) In the meantime the
*Times*, which insisted that the law was merely a “political trick...not prompted by
a sincere regard for the working classes,”\(^42\) railed that if senators failed to under­
stand that eight hours’ work did not suffice for more than hand to mouth living,
“they descend to a clap-trap of which legislators should be ashamed,” and that the
doctrine that government should be a more lenient and liberal employer than “pri­
ivate capitalists would be...is...fallacious.” But if the newspaper’s fundamental
message was that “[t]here is no legislative road to health of body and mind,”\(^43\) it
need not have worried: Sherman’s wage-reduction amendment may have lost in
Congress, but the Executive Departments implemented it anyway.\(^44\)

In protest against orders, especially by the Secretary of War, that wages be
reduced together with hours, a committee of workers requested that President
Johnson secure an opinion from his Attorney General interpreting the statute.\(^45\)
Attorney General Evarts’s opinion of November 1868 stated that the law did not
absolutely require that government employees receive as high wages for eight
hours as someone in similar private employment received for 10 or 12.\(^46\) Nothing
in the language of the act indicated an intention to reduce compensation in tandem
with hours; nor did that construction seem consistent with the aim and purpose of
the law, which had in view “the promotion of the physical, intellectual, and moral
welfare of those who are engaged in manual labor, and of the general interests of
society. The theory appears to have been that the laboring man or mechanic, by
means of the increased physical strength and vigor acquired through a reduction
in his hours of toil, would be enabled to accomplish daily as much upon an average
of eight hours’ constant labor as he formerly did in ten or even a longer period,
while at the same time he would enjoy a longer season for mental and moral im­
provement.” The congressional debates showed that this theory was the main
ground on which the act proceeded.\(^47\) If the theory turned out to be true and the

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\(^{41}\) Act of June 25, 1868, ch. 72, 15 Stat. 77. According to a vigorous opponent of the
law, Senator Justin Morrill: “National legislation upon this subject can only reach those
employed in the Government Printing Office, the navy-yards, and armories, and arsenals.”
Stat. 47, 57, Congress ordered the GPO to enforce the eight-hour law “rigidly.”


\(^{43}\) “The Eight Hours’ Question,” *NYT*, June 25, 1868 (4:4) (editorial).

\(^{44}\) Montgomery, *Beyond Equality* at 318-19; Sterling Spero, *Government As Employer
77-92* (1972 [1948]).

\(^{45}\) Commons et al., *History of Labour in the United States* 2:124.

\(^{46}\) *OOAG* 12:530-36 at 530 (1870 [Nov. 25, 1868]).

\(^{47}\) *OOAG* 12: at 532.
government got as much labor for eight hours, then the compensation should be as much as for 10 hours in private industry; if not then not.\textsuperscript{48}

Because, in disregard of the attorney-general's opinion, executive departments construed the law as they pleased,\textsuperscript{49} on April 8, 1869, the House passed a joint resolution stating that the eight-hour law "shall not be construed as to authorize a corresponding reduction in wages."\textsuperscript{50} Less than two weeks later, another opinion by Attorney General Ebenezer Hoar again stressed the empirical-experimental basis of the law. If, he hypothesized, private employers in the vicinity employed their workers only five hours a day, "there would, obviously, be no justice" in lowering navy yard wages for eight hours to the amount paid for five outside "and the law intended no such result. On the other hand, I find nothing in the statute which requires you to pay the same price for eight hours' labor which private establishments pay for ten or twelve, unless the amount of service rendered or the quality of the work make the fewer hours in the navy-yards equivalent in value to the longer time hired in private establishments...."\textsuperscript{51} Further worker protests finally impelled President Grant to issue a proclamation on May 19, 1869,\textsuperscript{52} directing that from that date forward no wage reductions be made by the government on account of reductions in hours under the Act of June 25, 1868.\textsuperscript{53}

In the Senate, Wilson had pressed for immediate action on the joint resolution the day after the House had passed it,\textsuperscript{54} because the departments' construction had put Congress in a "false position," whereas Wilson "desired...to try this experiment fairly and honestly, and not stand before the country...as simply demagoging upon the question." The Senate had failed to vote on the measure in April 1869, but by December Grant's proclamation had "relieved Congress" and Wilson thought there

\textsuperscript{48}OOAG 12: at 534-36.
\textsuperscript{49}CG, 41st Cong., 2d Sess. 1421 (Feb. 19, 1870) (Sen. George Spencer, Rep. AL).
\textsuperscript{50}H. J. Res. 72; GC, 41st Cong., 1st Sess. 637 (Apr. 8, 1869); Journal of the House of Representatives of the United States 198 (1869).
\textsuperscript{51}OOAG 13:29-31 at 30 (1873 [Apr. 20, 1869]).
\textsuperscript{52}Commons et al., History of Labour in the United States 2:124-25; Montgomery, Beyond Equality at 319-20.
\textsuperscript{53}Proclamation No. 3, 16 Stat. 1127 (May 19, 1869). An attorney-general opinion interpreted the proclamation as having only prospective effect. OOAG 13:424-25 (May 31, 1871).
\textsuperscript{54}CG, 41st Cong., 1st Sess. 653, 679 (Apr. 9, 1869). On April 20, Wilson wrote a letter to Secretary of War John Rawlins declaring that government officers' construction of the eight-hour act was a palpable violation of its letter and spirit and (accurately) reciting at length the Senate debate, especially over Sherman's amendment. "The Eight-Hour Law—Letter from Senator Wilson," NYT, Apr. 26, 1869 (1:6-7).
was “now no special hurry to act”\(^{55}\) and the resolution never came to a vote in the Senate.\(^{56}\) Because department heads also failed to comply with Grant’s proclamation, he issued a second proclamation in 1872, noting that failure and again directing all executive department officers to make no wage reduction in pay by the day on account of a reduction in hours.\(^{57}\)

A week after Grant had issued this second proclamation, Congress passed an appropriations bill providing restitution to government workers for wage reductions that they had suffered between enactment of the eight-hour law and Grant’s first proclamation.\(^{58}\) But this measure also failed to correct the abuses. Some departments continued to flout the law and, together with employers and congressmen, openly urged its repeal.\(^{59}\) Common to their opposition was the claim that the law engendered “alienation” when covered and uncovered workers worked at the same time at the same worksite\(^{60}\) and threatened to create “an aristocracy of labor, composed solely of those employed by the Government.”\(^{61}\) Prominent manufacturers in Baltimore complained that “[t]he demoralizing effect on the labor which the Government has temporarily employed has unfitted mechanics and laborers for a regular day’s work.” Unsurprisingly, they preferred to “leave the question to settle itself by the laws of supply and demand.” They agreed, moreover, with the supervising architect of the Treasury Department that the eight-hour law, having undergone the test for which its supporters had called, had “‘shown that it is not only impossible for a man to perform as much labor in eight hours as in ten, but that he absolutely performs less work per hour under the eight-hour system.’”\(^{62}\)

In addition, after “a large class of cases” had been pending in the U.S. Court of Claims, which workers had filed who were petitioning for back wages under the eight-hour law,\(^{63}\) the U.S. Supreme Court in 1877 nullified the statute. In the landmark case of *United States v. Martin*, the claimant Alfred Martin had been

\(^{55}\)CG, 41st Cong., 2d Sess. 152 (Dec. 15, 1869). By this time Senator Morrill also moved to amend the resolution by proposing to repeal the eight-hour act altogether. *Id.* at 145.

\(^{56}\)CG, 41st Cong., 2d Sess. at 2895, 4305 (passed over).

\(^{57}\)Proclamation No. 10, 17 Stat. 955-56 (May 11, 1872).

\(^{58}\)Act of May 18, 1872, ch. 172, § 2, 17 Stat. 122, 134.


\(^{63}\)Brief for Appellants at 1, United States v. Martin, 94 US 400 (1877).
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employed as a fireman in steam boiler heating at the Naval Academy in Annapolis for $2.50 a day with the understanding that during the steaming season (October 1 to June 1) he would work 12 hours a day. After the Act went into effect, Martin and others spoke to the foreman, who put on an additional man in the gas works (where Martin was not employed) and reduced the hours to 8, but, interestingly: “Soon afterward, the men told him they would rather have half a dollar a day additional than to have the eight hours’ work.” The admiral who was the superintendent of the Academy told the foreman that he would not give additional pay and if any workers would not work the full hours, he would replace them. Martin heard this conversation and continued his work without saying anything further.  

In 1873 Martin filed a claim with the Treasury Department for payment for the “extra hours’ work” performed during the 12-hour days when he “was required...to do one and a half day’s work each calendar day...and received therefor wages but for one day’s work for each day and a half for which he [was] so employed” between the date the eight-hour law went into effect and the date of Grant’s first proclamation. The Treasury paid Martin for two of the hours beyond eight, but not for the other two; in addition, Martin petitioned for the wages for his 12-hour days from the time of Grant’s first proclamation until he stopped working in 1872.

The United States, however, argued before the Court of Claims that the Treasury had given the law a strained construction by concluding not only that employees whose hours and wages had been reduced were entitled to settlement, but that also those laborers working 10 or 12 hours after June 25, 1868 were entitled to an additional 25 or 50 percent. Martin’s wages, the United States claimed, had remained the same; his real complaint was that his wages had not been increased, to which increase the law did not entitle him. The Court of Claims ruled that the Act did not apply to contracts made after its passage to work 12 hours a day at an agreed rate: the Act did not regulate wages or prevent laborers and mechanics from “waiving its intended beneficial provisions.” And whatever benefits the law might have conferred on Martin, he had neglected to avail himself of and waived.

In its brief before the Supreme Court, the government argued that laborers could waive the eight-hour law: “for if the law was mandatory, all work additional to the eight hours per day was illegal, and would not support an action on the quantum meruit. If compulsorily extorted, it would be a tort.” In the government’s view, if Martin had desired the benefit of the act, “he should have stopped work”

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64U.S. v. Martin, 94 US 400, 401 (1877).
66Martin v. United States, 10 Ct. Cl. 276, 278 (1874).
67Martin v. United States, 10 Ct. Cl. at 280, 282.
after eight hours. Having failed to do this, and no one in authority having asked him to labor longer,...[i]he labor for the next four hours became that of a volunteer, or else was performed under an implication that he waived the benefit” of the statute and accepted his daily wage as adequate compensation for all his labor.68

Martin, in contrast, sought to undermine the government’s position by arguing that if it was unlawful to reduce the rate of pay on account of a reduction in hours, “that result could not be secured by indirection. If the act was intended for the benefit of the laborer, the result is the same whether you reduce his pay in proportion to the number of hours taken off by the statute, or compel him to work more than the statute day for a day’s wages...by a threat of dismissal.”69

Martin and his class fared ill in the Supreme Court, whose decision was far more radical than that of the Court of Claims. It held that the eight-hour law was merely “a direction by Congress to the officers and agents of the United States, establishing the principle to be observed in the labor of those engaged in its service. It prescribed the length of time which should amount to a day’s work, when no special agreement was made upon the subject.” But it did not regulate the price to be paid for a day’s work.70 Substituting a consensual model for government imposition of a standard, the Court declared: “Principals, so far as the law can give the power, are entitled to employ as many workmen...they think fit, and, except in some special cases, as of children or orphans, the hours of labor and the price to be paid are left to the determination of the parties interested. The statute of the United States does not interfere with this principle. It does not specify any sum which shall be paid for the labor of eight hours, nor that the price shall be more when the hours are greater, or less when the hours are fewer.” Thus the statute did not provide that employer and laborer may not agree as to what time constitutes a day’s work. There were, the Court conceded, some branches of labor, connected with furnaces, foundries, and steam works, where labor and exposure of eight hours a day “would soon exhaust the strength of a laborer and render him permanently an invalid.” A government officer, the Court added in what must be viewed as an ironic aside, was not prohibited from knowing these facts or from agreeing that fewer hours than eight were to be a day’s work (in spite of the fact that Martin was required to perform precisely this kind of work for 12 hours a day for years); nor, conversely, did the statute intend that where outdoor labor on long summer days might be offered for 12 hours at a uniform price, the officer was not permitted to contract with a consenting laborer. Being chiefly a direction from principal to agent that eight hours was deemed the proper length of time for a day’s

68Brief for Appellants at 2-3, United States v. Martin.
69Brief for Appellee at 3, 7 United States v. Martin.
70U.S. v. Martin, 94 US 400, 402 (1877).
labor and that his contracts were to be based on that theory, the statute was exclu­sively a matter between principal and agent, in which a third party like Martin had no valid legal interest.71

Unsurprisingly, the Court’s evisceration of the eight-hour law gave executive departments even less incentive to comply with the original congressional intent than they had had before. The Secretary of Navy, for example, in responding to a resolution of the House of Representatives on working hours at navy yards, revealed an unmediated split formal-realist consciousness that apparently facilitated disregard of the perverse outcome of the Court’s decision. On the one hand, Secretary Thompson wrote that the act was “not supposed to be compulsory in any other sense than forbidding that laborers shall be required to work more than eight hours a day if they shall object to doing so. The interpretation put upon it by the Department is, that if a laborer is willing to contract to labor more than eight hours a day, such a contract may be properly and legitimately made with him. If he does not so contract, he cannot be compelled to work beyond the time fixed by the law, or allowed to work for less time; if it did the latter, it would deprive him of his wages for eight hours’ work.”72 Since he did not explain on what legal basis, in the wake of the Thirteenth Amendment to the Constitution, the Navy could require civilian non-prisoner employees to work any number of hours at all, he failed to give the eight-hour law any meaning whatsoever. On the other hand, he noted that, in the wake of Martin, the Navy Department had left it “discretionary with the laborers themselves to work either eight or ten hours a day as they pleased.” Their wages, however, were fixed on the basis of 10 hours; if they chose to work eight hours, their wages would be correspondingly reduced. With a massive nod to the labor market during the long depression of 1873-78,73 and inadvertently documenting why state intervention was necessary to prevent a race to the bottom, Secretary Thompson declared, in his role of quasi-capitalist employer forced “to secure economy,” that there had been “no difficulty in finding laborers ready and willing to occupy all the positions in the navy-yards upon these conditions, and scarcely a day passes but others express a desire to do so. There are so many of the latter as to give assurance that, if those already engaged are dissatisfied and shall decide to give up their present employment, their places can be easily and immediately filled.”74

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73 Thorp, Business Annals at 131-32.
In contrast, some in Congress pointed to the depression as an important reason for enforcing the law and cutting off one-fifth of the hours of labor, thus “add[ing] to the employment of one-fifth more of the workingmen of this country. And there never was a time when Congress could better do a graceful and beneficent act to the workingman than right now....” At the same time, congressmen lamented the fact that the results of the eight-hour “experiment”—“which could not be tried by any manufacturer because his rivals working ten hours and forcing the labor would undersell him”—were unreported and perhaps unreportable because “owing to the great economy forced upon the Navy...the Secretary of the Navy has declared that all the navy-yards must work ten hours....”

Congress, and especially the House, continued to debate bills and even to pass joint resolutions to enforce the eight-hour law, but achieved little beyond keeping alive the memory that the government’s officers had treated it as a “dead-letter.” In yet another in a long series of congressional reports on the issue, in 1880 the House recited that “many of the officers and agents of the government...dis-regarded its beneficent and vital requirements....” Even after Grant’s proclamation, provisions of the law “continued to be evaded or utterly disregarded” and the “law is practically now a dead letter, and many of the officers charged with its execution utterly disregard its provisions....” Exactly how dead the law was can be gauged by the audacious official opinion issued by Attorney General William Miller in 1890 that the act “simply prescribes a unit of measure for a day’s work in the absence of any specific contract. It is no more and no less, in legal effect, than if Congress should provide that in all contracts for the purchase of coal by officers of the United States Government 2,000 pounds should constitute a ton. Surely no lawyer would claim that such a statute, either directly or by implication, would forbid an officer to pay more for 2,240 than 2,000 pounds of coal.”

Although some executive departments succeeded in largely nullifying the

75 CR 7:3323 (May 9, 1878) (Rep. Samuel Cox, Dem NY).
76 CR 7:3323 (Rep. Benjamin Butler, Rep. MA). Butler, another convert to radical Republicanism, had supported the earlier ten-hour movement of the 1850s for careerist reasons. Norman Ware, The Industrial Worker 1840-1860: The Reaction of American Industrial Society to the Advance of the Industrial Revolution 102, 154 (1974 [1924]). Bizarrely, the very next speaker, Butler’s fellow Massachusetts Radical Republican, Nathaniel Banks, asserted that the average workday in the navy yards was eight and a half hours and had never been longer. CR 7:3323.
79 OOAG 19:685-87 at 686 (1891 [Nov. 12, 1890]).
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Legislated eight-hour day for their employees, the bureaucratic processing of claims continued and generated what may have been the first administrative decisions distinguishing covered blue-collar workers from excluded white-collar employees. For example, in 1872, when three civilian clerks at the Benicia Arsenal in California petitioned for "difference of wages" under the law, the chief clerk of the Treasury Department referred their petition to the Second Comptroller, who, in a reflexively literalist interpretation, informed the Treasury Secretary that his decision was "founded on the presumption that when Congress said ‘laborers, workmen, and mechanics,’ they meant what they said" and he failed to "see how the accounting officers, or anybody else, can add to the list, without usurping the functions of legislation." For J. M. Brodhead, the chasm between manual laborers and those working in offices was so categorical that the latter group was capacious enough to survive its extreme heterogeneity: "A clerk is no more a ‘laborer, workman or mechanic,’ than the Secretary of the Treasury is...." When asked the following year "what classes of laborers, workmen, and mechanics in the Quartermaster’s Department is it the intendment of the law...shall be benefited," Brodhead was epistemologically modest enough to concede that it was, "of course impossible to lay down a set of rules in advance that shall apply to every case that will be presented in the execution of the law," but nevertheless maintained that based on "the general principles" applied to earlier claims "the classes entitled under the law " were "pretty clearly defined." Specifically, master-carpenters, master-mechanics, foremen of bricklayers and laborers, the superintendent of a shoeing shop, and store-keepers were "prima facie not entitled. The law was intended to apply to muscular rather than brain labor." The aforementioned classes had "generally merely a supervisory duty, and at an increased compensation, taking them out of the reason and intent of law." If, however, they were "hand laborers" in addition to being supervisors, they might be entitled. Finally, engineers were also not included within the protected groups.

As late as 1888, during the course of House debate on a bill that would, inter alia, have done away with the statute of limitations on back pay claims under the eight-hour law, Timothy Tarsney, the Michigan Democrat in charge of the bill, when asked whether it would apply to clerks and employees in various departments held over 10 or 12 hours, replied that a proper answer depended on whether they would be construed as coming under the statutory terms "laborer," "workman," or "mechanic." Remarkably he added that "I am not clear in my own mind as to

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whether they would or would not," although he promptly admitted in further
colloquy both that he opposed amending the bill to include "other employés" and
that the act of 1868 did not go beyond those three groups.82

The reason for the lack of congressional concern about the working hours of
federal clerical employees may have been that, as the carpetbagging Senator
George Spencer, Republican of Alabama, observed in 1870, six hours of labor per­
formed by a departmental clerk "has been from time immemorial the limit of their
daily work...." In a rare congressional reference to a dichotomized understanding
of a blue- and white-collar occupational hierarchy, Spencer taunted Senator
Morrill: if he argued that the eight-hour day for government laborers offended
private workers working 10 hours, why not vis-à-vis private clerks as well? "The
honorable Senator will certainly not attempt to create this distinction between
gentlemanly labor and manual labor; between educated employment and its
reverse; between the better-clothed and better-paid labor of the head and pen, and
the hard-earned wages of the 'homy handed sons of toil.'"83 The accuracy of
Spencer's estimate of the federal clerical workday appears to be corroborated by
periodic congressional enactments making it the duty of heads of executive depart­
ments to require of all clerks and other employees not less than seven hours of
labor each day except Sundays and public holidays: "Provided: That the heads of
the Department may by special order...further extend or limit the hours of service
of any clerk or employee...; but in case of an extension it shall be without addi­
tional compensation...."84

City Letter Carriers

Capital has advantages over labor, which labor will always deem unfair and unjust.
... Capital certainly gets the most. The capitalists of the world get richer;—they live more
sumptuously;—they absorb, more and more, the culture, the grandeur, the enjoyments and
the power of the world;—while the laborers—the active partners in the whole con­
cern,—do not share in these advantages in a corresponding degree. These are strong
points, and, in the main, they are true. ...

But we doubt the possibility of making any very great changes in the relations between

82CR 19:2276 (Mar. 20, 1888) (H.R. 1539). At the close of the inconclusive debate
an amendment was proposed to add "or clerk or other employé" to the bill. Id. at 2282.
83CG, 41st Cong., 2d Sess. 1421 (Feb. 19, 1870). A New Yorker, Spencer went to
Alabama with the army and made a fortune through speculation. Eric Foner,
84Act of Mar. 3, 1883, ch. 128, § 4, 22 Stat 531, 563. Identical language appeared in
When a man has worked eight hours and earned a day’s pay we want him to quit for his own physical and mental good; and also to make room for some other worker to earn his living. ...

Among all the ways of violating the spirit of the eight-hour law there is none we detest so much as the “permitting” of favored Government employés to grab all the work and all the pay. ... If any man wants to work ten, twelve, or fourteen hours so badly that he seeks and obtains “permission,” let him do it for a regular day’s pay. When there is no extra pay (except in cases of extraordinary emergency” named in the bill) for overtime there will be no “permission” violators of the eight-hour law.86

Against the background of overall statutory nullification, it may seem odd that Congress could have imagined that it was bestowing any kind of benefit at all on any group of government workers by—as the chairman of the Senate Education and Labor Committee titled his bill—“extend[ing] to letter-carriers the advantages secured to other employees of the United States”87 who had been cruelly disillusioned by the mortally wounded eight-hour law, but city letter carriers in the latter half of the 1880s clamored for and ultimately secured congressional sanction for their inclusion in the federal eight-hour hoax.88

The post office was at that time far from being a sideshow of the federal government’s activities. From the early nineteenth century until U.S. entry into World War I in 1917, the post office accounted for more than half of all of the government’s paid civil employees. In 1881, 56,421 or 56.4 percent of 100,020 such employees worked for the post office; by 1891, it was 95,449 or 60.6 percent of 157,442.89 The total number of letter carriers in the free-delivery service had risen uninterruptedly from 685 in its inaugural year of 1863, reaching 8,257 in fiscal year 1888-89 and 34,593 in fiscal 1917-18.90
After the long depression of the 1870s was finally overcome and as the campaign for the eight-hour day was reinvigorated in the 1880s, letter carriers took an interest. Samuel Cox, a Representative from New York City whom the carriers would later hail as the key congressional figure in achieving the eight-hour law for them, building on his success in having secured passage of a law granting carriers 15 days’ paid leave, appears to have initiated action in the House by submitting a resolution in late 1884 requesting that the attorney general report to that body whether letter carriers were covered by the eight-hour law. The House adopted the resolution, but when the attorney general replied that his authority for giving official opinions was limited to calls made by the president and the heads of the executive departments, the House amended the resolution to direct the request to the postmaster general, who could then seek an opinion from the attorney general.

Having tried in vain through their accustomed channels to have the eight-hour law of 1868 amended to apply to them, the carriers turned to the Knights of Labor, whose legislative committee drafted a bill extending the law to carriers and succeeded in securing its introduction in Congress. The Post Office Department opposed the bill with all its resources, and local postal authorities, especially Henry G. Pearson, the New York City postmaster, tried to disrupt the Knights of Labor local assemblies that the carriers had formed in 1886. One possible reason for the difficulties experienced by the carriers in achieving a legal eight-hour day was that prior to the civil service reform of 1883, “when postal employees had been hired and fired at will according to the turns of the political wheel, Congress had been somewhat solicitous of their welfare....” But following the reform, Congress “lost

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93Act of June 26, 1884, ch. 126, 23 Stat. 60.

94CR 16:82 (Dec. 8, 1884).

95CR 16:253 (Dec. 15, 1884). Rep. McAdoo submitted a similar resolution. Id. at 633 (Jan. 12, 1885).

96CR 16:811 (Jan. 17, 1885).

97Sterling Spero, The Labor Movement in a Government Industry: A Study of Employee Organization in the Postal Service 63-73 (1924); Sterling Spero, Government as Employer 107-108 (1972 [1948]). Unfortunately, Spero failed to document many of these historical events. On the role of Terence Powderly, the Grand Master Workman of the Knights of Labor, in the letter carriers’ congressional eight hours campaign, see “Calling for Shorter Hours,” NYT, June 25, 1886 (5:5).
almost all interest in postal employees. If the employees could not help Congress, Congress saw no reason to help them."98

The congressional bills that began to be introduced in early 1886 were virtually identical with the statute that was enacted two years later. Thus, for example, Representative William McAdoo’s bill of February 1, read: “That hereafter eight hours shall constitute a day’s work for letter-carriers in cities..., for which they shall receive the same pay now as is now paid for a day’s work of a greater number of hours. If any letter-carrier is employed a greater number of hours per day than eight, he shall be paid extra for the same in proportion to the salary now fixed by law.”99

The need for quick legislative action was underscored a few days later by the response that the House received to its inquiry from Postmaster General William Vilas. In addition to observing that he was unaware of any departmental regulations prescribing the number of hours that letter carriers were required to work, he informed the House that the 1868 eight-hour law was not deemed applicable to letter carriers because they were not laborers, workmen or mechanics within the meaning of the law inasmuch as they were not paid by the day, were paid an annual salary, and were classified under civil service law. Without dating or identifying it, Vilas indicated that the opinion that the eight-hour law did not apply to letter carriers had been issued before his incumbency. Finally, availing himself of the same kind of contractarian rhetoric that the Supreme Court had used to trump the statute in United States v. Martin, Vilas claimed that it had been thought that carriers who had accepted employment with knowledge of the requirements should be regarded to some extent as having contracted for the part of the work so regulated for the compensation so provided.100

Interestingly, rather than arguing that carriers were not “laborers, workmen or mechanics” because they were in fact clerical employees of some kind, Vilas had in effect adopted an attorney general opinion from 1872, which had declared in response to a question from the Secretary of War concerning the applicability of the 1872 act on back pay under the eight-hour law that he was “strongly inclined to the opinion” that it was to “have a broad and liberal construction.” Citing a recent Supreme Court decision as “decisive against limiting its provisions to those who would fall in strict language within the terms ‘laborers, workmen, and me-

99 HR 5009 (49th Cong., 1st Sess., Feb. 1, 1886).
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chanics,” the acting attorney general stated that it was “the intention of Congress to include within the provisions of this act, and of the previous act of 1868, all persons who are employed and paid by the day. It clearly does not extend to persons who are paid regular salaries, but is limited to employees who are paid a day’s wage for a day’s work.... If there is in the employment of the Government any class of persons so employed and paid, I think they are entitled to the benefit of this act, although in common parlance they might not come within the strict definition of laborers, workmen, and mechanics.”

In other words, the attorney general and the postmaster general took the position that an annual salary in its own right was a sufficient marker of non-manual labor—doubtless a socio-economically accurate observation for the time. And in fact, carriers were paid on an annual basis: for example, after two years, those in cities with a population in excess of 75,000 received an annual salary of $1,000. The conclusion that letter carriers, legally construed, were not laborers flowed from the recently enacted civil service reform statute and Vilas’s own contemporaneously issued regulations.

The so-called Pendleton Act of 1883, which required competitive examinations for federal employees in the classified service and expressly required the postmaster general to classify “the several clerks and persons employed” in post offices employing 50 or more such persons, declared that no “person merely employed as a laborer or workman” shall be required to be classified. The newly established Civil Service Commission, observing that “[i]t hardly need be said that examinations are not applicable to any...laborer,” added that examinations applied in the postal service to all places above the grade of laborer. The Post Office De-

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101 OOAG 14:128, 129-30 (1875). The opinion letter did not disclose the nature of the jobs in question. Since the Supreme Court decision, Twenty Per Cent. Cases, 13 Wall (80) 568 (1871), had nothing to do with the eight-hour law, laborers, non-salaried employees, or an express broad and liberal rule of statutory construction, the attorney general opinion was remarkable for its reach.


106 Second Annual Report of the United States Civil Service Commission: January 16,
partment itself specified that no person employed merely as a laborer or workman (excluding anyone designated as a skilled laborer or workman) was to be considered as within the classification system.107

The postal regulations provided that to be eligible for appointment: “Carriers must be intelligent, able to read and write,...and temperate.” Moreover, like clerks, they were required to pass a competitive Civil Service examination.108 The content of the exams itself sheds important light on the carriers’ location along the blue-collar/white-collar spectrum. Prior to the reform of the civil service in 1883, carriers’ exams, which were virtually identical to those for clerks, tested for knowledge that appeared to be not only inappropriate for manual laborers, but in large part irrelevant to the carriers’ job duties.109 In this connection, the Pendleton Act itself expressly required that the competitive examinations be “practical in their character, and so far as may be shall relate to those matters which will fairly test the relative capacity and fitness of the persons examined to discharge the duties of service into which they seek to be appointed.”110 The Civil Service Commission’s rules then laid out the general framework for the examinations encompassing five subjects: 1. Orthography, penmanship, and copying; 2. Arithmetic; 3.

1884 to January 16, 1885, at 9 (2d ed. 1885).

107Sixth Report of the United States Civil Service Commission: July 1, 1888 to June 30, 1889, at 58 (1889).

108The Postal Laws and Regulations of the United States of America § 634.2 and .4 at 263, § 497 at 216 (H. Misc. Doc. No. 63, 50th Cong., 1st Sess. 1887). According to postal regulation: “Carriers shall be employed in the delivery and collection of mail matter, and during the intervals between their trips may be employed in the post-office in such manner as they postmaster may direct, but not as clerks.” Id., § 647 at 268. Although this rule prohibited carriers from performing the specific work of clerks in post offices, it was not inconsistent with their performing other work of a clerical nature.

109In his statement on February 4, 1882, before the Senate Committee on Civil Service and Retrenchment, the postmaster for New York City, Harry Pearson, furnished copies of examinations from 1881 and 1882 for clerks and carriers. Carriers were asked, inter alia, the cause of the U.S.-Mexican War, the names of the two rivers that unite to form the Ohio River and where the latter empties, the name of the vice president in the Polk administration, and the names of three U.S. presidents who had served as generals in the U.S.-Mexican War. Carriers were also asked to divide a 7-digit number by a 3-digit number, and the meaning of a “pronoun” and “parsing” a sentence. To Regulate and Improve Civil Service of United States 38-76 at 65-75 (S. Rep. No. 576, 47th Cong., 1st Sess., May 15, 1882). On examinations for federal government clerks from 1853 to 1883, see Leonard White, The Jacksonians: A Study in Administrative History, 1829-1861, at 365-75 (1965 [1954]).


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Interest, discount, bookkeeping; 4. English language, letter writing, and proper sentence construction; and 5. Geography, history, and government of the United States.\textsuperscript{111} Would-be civil servants had to score at least a 65 on the first three subjects in order to be certified for appointment, but for positions for which a lower degree of education sufficed, the Commission was authorized to limit the examination to fewer than five subjects.\textsuperscript{112} Interestingly, two white-collar groups that in the twentieth century massively appeared as excluded in the United States and elsewhere from various hours statutes were excepted from civil-service examination: confidential clerks or secretaries of any department of office head and persons whose employment was exclusively professional.\textsuperscript{113}

On a more specific level, the Commission’s regulations then mandated subjects 1, 2, 4, and 5 for inclusion on postal clerks’ examinations,\textsuperscript{114} while 1, 2, and the geographical segment of 5 were required on carriers’ examinations.\textsuperscript{115} A considerable number of these questions suggested that the postal service regarded examinees as brain rather than predominantly hand workers. Carriers were asked, for example, to “[n]ame five of the leading agricultural products of the State in which you live” and “[w]hich one of the five great lakes is wholly within the United States.”\textsuperscript{116} A spelling quiz required them to spell numerous non-proper nouns—such as conceited, diffidence, felicitate, perseverance, and consciously—\textsuperscript{117} that were unlikely candidates for inclusion in any addresses they would ever have to deal with. But tucked away in the arithmetic test was presumably the most important question on the whole examination, the mere posing of which put would-be examinees on notice as to the character of labor-management relations at the

\begin{itemize}
\item \textsuperscript{111} Amended Civil Service Rules, § VII.1, in Second Annual Report of the United States Civil Service Commission at 63.
\item \textsuperscript{112} Amended Civil Service Rules, § VII.3-.4, in Second Annual Report of the United States Civil Service Commission at 64.
\item \textsuperscript{113} Amended Civil Service Rules, § XIX, in Second Annual Report of the United States Civil Service Commission at 68.
\item \textsuperscript{114} Despite the more demanding examinations, the clerks’ working conditions were “much worse” than the carriers’. Not only was their pay lower, but they were given no days off, a national survey in 1889 revealing that 90 percent of them worked 365 days with an average workday of 14 hours. In addition, their workrooms were filthy and dusty, and tuberculosis was called the “clerks’ sickness.” Cullinan, United States Postal Service at 109.
\item \textsuperscript{115} Regulation 22, in Second Annual Report of the United States Civil Service Commission at 73.
\item \textsuperscript{116} Second Annual Report of the United States Civil Service Commission at 123.
\item \textsuperscript{117} Seventh Report of the United States Civil Service Commission: July 1, 1889 to June 30, 1890, at 248, 191 (H. Ex. Doc. No. 1, Pt. 8, 51st Cong., 2d Sess., 1891).
\end{itemize}
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post office (except for its suppression of the fact that carriers were also required to work Sundays):

In an office employing 35 carriers, each carrier loses 20 minutes a day in idle talk. Suppose the average salary of each to be $2.50 for ten hours' work, what is the cost to the Government of the lost time each day, and what will it amount to in a year of 313 working days?118

Any inferences about the white-collar character of carriers' work that can be drawn from these questions must be qualified by the fact that, inconsistently with the aforementioned rule against examinations for laborers, the same Civil Service Commission regulation that defined the subject matter of the clerks' and carriers examination, also provided that the examination for porters, pilers, stamp boys, or junior clerks, or messengers, or other "employees whose work is chiefly manual," might be limited to subjects 1 and 2, including only the four elementary rules of arithmetic.119 Remarkably, the messengers, who were used for special delivery, had to be boys, who could be as young as 13 years old. Yet even these "messenger boys"120 had to be able to add sums in the hundreds of billions of dollars.121 The porters' examination, too, tested the ability to add, subtract, multiply, and divide numbers larger than they presumably would ever have to deal with at work.122 In contrast, watchmen were expressly deemed as not strictly speaking workmen or laborers and thus not outside the classified service; because the position was of "some responsibility," it was to be filled by persons of such character and intelligence as guaranteed by the examination for messengers.123

Several other bills that were introduced in 1886 literally amended the codified version of the eight-hour law to add letter carriers to the three covered general cate-


120 The Postal Laws and Regulations of the United States, § 672 at 275. Neither the messengers nor any of these other occupational groups are mentioned in the very detailed index to this 600-page book.

121 Seventh Report of the United States Civil Service Commission: July 1, 1889 to June 30, 1890, at 249.


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gories of workers. The one passed by the Senate in June also declared that "there shall be no reduction in compensation paid for services rendered by reason of the limitation of the hours of labor prescribed by this act." In the interim before debate began in the House, The New York Times published a vitriolic attack on the measure, purportedly based on the paper's own investigation. The newspaper was amused that "professional agitators" had begun several months earlier "a movement intended to foment discord among the letter carriers of this city," who were "styled 'slaves' and...generally described as much overworked and as decidedly underpaid." After this movement had progressed to the point that the aforementioned bills, "designed to do away with the existing order of things," were introduced in Congress, the Times could no longer suppress its sarcasm: "The proceeding as a whole is somewhat remarkable as being, perhaps, the first on record since the establishment of the Government in which office holders have appeared as an overworked and underpaid class." As ascertained by the paper, "the facts" were that letter carriers, whose duties required no special skill, and only ordinary intelligence, a common school education, and good physical condition, received $600 the first year, $800 the second, and $1,000 thereafter. To be sure, weekdays "their hours of attendance" were long—in New York City 12 and a half hours—but the intervals between their delivery trips brought their hours of actual work in most cases to between six and nine. Experience had shown "conclusively" that it was "not possible to confine the delivery and collection of letters in a large city to the ordinary hours of a 'working day,' whether of 10 or of 8 hours": if on-duty hours were cut to eight, then there would have to be a large increase in carriers or the public would have to be satisfied with a smaller number of deliveries and collections.

During the brief and inconclusive House debate on July 15, 1886, the Senate bill's chief spokesman, Texas Democrat William Crain, asserted without documentation that the bill was needed because letter carriers had been supposed to be included among the laborers, workmen, and mechanics of the eight-hour law, but that the postal authorities had held that they were not. What Crain, however, was

124S. 2076 (49th Cong., 1st Sess., Apr, 7, 1886). S. 2145 (49th Cong., 1st Sess, Apr. 14, 1886), introduced by Warner Miller, Rep. NY, included the proviso authorizing postmasters to arrange letter carriers' work so that each may could be employed an average of eight hours. The codification of the eight-hour law was § 3738 of Revised Statutes of the United States (1875) and Revised Statutes of the United States (2d ed. 1878).
125S. 2076 (In the House of Representatives, 49th Cong., 1st Sess., June 3, 1886); CR 17:5096-97 (June 1, 1886).
126"Carrying the Letters," NYT, June 22, 1886 (8:1),
127CR 17:7003 (July 15, 1886).
able to document was that Postmaster General Vilas held mutually inconsistent positions: he had, namely, asserted in a letter to the Speaker of the House both that “although letter-carriers are in a certain sense on duty more than eight hours in many places, yet the actual labor which they perform frequently does not reach to eight hours,” and that introduction of the eight-hour regime would require hiring 2,208 additional carriers. Crain noted and dissolved this contradiction by pointing out that whereas the postmasters who had furnished Vilas with information had stated that although they kept the carriers from 6:30 in the morning until 7:00 in the evening, they worked on average only eight hours delivering and collecting on the streets, in fact they worked 12 to 15 hours, doing sorting and routing in the post office the other hours.128

Although the postal bureaucracy made no attempt to convince the House that carriers were not laborers within the meaning of the eight-hour law, it did undertake such an effort with regard to the more than 4,500 railway mail clerks, in case Congress contemplated their inclusion. (Not that the postal bureaucracy apparently felt that it needed any justification for violating the eight-hour law: it nonchalantly informed Congress, for example, that 20 “laborers” were employed in the department’s building in Washington “to do all the heavy work of the Department such as moving and lifting furniture and carrying books, files, heavy bags, and packages” more than ten hours a day.)129 The General Superintendent of Railway Mail Service claimed that:

The railway mail service demands fully as much mental as physical labor. A clerk is required to commit to memory his schemes of distribution, to make himself thoroughly familiar with railroad schedules and connections, to make out daily, monthly, and a number of special reports, to appear for examination at stated periods, keep a careful and accurate record of all registered matter handles, and thoroughly understand the postal laws and regulations. He can not, therefore, be properly classed as a laborer. While his duties could not exactly be classed as professional, still the intellectual strain he is required to undergo is akin to that required in the learned professions.130

The superintendent was so preoccupied with detailing the railway mail clerks’ intellectual stresses that he neglected to mention their more prosaic “extremely hazardous” working conditions, which were a function of their physical workplaces—“antique wooden mail cars...usually placed immediately behind the coal tender. In even minor wrecks, the flimsy cars were inclined to buckle and splinter

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128 CR 17:7004, 7005.
129 Letter from Perry Smith, Disbursing Clerk and Superintendent (May 7, 1886), in CR 17:7007.
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into bits.” As a result of 1118 wrecks between 1889 and 1892, for example, 11 percent of the railway mail clerks were injured, permanently disabled, or killed.131

After the House failed to vote on the bill in 1886, a New York City representative, Darwin James, submitted a resolution of the New York State legislature in early 1887 requesting, since the attorney general had decided that carriers were neither mechanics nor laborers and thus unprotected by the eight-hour law, that the state’s congressional delegation support the Senate bill for their relief.132 By the end of 1887 and beginning of 1888 the new Fiftieth Congress witnessed the renewed introduction of a large number of bills on behalf of carriers,133 including one by Crain that would have amended section 3738 to include “all other persons who are now or who may hereafter be employed in manual or clerical labor in the civil service by or on behalf of the Government of the United States, whether they be paid per diem or by salary”; the bill provided that such workers “shall not receive less compensation for a legal day’s work, as...herein defined, than the rate of wages paid for an ordinary day’s labor of similar character by private employers in the respective localities in which the Government employees may be at work.”134

The Senate report on the main bill presumed that a letter carrier was a hybrid white-collar/blue-collar worker who “must possess the qualifications of an excellent clerk in order to be competent to discharge the duties of his position. His physical exertion is certainly as exhaustive as that of any laborer or mechanic, and there is little room to doubt that eight hours of his labor subtracts as much from his physical and mental powers as in the case of any other class of persons engaged in the public service.” In the case of carriers, however, a day’s work ranged from nine to 16 hours.135 The one point on which the Senate, whose Education and Labor Committee noted that Congress had received many memorials and petitions,

132CR 18:2395 (Feb. 28, 1887).
134H.R. 1880 (50th Cong., 1st Sess., Jan. 4, 1888). The bill also provided for a fine of up to $1,000 for any contractor or government agent who knowingly violated the act.
135S. Rep. No. 509 at 1 (50th Cong., 1st Sess., Mar. 8, 1888) (S. 117). The report’s further assertion that their compensation ($1,000 after two years) was little more than that of a common laborer was an understatement since the average annual earnings of nonfarm employees in the latter half of the 1880s was $446 to $471. Stanley Lebergott, Manpower in Economic Growth: The American Record Since 1800, tab. A-19 at 528 (1964).
including one from the New York City Board of Aldermen on behalf of relief for the carriers,\(^\text{136}\) failed to accommodate the carriers was their demand for an end to the split shift. Their wish for an eight-hour day within nine or ten consecutive hours, was driven, as the Letter-Carriers’ National Association, pointed out, by “fear that postmasters will work them three or four hours, then lay them over for that length of time, and then finish their day’s work by allowing this interval of one or two hours....” Whereas under the then regime carriers’ workday ranged from nine to 14 hours, under their proposal, the carriers would “know positively when their day’s work is done....”\(^\text{137}\)

On May 24, 1888, the act was approved, creating in effect an overtime law, with hours beyond eight paid without a penalty to the post office or premium to the worker. Specifically, it provided that “hereafter eight hours shall constitute a day’s work for letter-carriers in cities..., for which they shall receive the same pay now as for a day’s work of a greater number of hours. If any letter-carrier is employed a greater number of hours per day than eight he shall be paid extra for the same in proportion to the salary now fixed by law.”\(^\text{138}\) On July Fourth, thousands of letter carriers, some delegations coming from as far away as Washington and Baltimore, celebrated its passage with a parade in New York City before enthusiastic crowds.\(^\text{139}\)

The cheers turned out to be premature. Almost immediately letter carriers began complaining about the post office’s new rules fixing irregular hours under the eight-hour law. On August 2, Col. J. T. Bates, superintendent of the free-delivery system, replied that it had not been Congress’s intention to make the carriers’ hours consecutive, as shown by the fact that that clause had been deleted from the bill as wholly impracticable and had been admitted to be so by the committee of carriers that had appeared before the congressional committee that removed it. More pointedly, Bates allowed as five percent of the carriers were fault finders who should be removed from service: they were getting $1,000 a year for eight hours, which was more than skilled mechanics generally received for 10 hours and far more than post office clerks, who were necessarily on duty 10-15 hours.\(^\text{140}\)


\(^{139}\)"The Carriers’ Parade,” NYT, July 5, 1888 (8:4). Although the article mentioned 22,000 letter carriers, this figure cannot be correct since it was triple the total number of carriers, and must have included other post office workers.

\(^{140}\)"Not Consecutive Hours,” NYT, Aug. 3, 1888 (8:4). The text is based on an untitled
Pearson, the New York City postmaster and an extreme enemy of labor,\textsuperscript{141} added that it was absurd to suppose that deliveries and collections could be efficiently and satisfactorily performed if carriers' work were limited to eight consecutive hours. Because the public's needs required service from 4:45 a.m. until midnight, it was manifestly impossible to assign all carriers to duty during the same hours. Instead, the hours had to be divided so that while some were at work, others were unemployed, who would resume duty when their services were again required.\textsuperscript{142}

These comments were mild-mannered compared to the statement that Pearson issued the following day, suggesting that spite, revenge, and Schadenfreude were the administrators' driving motives. Opining that the carriers had made a grave mistake in getting the law enacted, he declared: "They saw fit to take the matter into their own hands, ignoring the responsible head of the service with whom all proposals for postal legislation properly originate...." In arranging schedules to meet the new law's requirements and giving carriers "all possible consideration," it was impossible to avoid leaving carriers with varying and irregular intervals between their hours of actual service, "and the inevitable consequence is that many of them are worse off than before. Realizing this, they unreasonably seek to quarrel with the Postmaster, whereas the responsibility rests with the cast-iron and crude requirements of the law whose passage they secured themselves without due consideration of its probable results. It is, in fact, the old story of a meddling with a buzz-saw, and I am sincerely sorry that in this case the usual result has ensued." A fixed eight-hour law and ever-shifting conditions in the volume of mail and the time and manner of its treatment could not be harmonized. The carriers' idea of eight-hour consecutive service was, therefore, "simply preposterous": it would have required a very large increase in the number of carriers and then no more than three or four hours of work daily could have been found for any carrier. The carriers had not sought Pearson's advice when they sought the bill's passage; but if they asked it now, he would recommend that they devote themselves with equal industry to repeal.\textsuperscript{143}

Although the postmaster general quickly claimed that the postal service had been reorganized to comply with the eight-hour act for carriers, he warned that carriers' claims for overtime pay would be numerous every year so long as the law remained in force with the then current construction. In particular, he complained that because the law did not provide for an average of eight hours, any time beyond eight entitled the carrier to overtime pay even though, as was often the case, he

\textsuperscript{141} William Doherty, \textit{Mailman, U.S.A.} 30 (1960).
\textsuperscript{142} "Not Consecutive Hours."
\textsuperscript{143} "Carriers Made a Mistake," \textit{NYT}, Aug. 4, 1888 (8:7).
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worked less than eight hours on other days (and still received full pay). The postal bureaucracy, however, promptly engaged in self-help by formulating its own interpretations that nullified the 1888 law, with the result that “many carriers were forced to stay on the job as long as eighteen hours, on a stop-and-go basis, to fulfill their daily obligation.” At this point carriers began to see need for national organization and in 1889-90 the National Association of Letter Carriers was formed.

The locus and focus of carriers’ struggle for the eight-hour day shifted in 1892 from Congress to the courts as they filed claims in the United States Court of Claims for back pay for work they had performed beyond eight hours a day. The postal bureaucracy’s adamant refusal to accept the legislature’s unambiguous intent to codify the carriers’ demand for a workday limited to eight hours is reflected in the frivolousness of its legal and socio-economic construction of the statute. The government asserted before the Court of Claims that the 1888 law had to be construed as meaning that the prohibited daily worktime beyond eight hours be devoted to the performance of letter-carrier service; in contrast, non-clerk work in the post office between deliveries did not count. Recognizing that the cases before them affected the compensation of probably all the letter carriers in the United States, the judges agreed that the statute was “singularly brief and clear, and expressed in unmistakable terms the legislative intent,” but nevertheless maintained that “the services of letter-carriers are so peculiar and ill-defined, that the application of the law to the facts is no easy task.”

The claimants—all of whom worked in Salt Lake City except one who worked in New York, where carriers, as they were “probably in all the great cities,” were “occupied incessantly from morning to night without an intermission for rest or food”—were “absent from home thirteen hours,” of which five hours were spent in making two deliveries and collections on the streets, two hours to preparing mail for the route and making reports, four hours to distributing mail within the office, and two hours to meals. The Post Office Department’s claim that the eight-hour law applied only to carrier work in the narrow sense was based on its juxtaposing

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145 Cullinan, United States Postal Service at 109.
147 Post v. United States, 27 Ct. Cl. 244 (Mar. 7, 1892).
148 Post v. United States, 27 Ct. Cl. at 251.
149 Post v. United States, 27 Ct. Cl. at 251.
150 Post v. United States, 27 Ct. Cl. at 253.
one of its own regulations and an unrelated 1842 statute generally applicable to
government employment. According to the postal regulation: "Carriers shall be
employed in the delivery and collection of mail matter, and during the intervals
between their trips may be employed in the post-office in such manner as they
postmaster may direct, but not as clerks."\(^1\) The statute provided: "No...comp-
ensation shall be made to any officer or clerk by reason of the discharge of duties
which belong to any other officer or clerk in the same or any other Department; and
no...compensation shall be made for any extra services whatever which any officer
or clerk may be required to perform unless expressly authorized by law."\(^2\) The
government’s defense rested on the claim that the eight-hour law granted additional
pay only where the carrier performed legally authorized services—namely, in this
case, a carrier’s and not a clerk’s.\(^3\)

Seeking to make sense of this governmental overreaching, the Court of Claims
concluded that the work that the regulation permitted carriers to do between
deliveries was "wholly undefined. No regulation, order, or instruction of the Post-
Office Department can be found which would inform postmasters or enlighten the
court as to what those services are." The court was similarly unable to decipher the
scope of the forbidden clerkly activities: "The term clerical service strictly means
a service that involves writing," but the court could not determine with certainty
whether the regulation was designed to prohibit carriers from selling stamps, regis-
tering letters, issuing money orders, or writing reports, whereas the "manual labor"
of sorting letters and tossing them into the right boxes was permissible. But since
it was certain that the regulation did contemplate carriers’ performing some other
work between delivery trips, the judges, hoisting the postal authorities by their own
vague regulation, were not prepared to say that its interpretation by the Salt Lake
City postmaster, who under stressful circumstances had construed it to "mean that
he might exact from the carriers additional work in the distribution of mail...within
the office,...was wholly and clearly wrong." After indulging in all of these subtle-
ties, the court abandoned them, declaring itself "unqualifiedly of the opinion that
whatever work they may be required to do, relating to the mail matter which they
distribute and collect, must be regarded as carrier service in construing and
applying the eight-hour law." Moreover, "the equities" were so strongly in the car-
riers’ favor that the court deemed it "only just to resolve doubts" in their favor.\(^4\)

\(^1\)H. Misc. Doc. No. 63: *The Postal Laws and Regulations of the United States of
America* § 647 at 268 (50th Cong., 1st Sess., 1887).

\(^2\)Revised Statutes of the United States, § 1764 at 314 (2d ed. 1878).

\(^3\)Post v. United States, 27 Ct. Cl. at 252.

\(^4\)Post v. United States, 27 Ct. Cl. at 254, 255. In the New York case, the court
additionally rejected the government’s claim that the eight-hour law permitted hours-
Undeterred by this sharp judicial rebuff, the Post Office Department decided to try its luck with the Supreme Court. (In fact, in the companion case of the New York carrier, the solicitor general even admitted in his brief that the Court of Claims was right, but stated that he was prevented from dismissing the appeal only by the fact that another government department declined to follow that view until the Supreme Court decided the matter; in any even he offered no argument.)

The justices, however, had little patience with the government’s pseudo-arguments. For them it sufficed that the eight-hour statute did not specify the kind of employment to which the extra hours of work had to be devoted; it was necessary only that the letter carrier be a letter carrier and lawfully employed in work not inconsistent with his general business as carrier. Issuing an even more powerful rebuke than the Claims Court’s, the Supreme Court held that: “The statute was manifestly one for the benefit of the carriers, and it does not lie in the mouth of the government to contend that the employment in question was not extra service, and to be paid for as such, when it appears that the United States...actually employed the letter-carriers the extra number of hours per day.... The postmaster was the agent of the United States to direct the employment, and if the letter-carriers had not obeyed the orders of the postmaster, they could have been dismissed. They did not lose their legal rights under the statute by obeying such orders.”

Even this double defeat failed to deter the postal bureaucracy from continuing to try to subvert the carriers’ right to an eight-hour day. In a self-servingly mendacious reference to its blatantly unlawful policies practices until, at the very least, the Supreme Court’s ruling in 1893, the Post Office Department asserted in its annual report for 1898 that “[a]fter ten years of earnest effort” to enforce the eight-hour law, it was “forced to the conclusion that the law in its present form can not be practically applied to the conditions and circumstances peculiar to the free-delivery service without causing much loss to the Department and many hardships to the employees for whose benefit its enactment was intended.” Given daily variations in loads, it was impossible to provide eight hours’ work consecutively or at intervals. To prevent (having to pay for) overtime, the Post Office was compelled to base schedules on heavy days, meaning the loss of 30-40 minutes of work on light days. The only way to change these unsatisfactory conditions, including “constant conflict between the carriers and their superiors”—as if such struggles averaging so that the Post Office Department was “at liberty to keep a carrier employed eight hours every day, but not to give him a deficit of work one day and an excess another.” *Id.* at 260.

had not been going on for years—was to modify the law so that carriers would work 48 hours over six days in addition to as many as eight on Sunday. If Congress accommodated the department’s request for hours-averaging (which the Court had denied it), then postal officials “might...abrogate certain rules of discipline which now appear obnoxious to the letter carrier,” limit the daily spread of carriers’ hours to 12, and require Sunday work only twice and possibly only once a month.158

After having once again asked for the 48-hour, six-day week plus Sunday in its annual report for 1899,159 the Post Office Department finally achieved its goal in 1900 when Congress added a proviso to the Post Office appropriations act:

“That letter carriers may be required to work as nearly as practicable only eight hours on each working day, but not in any event exceeding forty-eight hours during the six working days of each week; and such number of hours on Sunday, not exceeding eight, as may be required by the needs of the service....”160 The proviso had originated with “antilabor”161 Representative Eugene Loud, a California Republican and chairman of the House Post Office Committee, who had offered a somewhat different version as a floor amendment: “That letter carriers may be required to work not exceeding forty-eight hours during the six days of each week; and such number of hours on Sunday, not exceeding eight, as may be required by the needs of the service ... If any letter carrier is employed for a greater number of hours than forty-eight during the working days in any week, he shall be paid extra for the same in proportion to the salary fixed by law.” Although the House agreed to the amendment after Loud assured the members that his “understanding is that the letter carriers themselves have agreed that this will be an improvement in the method of managing the business of the carrier service,”162 the following day, two Democratic Representatives who were close to the NALC, Amos Cummings of New York and John Fitzgerald of Massachusetts,163 accused Loud of having proposed it “under false pretenses” because he had said that it was satisfactory to the letter carriers, whereas in fact their union was “absolutely and totally opposed” to it. Loud, whose stance on the question can be gauged by his claim that the more than three million dollars that the government ultimately had to pay as a result of

159Annual Reports of the Post-Office Department for the Fiscal Year Ended June 30, 1899, at 151 (H. Doc. No. 4, 56th Cong., 1st Sess., 1899).
160Act of June 2, 1900, ch. 613, 31 Stat 252, 257.
161Cullinan, United States Postal Service at 118.
162CR 33:4632 (Apr. 24, 1900).
163The grandfather of President John F. Kennedy.
the aforementioned litigation was for “the time that letter carriers lay around the office and were not working,” evaded the charges by lamely replying: “It is not so much what one letter carrier wants or what they all want as it is a question whether it is a good business proposition....” When Cummings and Fitzgerald did finally get their separate vote on the amendment, the House agreed to it 74 to 53, although in conference the House receded to the Senate version.

Even as the Post Office Department was boasting that the new 48-hour law was being strictly enforced, it asked the attorney general’s office for an opinion as to whether the proviso in the annual appropriations bill was temporary and would end with the fiscal year, and on April 6, 1901, the opinion was issued ruling it was temporary. The eight-hour regime was thus reinstated and lasted for nine years until the postmaster general devised a test case before the Court of Claims to decide whether the 48-hour law was still in effect. In a weakly supported opinion, the court held that the proviso was “evidently intended as permanent remedial amendment” of the eight-hour law, especially when read in light of the mischief sought to be remedied as explained in the postmaster general’s reports. The 48-hour law was reinstated as of July 1, 1910, prompting complaints by carriers that each postmaster was interpreting the law individually. Moreover, since, as one of their congressional supporters observed, there was no penalty for violating the 48-hour law and, under the Supreme Court’s ruling in Martin, carriers were not en-

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165 CR 33:4730 (Apr. 26, 1900). Twelve years later, Rep. William Calder, a Republican from Brooklyn, erroneously asserted that there had been no separate vote, “and it has always been a sore spot in the minds of the letter carriers...when they think of the way in which their eight-hour law was taken away from them. 48 CR:4653 (Apr. 12, 1912). Similarly incorrect was his assertion that “the post-office clerks of this country have never enjoyed the benefits of an eight-hour law or, in fact, any law that places a limit on the hours of labor they can be employed in any one day.” Id.

166 CR 33:6240 (May, 29, 1900).

167 Annual Reports of the Post-Office Department for the Fiscal Year Ended June 30, 1900, at 113 (H. Doc. No. 4, 56th Cong., 2d Sess., 1900).


169 Van Doren v. United States 45 Ct. Cl. 476, 483 (quote), 484 (May 31, 1910).
titled to overtime pay for hours beyond 48, they "might just as well not be working under any law at all."  

Almost immediately efforts began in Congress to repeal the 48-hour law, which, when they finally came to fruition two years later, also conferred the eight-hour day on postal clerks. The 62nd Congress, controlled by Democrats and insurgent Republican Progressives and encompassing the years 1911-12 when "[b]ig capital and growing labor were in critical conflict..., both demanding that the government act in ways that would permit their own steady development at the expense of the other," attached to the postal appropriations bill for 1912 a provision that as of March 4, 1913, "letter carriers in the City Delivery Service and clerks in first and second class post offices shall be required to work not more than eight hours a day: Provided, That the eight hours of service shall not extend over a longer period than ten consecutive hours and the schedules of duty of the employees shall be regulated accordingly." To be sure, it added that "in cases of emergency, or if the needs of the service require," they "can be required to work in excess of eight hours a day, and for such additional services they shall be paid extra in proportion to their salaries as fixed by law."  

The testimony at the hearings and the debates on the bill furnished much of the only congressional insight on hours regulation for white-collar workers for the period prior to the 1930s. At the post office appropriations bill hearings in January 1912, Oscar Nelson, the president of the National Federation of Post Office Clerks (NFPOC), which represented about 4,400 of 30,000 clerks, informed the House Post Office Committee that postal clerks had been left outside the eight-hour law

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170 CR 48:4653 (Calder).
173 Act of Aug. 24, 1912, ch. 389, § 5, 37 Stat 539, 554. In addition, the law provided that if Sunday work was necessary, carriers and clerks had to be given compensatory time off the following week. Id. at 554-55. See also 39 USC § 117 (1925), in Code of the Laws of the United States of America, 44 Stat. Pt. 1 at 1243-4. Daily compensation was computed by dividing annual compensation by 306 (=365 days minus Sundays and legal holidays) and hourly compensation by dividing by 8.
because they had been ruled as being neither laborers nor mechanics, but rather “‘officials of the Government.’” But the clerks protested that “classification of us as ‘officials’ does not compensate us for the long hours worked; neither does it restore our shattered health nor restore those whose lives have been shortened because of the long hours of duty imposed upon them....”175 (To be sure, even congressional interest in that restoration was limited: when the Socialist Representative Victor Berger offered an amendment during the eight-hour debates in 1912 requiring the postal authorities to permit clerks to sit at least two hours a day while working, many of his colleagues went on record objecting, the amendment quickly being rejected 55 to 35.)176 Initially, by emphasizing the mental or intellectual dimensions of their work in his narrative of their work and working conditions, Nelson appeared to confirm the logic of the clerks’ exclusion. He related that most clerks in large offices did distributing work, which was their “‘real work’” and “‘the brain work of the postal service.’” An outgoing mail clerk had to study and memorize the name of every post office in every state to which he was assigned in addition to the name of every railroad going into each town and which post offices were served through other towns; the clerk also was required to know the train schedules of every rail line that served the state or states to which he was assigned. The outgoing mail clerk’s study of all this information and any changes in it as well as of postal rules and regulations had to be “done at home and on his own time,” which the post office department never took into account in estimating the number of hours clerks worked177 (a claim that the postmaster general conceded with no justification other than “the efficiency of the service”).178 Similarly, the city mail clerk had to memorize the names of all the streets, buildings, business, and firms, and was expected to know the names of individuals receiving any mail. On average, a clerk had to memorize 6,000 facts, and “it is admitted by those who


176 CR 48:5511 (Apr. 27, 1912). One of the NFPOC’s legislative objectives formulated at its 1919 convention was five-minute rest periods every hour for all work that required close mental application and rest stools for distributors. Baarslag, History of the National Federation of Post Office Clerks at 125. When the Post Office Department in 1923 finally introduced rest bars—“ingeniously designed so that one could not sit on them”—for clerks, many experts in the department criticized them as being conducive to laziness. Id. at 142.


have experienced both that the average clerk does more studying and of a more difficult and disinteresting nature than does the average professional man in mastering and keeping up knowledge of his profession, whether it be medicine, law, or dentistry.” The result, said Nelson, was that “[m]any clerks have become unbalanced of mind and committed to asylums because of the constant study required.”

After this “recital of the knowledge” that a clerk was required to acquire and of its detrimental psychological consequences, Nelson then did an about-face and declared that a clerk is “a most skilled mechanic doing laborious work.” (In 1924, a chronicler of postal unionism observed: “Though misleadingly designated ‘clerks,’ only a small proportion of them do work which might properly be called clerical. Their tasks vary from hard manual labor, in which at least thirty-five percent of the force is engaged, to that of highly trained distributors of mail, accountants and postal specialists....” Nevertheless, when the AFL chartered the NFPOC in 1906, Gompers’s misgiving were, according to the union’s historian, understandable, since many postal clerks were “still laboring under the white collar ‘government official’ complex of social superiority handed down from previous generations.”) Although the “sum and substance of the situation is that the department would rather that they have the authority to work us an unlimited amount of hours than employ the force necessary to efficient service or pay us overtime,” Nelson emphasized that the clerks did not want to work overtime; he sought to show their good faith by declaring that they were not asking for time and a half or double time: “We would rather have a law that would prohibit over eight hours’ work a day, if such a law were constitutional or did not interfere with the interests of the service.”


\[180\] Post Office Appropriations Bill, 1913: Hearings Before Subcommittee No. 1 of the Committee on the Post Office and Post Roads, House of Representatives, Part II at 450.


\[182\] Spero, The Labor Movement in a Government Industry at 79-80. In a recycled version of the book, Spero wrote a quarter-century later: “Although called ‘clerks,’ but a small proportion of them is engaged in work which is really clerical in nature. Their function is the distribution of mail in the post offices and this involves all sorts of tasks from hard manual labor, in which perhaps a third of the force is engaged, to work requiring a high degree of skill and special knowledge.” Spero, Government as Employer at 110.

\[183\] Baarslag, History of the National Federation of Post Office Clerks at 47.

\[184\] Post Office Appropriations Bill, 1913: Hearings Before Subcommittee No. 1 of the Committee on the Post Office and Post Roads, House of Representatives, Part II at 453.
Like the Progressives—and indeed like all those since 1867 who had regarded the eight-hour day as an empirical experiment—who regarded shorter hours as no concession to capital since it would either pay for itself or even “bring in profits greater than its cost.” Nelson also went to great efforts to persuade the committee that the Post Office Department was simply wrong in believing that long hours were economical: clerks could not work more or more accurately than in eight hours. Because postal officials had never been compelled to plan eight-hour schedules, they had also never tried, for example, to arrange with heavy mailers not to dump tons of circulars at one time without notice, but instead to send them as they became ready for mailing.

Finally, Nelson revealed that the “Postmaster General, evidently in an effort to forestall the enactment of legislation to regulate our hours of labor, has established in some post offices a rebate system for the rebating of all time worked in excess of eight hours a day averaged for the year.” The hours-averaging account was biennial, permitting time off during the following year although the clerks “appreciate[d] receiving such a rebate rather than none at all,” Nelson correctly called attention to “the fact that working us 10 hours a night for two or three months straight and thereby shattering and undermining our health cannot be compensated for by allowing us time off the following year,” especially since the rebate system reinforced the regime of “continuous overtime” by compelling yet more overtime when some clerks were off on rebate time. Indeed, the clerks’ advocacy of the eight-hour day was so determined that they preferred it to working nine hours with overtime pay some days and an equal number of seven-hour days if they did not know in advance that they were working seven hours and therefore “could not make use of the time.” AFL president Gompers reinforced this point a few months later at the counterpart Senate hearings when he observed that daily hours should be limited as well as weekly hours because otherwise employers—and here he denied any distinction between the government and private firms—had the inclination that “at some time they might work their employees unlimited hours any day provided that they did not violate the weekly limit.

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185 William Walling, Progressivism—And After 77 (1914).
188 Post Office Appropriations Bill, 1913: Hearings Before Subcommittee No. 1 of the Committee on the Post Office and Post Roads, House of Representatives, Part II at 469.
189 Post Office Appropriations Bill, 1913: Hearings Before the Committee on Post Offices and Post Roads, United States Senate at 118 (June 7, 1912).
The Nineteenth Century

To be sure, by the time he testified at those Senate hearings, Nelson had experienced enough of the legislative process to realize that compromise might be necessary lest the clerks, the only government employees not protected by the eight-hour day, jeopardize its enactment. Therefore—and also "to completely prove that we do not want to make extra compensation by overtime"—he proposed an amendment to eliminate overtime pay for extra hours on Mondays (with the heaviest workloads) provided that the immediately following Tuesdays be shortened by a corresponding number of hours. Indeed, Nelson even went so far as to express the clerks' willingness to "work overtime when it is necessary," although they requested monetary compensation for it both because "we feel that we are entitled to it" and as a penalty to "compel the supervisory force" to schedule an eight-hour day.

At the Senate hearings in May, Edward Cantwell—who appeared pursuant to a subpoena because, since 1902, when President Theodore Roosevelt had issued a "gag order," federal employees had been forbidden to seek legislation on their behalf directly or through organizations, except through their departmental employers—the secretary of NALC, which represented 28,200 of the little more than 29,000 letter carriers, testified that even during the years following the Supreme Court's decision in United States v. Post when the eight-hour law was enforced in a generally satisfactory way, the principal exception had been the drawing out of schedules over a long period each day. Ignoring any mental or intellectual strains, Cantwell emphasized that the purpose of the eight-hour law was to protect "the laboring man from the injurious consequences of prolonged physical effort, giving him more time for his personal affairs and more time and energy to attend to the cultivation of his moral and mental powers." Nelson of the NFPOC explained the especially pernicious aspect of swing shifts:

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190 Post Office Appropriations Bill, 1913: Hearings Before the Committee on Post Offices and Post Roads, United States Senate 64 (62d Cong., 2d Sess., June 1, 1912).
191 Post Office Appropriations Bill, 1913: Hearings Before the Committee on Post Offices and Post Roads, United States Senate at 61.
192 Spero, Government as Employer at 122; this practice, which the Post Office Department had instituted in 1895, was not prohibited until 1912. Id. at 117-43; Spero, Labor Movement in a Government Industry at 96-137.
193 Post Office Appropriations Bill, 1913: Hearings Before the Committee on Post Offices and Post Roads, United States Senate at 79, 89 (June 7, 1912).
194 Post Office Appropriations Bill, 1913: Hearings Before the Committee on Post Offices and Post Roads, United States Senate at 80.
195 Post Office Appropriations Bill, 1913: Hearings Before the Committee on Post Offices and Post Roads, United States Senate at 81.

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In many large cities clerks and carriers both have their schedules so arranged that it takes 14 or more hours to put in 8 hours' work. They report at 6 a.m., work a couple of hours, then are compelled to take a two or three hour swing and report again at noon, work two hours and then take another two or three hour swing, and report again at 4 or 5 o'clock and work until 8 or 9 p.m. Often the employees live a distance away from the center of the city and it would take them 2 hours' round trip on the street cars to go home and return; therefore many of them idle around the office on their 2 or 3 hour swing and virtually are on duty the entire 14 hours. Such schedules are absolutely unnecessary, and they exist...because the supervisory force have never been under necessity to figure out other schedules.196

Nelson’s testimony was a useful corrective to the testimony on the first day of the Senate hearings by Charles Grandfield, the First Assistant Postmaster General, who had insisted not only that it was a physical impossibility to complete all deliveries within eight hours, but that there was also no way, as far as he could see, to arrange a strict eight-hour within 10 hours in all cases. To be sure, Grandfield, in explaining the split shift, adduced as his only illustration a six- or seven-hour swing between 9 a.m. and 3 or 4 p.m.197 (As Thomas Reilly, the House floor manager of the bill’s labor provisions had already pointed out in April, clerks were often “compelled to report for duty three or more times a day,” the result being that the off-duty time is so fragmented that it “can not be put to any practical use...”))198 After the committee chairman, Jonathan Bourne, who was also the president of the National Progressive Republican League,199 had remarked that it was “rather a hardship” to be on call so many hours,200 Republican Senator Joseph Bristow of Kansas, who was also a recent recruit to Progressivism,201 misleadingly chimed in that such a worker “can go to sleep; he is absolutely at liberty,” and then added, falsely as the immediate future proved, that the split shift itself “is one of the conditions of the service that can not be avoided.”202 To be sure, as Fourth Assis-

196 Post Office Appropriations Bill, 1913: Hearings Before the Committee on Post Offices and Post Roads, United States Senate at 56-57.
197 Post Office Appropriations Bill, 1913: Hearings Before the Committee on Post Offices and Post Roads, United States Senate at 15.
200 Post Office Appropriations Bill, 1913: Hearings Before the Committee on Post Offices and Post Roads, United States Senate at 15.
202 Post Office Appropriations Bill, 1913: Hearings Before the Committee on Post Offices and Post Roads, United States Senate at 15.
tant Postmaster General with jurisdiction over the city delivery service from 1903 to 1905, "'Czar Bristow IV'" had been "'the real head of the postal establishment and...ruled it with an iron hand. He refused to recognize the workers' right to organize or petition. It was his belief that the government could not bargain with its servants.... He refused to deal with the representatives of the carrier bodies..., telling them that he 'did not need, did not want and would not have their cooperation.' When the [NALC] officers persisted in their efforts to carry on their activities, he made determined efforts to crush their organizations." Bristow then proceeded to stand history on its head as well, alleging that under the 1888 overtime law, letter carriers' overtime claims resulted from "loaf[ing]...." This claim then prompted Grandfield to project the allegation onto the future: "The law would engender habits of idleness on the part of the clerks, because there would be nothing for them to do at certain times of the day and at certain periods of the year. The temptation to make overtime would be ever present." Notably, Bristow was the senator who led the forces opposed to providing for overtime work or pay. His initial and principal objection was the carriers' aforementioned "abuses" and the "very great expense" it would entail for the government. But as his colleagues began to resist his reasoning, Bristow shifted to work-sharing:

Then, the whole trend of modern industrial affairs is against allowing overtime, because more employment is afforded by doing away with it.

We passed an eight-hour law. What was the purpose of that law if not to limit the term of employment to eight hours a day? [N]ow we are undertaking to pass a bill authorizing the violation of the eight-hour law. ... It is an utter inconsistency....

But when Alabama Senator Joseph Johnston, a former iron and steel company president, tried to puncture the economy argument by correctly pointing out that hiring substitutes to work instead of permitting overtime would not save any money (since the overtime rate would not have been at a premium), Bristow failed to use his strongest argument—namely, that such work spreading was precisely the intended outcome. He was able, however, to call upon his postal expertise in

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*Offices and Post Roads, United States Senate* at 15.

*Post Office Appropriations Bill, 1913: Hearings Before the Committee on Post Offices and Post Roads, United States Senate* at 18.


CR 48:9943 (July 31, 1912).

CR 48:9943.

CR 48:9943.
undercutting the argument of the chair of the Senate Post Offices Committee that overtime would be statutorily permissible “only in case of emergency”\textsuperscript{208}. “There will be no emergencies in the future that have not occurred in the past....”\textsuperscript{209}

When the issue reappeared two weeks later, two southern senators insisted on viewing the affected employees as white-collar workers. Nathan Bryan, a Florida Democrat who later became a federal appellate judge, agreed with Bristow that preventing employees from working more than eight hours could be only “very poorly accomplished” by offering additional pay for overtime work: “Clerical work is different from manual labor. No business man would submit for one moment that his stenographer, who works less than eight hours on one day because business happened to be slack, should be paid the day’s salary and if there was a little more business than usual the next day and that man had to stay half an hour or an hour longer that he should then be paid in proportion to his day’s salary for the extra hour’s work.”\textsuperscript{210} In order to mimic private clerical practices (and to test the workers’ claim that their object was not to receive extra compensation but the eight-hour day), Bryan offered an hours-averaging amendment that would have permitted overtime work on weekdays, but would have allowed compensatory time off on one of the following six days—as the bill already (and the act ultimately) provided for regarding Sunday work. (Although the amendment was not enacted, during the Great Depression, Congress reduced the workweek of both postal employees and all federal civilian employees to 44 hours by creating a four-hour Saturday with compensatory time off if this limit was exceeded,\textsuperscript{211} and the same day that it enacted the Social Security Act, Congress created an average 40-hour week for postal employees by requiring that they be given compensatory time off the following for any hours worked on a Saturday.)\textsuperscript{212}

Hoke Smith, a Democrat from Georgia, elaborated the logic of Bryan’s white-collar post-office operations:

\textit{All men engaged in commercial affairs know that frequently their clerical force for a day or two work over hours, and then the effort soon thereafter is made to compensate them by giving them some leisure to take the place of it. If we are going to build up the Post

\textsuperscript{208}CR 48:9943 (Sen. Bourne).
\textsuperscript{209}CR 48:9944.
\textsuperscript{210}CR 48:10821 (Aug. 13, 1912).
Office Department and enable it to do for the people of this country what we hope it may do; if are going to build up in the Post Office Department a proper rural-route service and a parcel-post service, we must regard business principles when it comes to the expenses of conducting that department. If we will not regard them, then we ought to abandon any idea of the Post Office Department doing anything but carrying letters. If we can not apply to the methods of the department the principles that would be employed in a bank or in any mercantile house and give the employees leisure within six days, instead of paying extra compensation every time they work an hour over eight hours, we can not conduct the business in an economical manner so as to justify any enlargement of it.213

The postal bureaucracy remained unreconciled to the eight-hour law. In its first annual report, the Wilson administration’s Post Office Department, while conveying the “frequent complaints from the business interests” about delivery times and recalling the suggestion that many of the difficulties created by the eight-hour law could be eliminated by amending it to allow eight hours of service within 12 consecutive hours, declared that it should give itself the benefit of one year’s experience before recommending such an amendment.214 As good as his word, in his next annual report (for 1914), Wilson’s Postmaster General, Albert Burleson—whose accentuation of the department’s traditional labor policy earned the postal service “what the workers called a ‘sweatshop reputation’”215—was still complaining that it was “not possible to employ throughout the day to advantage a permanent force of employees for eight hours continuously or even for 8 hours within a period of 10 hours.”216

Burleson recommended legislation to Congress in effect resurrecting the Loud amendment of 1900 under which clerks and carriers “shall be required to work eight hours daily as nearly as practicable, and may be required to work more than eight hours daily without extra compensation: Provided, however, That in case such employees are employed more than forty-eight hours a week...they shall be paid extra for such additional services in proportion to their salaries....” The only limitation Burleson was willing to impose on the postal authorities was a daily

214Post Office Department Annual Reports for the Fiscal Year Ended June 30, 1913: Report of the...Postmaster General 121-22 (1913). Although the Comptroller of the Treasury had ruled that the law did not apply to supervisory officers, the department nevertheless directed postmasters to arrange their schedules as nearly as possible on the same schedule as clerks and carriers’. Id. at 121.
216Post Office Department Annual Reports for the Fiscal Year Ended June 30, 1914: Report of the...Postmaster General 142 (1914).
ceiling of 12 consecutive hours.217

Just in case it failed to secure a statutory lengthening of the workday, the Post Office Department began at this time to introduce Tayloristic stop-watch methods to extract more labor in a given workday from clerks and carriers.218 Burleson apparently did not wait for Congress to repeal and amend the eight-hour law: at the AFL convention in 1917, delegates of the NALC and the National Federation of Postal Employees219 offered a resolution declaring that although the eight-hour law regulating postal clerks and letter carriers' hours provided that overtime could be imposed only in emergencies and it was to be compensated at the regular rate of pay, in the absence of a penalty for work in excess of eight hours, the practice had developed of imposing excessively long hours on experienced men instead of keeping the work force recruited to the proper standard; consequently, the excessive overtime was breaking down the workers' health and morale. The convention, abandoning the actual for the basic eight-hour day, then adopted the resolution that the AFL support efforts to insure stricter observation of the law by securing legislation establishing time and a half for overtime hours in excess of eight daily.220 A large-scale survey conducted by the congressional Joint Commission on

217 Post Office Department Annual Reports for the Fiscal Year Ended June 30, 1914: Report of the . . . Postmaster General at 64. The Post Office Department's overreaching was underscored by its recommendation that the statute requiring carriers and clerks to be given compensatory time off for Sunday work within the next six days be amended "to permit the department to grant such compensatory time whenever the employees can be most conveniently excused from duty." Id. at 143. On the department's abuse of the statutory trigger for Sunday work ("the needs of the service") "to make overtime a regular occurrence so as to keep down the size of the force," see Spero, The Labor Movement in a Government Industry at 192-93.


219 The National Federation of Postal Employees was an industrial union, formed by the merger in 1917 of the NFPOC and Brotherhood of Railway Clerks, claiming jurisdiction over all postal workers below supervisory grades. The 1917 AFL convention ordered affiliation with it of NALC, which the latter's membership later approved. But the National Federation of Postal Employees then surrendered its jurisdiction over carriers and railway mail clerks and, readopting its old name, once again became a clerks' union. Spero, Government as Employer at 147. See also Spero, The Labor Movement in a Government Industry at 230-35.

220 Report of Proceedings of the Thirty-Seventh Annual Convention of the American
Postal Salaries revealed that in the year ending June 30, 1919, clerks in first and second class post offices were still working 134.58 overtime hours and 88.95 hours on Sundays and holidays.221

Two months before enacting the eight-hour law for postal carriers and clerks, the same Congress had enacted an eight-hour law on behalf of the employees of federal contractors,222 thus expanding an 1892 law establishing the eight-hour day for laborers and mechanics employed by the United States or any contractor or subcontractor on federal government public works.223 Together the two laws finally succeeded in giving effect to the long-dormant 1868 act,224 although they, too, revealed themselves vulnerable to restrictive interpretation.225 The House report in 1892 identified the basis of the agitation in movements seeking shorter daily hours for workers engaged in “fatiguing physical labor” as: physical recuperation; the opportunity for enjoyment of their families and social and intellectual improvement; and, “in an overcrowded or congested labor market by expanding the opportunities for obtaining employment, giving a more general and more equitable diffusion to the wage product of the labor of such market.” The House report observed that the work-sharing basis was the commanding proposition in Europe, whereas the other two bases had, “until recently,” been “most urged” in the United States,226 but the salient point in the present context was the committee’s focus on

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223Act of Aug. 1, 1892, ch. 353, 27 Stat. 340. See also OOA G 20:459-63 (Aug. 27, 1892) (1892 eight-hour law applies generally to government employees and also to those working for contractors on public works).

224By 1892, all government work for construction of public buildings and 75 per cent of all other government work was done by contract. Hours of Labor for Mechanics and Laborers 6 (H. Rep. No. 1267, 52d Cong., 1st Sess., May 3, 1892).

225For example, the attorney general issued an opinion that under the 1892 eight-hour law, a worker who removed office furniture and cleaned was not a “laborer” within meaning of statute, but more like domestic servant. OOA G 26:623-24 (June 7, 1908). See generally, Marion Cahill, Shorter Hours: A Study of the Movement Since the Civil War 72-79 (1968 [1932]).

“fatiguing physical labor” as an explanatory description of the scope of coverage of “laborers and mechanics.” In interpreting the law’s scope for executive departments and agencies, the attorney general over the years repeatedly ruled that it did not extend to office workers. For example, in 1905, while noting that the law “is but one incident in the world-wide movement for shorter hours of labor,” he nevertheless expressed his opinion that it did not apply to the office force of the Isthmian Canal Commission or to any government employees who were not within the ordinary meaning of laborers and mechanics. And as late as 1922, the attorney general was still opining that the 1892 8-hour law “does not constitute an eight-hour day for Government clerks....”

For similar reasons, state hours laws for public works covered the same groups. E.g., 1853 NY Laws ch. 641, § 1, at 1223 (mechanics and workingmen); 1870 NY Laws ch. 385, § 2, at 919 (mechanics, workingmen, and laborers); 1893 Colo. Sess. Laws ch. 113, § 1, at 305 (mechanics, workingmen, and laborers); 1905 Cal. Stat. ch. DV, § 1, at 666 (laborers, workmen, and mechanics); 1912 Ariz. Sess. Laws ch. 78, § 1, at 415 (laborers, workmen, and mechanics); 1913 Tex. Gen. Laws ch. 67, § 1, at 127 (laborers, workmen, and mechanics). Similarly, the prevailing wage provisions of the Davis-Bacon Act applied to laborers and mechanics on federal construction projects. Act of Mar. 3, 1931, ch. 411, Pub. L. No. 798, 46 Stat. 1494.

227 Ooag 25:441-48 at 447, 448 (1906 [May 10, 1905]).
228 Ooag 33:355-61 at 359 (1924 [Oct. 20, 1922]).
The early distinction...drawn in the federal service between white-collar groups and crafts and labor groups was a counterpart of that found in industry prior to the Fair Labor Standards Act of 1938.\textsuperscript{1}

The period from the close of World War I to the onset of accelerated rearmament in 1940-41 is of interest not because the federal government implemented new policies for regulating the overtime work of its own white-collar employees, but rather for the creation of a detailed classification system that later served as the basis of an overtime compensation regime whose scope was and remains significantly more comprehensive than FLSA's. In contrast, the struggles over overtime compensation for federal white-collar workers during World War II—who accounted for about 1.5 million of all 10.5 million white-collar employees in the country\textsuperscript{2}—though reflections of skirmishes over highly specific, transient wartime conditions, nevertheless exerted an enduring impact on governmental overtime policy that far outlived its origins.

The Interwar Years

No permanent law uniformly identifies service as overtime when performed by a salaried employee...on a per annum basis. ... Prior to the national defense program salaried employees, with few exceptions, were not entitled to extra pay for overtime work.\textsuperscript{3}


\textsuperscript{2}Of the remaining nine million, two million were state, county, and municipal government employees. Frances Perkins, Letter to the Editor, \textit{NYT}, Nov. 20, 1943 (12:5-6).

The National Federation of Federal Employees, which was founded in September 1917 under the auspices of the AFL with a broad jurisdiction covering all federal employees (except postal employees) who lacked the power to hire or fire, expanded its membership to about 60,000 during World War I. The union repeatedly complained about the shortcomings of wartime bonuses as a remedy for the inadequacies and inequities of the federal employee salary structure, which were exacerbated by the economic dislocations of World War I. The NFFE’s demands for a thoroughgoing reclassification of the federal government service finally resulted in the creation by Congress in March 1919 of the Congressional Joint Commission on Reclassification of Salaries.\(^4\) The commission was charged with investigating rates of compensation of civilian employees of the executive departments and municipal government in the District of Columbia (with the exception of the navy yard and postal service), with the object of providing “uniform and equitable pay for the same character of employment.”\(^5\) Against the background of the general knowledge that “chaotic conditions had been permitted to develop in the Federal service,” the report that the commission submitted a year later, based on a classification of 100,000 employees into 1,700 classes, found that the United States government, the world’s largest employer, lacking a “modern classification of positions” as a basis for just standardization of compensation, was also without an employment policy.\(^6\)

The commission found that hours of work were more uniform than other conditions of employment: seven hours constituted a normal day’s work for clerical and professional employees and eight for manual employees; thus six-day weeks produced 42- and 48-hour weeks, respectively. At the time, according to its report, outside of government, office workers generally worked seven or 7.5 hours for five days and four or 4.5 hours on Saturday in the larger cities; in mercantile establishments and factories office workers usually worked 7.5 or eight hours with no Saturday half-holiday. In addition, federal government administrative heads had the authority to increase hours “as the needs of good administration may require.”\(^7\)


\(^7\)Report of the Congressional Joint Commission on Reclassification of Salaries, Part
Nevertheless: “A general provision of law prohibits the payment of additional compensation for overtime.” Exceptions to this provision were, however, made in the case of per hour and per diem employees and at the Bureau of Engraving and Government Printing Office, which paid a 50 percent and 20 percent premium, respectively. Nowhere were federal employees on an annual basis compensated for overtime. Not only did such inconsistencies violate the aforementioned cardinal principle of “uniform and equitable pay for the same character of employment,” but because it had become generally accepted, based on the experience of the world war, that extended periods of overtime decreased efficiency in the long run, the commission concluded that an effort should be made to “reduce overtime to a minimum.” Experience in non-governmental industrial and business employment had indicated that “one of the most effective ways to do this is to require the payment of extra compensation at an increased rate to all employees in the manual group who are required to work longer than eight hours a day....” The commission saw no reason not to follow this practice in government employment, but: “Similar provision does not seem necessary for employees in the clerical and professional groups, whose normal working day is one hour less than that of employees in the manual group, and who are also less likely to be called on for overtime work.” However, the general principle that in the long run overtime was “unfair and detrimental to the efficiency of the service” also applied to these white-collar groups.8

The commission then formally recommended that Congress prescribe rules for time-and-a-half overtime compensation for hourly employees and that clerical and professional employees paid on an annual basis be required to work at least seven hours a day six days a week. It also urged that under normal circumstances work should be organized—and, where the workforce was inadequate, be augmented—so as to make unnecessary more than seven and 42 hours of work for clerical and professional and eight and 48 hours for manual employees. Consequently, overtime work would be “necessitated only by real emergency situations.”9 The commission’s draft bill thus empowered department heads to extend the hours of per annum employees, “but no additional compensation shall be paid for such extension.”10

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8Report of the Congressional Joint Commission on Reclassification of Salaries, Part I at 89.

9Report of the Congressional Joint Commission on Reclassification of Salaries, Part I at 91. Such minimum-hours laws were not unknown. For example, in 1879 Texas required the employees of the departments of the State of Texas to “labor nine hours each secular day.” 1879 Tex. Gen. Laws ch. 137, § 1, at 151.

10Report of the Congressional Joint Commission on Reclassification of Salaries, Part
The compensation schedules of the landmark Classification Act of 1923—before which there had been no general legislation uniformly classifying federal government positions on the basis of their duties and responsibilities and evaluating their worth—encompassed, inter alia, a Professional and Scientific Service and a Clerical, Administrative, and Fiscal Service. The PS service included positions whose duties were to “perform routine, advisory, administrative, or research work which is based upon the established principles of a profession or science, and which requires professional, scientific, or technical training equivalent to that represented by graduation from a college of university of recognized standing.” The CAF service, in turn, which included positions whose duties were to “perform clerical, administrative, or accounting work, or any other work commonly associated with office, business, or fiscal administration,” encompassed 14 grades: the six lowest-paid were clerical, the next six were administrative, and two highest paid were executive. The six administrative grades involved either the performance of responsible office work along specialized and technical lines requiring specialized training and experience, and the exercise of independent judgment or supervision of operations or offices, while the executive grades involved still higher supervisory or administrative functions.

To assist in formulating a federal personnel program, at the end of the 1920s the Personnel Classification Board (which had been created by the Classification Act of 1923) conducted a large survey, covering 500,000 employees in 1,400 establishments, of private employers’ personnel policies, including overtime com-
From World War I Through World War II

penetration.14 The PCB discovered that in offices of both large and small firms it seemed to be standard practice not to pay for overtime work other than supper money: 64 percent of firms surveyed employing 33 percent of the total number of employees did not pay for overtime. Many larger offices did pay supper money (ranging from 75 cents to $2), but not unless an employee worked at least one or two hours of overtime. The other 36 percent of firms employing 67 percent of office employees paid for overtime, meaning that more larger offices paid than smaller ones. However, most of the larger offices paid at a fixed hourly rate: payment at a rate higher than the regular rate was infrequent and confined largely to railroads.15 The PCB survey disclosed that in private-sector offices:

An excessive amount of overtime has a bad effect both upon the health of the employees and upon their morale. Tests have shown that the total production of an employee frequently working overtime is not increased beyond the normal output. It is, therefore, the general policy in most offices to discourage overtime and to eliminate it as far as possible by increasing efficiency and production during the regular working hours.16

Nevertheless, neither this fact nor the datum that in the British civil service lower clerks, typists, and stenographers normally working 42-hour weeks could be paid time and a quarter for the first 12 overtime hours, time and a half for the next six, and double time for all hours beyond 6017 induced the U.S. government to adopt an overtime-pay regime for its clerical workers before World War II.

By the mid-1930s, the federal government employed, outside of the postal service and industrial undertakings, about 200,000 employees in clerical, technical, administrative, scientific, and professional services, who, because of their “traditional ‘white collar’ and professional antagonism” to labor unions and their wide variety of occupations, had been “the slowest of all sections of the federal service to organize.”18 On October 24, 1938, the day the FLSA went into effect, Charles Stengle, the president of the American Federation of Government Employees,19

17PCB, Report of Wage and Personnel Survey at 455-56. In addition, lower-grade executives and higher-grade clerical servants in the British civil service could be paid for authorized overtime at a rate not to exceed 5 shillings per hour if 200 hours or more were worked in four consecutive weeks; where the normal workweek was 42 (or 44) hours, the overtime rate kicked in after 184 (or 192) hours. Id. at 456.
18Spero, “Employer and Employee in the Public Service” at 211.
19On the background of the dispute with the NFFE that prompted the AFL to charter
issued a statement welcoming the new law as ""a milestone of the greatest im-
portance in the march of American labor,"" but observing that ""large numbers of
Government employees work considerably longer hours, which will not be reduced
in any way by this law."" A great many AFGE members worked much more than
44 hours, for whom ""no relief is in sight...at the moment."" For example, in prison
service workweeks of 50-70 hours were by no means uncommon. Without fully
reflecting the huge gaps in coverage for private-sector white-collar workers,
Stengle summarized the situation: ""The overtime problem in the Government
service is in one respect more serious than in many private employments, for with
few exceptions employees working on a monthly or per annum basis get no pay for
overtime.""20

Thus as the next world war drew inexorably closer, while federal blue-collar
employees were generally entitled to time and a half for overtime work,21 their
white-collar colleagues continued, as they had since the nineteenth century, to face
a radically different statutory situation:

It shall be the duty of the heads of the several executive departments, in the interest of the
public service, to require of all clerks and other employees, of whatever grade or
class,...not less than seven hours of labor each day, except Sundays and...public holidays...:
Provided, That the heads of the departments may, by special order, stating the reason,
further extend the hours of any clerk or employee...; but in case of an extension, it shall be

the AFGE in 1932, see Sterling Spero, Government As Employer 168-203 (1948); Spero,
"Employer and Employee in the Public Service" at 216-17.

2:6-7).

21Act of Mar. 28, 1934, ch. 102, Pub. L. No. 522, § 23, 48 Stat 509, 522 ("Provided,
That the regular hours of labor shall not be more than forty per week; and all overtime
shall be compensated for at the rate of not less than time and one half"). This overtime
provision applied to ""[t]he weekly compensation...for the several trades and occupations,
which is set by wage boards or other wage-fixing authorities...."" Id. ""[W]age board em-
ployees of the Government"" were judicially defined as ""mechanical employees who per-
form the same kind of work for the Government that others of the same trade perform for
private enterprise. Their wages are not set by statute in the Classification Acts, as are
those of administrative, clerical, and armed forces employees, because the Government,
being in direct competition with private employers for their services, must keep their
wages more nearly on a level with those of private enterprise in the area where they work.
Pertinent statutes, or executive orders..., grant to a board, or to a single administrator...the
power to fix the wages of mechanical employees in his enterprise."" Poggas v. U.S., 118
Ct. Cl. 385, 403 (1951).
Against this disparate treatment of federal government employees unions were beginning to protest with increasing vigor. At its national convention in December 1938, for example, the left-wing Federation of Architects, Engineers, Chemists and Technicians, taking note of the Civil Service Commission’s report that during a six-month period federal workers had worked more than 10 million overtime hours “amounting to more than 8 million dollars in unpaid compensation,” and arguing that the “U.S. Government should set an example to employers at large,” resolved that a Federal Workers Labor Standards Act should be passed providing a five-day, 35-hour week with overtime paid at time and a half the regular hourly rates and that working hours in the Navy Department and Yards should not be increased.23

World War II

[T]he white-collar worker...we can no longer call him the forgotten man. He has been disinherited, abandoned. ...

Since they are clerical, white-collar, and unorganized employees, they are unable to take advantage of the National War Labor Board. They are victims of prosperity, unable to compete as individuals for the better things of life or to voice their demands as a group. ...

This group is slowly being forced to write its living standard downwards, ...while their laboring brother climbs higher and higher, day by day, into the brackets of high incomes and proportionately higher living. ...

But theirs is a lonely divided cry for help, dimly heard against the united cry of agriculture and labor, industry and commerce, all those groups fortunately so constituted as to allow of organization. ... [I]t might be said that the white-collar worker and other unorganized groups are virtually subsidizing the workers of the organized groups.24


As war-induced inflation made basic statutory changes in pay schedules “almost inescapable,” the Roosevelt administration sought to persuade Congress to accept, at the very least, “[m]akeshift arrangements in the form of overtime pay...as temporary expedients on the grounds that an increased workweek” would reduce the need to hire additional government workers.25 Similarly, from the existing workforce’s perspective, overtime compensation was a way of adjusting its salaries to the increased cost of living so as to make them comparable to the increases that private sector industrial workers (and some federal employees) had obtained through the advent of the 48-hour week: “So long as revision in basic salary schedules seemed unattainable, overtime pay was eagerly sought.”26 In other words, the principles underlying overtime for white-collar workers that were being articulated had been deflected and displaced from a different setting—a wage dispute. Ironically, however, in an unprecedented break with societal understandings of the purposes of overtime regulation, the instrumental use that both sides made of overtime compensation as a substitute for salary increases anticipated the postwar attitude that the labor movement developed toward the FLSA overtime provision as a means—in what by the twenty-first century, in the wake of the Bush administration’s efforts to cut back white-collar coverage, became an unceasing Democratic refrain—of “making ends meet.”27

The Navy Department Contra Chairman Carl Vinson

It is too easy to act on the assumption that all consumers have surplus purchasing power; and that the high earnings of some workers in munitions plants are enjoyed by every worker’s family. This easy assumption overlooks the 4,000,000 wage workers still earning less than 40c per hour.... It further overlooks the millions of salaried, white-collar workers—the school teachers, the clergymen, the State, county, and city officials, the policemen, the firemen, the clerks—whose salaries have remained low, but whose living standards are being cruelly and inequitably slashed by higher food prices. ...

These unorganized millions must not become the forgotten men and women of our

25Gladys Kammerer, *Impact of War on Federal Personnel Administration 1939-1945*, at 215 (1951). See also *Civil Service in Wartime* 168 (Leonard White ed. 1945) (sponsors of overtime pay legislation had three objectives: uniformity; increased earnings to offset a rise in the cost of living; and, by authorizing longer hours, securing greater output from existing personnel and, if possible, reducing employment).


27See above chs. 2 and 16-17.
Unsurprisingly, congressional action on overtime work and pay for federal employees during the rearmament period in 1940-41 and then after U.S. entry into the war was driven by events shaping the employment of civilians by the military. The sharpest public conflicts yielding the deepest insights were ignited not by labor’s intervention, but by disputes between workaday bureaucrats, especially in the Navy Department, desperately and pragmatically trying to sustain ramped-up production schedules, and the anti-labor representative who ran the House Naval Affairs Committees—Carl Vinson of Georgia, who, during his half-century congressional tenure, chaired that committee from 1931 to 1946, and “ruled like a potentate.”

This dynamic was visibly on display at a hearing on May 14, 1940, which was convened by Vinson, against the backdrop of Nazi Germany’s overrunning western Europe, to determine how the naval shipbuilding program could be speeded up. Captain Charles Fisher, Construction Corps, Director of Shore Establishments, who handled personnel questions for all Navy bureaus, sought to boil down the “complicated question” of working conditions of civilian labor in the Navy Department and to persuade Vinson of the practical need for overtime pay by recommending that it would be ultimately advantageous, even in normal times, that all 105,000 naval civilian employees—including laborers, helpers, mechanics, and white-collar employees—have an eight-hour day and 40-hour week with time and a half for overtime. But whereas the blue-collar per diem employees (who made...
up 90 percent of the workforce) were paid time and a half for hours beyond 40, which were permissible only in extraordinary unforeseeable emergencies involving loss of life or government property, "injustice results to...white-collar employees and the salaried employees of the Navy Department in Washington...because overtime cannot be granted to them, although we have the right to work them overtime and do work them overtime when necessary...and they do not get a cent." Fisher tried to buttress his recommendation by pointing out that 90 percent of all union agreements in the United States included a provision for time and a half, which was also "in accordance with most all of the customs of the industries throughout the country." If Fisher meant to derive a justification for his proposal from the latter point by suggesting to the committee that almost all private-sector white-collar employees received overtime, he knew better (as he demonstrated at later hearings) and misled them.

Unwilling to rely solely on such custom, Fisher came to his "main point" in offering another incentive for Vinson to accept generalized overtime pay: the Navy’s statutory recommendation included repeal of the actual eight-hour day legislation, which would confer on the department the "greater freedom" of requiring overtime outside of extraordinary emergencies. At first Vinson seemed to acquiesce in the proposal—provided that it be applied only to the limited emergency preparedness period. But when Vinson finally realized that Fisher intended to incorporate all of white-collardom, he again turned obdurate:

The CHAIRMAN. Does that mean down here in the Navy Department if stenographers and clerks work over 8 hours a day or 40 hours a week—does that mean designers and all that group will get time and a half for overtime?

Captain FISHER. That means that during the last 6 months or year, and increasingly so during the last few weeks, many designers, stenographers, and clerks, including our own, have stayed until 9 o’clock or 10 o’clock at night and have not earned an extra cent pay for it.

The CHAIRMAN. But that happens in the Government service all the time, and when you start to embark upon that I am afraid you are getting on thin ice. [I]f a...chief wants a

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32 Hearing on H.R. 9822 to Expedite Naval Shipbuilding at 3289-90.
33 Ignorance of the large-scale exclusions of white-collar workers from the FLSA was widespread. Even Senator Robert Wagner, the leading New Deal labor legislator, in discussing a drafting error in H.R. 9822 that would have caused some workers to lose their overtime entitlement, asserted: "This is the only case I know of in all our labor laws in which the worker is deprived of time and a half for overtime." CR 86:8824 (June 21, 1940).
34 Hearing on H.R. 9822 to Expedite Naval Shipbuilding at 3290.
35 Hearing on H.R. 9822 to Expedite Naval Shipbuilding at 3291.
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clerk to stay in any department and it is very important, that clerk stays right on and does the work.

Captain Fisher. We have been prohibited by law to give them time off to compensate for it.

The Chairman. Oh, yes; I know. But they can cut down the period in which they go to get ready to leave the office and that might save considerable time. [Y]our objective is all right when they are turning out these ships, but when you apply it down here in the Navy Department to every stenographer and every clerk and every file clerk and janitor and everybody else, to say, "If you work over 8 hours today and over 40 hours during the week we are going to pay you time and a half over time." I am afraid we are going a little bit too far in establishing this principle. These are quasi-professional positions, particularly the position of designer. It is above that of a laborer.... And you put that upon the same basis that you put a laborer, and [you] are taking it out of the professional class. 

Then it would naturally follow if a lawyer down here at the Department stays and works until 10 o'clock the same thing would apply. ... I think it would be going too far. I don't think it should apply to clerical positions or to professional positions. ... So far as...the clerical force in the shipbuilding plant, it is all right.36

Vinson continued to insist that a man with a permanent civil-service job entailing steady employment during slow times simply "should not be classified in the group of men who hasn't that character of job." In addition, Vinson worried that if Fisher's proposal were adopted: "You will soon have the Navy Building lit up like a cathedral at night with all the typewriters going."37 That Vinson in reality was worried not about such overtime work, but overtime pay for "the white-collar workers who are really what might be called in mass clerical production here in Washington,"38 was underscored by his failure to respond to Fisher's remark that the building was already lit up (for unpaid workers). In any event, Fisher testified that he saw no difference between clerical and technical employees in the navy yard and those in the Navy Department. Moreover, it was his "firm conviction...that the labor movement in this country is such that this will be attained in a very short time anyway." At this point Fisher allowed himself to be provoked by Vinson into the retrospective judgment that "we should have paid overtime" during World War I as well, which diminished much of the credibility he had been able to build up with Vinson: "This is the first suggestion that has ever been made to pay department heads or department clerks or janitors or anybody time and a half

36Hearing on H.R. 9822 to Expedite Naval Shipbuilding at 3292.
37Hearing on HR. 9822 to Expedite Naval Shipbuilding at 3293.
38War Overtime Pay Act of 1942: Hearings Before a Subcommittee of the Committee on Civil Service United States Senate on S. 2666 and S. 2674, at 65 (77th Cong., 2d Sess., Sept. 22-23, 1942) (statement of Eleanor Nelson, secretary-treasurer, United Federal Workers of America (CIO)).
overtime for working over 40 hours a week. I know of no person that has ever broken down by working 40 hours a week.”

Vinson’s antipathy to overtime compensation for white-collar workers was so intense, that, although he had opposed enactment of the FLSA in 1938, he confided to Fisher that the manual laborer’s entitlement to overtime pay was self-explanatory: “The fellow at Portsmouth or New York in his overalls sweating on a ship to turn these ships out, when you keep him overtime he is entitled to payment along the lines suggested by you. I do not follow you at all as to the Navy Department here in Washington. ... It should apply to all these industrial activities and that is the only place it should apply...” When Fisher replied that he regarded universal extension as “inevitable,” Vinson’s retort left not a sliver of doubt that he was not the political actor to hide his potent human agency under a bushel: “It is not inevitable as long as I am sitting here.”

Four days later, when Fisher reported back with other Navy officers to face further interrogation, Vinson could not resist returning to the subject, this time focusing on the design profession. Ironically, although Vinson’s rigidity seemed, in the context of the practical personnel motivation problems that preoccupied Fisher, counterproductive, he inadvertently identified the unprincipled character of labor’s fight for overtime pay divorced from a stance on overtime work itself:

I told them that the Government did not pay professional people for time-and-a-half overtime; that if they wanted an increase in pay, such as time and a half would bring about,...what they wanted was to obtain a different civil-service rating and get a higher classification than they have today. ... You do not want to pay a draftsman on the basis of time and a half for overtime, as a matter of principle. If he is doing extra work, you can compensate him by putting him in a different classification.... [B]ut if you are going to put the professional personnel and the classified personnel upon time and a half for overtime,

39Hearing on H.R. 9822 to Expedite Naval Shipbuilding at 3293.
40W. H. Lawrence, “Fight on 40-Hour Week Turns on the Political,” NYT, Mar. 29, 1942 (E8:1-2).
41Hearing on H.R. 9822 to Expedite Naval Shipbuilding at 3294. In contrast, for example, Wilbur Mills, the “formidable” but “adaptive” chairman of the House Ways and Means Committee from the 85th through the 93rd Congress, when confronted with the Johnson’s landslide electoral victory in 1964, which “reallocated power,” had to choose between the role of “reluctant bystander” or “adroit manager of legislation which in another setting he would have preferred to block.” In fact, Mills had “always adjusted to legislative certainty and tried to take charge of the form which the inevitable takes.” In 1965 he was instrumental in shaping Medicare legislation that he had opposed for years and that administration supporters had never imagined feasible. Theodore Marmor, The Politics of Medicare 41, 105, 109 (1973 [1970]).
you are adopting an entirely new principle. ... There is nothing else to it; the objective is all the same—all they want is more money. And, instead of putting them on time and a half for overtime, you can give them different ratings in the civil service.42

Amusingly, Vinson then did an about-face, deferring to the judgment of Fisher’s superior, Rear Admiral Alexander H. Van Keuren,43 who testified that Vinson’s proposal would still not deal with the situation in which some draftsmen would work overtime and others would not. But when Vinson then instructed Van Keuren to “fix up an amendment,” and Van Keuren asked whether it was to apply to all the classified people in the civil service, Vinson repeated that: “We are not going to take in this clerical force in the City of Washington.”44 Vinson’s rationale for giving time and a half to draftsmen appears to have been rooted in their link to manual labor: “I know the draftsman has to go right along with the man who is driving rivets. There is no need to have a man doing riveting work, unless you have a man to draw off on a piece of paper to show him where they go, because the man who drives rivets has to have a blueprint to show him exactly what to do.”45

At this juncture, events moved swiftly, as the committee members asked Fisher to draft an amendment to cover not only draftsmen and designers, but also blueprinters and others, and Vinson himself read out a telegram from the Naval Design Alliance at the Philadelphia Navy Yard requesting inclusion, prompting Vinson to observe that “we will try to work that out.”46 Then after taking Sunday off, the committee resumed the hearings on May 20, at which Vinson announced that Fisher had provided a substitute for the “most important section in the whole bill...which refers to labor.” It provided for hours in excess of five eight-hour days in connection with work on naval vessels or aircraft during a presidentially declared national emergency (not to exceed 48 hours unless the president declared it in the interest of national defense) and time-and-a-half overtime (calculated on the fictitious basis that employees worked 360 days a year) for per diem, professional, and subprofessional employees, and to blueprinters, photostat, and rotaprint operators, inspectors, supervisory planners, estimators, progress men, and assistants to ship and plant superintendents of the CAF service.47 This language, according

42Hearing on H.R. 9822 to Expedite Naval Shipbuilding at 3323-24.
43On Van Keuren’s career, see http://www.oac.cdlib.org/findaid/ark:/13030/tf5v19n7x5/bioghist/635702779.
44Hearing on H.R. 9822 to Expedite Naval Shipbuilding at 3325.
45Hearing on H.R. 9822 to Expedite Naval Shipbuilding at 3327.
46Hearing on H.R. 9822 to Expedite Naval Shipbuilding at 3327-28. The Alliance may have been associated with the FAECT.
47H.R. 9822, § 6 (76th Cong., 3d Sess., May 20, 1940); Hearing on H.R. 9822 to
to Vinson, “takes care of the professional people known as designers, draftsmen, engineers, and it takes care of everybody that works.”

The report that Vinson issued two days later to accompany H.R. 9822 reflected these changes (specifically mentioning draftsmen, engineers, and designers) and declared that overtime pay had not previously been allowed to any per annum government employees: “This section corrects that inequality by granting overtime pay to the draftsmen, engineers, and other subprofessional and professional employees and others upon whose rapid production of designs and working plans nearly all ship and aircraft work depends.” Vinson had thus acquiesced in the categorical breach by granting overtime to some white-collar employees, but he succeeded in staving off, for the time being, Fisher’s “inevitable” extension to clerical workers. Availing itself of a trope that would be deployed again, the committee report also observed that, although shift work was the best way to expedite work, in some cases the nature of the job made it impossible: “For example, shifts cannot be worked on a design job in the drafting board any more than shifts can be worked in painting a portrait. This section of the act takes account of that fact by permitting work up to a maximum of 48 hours per week.”

Vinson, the floor manager for the House debate on H.R. 9822 on May 28, maintained that the bill’s labor section did nothing to affect adversely any benefits


48 *Hearing on H.R. 9822 to Expedite Naval Shipbuilding* at 3343.
52 On the House floor Vinson stated that it was the desire of the Navy Department and the committee to spread employment as much as possible and “reduce the appalling number of unemployed in this country.” *CR* 86:7022-23 (May 28, 1940).
to labor conferred by any labor laws enacted during the Roosevelt administration, including the FLSA and the Walsh-Healey Act. He added that the bill provided for overtime pay for work in excess of eight hours a day and 40 a week for all naval employees “except certain clerical and salaried employees whom [sic] the committee did not feel were entitled to overtime pay because of their salaried status and common acceptance of the fact that such employees are expected, being on a per annum salary basis, to work beyond regular working hours from time to time as the needs of the office or the business may require.”

Denying what he referred to as “erroneous” press reports to the effect that sections of the bill were “mere subterfuges to destroy hard-won rights of labor,” Vinson asserted that H.R. 9822 preserved those rights. Vinson’s denial rested on his view that the bill’s only effect on the “rigid” actual eight-hour laws was to permit employees to work more than eight hours “by the simple expedient of paying them time and a half for overtime. In other words, [it] does away, temporarily, with the requirement that it takes an extraordinary emergency to justify work in excess of 8 hours a day.” Vinson further downplayed this categorical transformation of a real maximum-hours regime into a mere overtime regulation by suggesting that the former never had any bite to it since “[n]obody knows just what constitutes an ‘extraordinary emergency,’ anyway.” In contrast, for the FLSA, which he claimed H.R. 9822 was “patterned from,” Vinson had nothing but praise as “an intelligently drawn law in all respects, particularly the flexibility permitted in the question that concerns us—hours of labor.”

An administrative enforcement apparatus was, as far as Vinson was concerned, superfluous because the “law of self-preservation, one of the first laws of Nature,” would intervene in the sense that “[e]very union will see that every man who works overtime gets his time and a half pay.” The only congressman who outflanked Vinson on the right during the debate was anti-labor Michigan Republican Clare

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54CR 86:7022 (May 28, 1940). In the immediately following sentence Vinson said: “Of course, that does not apply to stenographers, messengers, and others of the clerical force down in the Navy Department.” Id. His use of the vague demonstrative “that” is confusing: although it seems to suggest that such employees were excluded from the exception, they were precisely the ones he meant to and did deprive of overtime pay.

55CR 86:7023.


57CR 86:7024. Vinson noted that H.R. 9822 would also have no impact on the Walsh-Healey Act because the Labor Secretary’s regulations permitted unlimited overtime so long as employers paid time and a half. Id.

58CR 86:7041.
Hoffman, who offered an amendment that would have made the NLRA inapplicable to any activity undertaken under H.R. 9822 on the grounds that: "[W]hatever may be said about Hitler one fact remains, that he is efficient. ... Most of us know he prepared for this war. He did not have any Walsh-Healey Act; he did not have any Wage and Hour Act; he did not have any N.L.R.A., and some way he got along without an N.L.R.B. ... If a war comes to our shores, it is not going to be a 40-hour-a-week war, nor will any man fighting that war get time and a half overtime pay." Although Vinson ordinarily agreed with "a great deal" that Hoffman had to say, he assured the House that if the amendment would have speeded up shipbuilding, it would already have been included in his "very technical" bill. After Hoffman's amendment was rejected, the House passed the bill 401 to 1.

Several days later discussion of H.R. 9822 was taken up by the Senate Naval Affairs Committee, whose pro-labor and isolationist chairman, Massachusetts Democratic David Walsh, believed that it was "possible to live in some degree

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60CR 86:7043.
61CR 86:7043-44.
62CR 86:7045. Left-winger Vito Marcantonio of the American Labor Party cast the sole no vote—which was apparently not directed at the labor provisions—as he did with regard to a number of military appropriations bills between the signing of the Hitler-Stalin pact and the Nazi invasion of the Soviet Union because he opposed a system under which the United States "would have been involved in a Munich men's war, essentially imperialistic." "Vito Marcantonio Falls Dead in Street," NYT, Aug. 10, 1954 (1: 8, 14:1:4 at 3-4).
63"Ex-Senator Walsh Dies at Age of 74," NYT, June 12, 1947 (25:1). In spite of his pro-labor reputation, Walsh failed to grasp the real-world enforcement even of the statute named for him. Thus after he stated that "I am sure in my community...if somebody worked overtime, if they did not comply with the law, they would not do it more than 5 minutes before there would be a protest made and they would be brought into the courts," Wage and Hour Administrator Walling had to remind him that "many Government contracts...are awarded to companies which do not have any labor organizations and where there is no opportunity for labor organizations to know what the conditions are within that factory." To Expedite Naval Shipbuilding at 113-14. Representative Albert Engel (Rep. MI) held a related unrealistic view of the FLSA's overtime regulation. He believed that "[t]he only result" of suspending it "would be to take from the comparatively small group of lowest paid unorganized workers the benefits of the law," but that suspension "would undoubtedly drive them into the ranks of organized labor," because if one factory had time and a half after 40 hours and another worked 48 hours at straight time, it "would not be long before the second factory would be organized...." CR 88:3682 (Apr. 23, 1942).
of peace, even with a tyrant.... We have done so for 150 years. There have been Hitlers before."64 The lead witness, the ubiquitous Captain Fisher, assured the committee that the bill’s purpose was not to change wage-and-hour provisions or to affect any of the country’s economic or sociological conditions, but solely to expedite shipbuilding.65 On hearing Fisher explain that the House bill entitled certain civil service workers to overtime pay, but excluded the white-collar clerical workers, Walsh asked how they could be kept out once the doors had been opened. In response Fisher repeated his statement to the House committee that they neither could nor should be excluded: “I think it is inevitable that any civilian employee of the Government, when called upon to work overtime, will eventually get overtime.”66 However, Fisher’s testimony prompted only the former Progressive California Governor Hiram Johnson to remark that “[i]t would be an infinitely more just thing if we included” the clerical workers “in the classes...that receive for overtime additional pay....”67

The Solicitor of Labor, Gerard Reilly, testified that the House bill conflicted with the policy announced by President Roosevelt during his fireside chat on U.S. military preparedness just five days earlier68 that there was “nothing in our present emergency to justify making the workers of our nation toil for longer hours than those now limited by statute.”69 Although Reilly focused on a drafting error in the House bill that would have prevented laborers and mechanics from receiving overtime pay,70 he also emphasized that while “many low-paid common laborers and mechanics as well as clerical and custodial workers...are denied overtime compensation, the bill would require overtime compensation to already highly paid professional workers (whose salaries in the Government service range as high as $9,000 per year), who would seem to fall in the class least entitled to be favored. Such a capricious and costly policy would seem conformable neither to the President’s policy nor to the announced objective of the House Naval Affairs Committee.”71 At this point Reilly misinformed Walsh in answering yes to his

64CR 86:8783 (June 21, 1940). See also “Walsh Navy Bill Passed Senate,” NYT, June 22, 1940 (6:4).
65To Expedite Naval Shipbuilding at 5-6.
66To Expedite Naval Shipbuilding at 55.
67To Expedite Naval Shipbuilding at 59.
68To Expedite Naval Shipbuilding at 95.
69Franklin D. Roosevelt, Fireside Chat (May 26, 1940), in FDR’s Fireside Chats 152-62 at 159-60 (Russell Buhite and David Levy eds. 1993); “Text of President Roosevelt’s Radio Talk on the State of Our Defenses,” NYT, May 27, 1940 (12:1-6).
70To Expedite Naval Shipbuilding at 98.
71To Expedite Naval Shipbuilding at 99.
question as to whether $7,000-a-year Navy Department lawyers would get overtime pay. Palpably outraged by this news, Walsh promptly opined that Congress would not “stand for wholesale overtime in every Department of the Government.”72 (Walsh had not reacted at all when earlier Fisher had said that the highest salary of the group of draftsmen and designers was $5,600.)73 In order to conform the bill to the Vinson committee’s announced intention and Roosevelt’s policy, Reilly presented an amendment that would have expressly excluded professional and clerical employees, but it was not enacted.74

Unlike Vinson’s committee, the Senate Naval Affairs Committee did hear testimony from union witnesses. In addition to a brief statement of support by the AFL for overtime pay for white-collar employees,75 Charles Stengle of the AFGE pointed out that under the House bill “on that side of the table a high official will be working overtime with time and a half for it, and his stenographer, or his confidential clerk on this side will work the same hours but will only get the present salary without any regard to overtime.” On behalf of this “sort of lost battalion” of about 6,000 white-collar clerical workers in the Navy Department and navy yards Stengle was able to elicit a confirmation of the injustice, again, only from Senator Hiram Johnson.76 In case the other committee members had not grasped the disparity, H. J. Coley, an AFGE member from the Norfolk Navy Yard, disclosed that H.R. 9822 would pay overtime to 315 per annum employees there whose salaries averaged $2,393 and deny it to 605 with an average salary of $1,493. This low-paid group included $600 messengers and stenographers paid

72 To Expedite Naval Shipbuilding at 100. Although the text of the bill was ambiguous, Vinson’s committee report, as quoted above, expressly limited overtime pay to “draftsmen, engineers, and other subprofessional and professional employees and others upon whose rapid production of designs and working plans nearly all ship and aircraft work depends.” Lawyers would not have been encompassed by that definition.
73 To Expedite Naval Shipbuilding at 55.
74 To Expedite Naval Shipbuilding at 100-101. Ironically, it would probably have excluded the very draftsmen and engineers whom Vinson had been persuaded to include.
75 To Expedite Naval Shipbuilding at 108, 143 (Paul Scharrenberg, AFL national legislative representative). The International Association of Machinists, National Federation of Government Employees, United Federal Workers, and national Federation of Federal Employees also testified briefly in favor of inclusion of all white-collar workers in the Navy Department. Id. at 140-41, 143, 146-48, 151.
76 To Expedite Naval Shipbuilding at 130-31 (quote at 130). Stengle had himself served one term in Congress. Another AFGE representative, John Ross, added that demoralization would also be generated by failure to pay overtime to clerks who worked together with laborers who did receive overtime. Id. at 137
Getting down to particulars, Coley explained that under the bill:

the shop superintendents making, say, $20 to $25 a day, if they come in and work Saturday they will receive $30 or $35 a day. The stenographer who takes the dictation...and makes only $5 a day will not receive a penny extra for Saturday work.

In other words...the boss will receive more pay for work on Saturday than the stenographer...or the typist gets for the whole week. We do not believe that is good for the morale of the service.

Finally, John L. Lewis and Philip Murray, the president and vice president of the CIO, submitted almost identical letters observing that “strangely” and “[i]ronically,” whereas clerical workers were excluded, the bill granted overtime pay to “professional and supervisory employees, who have not in normal times received such protection.”

One union that did not testify at the hearings but that was holding its national convention in New York City exactly at the same time was the left-wing Federation of Architects, Engineers, Chemists and Technicians. Noting that the Navy and other government departments had indicated that they might demand overtime work from per diem and annual technical employees and that the navy yards at Philadelphia and Washington had already made the demands, the FAECT, more interested in work spreading than premium pay, adopted a resolution “that government departments hire enough of today’s unemployed technicians to perform without overtime schedule of work” and “that overtime demands be restricted to short periods of demonstrated necessity....” To be sure, the union added that any work that was performed beyond eight hours a day or 40 hours a week be paid at time and a half “the actual annual wage (which for annual employees is defined to be the annual wage divided by 52x40 hours).”

Perhaps the most tantalizing information to emerge at the Senate hearing was a suggested substitute provision that Walsh received (without identifying its source) that would have tapered overtime pay for per annum Navy employees so that those with an annual salary of $3,200 or less would have been entitled to time and a half, employees with a salary between $3,200 and $4,100 would have

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77 To Expedite Naval Shipbuilding at 135-36.
78 To Expedite Naval Shipbuilding at 136.
79 To Expedite Naval Shipbuilding at 150-51.
received straight time, and those whose salaries exceeded $4,100 would have received no additional compensation. With different dollar amounts, such a phase-out scheme was in fact the principle that Congress eventually adopted.

The bill that the Senate committee reported out on June 20 was more comprehensive than the House bill in that it extended uniform treatment of overtime compensation to all Navy Department employees. The committee felt that it was “wrong in principle to exclude the 4 percent of the total employees since this small group comprises, for the most part, the lower paid employees in the per-annum and per-month classes.” As a matter of “justice” and to “insure the highest morale,” the bill placed them on an equal basis with the 90 percent of employees already receiving overtime and the six percent added by the House bill. The committee’s universalist reorientation was presumably a result of the Navy Department’s repeated urging that “all of its per-annum employees should be allowed time and a half for overtime.” To be sure, the Senate bill also made overtime hours beyond eight and 40 subject to the condition that “additional employees cannot be obtained to meet the exigencies of the situation.”

If for some unexplained reason Walsh and his colleagues suddenly decided to

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81 *To Expedite Naval Shipbuilding* at 132.

82 In a somewhat different variant, Congress, as a wartime stopgap measure, enacted salary-based graduated overtime pay rates for post office inspectors and first-, second-, and third-class postmasters: overtime pay rates peaked at 20 percent on salaries of up to $2,000 and decreased to 5 percent on salaries between $5,000 and $7,999; overtime compensation was phased out for annual salaries of $8,000 or more. Act of June 12, 1944, ch. 242, Pub. L. No. 334, 58 Stat. 273, 274.


84 *To Expedite Naval Shipbuilding* at 56 (Captain Fisher). Fisher made the statement that the Navy Department had expressed this opinion before the Senate Naval Affairs Committee on another bill after answering a question from Senator James Davis (the former Labor Secretary under Harding, Coolidge, and Hoover) as to the highest salary ($5,600) of the draftsmen and others for whom the Navy was urging overtime compensation. Since a perusal of other hearings did not reveal such earlier testimony, Fisher’s reference remains unidentified.

85 H.R. 9822, sect. 5(a) (76th Cong., 3d Sess., June 17, 1940). Or as Walsh put it more fancifully: “there shall be no overtime work of any kind by anybody, unless no one can be found in the country who can do the work except some expert who is indispensable...such as drafters of plans, skilled mechanics, and technicians of one kind or another.” But there was “no reason why a helper in the navy yard needs to work overtime. Anybody can learn to be a helper in a few days.” *CR* 86:8824 (June 21, 1940). This Senate amendment was included in the statute.
pay overtime to $7,000-a-year lawyers after all, Vinson was having none of it. The conference committee voted to modify the Senate provisions "by refusing to allow time and one-half overtime to per annum employees except those specifically stated, namely professional and subprofessional employees and a few employees of the CAF group, such as blueprinters, rota print operators, inspectors, supervisory planners, and estimators. It denies overtime compensation to the clerks, stenographers, typists, etc."\(^6\)

And thus on June 28, the Act to Expedite National Defense, applying to the Navy Department and the Coast Guard and their field services, was passed, which authorized work beyond eight hours per day and forty hours per week and granted nominal time and a half compensation—artificially depressed by calculating a worker’s regular day’s pay as 1/360 of his annual salary—for weekly hours beyond 40 to the aforementioned white-collar workers.\(^7\)

Two days before Congress acted to extend government workers’ hours, in the Soviet Union the All-Union Central Council of Trades Unions had announced that with the capitalist world once again “shaken by a world war,” the “thumbscrew of capitalist exploitation has been tightened to the limit. ... If in capitalist countries the worker is compelled to work ten or twelve hours for the bourgeoisie, our Soviet worker can and should work more than now, work at least eight hours....” Consequently, office workers’ daily hours there were increased from six to eight.\(^8\)

A statute similar to H.R. 9822 covering the War Department was enacted in October.\(^9\) Since no uniformity had been achieved in the regulation of federal employees’ overtime compensation—for example, even where white-collar employees received such pay, it was depressed by the fictitious 1/360 formula, where-

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\(^7\)An Act to Expedite National Defense, ch. 440, Pub. L. No. 671, § 5(a), 54 Stat 676, 678 (June 28, 1940).

\(^8\)“Text of Soviet Order Increasing the Work Week,” NYT, June 27, 1940 (14:3-6). See also G. Gedye, “Russia Abolishes 5-Day Work Week,” NYT, June 27, 1940 (1:3).

\(^9\)Act Establishing Overtime Rates for Compensation of Employees in the Field Services of the War Department, ch. 903, Pub. L. No. 873, 54 Stat 1205 (Oct. 21, 1940). See also Act Authorizing Overtime Rates of Compensation for Certain Per Annum Employees of the Field Services of the War Department, the Panama Canal, the Navy Department, and the Coast Guard, ch. 168, Pub. L. No. 100, 55 Stat 241 (June 3, 1941) (time and a half for hours beyond 40 for per annum employees whose “overtime services are essential to and directly connected with expeditious prosecution of overtime work” on which employees enumerated in § 5(a) of Act of June, 28 1940 and § 1 of Act of Oct. 21, 1940, are engaged).
as blue-collar workers were largely paid real time and a half⁹⁰—thus exacerbating morale problems.⁹¹ both the Navy and War Department statutes were set to expire on June 30, 1942,⁹² and the labor movement was pressing for a reduction in overtime among federal employees in order to hire the unemployed and/or for overtime pay for hours beyond 40,⁹³ some members of Congress continued to propose legislation to attain universal overtime compensation for the civil service. At the same time, however, others in Congress sought to undo all existing overtime legislation, including the FLSA, or, at the very least, to restrict overtime pay to weekly hours beyond 48.

The predicament confronting opponents of overtime compensation was well illustrated at another Vinson committee hearing at the beginning of 1942. At issue was a bill authorizing time and a half pay for employees in the field service of the National Advisory Committee for Aeronautics (a federal agency created in 1915 to promote aviation research) “whose overtime services are essential to the national defense program” in a manner comparable to the work performed by the aforementioned employees of the Navy and War Departments.⁹⁴ John Victory, the NACA secretary, testified that if the bill became law, the agency could secure the equivalent of 25 percent of its additional needs “merely by extending the work hours that much, and...we will get that additional 25 percent of productive effort at not one-and-a-half times the cost for the additional hours beyond 40 per week,

⁹⁰E.g., Act of July 2, 1940, ch. 508, Pub. L. No. 703, § 4(b), 54 Stat 712, 714 (War Dept. laborers and mechanics engaged in manufacture or production of military equipment are entitled to time and a half after 8/40 hours); Act to Expedite National Defense by Suspending, During the National Emergency, Provisions of Law that Prohibit More than Eight Hours’ Labor in Any One Day of Persons Engaged upon Work Covered by Contracts of the United States Maritime Commission, ch. 838, Pub. L. No. 831, 54 Stat 1092 (Oct. 10, 1940) (every laborer and mechanic employed by any contractor or subcontractor entitled to time and a half after 8/40 hours); Act to Make Emergency Provision for Certain Activities of the United States Maritime Commission, ch. 84, Pub. L. No. 46, 55 Stat. 148 (May 2, 1941) (similar to Act of Oct. 10, 1940).

⁹¹Kammerer, Impact of War on Federal Personnel Administration at 217.

⁹²Act to Expedite National Defense, § 12, 54 Stat. at 681; Act Establishing Overtime Rates for Employees in the Field Services of the War Department, § 2, 54 Stat. at 1205


but at a fraction of the cost, the fraction being 89.4 percent...because our employees are per annum employees,” whose overtime pay was reduced by the 1/360 formula. The ranking Republican on the House Naval Affairs Committee, Melvin Maas of Minnesota, who was “violently opposed to paying overtime to anybody in time of war,” asked Dr. George Lewis, the director of aeronautical research: “Most of your people are research people and, if they can get somewhere near comparable pay, they will stay with you because they love to do research work; is that not correct?” After eliciting a positive response that also confirmed his implicit presupposition that professional scientists (even in peacetime) were not fully rational economic actors seeking to extract every dollar that their labor market position would have enabled them to secure, Maas was surprised but frustrated by the reply to his next question:

Mr. MAAS. Even repealing time and a half throughout the whole system would not help you; it would still not put you on a competitive basis?
Mr. VICTORY. If they repeal time and a half for everybody?
Mr. MAAS. For everybody.
Mr. VICTORY. Oh, yes; we would be all right then.
Mr. MAAS. I do not suppose we can repeal it; but it just seems utterly ridiculous to me, in time of war, to be paying time and a half overtime beyond 40 hours a week.
Mr. VICTORY. I might say the N. A. C. A. is opposed to the principle of paying time and a half for overtime in the Government, but we are confronted with conditions that make it necessary.
Mr. MAAS. The time-and-a-half was originally for the purpose spreading employment; it was not to pay an extra wage, but was a penalty upon employers for working people more than 40 hours instead of hiring more people to do the work; but, in your case, there is an actual shortage of the people you have to get?
Dr. LEWIS. That is right.96

Joining this collective lamentation, Vinson, who seemed finally both to discern the limits of his obstructionist power in labor law matters that transcended his committee’s jurisdiction and to appreciate the truth of Captain Fisher’s inevitabilist vision, told Victory and Lewis: “I thoroughly agree with Mr. Maas...but unfortunately, it is around our necks and we have to put you in the same

95 Hearing on H.R. 6133, in Hearings Before the Committee on Naval Affairs of the House of Representatives on Sundry Legislation Affecting the Naval Establishment 1942, at 2248.
96 Hearing on H.R. 6133, in Hearings Before the Committee on Naval Affairs of the House of Representatives on Sundry Legislation Affecting the Naval Establishment 1942, at 2248-49.

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position. In fact, however, Vinson had not quite abandoned resistance. Just two months later he was chairing a hearing on a bill to “permit the performance of essential labor on naval contracts without regard to laws and contracts limiting hours of employment....” The bill’s author was Howard Smith of Virginia, who had during the preceding several years been leading the attack on the NLRB. Smith, who refused to let himself be pinned down as to whether, after abrogating the 40-hour week, he would put in its stead 48 or 54 hours, preferred to “leave that open”: “I am from a farming district. The people in my section work from what we down south call ‘kin’ to ‘can’t.’ This is from the time they can see in the morning until they cannot see at night, and most of those people do not have anything the matter with their health or with their efficiency either. ... Let us forget about normal times, and remember that we are in war...and this bunk about social gains we have to forget about for a little while....”

97 Hearing on H.R. 6133, in Hearings Before the Committee on Naval Affairs of the House of Representatives on Sundry Legislation Affecting the Naval Establishment 1942, at 2249
98 Hearings on H.R. 6790, To Permit the Performance of Essential Labor on Naval Contracts Without Regard to Laws and Contracts Limiting Hours of Employment, to Limit the Profits on Naval Contracts, and for Other Purposes (Mar. 19, 1942), in Hearings Before the Committee on Naval Affairs of the House of Representatives on Sundry Legislation Affecting the Naval Establishment 1942, at 2429 (77th Cong., 2d Sess., 1942) (Comm. Print No. 205). In fact, toward the end of the hearings Vinson himself offered a substitute for the bill that amended the FLSA so that for the duration of the national emergency overtime pay kicked in only after 48 hours. Hearings on H. R. 6790, To Permit the Performance of Essential Labor on Naval Contracts Without Regard to Laws and Contracts Limiting Hours of Employment, to Limit the Profits on Naval Contracts, and for Other Purposes, Part 3 (Apr. 29, 1942), in Hearings Before the Committee on Naval Affairs of the House of Representatives on Sundry Legislation Affecting the Naval Establishment 1942, at 3085 (77th Cong., 2d Sess., 1942) (Comm. Print No. 207).
100 Hearings on H.R. 6790 at 2464. Smith’s opposition was an example of what former Wage and Hour Administrator Fleming meant when he wrote that “the agitation for relaxing the overtime provisions of the law seems to come with greatest zeal from those who opposed the Fair Labor Standards Act at its inception and have continued to work for its emasculation or repeal ever since.” Philip Fleming, “The Great 40-Hour Lie Nailed,” reprinted in Hearings on H.R. 6790 at 2449-51 at 2451. The then Wage and Hour Administrator rhetorically agreed with Smith, but did not believe that a problem existed empirically: “If 1 minute is to be lost in the race to equip the United Nations to smash the Axis because of the overtime provision of the law, we ought to strike it from the statute books—not a week or a month from now, but at once. ... Winning the war is paramount
Smith's bill, which was part of a larger campaign by some (but by no means all) employers to do away with or at least dilute penalty overtime, would have amended the Act of June 28, 1940, by suspending for the duration of the national emergency (which Roosevelt had proclaimed on May 27, 1941) any laws requiring payment of premium overtime compensation to employees of naval contractors or of the Navy Department. The pragmatic tenor of the testimony of the witnesses whose appearances Vinson had requested was captured by Under Secretary of War Robert Patterson, who stressed that time and a half had become "a standard practice in many industries, irrespective of these laws, and has been embodied in a large proportion of existing collective bargaining agreements. A violent change...might result in a deterioration of, rather than an improvement in labor relations...." Patterson found justification for the overtime law, even if there was no need for work spreading, because in certain industries the basic rate was fixed taking into account that there would be some time and a half: "if we wipe out the time and a half we may take him down to what is too low a wage. I do not think we can be dogmatic about it." Assistant Navy Secretary Ralph Bard, denied permission by Vinson to go off the record to respond to Representative Maas's question as to whether it was "necessary to pay overtime in order to induce these workers to work more than 40 hours to get this production out and save this Nation and themselves," personally opined that the point at which overtime pay kicked in could well be changed to 48 hours, but he was "convinced that there would be very strong opposition to that, with a serious effect upon production, which we just cannot afford at this particular time." Moreover, the lack of a ceiling on hours in Smith's bill would "open the door to sweatshop conditions and the possibility of employers working clerks, stenographers, white-collar workers and unorganized employees, without limit." Curiously, Bard's admonition moved even Vinson, who two years earlier had
denied permission by Vinson to go off the record to respond to Representative Maas's question as to whether it was "necessary to pay overtime in order to induce these workers to work more than 40 hours to get this production out and save this Nation and themselves," personally opined that the point at which overtime pay kicked in could well be changed to 48 hours, but he was "convinced that there would be very strong opposition to that, with a serious effect upon production, which we just cannot afford at this particular time." Moreover, the lack of a ceiling on hours in Smith's bill would "open the door to sweatshop conditions and the possibility of employers working clerks, stenographers, white-collar workers and unorganized employees, without limit." Curiously, Bard's admonition moved even Vinson, who two years earlier had to every other issue ***the 40-hour week, social gains, or anything else.** Radio Address by L. Metcalfe Walling, Mar. 18, 1942, Blue Network, 7:45-8:00 P. M, in *id.* at 2466.

101Marc Linder, *The Autocratically Flexible Workplace: A History of Overtime Regulation in the United States* 292-301 (2002). For example, Thomas Wallner, president of the Southern States Industrial Council, which declared that wage and hour legislation "should not invade the proper and legitimate field of management," conceded that time and a half might reasonably begin after 48 hours, but urged Congress to pass Smith's bill and "[s]weep away the last vestige of peacetime special privilege." *Hearings on H.R. 6790* at 2668 (quote), 2669, 2670 (quote).

102*Hearings on H.R. 6790* at 2431.

103*Hearings on H.R. 6790* at 2476.

104*Hearings on H.R. 6790* at 2484.
insisted on the continued exclusion of government white-collar workers from premium overtime pay, to interject: "That is right. That is a just criticism."¹⁰⁵

Navy Secretary Frank Knox himself, while agreeing that the 10-percent wage reduction that would result from paying overtime only after 48 hours would "precipitat[e] very serious labor difficulties,"¹⁰⁶ also took a longer view that encompassed a postwar resurgence of unemployment: "Having adjusted conditions on the basis of time and a half for time worked over forty hours, is it wise to change that law now when you will probably have to go back to it again when the war is over and unemployment may become widespread again—when it will be necessary to spread employment as much as possible?"¹⁰⁷

The Navy bureaucrats' reasoning coincided with labor's. For example, AFL President Green, who rather extravagantly asserted that the "40-hour week has been accepted as a standard workweek, just like the dollar is accepted as a standard of value,"¹⁰⁸ told the same committee that lowering or destroying overtime standards "would throw the Nation's entire wage structure into chaos. It would create a widespread demand for wage increases to make up for lost earnings."¹⁰⁹ The earlier attempt by CIO President Philip Murray to present the same position—namely, that eliminating overtime payments would "necessarily disturb the whole structure of collective bargaining"¹¹⁰—triggered an unchoreographed blow-up with Republican Melvin Maas, who asked him whether he was in favor of overtime work to get additional compensation. After Murray had replied that he was "in favor of the maintenance of the standard for the 40 hour week," Maas asked why labor had given up double-time pay for Sundays and holidays. Murray's response that President Roosevelt had thought that its elimination would help the war effort¹¹¹ prompted this exchange:

Mr. MAAS. Wasn't that cutting your wages?

¹⁰⁵Hearings on H.R. 6790 at 2541.
¹⁰⁷Hearings on H.R. 6790 at 3002.
¹⁰⁸Hearings on H.R. 6790 at 2801.
¹⁰⁹Hearings on H.R. 6790 at 2803.
¹¹⁰Hearings on H.R. 6790 at 2770.
¹¹¹Hearings on H.R. 6790 at 2773-74.
Mr. MURRAY. Unquestionably so. Now, do you want it all? Do you want it all? We are giving you that. Do you want the rest?

Mr. [James] HEFFERNAN [Dem. NY]. Yes, we do.

Mr. MURRAY. You do want it? That is the idea?

Mr. MAAS. That is not at all necessary. ... I want to know what the distinction is between time and a half and double time on Sundays and holidays.

Mr. MURRAY. I should say this to you, Congressman, have you engaged in collective bargaining with employees...

Mr. MAAS. What has that got to do with the relationship between double time and time and a half?

Mr. MURRAY. It has everything under God’s sun to do with the economic phases of American workingmen’s lives, Mr. Congressman, everything. Now, forgive me. I lost my temper and I didn’t intend to. I ask your forgiveness.

The Civil Service

It seems that there was no very clear and general policy with respect to the payment of overtime until the exigencies of the war called for compensation of Government employes as a class on a basis similar to that adopted in private industry. When the time came to make such general provision, the more or less haphazard dealing with the subject theretofore seems not to have been clearly in mind.

The problem of white-collar overtime work and pay, which was by no means confined to the military departments, beset the civil service as a whole and required centralized treatment. Perhaps the most thorough and accurate assessment of the relationship between the FLSA’s regulation of white-collar overtime and that of federal employees was developed by the hearings held by the House Civil Service Committee in June 1942. Chaired by Robert Ramspeck, a Georgia Democrat who had supported the FLSA in 1937-38, the committee was convened to consider Ramspeck’s bill, H.R. 7144, which, for the duration of the war and six months

112 Hearings on H.R. 6790 at 2774.
114 Nevertheless, in 1940 when addressing the annual meeting in Atlanta of the anti-labor and racist Southern States Industrial Council, Ramspeck expressed the hope that the anti-lynching bill would not pass, whose sponsors totally ignored that thousands of murders were committed each year and auto accidents caused more than 35,000 deaths. Robert Ramspeck, “Federal Legislation: Address,” Seventh Annual Meeting Southern States Industrial Council, Atlanta, Georgia, at 5 (Jan. 23, 1940).
thereafter, would have authorized department and agency heads to establish workweeks longer than 40 hours, and provided nominal time and a half compensation (computed by the 1/360 conversion factor) for executive branch civilian employees who worked more than 40 hours per week, provided that the additional pay did not cause their aggregate compensation to exceed $3,800.¹¹⁵

William McReynolds, Roosevelt's administrative assistant, explained how the CSC and the Budget Bureau had determined $3,800 as the maximum: "The philosophy of the wage-hour law, requiring time and a half for overtime work in industry, is that the overtime will not be paid for the executive and administrative employees. That is the level at which there is a pretty definite split in the Classification Act for Government employees above which the routine employee does not go. ... It would be necessary to go down as low as $3,000 a year to get the full benefit of overtime payments. The theory is that executive and administrative employees shall not be given the benefit of overtime payments."¹¹⁶ Although Civil Service Commissioner Arthur Flemming pointed out that it was necessary to correct the inequalities in treatment within the federal government—Congress had already authorized overtime compensation for 623,000 per annum employees and 461,000 hourly and daily employees of a total of 2,000,000 workers—it was equally important to eliminate the inequalities between government and private industry.¹¹⁷

The CSC recognized that the government had been violating the FLSA once Congress enacted piecemeal legislation for some per annum employees (in 1940). Since the CSC understood that "the Wages and Hours Act does exempt from overtime compensation benefits persons who are in administrative and executive positions," it felt "that if we put in the ceiling of $3,800 we will come as close to being consistent with the Wages and Hours Act as we can." To be sure, Flemming failed to explain why the commission believed that it was achieving equality between the federal and private sectors when FLSA's ceiling for administrative and professional employees was $2,400 and for executive employees only $1,560, above which they were entitled to no overtime pay. In contrast, under H.R. 7144, a worker with an annual salary of $3,100 would have been entitled to the highest amount of overtime pay—an additional $671.67 for eight weekly overtime hours 52 weeks a year, bringing his annual compensation to $3,771.67 or slightly under the maximum of

¹¹⁷Temporary Additional Compensation for Civilian Employees for the Duration of the War at 10-11 (1942).
Edgar Young, the principal administrative (personnel) analyst for the Bureau of the Budget, shed considerable light on the administration's attitude toward overtime pay for federal workers when, for the first time, it gave consideration to "this problem "from the standpoint of the Government as a single employer—...the largest single employer in the Nation." The problem began—prior to June 28, 1940, when the vast majority of annual salaried employees were not entitled to overtime pay, the bureaucracy had apparently developed no consciousness of a problem—with the onset of the defense program, when hourly production workers in navy yards and arsenals were required to work 48-hour weeks with actual time and a half, but foremen, supervisors, draftsmen, engineers, and others, who were also scheduled for the longer works were not entitled to additional compensation. The proposed overtime regulation, which Young characterized as "absolutely a war measure," which there would be no reason to carry on after the war, would bring about "slightly increased earnings for the vast groups of lower paid Federal employees who have had no adjustment in their compensation in recognition of the increase in the cost of living since the war began." (Indeed, 900,000 federal employees' salaries had not been changed since 1930.) By the same token, some higher-paid employees, especially in the Navy and War Departments, whose annual salary rates exceeded $3,100 and who had been receiving overtime since 1940 without an aggregate salary ceiling, would suffer a reduction in total compen-

118The amount is calculated by using the bill's fictitious 1/360 x 1/8 = 1/2,880 conversion factor: $3,100/2,880 = $1.0763888 x 1.5 x 8 x 52 = $671.67. The Bureau of the Budget presented a table at the hearing showing that the peak overtime earnings ($630.24) came at an annual salary rate of $2,900. Temporary Additional Compensation for Civilian Employees for the Duration of the War at 27 (1942). However, this example resulted from using only the entry level salaries for each classification grade; $3,100 was an actual intermediate annual salary rate for CAF-7 and 8 (assistant and associate administrative). Act of July 3, 1930, ch. 850, Pub. L. No. 523, 46 Stat 1003, 1004. In tabular form the salaries were presented in U.S. Congress, House Committee on the Civil Service, Special Report Concerning Pay Structure of the Executive Branch of the Federal Government: Staff Report, tab. III at 10 (Confidential Committee Print, Mar. 24, 1945).

119Temporary Additional Compensation for Civilian Employees for the Duration of the War at 25 (1942).

120Temporary Additional Compensation for Civilian Employees for the Duration of the War at 36-37 (1942).

121Temporary Additional Compensation for Civilian Employees for the Duration of the War at 26 (1942).

122Temporary Additional Compensation for Civilian Employees for the Duration of the War at 27 (1942).
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sation. To be sure, "wherever you might make a salary cut-off it would be arbitrary, but in the judgment of those who are well acquainted with the Classification Act, the $3,800 level seems to be the most reasonable point to provide a salary cut-off." They also believed that it would be thoroughly inconsistent with the economic situation...to provide for an overtime pay authorization which would result in very substantially increased earnings for the high-paid employees at a time when purchasing power must necessarily be curtailed as part of an anti-inflationary program.

I am not sure that it is fully realized that an employee with an annual salary of $4,600 a year at present gets about $1,000 a year in overtime compensation...where he is authorized to receive overtime compensation. It is easy to see where that goes if you take it up to the $8,000 employee.

The $3,800 ceiling is written...in such a way as to prevent an employee in a subordinate capacity from receiving more pay than his superior. He may, though, receive as much.

Young admitted that the scheme would result in a clustering of earnings at $3,800, which would create some administrative complications, "but at least it would not be as bad as an arrangement providing for subordinates to receive higher pay than their superiors."

Young may have considered the cut-off level arbitrary, but the president of the National Federation of Federal Employees, Luther Steward, complained that the $3,800 threshold would deprive a substantial number of draftsmen, engineers, and other highly trained technicians, especially in the Navy Department, who were "neither executives nor administrators," of the overtime pay they had been receiving since 1940. The result, he predicted, would be their departure for similar work in the private war materials industry.

Charles Fisher, now a rear admiral, was the first witness to compare the FLSA, civil service salaries, and H.R. 7144 accurately. Modestly remarking that he was

123 Temporary Additional Compensation for Civilian Employees for the Duration of the War at 47 (1942).
124 Temporary Additional Compensation for Civilian Employees for the Duration of the War at 29 (1942).
125 Temporary Additional Compensation for Civilian Employees for the Duration of the War at 29 (1942).
126 Temporary Additional Compensation for Civilian Employees for the Duration of the War at 30 (1942).
127 Temporary Additional Compensation for Civilian Employees for the Duration of the War at 64 (quote), 67 (1942).
“not absolutely sure” of his figures for the FLSA, he stated them as $30 a week for executive and $200 a month for administrative employees, adding that the definition “is much lower down in the scale than we consider it in the navy yard. ... Our supervisory engineers are above that.” The supervisory positions under the Classification Act began at $3,200 to $3,800.128 Pleading for a fresh start “on a logical basis,” Fisher urged the committee to consider adopting for federal employees a pattern similar to the FLSA’s because he could not see to save his life why what was just and equitable for employees in interstate commerce would not be equally so in the government.129 The director of civilian personnel in the War Department, William Kushnick, also favored the $3,800 ceiling, despite the fact that it would exclude about 10,000 employees, because it “would be more consistent with the national pattern of not paying overtime to those in managerial and executive positions.”130

Even if Fisher and Kushnick were right about the different hierarchical locations of executives and supervisors’ salaries in the private sector and the civil service, they neglected to mention that in addition large numbers of employees occupying nonsupervisory administrative and professional positions were excluded by the FLSA from overtime pay because their salaries exceeded $200 month, whereas thousands of their government counterparts receiving annual salaries up to $3,100 131 would have been entitled to overtime compensation under H.R. 7144 (and many more under later bills with a $5,000 ceiling).132

A parade of labor union representatives expressed considerable criticism and resentment of the bill. William Hushing, the AFL’s legislative representative, praised the other bill under consideration by the committee, H.R. 7071, which the AFL had drafted and Ramspeck himself had introduced on May 11 at the

128 Temporary Additional Compensation for Civilian Employees for the Duration of the War at 94-95 (1942).
129 Temporary Additional Compensation for Civilian Employees for the Duration of the War at 95 (1942).
130 Temporary Additional Compensation for Civilian Employees for the Duration of the War at 101 (1942).
132 The FLSA regulations defining excluded administrative, executive, and professional employees would, as the chief of the Personnel Classification Division of the CSC observed, “describe many supervisory, administrative and professional positions in the middle and higher brackets” of the CAF and Professional and Scientific Service. Ismar Baruch, “Federal Overtime Policies,” PA 7(3):1-5 at 3 (Nov. 1944).
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organization's request. It simply provided a $300 annual bonus to all federal civilian employees. Hushing suggested that the introduction of the AFL bill had impelled the Roosevelt administration—which opposed the bonus bill as perpetuating the inequalities of overtime compensation—to file H.R. 7144 two weeks later. Hushing also submitted an amended version of H.R. 7144, which provided for overtime pay also after eight hours daily, deleted the $3,800 ceiling, and substituted actual time and a half (using 2,080 hours as the divisor). The AFL opposed the ceiling because it would "result in a reduction in compensation for some worthy employees of the Government": times might be "difficult for those in the lower brackets," but their counterparts in the higher brackets were "also taking an awful rap."

The CIO's United Federal Workers, whose "sole purpose," according to its leftist secretary-treasurer Eleanor Nelson, was to "make Government workers better war workers and the Government service a more efficient war industry," displayed considerably less sympathy for the higher-paid civil servants. Although its jurisdiction extended beyond the "great civilian army of Federal employees which does vital mass-production clerical work," the UFW made it clear that the

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133 Temporary Additional Compensation for Civilian Employees for the Duration of the War at 64 (quote), 102-103 (1942).
135 Temporary Additional Compensation for Civilian Employees for the Duration of the War at 15 (Flemming) (1942).
136 Temporary Additional Compensation for Civilian Employees for the Duration of the War at 103 (1942). Stengle of the AFGE added that although H.R. 7144 had not been introduced until after H.R. 7071, it had been two or three months in the making as a result of President Roosevelt's feeling that uniform overtime regulation for government employees was necessary. Id. at 178
137 Temporary Additional Compensation for Civilian Employees for the Duration of the War at 104, 109 (1942).
138 The CIO chartered the UFW in 1937 to organize all federal civilian employees except the postal service and supervisors with the power to hire and fire. "Lewis Opens Drive for Federal Union," NYT, June 22, 1937 (1:4).
139 Temporary Additional Compensation for Civilian Employees for the Duration of the War at 113 (1942).
140 Temporary Additional Compensation for Civilian Employees for the Duration of the War at 114 (1942). A year earlier Nelson had accused the federal government of unleashing a "virtual reign of terror" using "Gestapo methods" in trying to weed out Communists and CIO members employed by the government. "Says U.S. Officials Copy the Gestapo," NYT, July 21, 1941 (28:1-2). On her later travails resulting from accusations of being a Communist, see Alexander Feinberg, "Compromise Fixes Spy Film Custody
organization
d has consistently advocated top salary limitations for overtime pay similar to that carried in this bill. It is our belief that the overtime problem in the Federal service is most acute among the rank and file of Federal workers earning low salaries who often, because of inefficient management in the office, are kept late at night to perform hard, routine, and tiring work. We do not recognize the same problem as existing among executive and administrative workers who are compensated in prestige, interesting work, and advancement.141

The UFW’s commitment to defeating fascism was so all-encompassing, that, unlike the AFL unions, it was willing to postpone substituting the 260-day for the 360-day conversion factor to “some future date,” because any delay in passing H.R. 7144 “immediately...would detract from total-war efficiency, which is the paramount concern” of the UFW and all organized labor.142

Another left-wing union, the FAECT, which represented 2,000 technical employees in the War and Navy Departments, while agreeing with Nelson’s statement, nevertheless disagreed with the $3,800 ceiling.143 Although it had been stated that this ceiling was designed to approximate the exemptions of administrative, executive, and professional employees under the FLSA, because the latter had five or six other conditions attached, the union found it very difficult to apply an arbitrary salary limitation: “In many cases, particularly in the technical field, employees in private industry earn as much as $100 a week base pay and they are still being paid time and a half for overtime by the nature of their duties. In other words, they are not exempted.” The FAECT made no definite proposal, but requested that the $3,800 limit be reconsidered for P-3 employees in the technical

After long Fight,” NYT, Dec. 14, 1948 (1:8).

141Temporary Additional Compensation for Civilian Employees for the Duration of the War at 114-15 (1942). The legislative representative of the CIO also urged immediate adoption of both bills. Id. at 144-45 (Nathan Cowan). Nelson’s reference to “interesting work,” which was presumably to be understood as non- or at least less alienated work, as ersatz-compensation, would seem to apply most convincingly to the one category she did not mention—professional employees. On the other hand, this criterion could just as well serve to justify lower (non-overtime) salaries for such professionals, an innovative pay practice whose time does not appear to have come yet. Remarkably, neither unions nor the WHD/DOL ever sought to impute this criterion to Congress in explanation of its intent to exclude white-collar workers from the FLSA.

142Temporary Additional Compensation for Civilian Employees for the Duration of the War at 115 (1942).

143Temporary Additional Compensation for Civilian Employees for the Duration of the War at 118-19 (George Curran, international representative) (1942).
category, who would not be exempted under FLSA.\textsuperscript{144} To be sure, the members' average wage was $2,000-$2,400, but most of the FAECT's high-paid P-3 technical workers with a salary of $3,200 would lose several hundred dollars in overtime pay. While the union in terms of its members basically had no interest in salaries above $3,800, “in the interest of fairness, some consideration should be given to applying the wage-hour standards to Federal employees rather than arbitrarily establishing a salary ceiling and saying that nobody earning more than that shall be paid overtime.”\textsuperscript{145} In the end, however, the FAECT abandoned the goal of general fairness and proposed raising the ceiling to $4,000 in order to include P-3’s at $3,200, while excluding supervisory employees.\textsuperscript{146}

Even unions that were largely unaffected by the $3,800 ceiling urged raising it. The union representing printers at the Government Printing Office thought that it should exclude only those whose salaries were high enough to have enabled them to save enough to offset the increased cost of living. The union estimated this amount to be about $5,000, but still insisted that “in principle a man with a high salary should be paid overtime, just as one receiving a lower salary should be paid overtime,” despite the fact that the increased cost of living had “meant the elimination of necessities for the low-paid employee, but only the elimination of luxuries for the high-paid employee.”\textsuperscript{147} Similarly, the International Association of Machin-

\textsuperscript{144} \textit{Temporary Additional Compensation for Civilian Employees for the Duration of the War} at 120 (1942). Grade 3 in the professional and scientific service (P-3), whose entry level salary was $3,200 and highest level was $3,800, was called “the associate professional grade,” and included “all classes of positions the duties of which are to perform, individually or with a small number of trained assistants, under general supervision but with considerable latitude for the exercise of independent judgment, responsible work requiring extended professional, scientific, or technical training and considerable previous experience.” Act of May 28, 1928, ch. 814, 45 Stat. at 777. The salaries were prescribed by Act of July 3, 1930, ch. 850, 46 Stat. 1003. Based on this general description, it is possible that the P-3’s would have been excluded by the FLSA professional duties tests.

\textsuperscript{145} \textit{Temporary Additional Compensation for Civilian Employees for the Duration of the War} at 121 (1942).

\textsuperscript{146} \textit{Temporary Additional Compensation for Civilian Employees for the Duration of the War} at 123 (1942). An employee at P-3 with an annual salary of $3,200 working eight hours of overtime every week all year would, on the basis of a 1/2,880 conversion factor, have earned $693.33 in overtime pay for total compensation of $3893.33; raising the ceiling from $3,800 to $4,000 would thus have preserved the employee’s entitlement to $93.33.

\textsuperscript{147} \textit{Temporary Additional Compensation for Civilian Employees for the Duration of the War} at 140 (James Holloman, chairman, legislative committee, Typographical Union
ists, whose members would also have been little affected, opposed the ceiling on the grounds that "employees receiving more than $3,800...a year usually are experts or have supervisory positions. In private industry they would get substantial bonuses; and therefore this overtime would not measure up to what they would receive in private industry."\textsuperscript{148} Even more expansive was Charles Stengle of the AFGE, who observed that the labor movement had been unable to find out how the $3,800 ceiling had been fixed and whether it had been designed to harmonize with the FLSA. In any event, it would exclude thousands of internal revenue agents, immigration experts, and non-supervisory technicians and experts in the Navy and War Departments, who would still have to work overtime just like their "humbler" coworkers. Under the slogan, "Let us be fair to everybody," Stengle was not prepared to exclude "supervisors and other administrative officers"\textsuperscript{149}.

I hold no brief for administrative officers or supervisors, but I do not feel so badly toward them that I want to punish thousands who work under them in order to get even with them.

I have no objection to a good supervisor getting paid for overtime; and I object to a bad employee getting overtime pay as much as I would object to a bad supervisor getting it. [L]et us be fair about this thing.\textsuperscript{150}

The president of the AFL-affiliated International Federation of Technical Engineers, Architects, and Draftsmen's Union, C. L. Rosemund—a vocal political enemy of the left-wing FAECT\textsuperscript{151}—was unusual in taking a sarcastically belligerent position on the bill. He characterized the government witnesses' advocacy of H.R. 7144 for the purpose of meeting the cost of living "a rather novel approach to this question, and in my experience of 25 years with the organized labor movement, I have never had a proposition advanced to meet increased living costs by requiring employees to work additional hours. No private employer would have the temerity to even suggest a procedure of this nature and from this angle I do not believe that H.R. 7144 deserves serious consideration."\textsuperscript{152}

\textsuperscript{148}Temporary Additional Compensation for Civilian Employees for the Duration of the War at 157 (N. Alifas, president, district 44) (1942).
\textsuperscript{149}Temporary Additional Compensation for Civilian Employees for the Duration of the War at 180 (1942).
\textsuperscript{150}Temporary Additional Compensation for Civilian Employees for the Duration of the War at 180 (1942).
\textsuperscript{151}See above ch. 12.
\textsuperscript{152}Temporary Additional Compensation for Civilian Employees for the Duration of the War at 189 (1942).
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overtime scheme, Rosemund did not hesitate to predict that if the $3,800 ceiling remained, "the very cream of essential employees...will be lost to the Government because...these same employees will be forced to accept employment in private industry engaged in defense work where there are no such restrictions." He purported to have "evidence to show that in private industry all employees, with the exception of top executive and administrative positions, are now receiving overtime at...time-and-a-half. This includes subordinate officials such as foremen, squad bosses, and like positions, by whatever term they are designated." To be sure, Rosemund did not claim that the FLSA required such payments, but since he realistically viewed the enactment of the overtime law for naval employees on June 28, 1940, as "action to conform to practices in private industry" that was "compelled" by the labor market,153 he was in effect warning the committee that, with the absorption of the reserve army and navy of the unemployed, the FLSA had been overtaken by supply and demand.

Since the Navy and Army overtime laws expired in the midst of the committee proceedings, twice Congress had to pass joint resolutions extending them first until June 30 and then November 30, 1942.154 The principal Senate bill (S. 2666) in the second session of the Seventy-Seventh Congress, when introduced in July 1942 by the upstate New York Democrat James Mead, a staunch New Dealer and pro-labor former railroad worker155 who soon chaired hearings held by a subcommittee of the Civil Service Committee, applied to almost all federal civilian employees and imposed no ceiling on aggregate basic pay plus overtime compensation, but it limited full overtime pay to those with salaries of $2,900 or less and even these workers were left with little more than straight time by virtue of the bill's use of the 1/360 conversion factor.156

At the Senate hearings in September, the Civil Service Commission, again represented by Commissioner Flemming, vigorously urged the committee to act quickly to put an end to the morale-depressing inequity of entitling 58 percent of 2,234,000 civilian federal employees to overtime pay and denying it to the other 42 percent. Although he exaggerated in asserting that "[o]bviously, any private employer who indulged in such a practice would be violating the basic philosophy

153 Temporary Additional Compensation for Civilian Employees for the Duration of the War at 190 (1942).
156 S. 2666, §§ 1, 3(a) (77th Cong., 2d Sess., July 21, 1942).
of the Wage and Hour Act,” he was able to offer blatantly irrational examples of the $6,500-a-year Navy Department lawyer who was paid for overtime while his secretary was not and the stenographer in the Washington navy yard who was compensated while her counterpart in the Navy Department headquarters was not.157 His more wide-ranging commentary revealed that even Flemming considered overtime compensation (and presumably hours regulation as well) inappropriate for white-collar employees above a certain salary level without being able to conceptualize or justify the dividing line. Moreover, he was either unaware of or ignored the fact that Congress had never articulated any (let alone a coherent) policy or principle regarding such a line under the FLSA:

The present practice of the Federal Government in paying overtime for high-salaried employees is in conflict with the principle of the Wages and Hours Act.

As we all appreciate, the Wages and Hours Act provides that persons in supervisory and administrative positions are not to be paid for overtime. The Congress, in passing previous overtime legislation [for civil servants], has passed it, however, in such a way that at the present time approximately 16,000 employees earning in excess of $2,900 receive overtime compensation. That means that some persons who received $8,000 a year are eligible for overtime compensation.

Now, the Commission has felt that basically this was wrong, that overtime compensation was not intended to apply to high-salaried employees. But, at the same time, we recognize that it is water over the dam, that we have 16,000 persons who have been receiving overtime compensation, and many of them occupy...key, critical jobs in connection with the war effort. Therefore, we feel that it would be unfortunate to take all of their overtime compensation from them.158

Whereas Flemming failed to take a position on the use of the 1/360 conversion factor, Rear Admiral Fisher testified that he would be “very pleased” if it were changed to 1/260 in order to “create more equitable treatment” between salaried and hourly wage employees.159 In contrast, AFL President Green erroneously believed that the bill already contained the 1/260 formula, which represented “the

best thought of both labor and management.”¹⁶₀ Only Charles Stengle of the AFGE offered what he deemed an even better thought: although he opposed any ceiling, he urged the committee to raise the maximum for full overtime coverage from $2,900 to $5,000 because the “man under $5,000 is bumped up pretty hard with the high cost of living” and many experts who were not lawyers were needed to work overtime and were punished by the bill.¹⁶¹

At the end of October, the Senate Civil Service Committee reported out S. 2666, which created full time and a half up to $2,900 by lowering the (annual hours) conversion factor from 1/2880 to 1/2080.¹⁶² The report observed that because under existing law 58 percent of federal employees were entitled to overtime pay while 42 percent were not, serious problems of personnel supervision and management had been created in offices where overtime could not be paid. In order to insure that the federal government moved toward “putting its own house in order” and to reduce the outflow of employees from government service, the bill treated all federal employees with regard to overtime compensation “in substantially the same manner as private employers are required to treat their employees” under the FLSA. In fact the combined use of the annual to hourly basic pay conversion formula of 1/2080 on salaries up to $2,900¹⁶³—only 7.3 percent of executive branch employees were in salary grades exceeding $2,999¹⁶⁴—meant that the Senate bill was more comprehensive since at the time the FLSA salary-level test for executives was only $1,560 and $2,400 for administrative and professional employees.¹⁶⁵

With the previous temporary overtime authorization having expired on November 30, Roosevelt sent a letter to the president of the Senate and speaker of the House on December 11, 1942, observing that the U.S. government, “the largest single employer in the Nation, has permitted a condition to develop regarding rates of pay, hours of work, and overtime compensation, which is grossly unfair, is one of the major causes of needlessly high personnel turn-over, and is impeding the successful prosecution of the war effort.” Whereas pay rates and time and a half for work over 40 hours corresponding to the situation of nongovernment industrial employees had been established for most mechanics, tradesmen, and laborers in navy yards, arsenals, and other government production establishments, and certain

¹⁶¹ War Overtime Pay Act of 1942: Hearings at 94-95.
¹⁶² S. 2666, § 3(a) (77th Cong., 2d Sess., Oct. 29, 1942).
¹⁶⁵ See above chs. 9 and 13.
groups of salaried employees in the War Department, Navy Department, Maritime Commission, and National Advisory Committee for Aeronautics, might be paid for overtime, other employees in the same agencies and in other agencies performing the same work whose hours of duty had been extended beyond the peacetime 39-40 hours could not. Calling this situation “a complete violation of the principle of equal pay for equal work which has been the guiding policy in Federal pay matters since the enactment of the Classification Act of 1923,” the president expressed his judgment that further temporary extensions of overtime pay authorization to limited groups was “only perpetuating a bad situation and should be avoided.” He therefore proposed that Congress either take immediate action “to deal realistically with the whole problem” or delegate to him authority to deal with federal government pay, hours, and overtime compensation for the duration of the war.\textsuperscript{166}

To be sure, at his morning news conference, where he read the letter, Roosevelt remarked that he was not optimistic about congressional action—the letter had just been “for the record.” In turn, House and Senate leaders, while professing sympathy for the proposal, argued that if such a measure were called to the floor, it would be the signal for efforts to amend the law in order to increase the workweek to 48 hours in private and government employment.\textsuperscript{167}

Despite initial congressional trepidations,\textsuperscript{168} ten days later Congress enacted an extension of the act of June 28, 1940 until April 30, 1943, but also for the first time authorized the payment of overtime compensation to all federal civilian employees (except in the judicial and legislative branches). In addition to retaining the use of the fictitious 360-day working year as an arithmetical device to deprive workers of real time and a half, the new law also restricted payment to that part of an employee’s basic annual compensation not in excess of $2,900 and prohibited payment of any overtime pay that would cause an employee’s total annual compensation to exceed $5,000.\textsuperscript{169}

Two days before issuing an executive order implementing overtime compensation “at the rate of one and one-half times the employee’s regular rate of

\textsuperscript{166}CR 88:9469-70 (Dec. 11, 1942).


\textsuperscript{168}CR 88:9470-72.

\textsuperscript{169}Joint Resolution Extending Until April 30, 1943, the Period for which Overtime Rates of Compensation May Be Paid Under the Acts of June 28, 1940, ch. 798, Pub. L. No. 821, 56 Stat. 1068 (Dec. 22, 1942). Also excluded were those whose wages were fixed on a daily or hourly basis and adjusted in accordance with prevailing rates by wage boards, elected officials, and department heads or heads of independent establishments or agencies.
compensation subject to the [three] limitations," which in fact insured that even low-paid federal workers would not be paid time and a half and that higher-paid employees would receive even lesser (or perhaps no) premiums, Roosevelt—demonstrating the impeccable logic of work-sharing in reverse—ordered all federal offices to adopt the six-day, 48-hour week in order to permit a reduction in personnel and eliminate the need to fill vacancies.\footnote{Executive Order 9289, in \textit{FR} 7:10897 (Dec. 29, 1942 [Dec. 26, 1942]).}

Chairman Mead introduced a new bill (S. 635) at the beginning of the Seventy-Eighth Congress, which was similar to S. 2666 in lacking an aggregate pay ceiling and limiting full overtime to salaries not exceeding \$2,900; however, it substituted the full time-and-a-half $1/260$ conversion factor for the $1/360$ in the earlier bill.\footnote{"President Signs Federal Pay Rise," \textit{NYT}, Dec. 25, 1942 (23:7).} H.R. 1860,\footnote{S. 635, § 2 (78th Cong., 1st Sess., Feb. 4, 1943).} the bill that eventually became the War Overtime Pay Act, was introduced by Jennings Randolph, the West Virginia Democrat who chaired the Civil Service subcommittee appointed by committee chairman Ramspeck to hold hearings on it. Randolph had simply introduced Mead’s S. 635 “by request,” indicating that he was not necessarily in agreement or disagreement with it, but that it was only a vehicle for the House hearings.\footnote{Temporary Additional Compensation for Civilian Employees for the Duration of the War: Hearing Before a Subcommittee of the Committee on the Civil Service House of Representatives on H.R. 1860 , at 4 (78th Cong., 1st Sess., Feb. 24-26, 1943).} Both Civil Service Committees held hearings at the same time on the same bill.

At the Senate hearing, even Mead, who called attention to “this ridiculous set-up” by which “the man who is paid for overtime dictates a sufficient amount of work to require overtime to the party that is not paid for overtime,” nevertheless regarded the situation as a “crisis.” Far from operating within a long-term framework, he instead assumed that when the wartime emergency was over, the federal workers would all return to a 40-hour week: “There will be no time and a half for overtime necessary. The legislation will become extinct....”\footnote{Overtime Compensation to Government Employees: Hearings Before a Subcommittee of the Committee on Civil Service United States Senate 6 (78th Cong., 1st Sess., Feb. 25-Mar. 2, 1943).} In contrast, the president of the NFFE, Luther Steward, when asked by another senator whether it was his hope that after the war the system could dispense with overtime treatment, observed that “the principle of punitive overtime” was “a necessary corrective even in normal times” because, for example, many administrators and supervisors “un-
intentionally work employees overtime by not getting around to signing the mail until late hours of the evening”—a “bad habit[]” that would be corrected if the government had to pay for it.176

CSC Commissioner Flemming, while supportive of eliminating the $5,000 ceiling, opposed computing overtime on an employee’s whole salary on the grounds that “we just do not feel that that is sound,” but he failed to explain why.177 When Georgia Democrat Walter George, pointing to the possibility of “forget[ting] this time-and-a-half thing” because “[y]ou cannot apply it; you have to have all kinds of exceptions,” proposed that instead all salaries be increased by a flat percentage, Flemming, rather than rejecting this approach as fundamentally missing the point of overtime work regulation, merely stressed that too “much water had gone over the dam...to shift over to a new formula.” Flemming also mentioned the difficulty of treating federal employees differently than those in private industry,178 but since they always had been and remained so under S. 635, the objection lacked force.

After the Bureau of the Budget informed the committee that using the 260-day formula would cost about $219,000,000 and eliminating the $5,000 ceiling for 18,000 employees an additional $15,660,000,179 Mead, who was again chairing the subcommittee hearing, implored the next witness, Rear Admiral Fisher, to “give us some very good material for the record....”180 He did not disappoint. After lamenting the “gross injustice” that until June 28, 1940 federal white-collar employees had been expected to work overtime without pay and that even since then their salaries, unlike those of their per diem and hourly colleagues, had not been increased, Fisher contrasted their situation with the FLSA regime: “In the Fair Wages and Hours Act the only employees exempted from time and a half for overtime work...are the administrative and executive employees, presumably these high officials of companies, rather than the lower ranks of supervisors or clerks, or draftsmen.”181 Apart from omitting the large numbers of excluded professional workers, Fisher (who, as his aforementioned testimony before the House committee eight months earlier revealed, knew better) severely distorted the FLSA’s white-collar coverage: in fact, it excluded an “executive” earning only $30 a week or $1,560 a year—just $120 more than “our stenographers, typists and clerks in the

176Overtime Compensation to Government Employees at 79.
177Overtime Compensation to Government Employees at 20.
178Overtime Compensation to Government Employees at 29-30.
179Overtime Compensation to Government Employees at 34 (testimony of Edgar Young, administrative analyst, Bureau of the Budget).
180Overtime Compensation to Government Employees at 48.
181Overtime Compensation to Government Employees at 48-49.
lower grades" (CAF-2) at a time when the average annual salary of “our white-collar workers was between” $1,800 and $1,900\textsuperscript{182} and one senator asked “how a man with a wife and children can live on $1,610 in Washington.”\textsuperscript{183} Fisher’s flawed empirical understanding (or, at least, description) of the FLSA’s exclusions of white-collar workers made it unnecessary for him to feel any need to reconcile them with his view that time and a half had become “definitely established in the economic life of this country...”\textsuperscript{184}

Some labor union representatives even chided the committee for setting the full overtime maximum at $2,900: “Why put that little ceiling in the middle there unless you want to make this a poor man’s bill? In other words, you think that up to $2,900 is about as far as anybody ought to ask for overtime pay.”\textsuperscript{185} The president of an AFGE local at the Springfield Armory representing salaried engineers, draftsmen, technicians, metallurgists (“the people who really make a good gun or a poor gun”) criticized the $2,900 threshold as not covering “the most valuable employees” and urged raising it to $3,800.\textsuperscript{186}

Before the House committee the Roosevelt administration supported the bill in order to create a uniform rule that would eliminate the “feeling” by some civil service employees that they were being treated unfairly.\textsuperscript{187} Speaking for the CSC, Flemming supported the 1/260 formula because it paralleled the treatment of blue-collar government workers and the FLSA’s approach; he also favored eliminating the $5,000 ceiling both to deal with the increase in the cost of living and because upper-bracket government salaries were lower than those for private-industry positions with comparable duties and responsibilities.\textsuperscript{188} Flemming did not mention that the FLSA presumably excluded such more highly paid private-sector white-collar employees from overtime pay.

Since Flemming had mentioned that working conditions had increased turnover among federal employees, Alabama Democrat Carter Manasco asked: “This is a very touchy question at the present time...but I think the people should know something about it, if you have the information. I have had quite a few girls from

\begin{enumerate}
\item \textsuperscript{182}Overtime Compensation to Government Employees at 62 (Fisher).
\item \textsuperscript{183}Overtime Compensation to Government Employees at 29 (Sen. Langer).
\item \textsuperscript{184}Overtime Compensation to Government Employees at 51.
\item \textsuperscript{185}Overtime Compensation to Government Employees at 84 (Charles Stengle, AFGE).
\item \textsuperscript{186}Overtime Compensation to Government Employees at 99-100 (testimony of A.C. Cardinal).
\item \textsuperscript{187}Temporary Additional Compensation for Civilian Employees for the Duration of the War at 3 (statement of William McReynolds, adm. asst to the President) (1943).
\item \textsuperscript{188}Temporary Additional Compensation for Civilian Employees for the Duration of the War at 15 (1943).
\end{enumerate}
my section of the country say that they left the Government service because of being ordered to work in offices and use the same rest rooms with people of other color. Of course, I realize that that is a very touchy question to bring up now, but have you made any investigation?” Flemming’s lack of any such information disappointed Manasco as much as the fact that civil service applications no longer bore applicants’ pictures and were not permitted to show their color.189

In contrast to the salary-based exclusions of white-collar workers under the FLSA, which unions had long ceased to protest, numerous labor representatives testified in favor of the elimination of the $5,000 ceiling on total compensation including overtime pay. Luther Steward, president of the NFFE justified abandonment of the $5,000 ceiling and urged at a “very minimum” that employees receive overtime on the first $5,000 of their salaries on the somewhat unusual grounds that “people in the so-called higher salaried brackets by reason of their normal financial commitments find it more difficult readily and rapidly to adjust themselves to a shrinking purchasing power and are the group which are among those hardest hit in times of inflation....”190 (At the Senate hearing Steward had additionally and erroneously asserted that raising the $2,900 full overtime threshold to $5,000 was necessary to place those in “key positions throughout the executive branch on an equality with those in private employment...in great demand....”191 The FAECT, which represented two to three thousand scientific and technical workers in navy yards and arsenals, both supported eliminating the $5,000 ceiling and proposed raising from $2,900 to $3,200 the maximum for full overtime coverage in order to cover more technical employees. Again, it is not clear (since members of Congress were as confused and ill-informed as the witnesses) whether mere ignorance prompted the erroneous claim that the bill (not to mention the proposed changes) did not treat federal employees better than those in private industry.192 Three organizations representing 2,000 designers and supervisors at the Philadelphia Navy Yard that supported eliminating both the $5,000 and $2,900 ceilings also incorrectly asserted that, with those changes, the bill would have placed salaried employees on the same overtime basis as both federal blue-collar workers and private-sector white-collar employees. In fact, whereas blue-collar government workers were not subject to those limits, very few of them would have earned $5,000 a

189 Temporary Additional Compensation for Civilian Employees for the Duration of the War at 26 (1943).
190 Temporary Additional Compensation for Civilian Employees for the Duration of the War at 61 (1943).
191 Overtime Compensation to Government Employees at 76.
192 Temporary Additional Compensation for Civilian Employees for the Duration of the War at 95-96 (Oscar Grauer, legislative representative) (1943).
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year; in contrast, the FLSA denied overtime pay to professional or supervisory salaried employees in private firms earning more than $2,400 or $1,560 annually. The navy yard organizations were concerned about the $5,000 limit because it meant that a supervisor with base pay of $4,600 supervising another professional employee earning $3,800 would wind up with $1.67 less every two weeks.¹⁹³ A representative of the organization of professional employees of the Agriculture Department did not object to retention of the $2,900 ceiling, but supported eliminating the $5,000 total compensation limit in part because salaries of federal government professionals such as chemists were considerably below those in private industry. Yet he failed to note that because the private-sector monthly salaries ranging from $227 to $564 (depending on seniority) that he listed all exceeded the FLSA salary limit (of $200) for professional employees, none of their recipients was entitled to any overtime pay at all.¹⁹⁴

The Senate bill (S. 635) reported out by the Civil Service Committee on March 26 retained the $2,900 ceiling (on full overtime) and reinstated the restrictive 1/360 conversion formula, but lacked the $5,000 ceiling on total compensation.¹⁹⁵ As reported out by the House Civil Service Committee on April 1, H.R. 1860 both imposed a $5,000 ceiling and reverted to the 1/360 conversion formula, which reduced overtime compensation almost to mere straight time.¹⁹⁶ Both the Senate and the House Civil Service Committees frankly characterized “[t]he major purpose” of their respective bills as providing government employees with additional compensation to enable them “to meet wartime living costs.”¹⁹⁷

The congressional floor debates underscored how thoroughly the principles of overtime work regulation had been instrumentalized in favor of mere wage policy. Robert Ramspeck, the Georgia Democrat who chaired the House Civil Service Committee for many years, made this point unmistakable. When George Mahon of Texas, an opponent of the 40-hour week during wartime, asked whether there was some way Congress could raise federal employees’ pay “without putting our

¹⁹³Temporary Additional Compensation for Civilian Employees for the Duration of the War at 96-98 (Edwin Alm) (1943).
¹⁹⁴Temporary Additional Compensation for Civilian Employees for the Duration of the War at 104-105 (S. Fracker) (1943).
¹⁹⁵War Overtime Pay Act of 1943, at 1-2 (S. Rep. No. 142, 78th Cong., 1st Sess., Mar. 26, 1943). Oddly, despite this account by the committee, the printed version of the bill (which was not included in the report) did in fact contain the $5,000 ceiling. S. 635, § 2 (78th Cong., 1st Sess., Mar. 26, 1943).
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stamp of approval on time and a half for overtime over 40 hours a week, Ramspeck forthrightly replied that they were not putting their stamp of approval on it because, whereas the FLSA used 260 as the divisor, which produced an overtime wage increase of 30 percent, the bill used 360: “It does not figure time and a half. It figures only 1.6 percent over straight time.” And in response to Mahon’s question, “The gentleman is just using this as the mechanics or vehicle for raising the pay?” Ramspeck replied: “That is correct. We are not endorsing any 40-hour week. As a matter of fact,...prior to this war employees in Washington worked only 39 hours a week. So we have really raised the number of hours 9 hours per week and we have given them 21.6 percent more money, which is just straight time.” And then with all imaginable clarity in response to a similar query Ramspeck declared: “It has nothing to do with the principle of the 40-hour week. It is simply a method of arriving at the pay.”

Token resistance—under procedural rules the bill could no longer be amended—to the $5,000 ceiling was offered by Manhattan Democrat Arthur Klein, whose amendment to eliminate it had already been rejected in committee. With the exception of agency heads, he argued that it was unfair to discriminate against a civil servant who faced the increased cost of living merely because he had “worked his way up after years of hard work....” Finally the House voted 224 to 107 to pass the bill.

In the Senate, debate focused on an amendment by Utah Democrat Elbert Thomas to use the 1/260 conversion factor to create actual time and a half. This proposal had been the major question before the Civil Service Committee, a large majority of which had voted against it primarily because it would have added over $200,000,000 to the cost of the bill. Virginia Democrat Harry Byrd also noted that the committee majority had been of the view that civil service employees “should not be considered on an hourly basis” as under the FLSA or like the mechanical workers in the navy yards and arsenals. In addition, Byrd opposed actual time and a half because civil service employees had 26 days of paid vacation and 15 days of paid sick leave per year, which, as far as he knew, no private enterprise offered. Ultimately the Senate rejected Thomas’s amendment and passed H.R. 1860.

The conference committee, adopting that feature of the Senate bill, eliminated

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199 CR 89:2921. Klein also favored the real time-and-a-half 1/260 divisor, as did Mendel Rivers (Dem. SC), who was not known as a friend of labor. Id.
200 CR 89:2922.
201 CR 89:3128-29 (Apr. 8, 1943).
202 CR 89:3175, 3186 (Apr. 9, 1943).
the $5,000 ceiling, but after the Senate had agreed to the conference report, the change met resistance in the House, some of whose members purported to resent paying more than $11,000,000 a year in overtime to the 18,000 bureaucrats with salaries above the ceiling. Initially the House voted 162 to 157 to reject the conference report, but two weeks later, reversing itself without debate, it agreed to it by a vote of 275 to 119.

The War Overtime Pay Act of May 7, 1943, which was to expire at the latest on June 30, 1945, applied to all civilian annual federal officers and employees (with the exception of GPO and TVA employees, those of the field service of the Post Office Department, elected officials, judges, and department and agency heads). Although it prohibited the payment of overtime compensation on any portion of an employee’s basic pay over $2,900, it provided for payment of overtime even when it caused his aggregate compensation to exceed $5,000 annually. The law also gave department heads discretion to grant per annum employees compensatory time off from duty in lieu of overtime compensation for work beyond 48 hours per week.

From the perspective of developing a uniform and consistent policy with

204 CR 89:3560 (Apr. 19, 1943).
205 CR 89:3655, 3657, 3659 (Apr. 21, 1943). Rep. Clarence Kilburn, an upstate New York Republican who opposed eliminating the ceiling, told the House that as a member of the conference committee he had proposed lowering the ceiling to $3,200, but that his amendment had been rejected. Id. at 3658. The proposal seems odd since, by disadvantaging even more civil servants, it would not have been a compromise, but would have driven the House position even further from the Senate’s. A compromise would have raised the ceiling to somewhere between $5,000 and $9,000.
208 Act to Provide for the Payment of Overtime Compensation to Government Employees, § 1, 57 Stat. at 75-76.
209 Act to Provide for the Payment of Overtime Compensation to Government Employees, § 2, 57 Stat. at 76. Although the salary brackets used in the data presentation did not permit an exact count of employees whose total salaries exceeded $5,000, as of January 1, 1945, fewer than 6 percent of more than 1.2 million per annum federal employees paid in accordance with the Classification Act received $4,428 or more in annual salary including overtime pay, while about 3 percent received $5,228 or more. U.S. Congress, House Committee on the Civil Service, Special Report Concerning Pay Structure of the Executive Branch of the Federal Government: Staff Report, tab. VIII at 39.
regard to overtime work and pay, the new law was seriously flawed by virtue of the fact that, as Labor Secretary Frances Perkins commented, its "express purpose" was to make it possible for federal employees to "meet the change in the cost of living." Because the principles that should have underlain discussion of the length of the standard workweek were subordinated to and distorted and in effect wholly supplanted by extraneous and temporary wartime demands, Congress subverted the entire history of overtime regulation by abandoning all the traditional justifications for maximum hours and/or penalty-premium overtime pay and introducing, for the first time, indirect wage supplements as the exclusive criterion. Consequently, the risk arose that the secular goal of shortening the workweek might be displaced by that of higher total pay.

A Permanent Overtime Law for Federal White-Collar Workers

[T]his section should be stricken out because it discriminates against outstanding executives in the departments.... Some of the people who would be affected are...Mr J. Edgar Hoover who has done such a splendid job during this emergency, who has made one of the finest records in the defense and protection of our country against saboteurs and other undesirables.... They would lose about $682 on overtime.... I cannot support that...emoluments are...taken away from such men...who could get five times as much in private employment as they presently make in Government employment. You are destroying the morale of some valuable Government officials....

The only substantial change which adds anything to the cost of the bill...grew out of the situation where a few employees, like J. Edgar Hoover,...were getting overtime above their $10,000-a-year salaries. With respect to that we made a compromise which permits those who are in that category on June 30 of this year to continue to receive the present overtime. If the overtime hours are reduced after July 1, then there will be a corresponding reduction in the overtime pay of Mr. Hoover....

In its annual report of November 1944, the Civil Service Commission, while conceding (the undeniable fact) that the federal government qua employer had

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210Frances Perkins, Letter to Editor, NYT, Nov. 20, 1943 (12:5-6).
211CR 91:6067 (June 13, 1945) (Samuel Dickstein, Dem. NY).
been "slow in recognizing the necessity for compensating its salaried employees for overtime despite the fact that existing laws required private employers to pay higher rates for overtime work," urged the proposition that the "United States Government...must be the most progressive employer in the Nation."\footnote{United States Civil Service Commission, \textit{Sixty-First Annual Report: Fiscal Year Ended June 30, 1944}, at 2, 1 (1944).} In spite of the fact that the FLSA's overtime provision had been in effect for only six years (and, to boot, excluded a significant proportion of white-collar workers), the CSC, anticipating the postwar period, confidently assumed that "this Nation will once again subscribe to the policy that overtime work is something to be avoided, and that when it becomes necessary it should be compensated for at higher rates of pay." Its certitude on this point derived from its vision of employers' having learned the lessons of mass unemployment: "Any other policy would invariably result in some workers receiving large incomes while others, who would be just as anxious to work, would find themselves deprived of such an opportunity." Consequently, the commission concluded that after the war the government "should do everything it can to discourage overtime work within the Government by providing for additional compensation at higher rates of pay."\footnote{US CSC, \textit{Sixty-First Annual Report} at 2.}

Institutional amnesia was reflected in the commission's insistence that the self-imposition of penalty overtime rates was the government's most powerful weapon—overlooking the existence for decades of an actual maximum eight-hour regime.\footnote{See above.} Recurring to the view that underlay the NIRA, the CSC asserted that it would be "necessary for all employers, both public and private, to follow such a policy if the goal of full employment is to be achieved."\footnote{US CSC, \textit{Sixty-First Annual Report} at 2.} Ultimately the CSC recommended enactment of a permanent law that would entitle salaried employees to time-and-a-half compensation after 40 hours computed by a formula that converted annual to hourly rates on the basis of 2,080 annual hours.\footnote{US CSC, \textit{Sixty-First Annual Report} at 3.}

Then at the beginning of 1945, President Roosevelt, in what turned out to be his final annual budget message, admonished the legislative branch:

\footnote{US CSC, \textit{Sixty-First Annual Report} at 2.}
Prior to the expiration of the overtime pay law, the Congress should reexamine the entire subject of hours of work and pay. Regardless of the progress of the war in Europe, many Federal employees will continue to be needed on a 48-hour work schedule, and provision must be made for their overtime compensation. I recommend that the Congress enact permanent legislation which would authorize overtime compensation at true time and a half rates.

When at some future date it becomes possible for most Federal employees to go on a 40-hour work week, their earnings will be materially reduced. A situation of hardship and unfairness will then exist unless an increase in basic salary rates has been granted in recognition of the rise in the cost of living. I recommend a prompt reexamination of Federal salary rates with a view to making adjustments consistent with the national stabilization policy.218

Not until Roosevelt had put Congress on notice that permanent overtime legislation was needed did it begin to act.219 In early April, the chairman of the Senate Civil Service Committee, Sheridan Downey—who had been the candidate for lieutenant governor in Upton Sinclair’s End Poverty In California gubernatorial campaign in 1934220—introduced a bill to amend the Classification Act of 1923 so that the overtime hourly rate for employees whose basic compensation was less than $3,800 annually would be time and a half for all hours over 40 and the basic hourly rate would be calculated by dividing by 2,080 hours. In contrast, the overtime hourly rate per 416 overtime hours for employees whose basic annual compensation was $3,800 or more would begin at $1,140 for $3,800 and taper down to $654 for salaries of $6,500 and over.221 This framework of what was “generally referred to as the white-collar pay bill for Federal employees”222 proved to be more generous than Congress as a whole was willing to be.

During the final days of the war in Europe, the committee held hearings on salary and wage administration for federal employees, which revealed widespread dissatisfaction with existing law and support for a permanent change. Testifying once again, CSC commissioner Arthur Flemming blamed the use of 2,880 hours as the divisor for the fact that “[t]he so-called provision for time and one-half pay
for overtime, in the existing law, is a misnomer. The existing law provides, in fact, for only time and one-twelfth pay for overtime work." Noting that the bill would create a true overtime system for salaries under $3,800, he pointed out that the new tapering-down formula was designed to ensure that employees in the upper brackets ($6,500 and up) did not receive less than they were paid under existing law ($628.33 on salaries of $2,900 and above). Government stabilization policy, according to Flemming, was based on a recognition that when hours were extended and some workers obtained additional overtime pay, they might receive more pay than those doing "more difficult or responsible work" unless some provision were made for workers in the higher levels. In this sense he saw the bill as creating a permanent overtime pay policy that was fair to employees and the government. Even though it was true that before the war emergency white-collar workers had not worked much overtime and that after the war the hours would certainly revert to 40, Flemming, implicitly criticizing the FLSA, insisted that: "Government must set the right kind of an example. If some people are going to work a lot of overtime it means that some other people are not going to have an opportunity to work at all."

Much more mundane concerns underlay the testimony of Rear Admiral R. G. Crisp, the director of Shore Establishments and Civilian Personnel of the Navy Department, who did not even have to reach the issue of overtime to complain that naval white-collar salaries were often far below those of less-skilled jobs. It was bad enough, for example, that the lowest level Professional-1 navy chemist had the same salary as a navy laborer or a telephone operator in a private shipyard. But: "Perhaps the worst situation, and one which has given the Navy a great deal of trouble, is that in which white-collar employees earn less than the blue-collar

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224 Salary and Wage Administration in the Federal Service at 17 (Senate).
225 Salary and Wage Administration in the Federal Service at 18 (Senate). The House Civil Service Committee stressed that the government stabilization policy was based on a recognition that when, during a period of extended hours, some workers received additional pay, "adjustments in aggregate compensation must be made for other workers in order that proper relationships may be maintained between duties and responsibilities, on the one hand, and pay, on the other. The adjustment...is to authorize additional amounts of pay to employees in the higher classifications...in such a way that each succeeding higher level receives a proportionately lesser amount." Federal Employees Pay Act of 1945, at 3 (H. Rep. No. 726, 79th Cong., 1st Sess., June 8, 1945).
226 Salary and Wage Administration in the Federal Service at 50 (Senate).
227 Salary and Wage Administration in the Federal Service at 96, 103 (Senate).
employee they supervise.” And because white-collar employees were aware of these higher scales, many requested transfers to blue-collar jobs; denials of such requests, in turn, had led to lower morale.229

The perspective offered by union representatives was monolithically in favor of a revamped overtime regime. Donald Murray, the acting legislative director of the United Federal Workers, bluntly told the committee: “I don’t think it would be telling you people any secret to tell you that Federal workers regard this time and a twelfth provision as a chiseling device.”230 The president of the NFFE, Luther Steward, harked back to unions’ earlier conception of overtime regimes, stressing that: “We feel...that overtime pay should not be looked upon primarily as a means of augmenting the amount of take-home pay, but should be fixed at a punitive rate so that overtime will be worked only in cases of real emergency.”231 To be sure, he distinguished between two different patterns. On the one hand, at agencies such as the Bureau of Internal Revenue and the Forest Service, which were “periodically under the necessity of requiring excessive hours from employees to meet service emergencies,” this “required work should be paid for at punitive rates.” Where, on the other hand, an agency required overtime constantly over months or years, the Budget Bureau was in a better position to control the situation and better administrative personnel practices had to be enforced. Consequently, although the proposed tapering provision was an improvement over existing law, in the NFFE’s view, “employees, regardless of their salary, should be paid in full for all overtime performed under competent direction.”232

The president of the Design Supervisor’s Association at the Philadelphia Navy Yard, Angelo Stefano, agreed that the proposed $3,800 limitation should be eliminated. Not the first or the last participant in the controversy to overlook the pervasive white-collar exclusions under the FLSA, he urged that the same principles that the federal government required in its work with private corporations under the wage and hour law, “which in part requires that private industry pay time and one half for overtime over 40 hours, with no limitations, should also be accorded per annum Federal technical employees.”233 In particular, Stefano pointed out that “all salaried technical employees, who by their initial qualifications and meritorious services have achieved responsible supervisory positions” with salaries

228 Salary and Wage Administration in the Federal Service at 105 (Senate).
229 Salary and Wage Administration in the Federal Service at 111 (Senate).
230 Salary and Wage Administration in the Federal Service at 155 (Senate).
231 Salary and Wage Administration in the Federal Service at 168 (Senate).
232 Salary and Wage Administration in the Federal Service at 169 (Senate).
233 Salary and Wage Administration in the Federal Service at 182 (Senate).
above $3,800, would be penalized by the bill.  

As reported out by the Senate Civil Service Committee a few days after the capitulation of Nazi Germany, the framework had been radically rolled back: overtime pay was applicable only to the first $2,900 of an employee’s compensation and hourly pay was to be calculated, reverting to the fictitious 360-day work year, by dividing the annual salary by 2,880. The bill substantially continued the provisions of Public Law No. 49 of the 78th Congress (especially time and one-twelfth). The committee rejected the proposed modification of computing overtime because it “felt that it was dealing with an issue of rapidly decreasing significance since committee members looked toward a post-war period of little or no overtime.”

Immediately after the Senate committee had issued its report, a subcommittee of the House Civil Service Committee held its own hearings in mid-May on two bills that were identical with Downey’s with respect to time and a half up to the $3,800 threshold, the 2,080 divisor, and the tapering scheme. The subcommittee was chaired by Representative Henry Jackson of Washington—who had introduced one of the bills in March. Several subcommittee members were puzzled by the Senate committee’s cut-backs, Jackson himself observing that if the Senate’s reasoning “were followed to its conclusion, we should have to put in a proviso in the Fair Labor Standards Act and say we will repeal it as soon as V-J day comes because there probably won’t be the problem of a 48-hour week.”

Arthur Flemming of the CSC expressed the commission’s judgment that as an empirical matter overtime work would virtually disappear in the executive branch after the end of the war with Japan (though some law-enforcement agencies like the Secret Service might continue to perform some). Nevertheless, as a matter of policy, employees should be paid more than the regular rate for overtime to compensate for increased fatigue, the decrease in normal leisure time, and the additional expense. Moreover, it was also a device to discourage the government

234 Salary and Wage Administration in the Federal Service at 183 (Senate).
235 S. 807, § 102 (79th Cong., 1st Sess., May 12, 1945) [Report No. 265].
239 Salary and Wage Administration in the Federal Service at 17 (House).
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as employer from working overtime. After all, it was generally recognized that overtime work was less effective than regular hours and was, in normal times, the result of bad management practices. Thus if appropriations were adequately controlled, the extra expense of overtime would discourage its use and encourage better management. Flemming’s attack on the abusive and irrational imposition of overtime on government white-collar workers included the charge that “in the past in the Federal services there have been tens of thousands of hours of uncompensated overtime that were absolutely unnecessary and brought about simply because...the boss didn’t properly plan his work when he came in the morning, but he sat around for a while, began to apportion the work about noon, and then expected the employees to work overtime in order to make up for his failure to apportion the work properly at the beginning of the day.”

Discussion of the salary ceiling on full overtime pay was initiated by Massachusetts Republican Christian Herter (a future Secretary of State under Eisenhower), who asked: “[C]an you tell me what the philosophy is of paying the fellow who gets $3,800 a year roughly $3 an hour overtime, whereas the fellow who gets double the salary, and who presumably is worth twice as much per hour, gets only half of that? ... I just think that that is an awfully hard scale to justify as a permanent peacetime matter.” Flemming was constrained to agree that “[f]rom the standpoint of strict logic you cannot justify it.... A fellow at $3,800 gets paid a certain overtime rate whereas a man whose duties are important enough to justify his being paid at the rate of $8,000 gets an overtime rate that is below the man getting $3,800.”

Although both witness and members of Congress appeared ill-informed about the structure of overtime regulation for white-collar workers under the FLSA—which instead of a taper simply excluded all executive, administrative, and professional employees above a rather minimal salary level—Representative Jackson directed the discussion in that direction in an effort to justify what Herter

240 Salary and Wage Administration in the Federal Service at 42 (House).
241 Salary and Wage Administration in the Federal Service at 43 (House).
242 Salary and Wage Administration in the Federal Service at 48-49 (House).
243 Salary and Wage Administration in the Federal Service at 49 (House).
244 For example, Flemming testified that federal employees were entitled to overtime pay, “that being the general practice, of course, as far as industry is concerned.” Salary and Wage Administration in the Federal Service at 43 (House). In fact, the FLSA excluded large numbers of private-sector white-collar employees from such an entitlement. Similarly, Flemming stated: “We are trying to climb up to the level of where private industry is at the present time....” Id. at 68. See also id. at 59 (statements by Rep. Rees and Rep. Miller).
and Flemming regarded as an anomalous salary cut-off point by asking: “Is there a distinction in federal law relating to time and a half between executive positions and the so-called hourly rate position? I am wondering if there isn’t some justification for this formula on that basis.” When Flemming responded that the FLSA recognized “a line of demarcation of that kind,” Jackson expressed his agreement with “the logic of the argument.”\(^{245}\) At this point, however, it began to dawn on the congressmen that adoption of the FLSA’s logic was hardly a panacea. Alluding to the salary level at which the taper terminated and apparently hoping to hear that the FLSA’s exclusion of executives could eliminate the anomaly, Representative Charles Vursell (Rep. IL) asked Flemming: “Now, most men who are hired at from $5,000 to $6,000 are, more or less, executives; are they not?” Contrary to his expectation, Vursell learned that “[a] good many are chemists, physicists, engineers, and so on. Many are doing scientific work but without supervisory responsibility.” Undeterred by this revelation, Vursell then discerned a species of moral hazard: “Who is going to keep the time over these executives, who is going to say when it is necessary to work a little overtime in the evening? It seems to me that when you get up to where they are drawing $5,000 a year you ought to be a little more sparing about this overtime. I just don’t get that myself.”\(^{246}\) Responding to Vursell, first-term California Democrat George Miller pointed out that “if I am a $6,000 executive I just can’t come in in the morning and say, ‘I decided to stay at the office last night for two hours and, therefore, I want $1.75 an hour.’”\(^{247}\)

Flemming then explained the constraints on executives’ authority to keep their hands in the overtime till—the necessity of a budget appropriation and an order or approval of the work by agency heads, who were themselves excluded from overtime compensation\(^{248}\)—but committee members continued to be divided over whether the flaw in the bill consisted in conferring on higher-paid federal employees a lower overtime compensation rate or in entitling them to any overtime pay at all.\(^{249}\) In contrast, Jackson sought an escape from this impasse in pragmatism:

Isn’t this essentially a compromise? ... You have got to have some sort of rule of thumb to take care of a situation like this. I think there is a vast difference...where a man acts in an administrative capacity his hours are indefinite. He may have to get to the office before the rest of the crew and he is there after the rest of the crew. But the difficulty is

\(^{245}\)Salary and Wage Administration in the Federal Service at 49 (House).

\(^{246}\)Salary and Wage Administration in the Federal Service at 50 (House).

\(^{247}\)Salary and Wage Administration in the Federal Service at 51 (House).

\(^{248}\)Salary and Wage Administration in the Federal Service at 51 (House).

\(^{249}\)Salary and Wage Administration in the Federal Service at 50 (House).
that if you just take the salary brackets there are so many people that are purely employees, without any administrative responsibilities, and are hired almost on a per hour basis, because of their peculiar skill, knowledge, or scientific ability.250

As much confusion and ignorance concerning the scope of white-collar workers' overtime entitlement under the FLSA prevailed among the leaders of federal employee unions as among the congressmen. For example, James Burns, the national president of the American Federation of Government Employees, after declaring that “we feel that all employees, regardless of the salaries received, should be paid in full for all overtime ordered and performed,” was asked by Representative Jackson: “Do you make a distinction at all between one who has an executive position or one who is doing administrative work and an individual, we will say, who is an expert chemist or technician...who is normally paid on a 40-hour-a-week basis?” Standing his ground, Burns replied: “If the overtime being performed...is ordered, and if it is under supervision, I do not make any distinction.” Seeking to undermine Burns’s absolutist position, Jackson pointed out that such an approach would mean that someone with a $9,000 annual salary would be paid $11,270—more than the head of his department (who was limited to $10,000). When Burns agreed that there would be a few such cases in the higher salary brackets, Jackson insisted that such an outcome “would hardly be practicable, because the person that presides over the department...in his executive capacity...may work 60 hours.” At this point Burns finally conceded that legislation might be passed for that head, but still insisted that “the principle of true time and a half for overtime should be recognized on the statute books, as it is in general principle in industry; and indeed it has been prescribed in industry by no less an authority than the Government itself.”251

This vast underestimation of the magnitude of the exclusions of private-sector white-collar workers from the FLSA’s entitlement also marked the testimony of Foster Pratt, the president of the International Federation of Technical Engineers, Architects, and Draftsmen’s Unions (AFL). Explaining that the small amount of money that government saved by failing to pay overtime it lost in lower morale, Pratt stated that one and one-twelfth time had been a “very sore spot with the technical engineers and architects,” many of whom, resenting the injustice of not receiving the “true overtime” that their fellow workers in industry received, had transferred to mechanical positions in government or to technical positions in industry.252

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250 Salary and Wage Administration in the Federal Service at 50 (House).
251 Salary and Wage Administration in the Federal Service at 135 (House).
252 Salary and Wage Administration in the Federal Service at 205 (House).
Following the House hearings Jackson introduced a new bill, which set the ceiling for full time and a half at $2,980, flattened the taper, and imposed a ceiling of $10,000 on aggregate pay including any overtime. The Civil Service Committee promptly reported the bill out and the House debate began almost immediately. Congressmen displayed an odd amalgam of realistic appreciation of the need for overtime regulation among federal white-collar employees—67 percent of whom earned $2,000 per year or less—and a pervasive misunderstanding of the counterpart scheme under the FLSA. Jackson, who played a leading role in guiding the bill through the debates, asserted that under the FLSA “they recognize time and a half up to $3,800 in private industry. After that they make no provision for time and a half. That is the line of demarcation between a per hour employee and an executive who is paid by the month. We went beyond that and reduced it even more...to $2,980...” In fact, from 1940 to 1950, the salary level above which bona fide executives forfeited their entitlement to overtime pay under the FLSA was $30 a week, which equaled $1,560 per year—barely one-half the proposed ceiling for federal employees and two-fifths of the $3,800 erroneously alleged and repeated by Jackson.

In contrast, congressmen emphasized that time and a half was a penalty designed to “discourage overtime employment” and “spread out the work.” Jackson agreed “absolutely” with Detroit Democrat John Dingell that it was “a

253 H.R. 3393, §§ 201 and 603(b) (79th Cong., 1st Sess., June 6, 1945).
256 CR 91:5906 (June 11, 1945).
257 CR 91:6009 (June 12, 1945). Rep. Samuel Dickstein (Dem. NY) stated that “true time and one-half” up to $2,980 “is in line with established Government policy which the Congress made explicit in the Fair Labor Standards Act.” Id. at 6006. During the 1940s the threshold for administrative and professional employees under the FLSA was $200 per month, which equaled $2,400 per year. Referring to the FLSA, Homer Angell (Rep. OR), who had introduced a bill similar to Jackson’s, felt that it “would seem fair for the Federal Government to accord the same treatment to its own employees it requires of others.” CR 91:6062. At the other end of the spectrum, Representative Frank Keefe (Rep. WI) did “not know that stenographers in many private businesses are getting time and one-half.” CR 91:6059.
259 CR 91:5913 (Rep. Vursell). Rep. Lansdale Sasscer (Dem. MD) agreed that: “The overtime provision in this bill, like all overtime pay, should have a tendency, when employment demands are less heavy, to reduce the working hours to a basic workweek of 40 hours.” Id.
grave injustice" not to pay overtime to white-collar employees "because it does not make any difference whether he is a clerk or an executive, if he works overtime he should get time and one-half. ... Clerk or executive should be compensated on the same basis without distinction."260

Emblematic of the broad congressional support for an overtime system for federal white-collar employees more comprehensive than the FLSA's is the fact that even the radical right-wing California Republican Bertrand Gearhart261 paid homage to it: "Congress has before it...an elementary question...of doing justice to the white-collar workers in the service of our Government,"262 against whom the law had "discriminated...."263 Gearhart even offered a humanitarian critique of the bill's failure to provide true time and a half for upper-bracket employees:

This, of course, is based on the theory that the lower-bracket employees need the greater increases, which may be true enough, but it also seems clear that as a matter of abstract justice there should be no distinction; if a man's effort is worth a certain amount per hour, whether it is much or little, the principle of premium pay for overtime work is still sound.

That principle is derived from the fact that human beings are not machines and that there is a limit to the time they can work, or should work, in the interest of their physical health.264

Gearhart went on to declare that it was generally conceded that in normal times 40 hours was best for the employee's welfare and the quality and quantity of his production: "Scientific studies indicate that the average man is probably able to do good work for a 48-hour week but that a 40-hour week is better for the average

260 CR 91:5909.


262 CR 91:5913 (June 11, 1945).

263 CR 91:5914.

264 CR 91:5914.
woman, not necessarily because of physical health but because she usually has home responsibilities that take considerable time. In either event, however, when we impose a 48-hour week, we are asking people to work a schedule that may possibly imperil their recuperative powers."

The version of the bill that the House then passed by the overwhelming majority of 317 to 36\textsuperscript{266} differed considerably from the Senate version, and in conference the Senate receded with respect to all the aforementioned significant overtime issues, in particular concerning the determination of the hourly rate of pay, which in the Senate version would have limited overtime pay to one and one-twelfth time.\textsuperscript{267}

Thus as finally enacted on June 30, the Federal Employees Pay Act of 1945, which applied to all civilian officers and employees in the executive branch, but excluded elected officials, judges, heads of departments and agencies, and the field service of the Post Office Department,\textsuperscript{268} provided time-and-one-half overtime for all hours, officially ordered or approved, in excess of 40 per week for employees whose basic annual compensation was less than $2,980; time and a half was computed on an hourly rate determined by dividing the annual rate of compensation by 2,080. For employees with an annual compensation of $2,980 or more, the overtime rate of compensation per 416 hours was $894 at $2,980, tapering down to $628.334 at $6,440 and above.\textsuperscript{269} A crucial component of the

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\textsuperscript{265}CR 91:5914.
\textsuperscript{266}CR 91:6068-69 (June 13, 1945).
\textsuperscript{267}Federal Employees Pay Act of 1945 (H. Rep. No. 784, 79th Cong., 1st Sess., June 23, 1945); CR 91:6666-74 (June 25, 1945) (House); id. at 6709-13 (June 26, 1945 (Senate).
\textsuperscript{269}FEPA, § 201, 59 Stat. at 296-97. With an annual salary of $6,440 equal to an hourly rate of $3.10 (for 2,080 hours), an hourly overtime rate of $1.51 (=8628.334/416) was less than half the regular rate. At an annual salary of about $4,080 the overtime rate dropped to straight time. H. Rep. No. 726: Federal Employees Pay Act of 1945, at 11 (79th Cong., 1st Sess., June 8, 1945). Years later, the chief of the Personnel Classification Division of the CSC explained “the mathematics” of the cut-offs this way: In order to prevent workers from receiving higher wages than their supervisor by working overtime, private industry raised executives’ and administrators’ base pay to maintain a “logical differential”; the wartime wage stabilization program required approval of the Salary
\end{footnotesize}
law was an annual overtime cap prohibiting payment to any employee, for any pay period, of basic compensation plus additional compensation provided for by the FEPA in excess of an annual rate of $10,000.\textsuperscript{270}

With enactment of the FEPA Congress established a considerably broader scope of coverage for federal government white-collar workers than it and the DOL ever had for their private-sector counterparts—a gap that would last into the twenty-first century. (When the acting commissioner of labor statistics informed the Senate Education and Labor Committee in early 1944 that “factory workers are customarily paid premium rates for overtime while the office worker only infrequently enjoys this added compensation,” it was unclear whether this infrequency resulted from the expansive exclusions or pervasive noncompliance.)\textsuperscript{271} And the

Stabilization Unit of the Treasury Department for white-collar workers, which informed the Senate Civil Service Committee that $6,400-$6,500 was the cut-off point where no overtime, even pursuant to a tapering procedure, would be granted to an executive, where-as the supervisor closest to the employee would be given the full 50-percent premium. The committee therefore selected CAF-7, the grade where minor executive or administrative positions began, and calculated time and a half on the CAF-7 base rate of $2,980, which was $894 for eight hours of overtime for 52 weeks a year; from the total of $3,894 the committee then tapered the payment off to a point at which the overtime pay would not be reduced that the higher-paid government employees had been receiving under the War Overtime Pay Act of 1943; this point turned out to be overtime pay of $628.33 at a base salary of $6,440, the $2,900 being the lower ceiling under the 1943 act. Compensation for Overtime and Holiday Employment: Hearings Before a Subcommittee of the Committee on Post Office and Civil Service United States Senate on S. 354, at 36 (82d Cong., 1st Sess., Sept. 6-7, 1951) (testimony of Ismar Baruch).

\textsuperscript{270}FEPA, § 603(b), 59 Stat. at 303. A grandfather clause made an exception for any employee who was receiving overtime pay on June 30, 1945 and whose aggregate rate of compensation on that date was over $10,000 annually: he was permitted to receive overtime compensation at such a rate as would not cause his aggregate rate of compensation for any pay period to exceed what he was receiving on June 30, 1945, until he ceased to occupy that position or until the overtime hours in his workweek were reduced, at which time such a compensation rate had to be reduced proportionately. \textit{Id.} This section was amended the following year to include any payments provided for by any amendments to FEPA. Federal Employees Pay Act of 1946, ch. 270, Pub. L. No. 390, § 7, 60 Stat. 216, 218.

\textsuperscript{271}Wartime Health and Education: Hearing Before a Subcommittee of the Committee on Education and Labor United States Senate, Part 3: Fixed Incomes in the War Economy: 1:1457, 1458 (78th Cong., 2d Sess., Jan. 25-Feb. 9, 1944) (A.F. Hinrichs, “Report on the Wages of White-Collar Workers to the Subcommittee on Wartime Health and Education of the Senate Committee on Education and Labor”). Foster Pratt, the president of International Federation of Technical Engineers, Architects, and Draftsmen’s Unions,
unfairness that many members of Congress perceived in the tapering off of the overtime scale for higher-salaried employees found no historical equivalent in the FLSA context. This legislative achievement in the interim between V-E and V-J day was especially significant in light of the fact that just a month after the end of the war the president of General Motors, Charles E. Wilson, was already urging modification of the FLSA to mandate a 45-hour week without overtime pay during a three- to five-year postwar adjustment period.  

AFL, testified to the same committee that whereas members of the union working under contracts in the private sector received time and a half after 8/40 hours, the unorganized usually did not. Id. at 1393.

272"45-48 Hour Week Urged by G.M. Head as Wage Solution," *NYT*, Oct. 21, 1945 (1:1).
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And between you and me, I do not think the person is living who needs 30 working days of the year as annual leave for any amount of relaxation.¹

Following enactment of the Federal Employees Pay Act in 1945, little changed in terms of the formal structure of overtime regulation for almost a decade. After giving federal employees a $330 raise in 1948 and raising the FEPA total salary plus overtime ceiling to $10,330,² Congress the following year undertook a major change in the Classification Act by creating the General Schedule (GS) system, into which it folded the Professional and Scientific, Subprofessional, and Clerical, Administrative, and Fiscal Services. CAF-1 through CAF-15 corresponded to GS-1 through GS-15, while PS-1 corresponded to GS-6 and PS-8 to GS-15. Pursuant to the new compensation schedule, GS-3 step 5 was paid $2,970, meaning that the full overtime ceiling of $2,980 kicked in at GS-3 step 6; consequently the entire professional and scientific workforce was deprived of full overtime as were all but the lowest-paid CAF workers. The upper ceiling of $10,330 fit in between GS-15 steps 2 and 3, meaning that all employees from that grade through GS-18 ($14,000) were excluded from the overtime system entirely.³ By 1951, after the next round of salary increases, the overtime system had become largely nonfunctional: the full overtime ceiling of $2,980 slid further down the scale to GS-1 step 7, while the upper ceiling now began at GS-14 step 5.⁴

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Shifting the Overtime Ceilings from Fixed Dollar Amounts to Fixed GS-Grades in 1954

I believe that a point is reached in a professional’s career where he is more concerned with the task to be accomplished than he is with the hours it takes to perform it. When such an employee has to travel on Government business, it is simply considered part of the job.5

As soon as the Democrats regained control of the 81st Congress in 1949, bills were introduced to reform the overtime system, the most far-reaching of which would have amended the FEPA to eliminate all ceilings and, as several of them put it, provide “true time and one-half for work in the Government service.”6 Other bills provided for a 35-hour week7 or “true time and one-half” after eight hours a day or 40 hours per week and double-time on Sundays and holidays.8

The midst of the Korean War did not appear to be a propitious moment for advocating more overtime pay for federal white-collar workers. After all, “[s]pokesmen for industry favor[ed] abolition of premium pay” after 40 hours, although they agreed that it was “‘unrealistic’ to expect Congress to endorse the idea.” The Chamber of Commerce of the United States, for example, recommended revisiting those elements in the FLSA (as well as the Walsh-Healey and Davis-Bacon acts) “which still reflect the aim of lessening unemployment by spreading the work through work-week limitations and mandatory provisions for overtime premium wage rates,’” while conceding that overtime was “‘too hot a political potato’....” Nor were employers the only abolitionists. Public officials

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5Federal Employee Benefits: Hearings Before the Subcommittee on Manpower and Civil Service of the Committee on Post Office and Civil Service House of Representatives on H.R. 3628, H.R. 8085, H.R. 8983, and H.R. 9778, at 4 (Serial No. 92-19, 92d Cong., 1st Sess., July 20-21, 1971) (statement of Robert Hampton, chairman, U.S. Civil Service Commission, opposing proposed bill to pay federal employees for all their work-related travel time on the grounds that private employers only rarely paid FLSA-exempt employees for traveling outside of regular working hours and much of such travel was done by employees in GS-11 or higher who were the equivalent of FLSA-exempt).


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such as Federal Reserve Board member and ex-New Dealer Marriner Eccles contended that overtime should not kick in until after 44 hours “so as to increase total production and to help maintain living standards without increased production costs.” And some members of Congress were pushing for 48-hour workweeks before overtime pay began.\(^9\) One southern Democrat introduced a bill in 1951 that proposed the same regime for government employees.\(^10\)

Nevertheless, as the federal white-collar overtime pay regime approached the vanishing point, the Civil Service Commission in its 1951 and 1952 annual reports recommended that Congress amend the FEPA to provide full time and a half for all Classification Act employees through the maximum salary of GS-9.\(^11\) Indeed, so many bills proposing changes in federal premium pay for overtime, night, Sunday, and holiday work had been introduced during the 81st Congress that the Senate Committee on Post Office and Civil Service suggested that the Bureau of the Budget and CSC undertake a comprehensive study of the various problems. The report, which they began in July 1950 and submitted to the committee in August 1951 and which also covered practices in state and local governments and private industry, pointed out numerous unresolved problems in the FEPA.\(^12\)

At the outset of the 82nd Congress in January 1951, Democrats introduced a number of bills similar to those that two years earlier had done away with all salary ceilings.\(^13\) On January 11, 1951, the chairman of the Senate Post Office and Civil Service Committee, Olin Johnston of South Carolina, introduced S. 354, which would have amended the FEPA to provide for time and a half on employees’ salary up to $5,000 for all hours in excess of eight per day, Monday through Friday, and all hours on weekends and holidays.\(^14\) As Johnston himself explained on the


\(^14\) S. 354 (82d Cong., 1st Sess., Jan. 11, 1951). Very similar bills were introduced at
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Senate floor, the bill had not been his idea, but rather that of the CSC and Bureau of the Budget. In March, the subcommittee on civil service held a brief hearing on S. 354 and another bill, touching only marginally on the question of overtime. The president of the National Federation of Federal Employees testified that the $5,000 was "wholly inadequate": there should be a "fixed principle" that any employee, regardless of compensation, should be paid for overtime work, which, he pointed out, was often not recorded, let alone, paid in many agencies.

Half a year later the same subcommittee, chaired by Rhode Island Senator John Pastore, held a two-day hearing, which was keyed to the September 5th Confidential Committee Print version of S. 354. This Federal Employees Overtime Pay Act used the maximum rate of GS-9 as the lower ceiling for calculating overtime for employees whose salary exceeded that rate, and the maximum rate of GS-15 as the upper ceiling for the maximum compensation including overtime. The hearing's centerpiece was the presentation by Robert Ramspeck, the chairman of the Civil Service Commission (and former chairman of the House Civil Service Committee), of the CSC's joint study with the Budget Bureau, "Recommendations and Findings on Overtime, Night, Holiday, and Sunday Pay."

The study found that the principle of premium overtime pay was "almost universal throughout American industry" so that even office workers who were not covered by the FLSA or union agreements "usually" received the FLSA rate. In contrast, in state government, the most common practice was to offer only compensatory time off, followed by straight-time payment. Among cities with more than 10,000 population, only 41 percent provided any compensation whatsoever for city hall administrative or clerical workers; of 331 cities that did pay for overtime work, 219 used time off. Remarkably, the majority of federal agencies recommending

the same time. H.R. 1371 (82d Cong., 1st Sess., Jan. 12, 1951) (Rep. George Miller, Dem. CA); H.R. 1509 (82d Cong., 1st Sess., Jan. 15, 1951) (Rep. Gardner Withrow, Rep. WI). These bills also all proposed compensatory time off at one and a half hours for each hour of irregular or occasional overtime work.


Stenographic Transcript of Hearings Before the Subcommittee No. 1, (Civil Service) of the Committee on Post Office and Civil Service United States Senate on S. 354, at 55-56 (Mar. 7, 1951) (testimony of Luther Steward).


Compensation for Overtime and Holiday Employment at 4-32.

Compensation for Overtime and Holiday Employment at 11. Three states specified that employees with monthly salaries in excess of $300 ($3,600 annually), $280-$320 ($3,360-$3,840), and $415-$505 ($4,980-$6,060) receive overtime pay only in exceptional
an extension of time and a half to higher salary levels—the modal recommendation—urged eliminating all salary ceilings; one agency proposed paying time and a half on all salaries up to the $5,400 rate of GS-11 and using that rate for all higher salaries.20

The CSC and Budget Bureau also devoted some attention to overtime practices in the private sector, which, since the beginning of the Korean War and extended workweeks, firms had restudied with regard to first-line supervisors, who until then had generally been regarded as part of management and thus expected to work overtime without additional pay.21 Relying on several recent studies by private employers’ groups,22 the agencies stressed that a National Industrial Conference Board study of 30 large firms with a total of well over a million employees disclosed that four paid supervisors no overtime compensation, 16 straight time, and seven time and a half; the modal salary at which tapering began was $4,800; of the nine firms that set an upper salary ceiling up to which overtime was paid, in seven the ceiling ranged between $7,200 and $8,000, while the highest was $10,020. In contrast, the National Office Management Association had discovered that: few firms extended overtime pay to employees at all salary levels; executive, administrative-staff, and professional employees were typically not eligible for overtime pay; $4,000 was the salary level at which most firms stopped paying overtime, while $4,500 was the average boundary at companies with more than 1,000 employees.23

The CSC and Budget Bureau concluded that although it was necessary to raise the lower ceiling of $2,980 in order for the regulation to remain reasonably consistent with the congressional intent underlying the FEPA as well as with the standards set for the private sector by federal regulation and existing industrial practice, extending time and a half to all salary levels, as worker organizations and some agencies proposed, would be contrary to federal law and industrial practice. Like the committee’s revised bill, the study recommended the maximum rate of GS-9 (which at the time was $5,350) as the lower ceiling, thus providing time and a half for 89 percent of full-time Classification Act employees; tapering would then generate straight-time pay at a salary of $8,025 and three-fourths of straight time at $10,700. The study justified the imposition of an upper ceiling as consistent circumstances. Id. at 14-15.

20Compensation for Overtime and Holiday Employment at 15.
21Compensation for Overtime and Holiday Employment at 13-14.
22The CSC and Budget Bureau did not identify the studies, but one was published by the National Industrial Conference Board: Herbert Briggs, “Paying Supervisors for Extended Overtime,” Management Record 12(12):442-44, 470-72 (Dec. 1950).
23Compensation for Overtime and Holiday Employment at 14.
with the FLSA’s exclusion of administrative, executive, and professional employees and the general business practice of excluding top management from overtime pay plans. Specifically, it recommended the maximum GS-15 salary rate of $11,000 on the grounds that if a 44-hour workweek were established, GS-14 employees would be prevented from receiving as much take-home pay as GS-15 employees, and that if a 48-hour week were established, only employees receiving the three highest GS-14 salary rates would surpass GS-15 pay. Oddly, the agencies failed to point out that this consistency of principle nevertheless embraced a considerable quantitative discrepancy since the FLSA long-test salaries, which the study did mention, amounted to only $2,860 a year for executives and $3,900 a year for administrative and professional employees. Finally, the joint study also rejected the proposal to offer time-and-a-half compensatory time off on the grounds that it would enable employees to earn their basic pay without working 40 hours.

Subcommittee chairman Senator Pastore, who had not been in Congress when the FEPA was enacted in 1945, asked Ramspeck about the “philosophy behind” the two salary ceilings and the tapered overtime rate: “Was it a political solution in that they felt that in certain higher brackets you did not have the possibility of passing if you made it at the same rate as those up to $2,980.... Does anybody know?” Ramspeck, who had been the House Civil Service Committee chairman at the time of passage, replied that “the thought behind it on the part of Congress...was that you don’t pay executives in private industry for overtime, but in order to avoid the supervisory officials getting less that [sic; must be than] the people they are supervising, that tapering off plan was devised....”

Having reached the limits of his knowledge, Ramspeck handed off the question to Ismar Baruch, who had been chief of the Personnel Classification Division of the CSC in 1945. After Baruch had stated that the underlying philosophy had been “to match as nearly as possible the practice in private industry” under the FLSA, Pastore asked whether the law, as a practical matter, had worked out well: “Has there been desire and inclination on the part of these people in the higher brackets to work overtime realizing that the emoluments would not be the same percentage-wise as in the lower brackets?” Initially, Baruch’s response was less empirical and more a reflection of a personnel officer’s ideology or idealization of reality: “In the higher brackets I think there has been, as a rule, very little complaint or difficulty because most people who are rightfully called executives or administrators put in

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24 Compensation for Overtime and Holiday Employment at 16-17.
25 Compensation for Overtime and Holiday Employment at 13.
26 Compensation for Overtime and Holiday Employment at 18.
27 Compensation for Overtime and Holiday Employment at 35.
28 Compensation for Overtime and Holiday Employment at 36.
lots of overtime without any record being made and voluntarily so, on the same theory,...that you do not ask them to punch a clock when they go out and come back at lunch time. It works both ways.” He then abruptly left the subject of higher-paid bureaucrats in order to turn to the salary ranges that were relevant to the reforms that the CSC wanted Congress to enact. He therefore called attention to the “very curious situations” that arose around and somewhat above the average Classification Act salary ($3,667), at which overtime work began to be paid at straight time and eventually even lower rates. In the meantime Pastore was still waiting for an answer to his question: “Have they been able to get people to work overtime under that situation?” Unable to evade the issue any longer, Baruch was forced to assert that the question was empirically unanswerable: “the problem really has not hit the Government yet” because two months after the FEPA was passed, almost all agencies, pursuant to a presidential memorandum, returned to the 40-hour week; not until the Korean War had the problem “actually” arisen. All that Baruch could confirm was that the tapering scale had caused “some dissatisfaction”—the real “fly in the ointment” was that the $2,980 cut-off was too low.29

The assistant director of the Budget Bureau, Elmer Staats, insisted that it was “reasonable to assume that as a matter of equity the pay practices in the Federal service should not be inconsistent with those prevailing in American business.”30 He did not venture an opinion as to whether overtime pay coverage of much higher-paid federal white-collar workers than the FLSA offered was an inconsistency.

The most astounding testimony was submitted by Ralph Wright, the Acting Secretary of Labor,31 who informed the committee in writing that “in limiting the payment of overtime compensation to that part of the employee’s salary which does not exceed $5,000 per year..., the bill falls short of placing the Federal Government among the leaders in the field of employment relations.” Lamenting that the DOL was “unable to accord uniformly the same treatment to its own employees” that it enforced in the private sector with respect to time and a half as the sole recognized overtime compensation, Wright complained that S. 354 would do nothing to change the situation in which “[e]mployees in the upper steps of GS-12, and in grades higher than GS-12, could be required to work overtime hours at less than their straight time rates.” He characterized this “anomalous result” as “directly contrary to the philosophy and purpose of the Federal statutes under which the Government requires private employers to pay premium rates for overtime hours

29Compensation for Overtime and Holiday Employment at 37.
30Compensation for Overtime and Holiday Employment at 50.
31Wright, an official from an AFL union, was the assistant secretary of labor; it is unclear why he was acting for Labor Secretary Maurice Tobin.
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worked."

Wright's statement was astonishing because at the time the maximum salary for GS-12 was $8,040 and that for GS-15 was $11,800, whereas the FLSA's new short-test salary for all white-collar exclusions was only $5,200, and the job descriptions for these GS grades would certainly have met the duties tests for those FLSA administrative, executive, and professional exclusions. In spite of this lack of analogous treatment under the FLSA, Wright sought to justify universal time-and-a-half coverage as a means of staunching the outflow of some of the federal government's "most valuable employees" to private industry, which offered higher salaries, often shorter hours, and bonuses. In other words, once again, overtime regulation was being opportunistically stood on its head: instead of limiting hours, the approach was designed to encourage overtime work in order to compensate for lagging wages—only this time, rather than labor or capital, the DOL itself was advocating this policy inversion.

Following the hearings, the Senate committee reported out S. 354, which was virtually identical with the September 5th version. The committee rejected as an

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32 "Compensation for Overtime and Holiday Employment" at 79. The representative of the Organization of Professional Employees of the United States Department of Agriculture also asserted that "it is not clear to us on just what grounds of logic or precedence in industry or business...persons on regular salaries of $5,000 or less should merit full time and a half..., whereas those on salaries above that figure should not." Id. at 93-94 (Frederick Rand). Ultimately he agreed to exclude from overtime employees above GS-15 because they were high executives who made their own decisions as to whether to work overtime. Id. at 94-95. The NFFE urged adoption of the maximum rate of GS-11 ($6,400) as the lower ceiling. Id. at 67. The State Department urged increasing the upper ceiling to $15,000 so that it could compensate most of its executives on a straight-time basis. Id. at 78.


34 Classification Act of 1949, sect. 602(a), 63 Stat. at 962-63.

35 "Compensation for Overtime and Holiday Employment" at 79.

36 The AFL, for example, warned that "unless overtime is paid for at good old honest full-rate," the government would be unable to hire the workers it needed. In insisting that the government was misguided if it believed that it could "discourage overtime by not paying for overtime done in the so-called upper brackets and upper middle brackets," whereas full payment would be much more effective in discouraging the ordering of overtime, this argument overlooked the self-contradictory character of premium overtime pay: it discourages employers while encouraging workers. "Compensation for Overtime and Holiday Employment" at 85 (statement of George Riley, member, National Legislative Committee, AFL). In contrast, Charles Stengle of the AFGE insisted on the "humanitarian objective" of the overtime law in constraining "greedy employers" from exploiting workers; consequently, the "man who is receiving $6,000 or $7,000 should not be worked unusually long hours any more than one who is receiving $5,000, or less." Id. at 70-71.
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"extreme," without explanation, the view, expressed by a number of agencies and all employee groups, that time and a half should be extended to all salary levels; instead, it proposed as the lower cut-off point the maximum rate of GS-9, which "would conform more nearly...to prevailing practice in private industry...."37 The Senate committee amended the bill to limit overtime pay to that part of an employee's basic compensation which did not exceed the maximum rate for grade GS-9 and set the maximum rate for GS-15 as an upper ceiling: no premium pay could be paid to any employee whose basic compensation or whose total compensation including overtime exceeded this amount.38 However, the amended bill was recommitted to the committee39 and the Senate never debated, let alone passed it.40

With the Korean War over and just as the federal white-collar labor force was on the verge of effectively losing overtime pay as the FEPA's fixed ceilings were overtaken by salary raises,41 Frank Carlson, the Kansas Republican who was chairing the Senate Post Office and Civil Service Committee while his party controlled the 83rd Congress, introduced a bill at the beginning of 1954 that, among other things, proposed to salvage some semblance of an overtime system by shifting from ceilings based on a fixed-dollar amount to ones keyed to fixed grades in the GS hierarchy, the compensation for which would rise over time with successive pay increases. S. 2665, in other words, tracked the Democrats' S. 354 from 1951, as did several other bills introduced at or around the same time.42 The proposed lower ceiling for time and a half pay was the maximum scheduled rate of basic compensation for GS-9; employees whose basic rate exceeded the GS-9 maximum would be entitled to time and a half only up to that maximum rate. The upper ceiling would be fixed at the maximum GS-15 rate so that no premium

40CR 97:12949-50.
41During the first session of the Republican-controlled 83rd Congress, Republican Representative from Wisconsin Gardner Withrow, a one-time railway brotherhood official and Progressive member of the 74th and 75th Congress, introduced one bill providing for time and a half after eight or 40 hours without any salary ceilings and a second using GS-9 maximum as the ceiling. H.R. 2474 (83d Cong., 1st Sess., Feb. 2, 1953); H.R. 4692 (83d Cong., 1st Sess. Apr. 20, 1953). No action was taken on either bill.
compensation could be paid to any employee whose basic rate exceeded that maximum or when any such premium would cause an employee's compensation (including the premium) to exceed that GS-15 maximum for any pay period. Finally, the bill would have authorized department heads, at their discretion, to require employees whose basic compensation rate exceeded the maximum GS-9 rate to take compensatory straight time off in lieu of payment for irregular or occasional overtime work.43

The new bill brought in its wake yet another round of hearings. At the Senate hearings in February, Luther Steward, the president of the National Federation of Federal Employees, briefly referred to the increase in the overtime ceiling as "a very welcome and very fair provision...."44 His counterpart at the AFGE, James Campbell, was more critical. Since the existing limit of $2,980 had become the maximum rate for GS-1 so that employees above the third step in GS-2 and first step in GS-3 were no longer entitled to full overtime, only 14 percent of all Classification Act employees remained eligible for full time and a half. Thus while the premium compensation provision "would provide some badly needed corrections of the existing overtime pay law," the union stood "for time and one-half payment for overtime duty for all employees, regardless of amount of salary. ... Even if no premium pay were provided beyond GS-9, I believe that in principle it does not appear to be sound to reduce the overtime rate below the straight-time rate"—a result that kicked in at the second step of GS-13.45

Philip Young, the chairman of the Civil Service Commission, offered the most detailed analysis. The CSC viewed extending the time-and-a-half entitlement beyond $2,980 as necessary to maintaining reasonable consistency with the original intent of FEPA, standards set by federal statutes and regulations for industry, and existing industry practices. Time and a half should cover employees at salaries up to the top rate of GS-9 ($5,810): "This level is sufficiently low to exclude from the full overtime rate most employees in the executive and administrative group and the higher professional levels." The fixed dollar amount of overtime pay based on the $5,810 became straight time in GS-13 and less than straight time in GS-14 and GS-15, but some overtime compensation above GS-9 was "necessary to maintain reasonable differentials between aggregate pay rates (salary plus overtime) of employees and their supervisors when the workweek is extended" because the federal government lacked "the devices used by American industry to meet this need, such

45Fringe Benefits for Federal Employees at 19-20.
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as lump-sum salary adjustments and various kinds of bonuses.” The CSC welcomed the fact that the fixed overtime rates would maintain exactly the same differentials in aggregate pay rates as in regular salary rates between employees whose salaries ranged between the lower ceiling of $5,810 and the GS-15 maximum upper ceiling of $11,800, which would restore that ceiling to its grade level of 1946-49. The CSC also approved of the provision that would authorize agencies to decide whether to give money or time off to employees with salaries in excess of $5,810 for irregular, unscheduled overtime: “In practice, agencies and employees alike generally consider irregular overtime work of personnel at the higher grade levels to be voluntary and such overtime is not paid for. The proposals recognize this practical situation and would bring the overtime pay statute closer to administrative practice.”

S. 2665 as reported out by the Senate committee on April 6 retained the lower and upper ceilings of the original bill. The bill, in the committee’s words, “modernizes and simplifies the overtime law...relating to Federal employees,” most importantly by raising the overtime base for “true time and one-half” from $2,980 to $5,810. The ceiling on base pay plus premium pay would be increased from the then current $10,330 (which was the previous maximum GS-15 rate) to $11,800.

On the Senate floor, the lower ceiling of the maximum rate of GS-9 was changed so that employees whose salaries exceeded that rate were guaranteed overtime compensation that at the very least equaled straight time calculated on their own salaries. The House, too, adopted this change. Nevertheless, the conference report both deleted this provision, thus permitting the overtime compensation of employees with salaries above GS-9 to taper down below straight time, and lowered the lower ceiling from the maximum to the minimum rate of GS-9.

46Fringe Benefits for Federal Employees at 63. Young stressed that supervisors’ being paid less than supervisees was “a very sore point” and “just plain bad from a sound personnel management point of view.” Id. at 71.


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The Senate agreed to the conference report without objection, but it did spark token protest in the House, where the chairman of the Post Office and Civil Service Committee called the changes “minor.” Representative James Davis of Georgia related that he had offered an amendment incorporating both of these features in the House Post Office and Civil Service Committee, which had been adopted almost unanimously in committee and were passed by the House. Davis, who at the same time was perfecting legislation to “prevent such people as Alger Hiss from drawing retirement pay” based on their government employment, failed “utterly to see any reason why an employee who works overtime should be denied the right to receive at least his regular rate of pay for such overtime work. I do not see the justice at all of requiring an employee to do overtime work at a lower rate of pay than he receives for his regular hours.” He was seconded by Harold Hagen, a Minnesota Republican and former Farmer-Laborite, who lamented this “major injustice” and “discrimination.”

In the end, then, while the 1954 amendments to FEPA retained the upper ceiling of GS-15 maximum in the original S. 2665, they depressed the original lower ceiling of the maximum rate of GS-9 ($5,810) to the grade’s minimum basic rate ($5,060), thus reducing considerably the universe of federal employees who were entitled to full overtime pay. The amendments also adopted the compensatory time off provisions of S. 2665. Consequently, an agency head was authorized, at an employee’s request, to grant him or her compensatory time off “in lieu of payment for an equal amount of time spent in irregular or occasional overtime work”; in contrast, at his own discretion, an agency head was authorized to require that an employee whose salary exceeded the minimum rate of GS-9 be compensatory time off provisions of S. 2665. 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54CR 100:15038 (Aug. 18, 1954). It is not clear that Davis was correct in asserting that the provisions had been in the bill when the House passed it. In the course of Senate proceedings, S. 2665 had reappeared as H.R. 2263, which originally had dealt with a minor aspect of postal pay. Although the House passed the latter very short bill, Rep. Rees, the chairman of the House Post Office and Civil Service Committee, in presenting the conference report, told the House that the bill had “not been called up for consideration by the House.” Id. at 15039. The index to the Congressional Record does not mention any House action on S. 2265 or H.R. 2263 as revamped by the Senate before presentation of the conference report.
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sated for such overtime work, for which compensation would be due, with an equal amount of compensatory time off.\textsuperscript{57}

Raising the Overtime Ceiling Again in 1966

\textsuperscript{57}Act to Provide Certain Employment Benefits for Employees of the Federal Government, § 202(a), 68 Stat. at 1109.


\textsuperscript{59}Compensation for Overtime and Holiday Employment at 38.

\textsuperscript{60}See above ch 15.

\textsuperscript{61}Chaired by Clarence Randall, the former board chairman of the Inland Steel Co., the panel was composed of seven members, including AFL-CIO president George Meany. It was appointed preliminary to a recommendation to bring government executives' and scientists' pay closer to that in private industry. “Randall Heads Federal Pay Panel,” \textit{NYT}, Dec. 29, 1961 (9:2-3).
plying to federal white-collar employees the same standard that had prevailed for navy yard production workers since the beginning of the Civil War. To be sure, both the executive and legislative branches were primarily concerned with the federal-private salary gap in the higher ranges of the civil service,\textsuperscript{62} which reputedly was interfering with government efforts to attract and retain those—especially executives, engineers, and scientists—with “superior” skills and capabilities.\textsuperscript{63} Shortly after Congress had mandated comparability in the Federal Salary Reform Act of 1962,\textsuperscript{64} President Kennedy issued an executive order requiring the director of the Budget Bureau and the chairman of the CSC to submit an annual report to the president “comparing the rates of salary fixed for Federal employees compensated under” the Classification Act “with the rates of salary paid for the same levels of work in private enterprise as determined on the basis of the National Survey of Professional, Administrative, Technical, and Clerical Pay conducted by the Bureau of Labor Statistics.... Such report shall contain such recommendations with respect to statutory salary schedules, salary structures, compensation policy, and other related matters, as the Director and the Chairman deem advisable.”\textsuperscript{65}

Then in 1965 President Johnson informed Congress that: “We do not have two standards of what makes a good employer in the United States: One standard for private enterprise and another for the Government. A double standard which puts the Government employee at a comparative disadvantage is shortsighted. In the long run, it costs more.”\textsuperscript{66} At the same time, the President’s Special Panel on Federal Salaries reported that the federal government lacked a uniform and equitable policy regarding premium overtime pay for all of its civilian employees. The panel observed that in some government activities laws and practices required scheduling of uneconomical overtime work and payment at regular rates. It therefore recommended the authorization of enough manpower to reduce or eliminate uneconomical overtime, and, as soon thereafter as practicable, the enactment of


\textsuperscript{65}EO No. 11073, § 201, FR 28:203 (Jan. 7, 1963).

\textsuperscript{66}Pay Increases for Certain Civilian Employees and Members of the Uniformed Services: Message from the President of the United States 2 (H. Doc. No. 170, 89th Cong., 1st Sess., May 12, 1965).
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legislation authorizing premium overtime pay on an equal basis.67 Alluding to congressional hearings on the FLSA68 and implying that time and a half had lost its deterrence, the panel mentioned a concurrent discussion of whether premium rates should be increased to “serve again as a substantial financial deterrent to long hours.” This issue was not before the panel, but once more personnel had been hired to avoid uneconomical overtime, employees should be paid premium rates “on a basis comparable with industry practices when overtime is necessary.” Specifically, the panel contended that “sufficient manpower should be authorized to regularize employment to the maximum extent possible on the basis of 40 hours per week with no scheduled overtime.”69

By the mid-1960s, federal employees’ complaints, echoing those of the early 1950s, about the dysfunctionality of the overtime pay ceilings could no longer be ignored. At a June 1965 House Post Office and Civil Service Committee hearing on federal pay, president John Griner of the American Federation of Government Employees testified that some aspects of the overtime system are greatly in need of correction. The limit on overtime payment to the minimum rate for GS-9 means that true time and one-half now ends at a salary of $7,220. The overtime rate, however, becomes less than the straight time rate at the ninth step in GS-11, and the fourth step in GS-12.

Any overtime approved for the person above the first step, or in any higher grade, would be paid at the rate of time and a half for the first step. So when an individual reaches his ninth step in grade 11, or the fourth step in grade 12, his overtime rate is actually less than his straight time rate. Certainly, if there is need for that man to work, then he should be paid accordingly.70

In early August, Arizona Democrat Morris Udall introduced a bill, the Government Employees Salary Comparability Act of 1965, which would have amended the FEPA to substitute GS-10 step 1 for GS-9 step 1 as the ceiling for full

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69Report of the President’s Special Panel on Federal Salaries, in H. Doc. No. 170: Pay Increases for Certain Civilian Employees and Members of the Uniformed Services at 22-23.

time and a half and to provide overtime pay for daily hours in excess of eight.\textsuperscript{71} The bill was reported out by the House Post Office and Civil Service Committee two weeks later\textsuperscript{72} and passed the House,\textsuperscript{73} but these provisions were deleted in the Senate,\textsuperscript{74} and the House concurred in the changes.\textsuperscript{75} Debate did not focus on these general overtime amendments, but proponents, eager to emphasize the recently enacted mandate of comparability with the private sector, exercised little restraint in exaggerating the FLSA's comprehensiveness and stringency. For example, Congressman James Morrison, a Louisiana Democrat who was the committee's second-ranking majority member, preposterously claimed on the House floor that: “It is almost unheard of for employees in private industry to work more than 8 hours a day or 40 hours a week...without being paid at least time and a half.”\textsuperscript{76}

At the end of 1965, between the defeat of these overtime provisions in the first session of the 89th Congress and the opening of the second session, the Bureau of Labor Statistics published the results of a 1963 survey of the white-collar overtime pay practices of metropolitan-area establishments with 250 or more employees. This study of supplementary compensation, which was designed to supplement the collection of private- and public-sector salary rates that the Federal Salary Reform Act of 1962 mandated, had been requested by the Civil Service Commission and Budget Bureau.\textsuperscript{77} The study found that almost all employing units of FLSA-“nonexempt” employees reported paying them something for overtime, whereas only about one-third paid “exempt” employees (excluding upper management), and hardly any (2 percent) paid upper management. More specifically, 90 percent of units paid “nonexempt” employees time and a half, whereas fewer than 10 percent paid time and a half (and 12 percent straight time) to “exempt” employees (excluding upper management), and only one unit paid that premium to upper management.\textsuperscript{78}

\begin{itemize}
\item \textsuperscript{71}H.R. 10281, § 104 (89th Cong., 1st Sess., Aug. 4, 1965).
\item \textsuperscript{73}CR 111:25702 (Sept. 30, 1965) (370 to 7).
\item \textsuperscript{75}CR 111:28160, 28526 (Oct. 22, 1965).
\item \textsuperscript{76}CR 111:25664 (Sept. 30, 1965). Udall himself echoed this absolutist claim. Id. at 25665.
\item \textsuperscript{78}US BLS, Supplementary Compensation for Nonproduction Workers, 1963, chart 8 at 42, tab. 28 at 63. Upper management was defined as “high level workers (but under the
As the second session of the 89th Congress began in 1966, new bills were introduced accompanied by a fresh round of hearings. AFGE president Griner appeared again before Udall’s Subcommittee on Compensation of the House Committee on Post Office and Civil Service, this time urging that the ceiling for full time and a half be raised from the minimum rate for GS-9 to GS-11: “The proposed increase would not be great, but would provide more nearly equitable payment.... [S]ince this law went into effect in 1945 there has been agency classification of grades, which has been brought about by the increased complexity and responsibility of the jobs. So, ordinarily I would consider that the grade 11 today would be equivalent to the grade 9 back in 1945.” At the time, 57.6 percent of Classification Act employees were classified in grades below GS-9, while 70.6 percent fell below GS-11; the salaries for the minimum rate in GS-9 and GS-11 were $7,696 and $9,221, respectively, by 1966. In response to a representative’s question as to whether a GS-11 employee “determine[d] his own condition of overtime,” Griner responded: “Above GS-11 you begin to get into principally supervisory grades.” Resuming the agitation that had begun the previous session, Griner also advocated time and a half after eight hours daily, to which federal blue-collar and postal employees were already entitled, and which was a common practice in private industry: 77 of 102 collective bargaining agreements with the largest firms in private industry analyzed by the AFL provided it. Taking the mandate of the Federal Salary Reform Act of 1962 at its word, Griner opined: “If we are going to move to comparability, then I think we ought to move to comparability on premium pay as well as compensation.” The urgency that the AFGE attached to the issue of overtime ceilings was conditioned by the times: “[S]ince the escalation of the Vietnam war, there is a great deal of overtime. ... We have a tremendous amount of...overtime work...now going on in the Department of Health, Education, and Welfare because of the medicare situation. We have...doctors, and others working 6 days a week and the maximum overtime they can be paid is based on the beginning rate of a GS-9, and it is just not fair to them.

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senior officer level) who were treated separately for compensation purposes or, if there was no such differentiation, were earning $20,000 or more per year....” Id. at 88.


80 Federal Salaries and Fringe Benefits at 185. It would have been relevant to know how many employees were classified at GS-9 step 1 and GS-11 step 1, but the data were not broken down by within-grade steps.


82 Federal Salaries and Fringe Benefits at 183.
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Employees don't work overtime because they ask for it. Employees don't control overtime. They are instructed to work. And if they are instructed to work overtime, certainly they should be paid for it.\(^83\)

At the end of March, Representative Morrison introduced H.R. 14122, the Federal Salary and Fringe Benefits Act of 1966, which once again substituted GS-10 step 1 for GS-9 step 1 as the ceiling for full time and a half, and also provided overtime pay for hours in excess of eight per day.\(^84\) The bill was reported out by the House Post Office and Civil Service Committee a few days later with these provisions intact,\(^85\) and the full House passed it 393 to 1 on April 6.\(^86\) At the counterpart Senate committee hearings at the end of April, the lead witness, John Macy, Jr., the chairman of the CSC, concurred in the proposal to extend the overtime pay entitlement to daily hours beyond eight for equitable reasons, but not in raising full overtime eligibility from GS-9 to GS-10. Since the FLSA required nonsupervisory clerical and equivalent-level workers in private firms to be paid time and a half, "most of the kinds of positions covered by the act are similar to those most common in Federal grades GS-5 and below." The $150-a-week short-test salary level (which was the equivalent of $7,800 a year) determined whether a position was excluded under the FLSA—lower-salaried positions could also be excluded under the long-test salaries (unlike the situation under Title 5)—but a salary of $7,800 eliminated some of the other criteria under the duties test required at lower rates: "This figure is very close to the minimum salary rate of grade GS-9, up to which the Federal Employees Pay Act now provides a full time-and-one-half overtime rate. The president has proposed $7,705 as the minimum rate for this grade and $8,475 as the minimum for grade GS-10; H.R. 14122 proposes $7,796 as the GS-9 minimum rate and $8,421 as the lowest rate of GS-10."\(^87\) Macy then referred to the results of the aforementioned BLS study:

The findings of this extensive survey do not support a time-and-a-half rate of overtime pay at higher Federal grades than those for which it is now prescribed. Most employers do not pay at all for overtime work of personnel at the higher salary levels; the Govern-

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\(^83\)Federal Salaries and Fringe Benefits at 197.


\(^86\)CR 112:7756 (Apr. 6, 1966).

\(^87\)The Federal Salary and Fringe Benefits Act of 1966: Hearings Before the Committee on Post Office and Civil Service United States Senate on H.R. 14122, at 4-5 (89th Cong., 2d Sess., Apr. 20-27, 1966). In fact, the long-test salary was more akin to Title 5's lower ceiling; see below Appendix I.
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ment is already ahead of common practices at these pay levels in providing overtime pay (though at less than time-and-one-half rates) up through grade GS-15.88

A number of union representatives testified, urging higher ceilings—the presidents of the National Federation of Federal Employees and the American Federation of Technical Engineers suggesting GS-11 and GS-12, respectively.89 John Griner, the president of the AFGE, had also originally requested GS-11 as the ceiling, but he chose to focus on the positive impact for workers of the overtime penalty’s deterrence. Many of the union’s members, for example, worked 9 or 10 hours a day until they reached 40 hours “and then they are cut off for the balance of the week. We don’t expect this provision to bring in any additional money in these people’s pocketbooks but we expect better administration.”90 Indeed, Griner was so insistent on this point that he went to the extreme of arguing that although the Johnson administration had questioned this provision as not falling within its wage guideposts: “The purposes [sic] of premium pay is not to increase the income of individuals or to add to payroll costs.”91 If, in Griner’s view, agencies had to pay overtime rates for hours beyond eight, they would start creating 40-hour weeks composed of eight-hour days.92 He related that inspectors in poultry slaughter plants were at one time working as long as 15 hours a day (until they reached 40), but even at nine hours it was “almost impossible” for them “to make any plans from one week to another as to when [their] free time is going to be....”93 The AFGE also, in effect, pointed out that, given the historical shifts in the composition of the GS hierarchy, using GS grades rather than absolute money sums was not a cure-all; lifting the ceiling from GS-9 to 10 “merely update[d] the first limitation on classified overtime payment placed in effect” when the FEPA was enacted in 1945 (the equivalent of GS-7) and raised to GS-9 in 1954: in 1945 GS-9 had been the journeyman level and GS-11 included a great many supervisory positions. But: “Now because of increased complexity of the work, grade GS-11 has come to be looked upon as a journeyman grade. This grade now includes many technical and professional positions which are not supervisory. The increased use of automated processes also has contributed to the change in the significance of grade levels.”94

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Following the hearing, the Senate committee reported out H.R. 14122, including the two overtime provisions, at the end of May, but with one amendment: excepted from the eight-hour overtime provision were “employees engaged in professional or technical engineering or scientific activities for whom the first forty hours of duty in an administrative workweek is the basic workweek and employees whose basic compensation exceeds the minimum rate of GS-10...for whom the first forty hours in an administrative workweek is the basic workweek....” The committee explained the change as designed to avoid paying overtime to employees who did not have a regularly established five-day workweek, but also did not work more than 40 hours a week. On the Senate floor, Oklahoma Democrat Mike Monroney, the chairman of the Senate Post Office and Civil Service Committee, explained the change as applying to “certain employees engaged in scientific and research work whose schedule, while not exceeding 40 hours in a week, does occasionally exceed 8 hours in a day. The nature of the work requires it.” Although this explanation did not appear to apply to the broader group of employees whose above-GS-10/1 salary placed them outside the full time and a half group, the real reason for the exclusion was apparently the reduction by two-thirds of the cost of the House provision. In any event, Texas Democrat Ralph Yarborough, the chairman of the Senate Postal Affairs Subcommittee and one of the most pro-labor members of Congress, was carried away by the self-congratulatory mood on the Senate floor when he declared that the bill “would virtually eliminate unpaid overtime work for all classified employees—the only group heretofore left out of overtime pay for work over 8 hours a day.” The Senate then passed the bill by a unanimous vote on July 11. The House quickly concurred in this change.

96 Federal Employees’ Salary Increases 2 (S. Rep. No. 1187, 89th Cong., 2d Sess., May 26, 1966). The regulation sheds more light on the situation that Congress had in mind: “When it is impracticable to prescribe a regular schedule of definite hours of duty for each workday of a regularly scheduled administrative workweek, the head of an agency may establish the first 40 hours of duty performed within a period of not more than 6 days of the administrative workweek as the basic workweek. A first 40-hour tour of duty is the basic workweek without the requirement for specific days and hours within the administrative workweek. All work performed by an employee within the first 40 hours is considered regularly scheduled work for premium pay and hours of duty purposes. Any additional hours of officially ordered or approved work within the administrative workweek are overtime work.” 5 CFR § 610.111(b) (2003).
97 CR 112:15132 (July 11, 1966).
98 CR 112:15134.
99 CR 112:15164 (81 to 0).
100 CR 112:15138 (July 12, 1966).
and in July Congress amended the Classification Act to raise the ceiling for full overtime pay to GS-10 step 1 and to entitle some white-collar workers to premium pay after eight hours daily.\(^{101}\)

To be sure, agency heads were free to require employees whose salaries exceeded the minimum rate of GS-10 to accept straight-time compensatory time off in lieu of time and half calculated on that GS-10 ceiling.\(^{102}\) Nevertheless, the federal government was failing to live up to its self-proclaimed ambition of being a model employer: despite the entitlement of employees whose salaries fell below that threshold to take their compensation in money at time and a half, by 1967 AFGE president Griner was editorially warning members in the union’s *Government Standard* that “the current management mania for coercing or tricking employees into working overtime without getting the premium pay to which they are entitled stems from the order of President Johnson last year to cut overtime in the agencies by 25 per cent.” The most consistent offender was the Veterans Administration (especially its hospitals and administration centers). Stressing the illegality of such practices, Griner informed the membership that: “Reports continue to pour in that employees are being coerced and ‘conned’ by their supervisors into working overtime and into accepting compensatory time off rather than” time and a half in money.\(^{103}\)

**A Special Higher Ceiling for Air Traffic Controllers**

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Mr. [Frederick] SEIBERLING [Dem. OH]. I have a very simple little amendment...in the future whenever the House debates a minimum-wage bill, we ought to be paid time-and-a-half for overtime.\(^{104}\)

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Important light was cast on the federal government’s overtime system and its

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\(^{101}\) Act of July 18, 1966, Pub. L. No. 89-504, § 404(a), 80 Stat. 288, 297. The change in ceiling became effective the first day of the pay period after enactment.

\(^{102}\) The 1966 amendments conformed this compensatory-time-off floor to the higher ceiling of GS-10 and after the various government organization statutes were codified later in 1966, the codified provision, § 5543(a)(2), was changed too. Act of Sept. 11, 1967, Pub. L. No. 90-83, 81 Stat. 195, 200; 5 USC § 5543(a)(2) (1970).


\(^{104}\) *CR* 119:18377 (June 6, 1973).
relationship to the FLSA's by a brief legislative episode toward the end of the Johnson administration involving air traffic controllers. On July 16, 1968, Representative Morris Udall, chairman of the Compensation Subcommittee of the House Post Office and Civil Service Committee, introduced a bill at the request of the Federal Aviation Administration (FAA) to revamp the regulation of overtime compensation solely for this one occupation. H.R. 18630 would have amended Title 5 of the United States Code to permit time and a half for nonmanagerial employees of the Transportation Department who occupied a position determined by the Secretary of Transportation: to involve duties that were critical to the immediate daily operation of the air traffic control system, directly affected aviation safety, and involved physical or mental strain or hardship; in which overtime work was therefore unusually taxing; and in which operating requirements could not be met without substantial overtime work. The bill did not limit the overtime entitlement to any specific GS grades.

At the subcommittee hearings on the bill, David Thomas, the FAA deputy administrator, testified that given the growth in air traffic and the limitations on hiring, the agency either had to limit airport operations or schedule more overtime, the incessant nature of which had been particularly burdensome. However, he also asserted that even if the size of the workforce were not a problem, "the nature of the air traffic control system gives rise to a need for a substantial amount of overtime...because it is not economically feasible to staff our facilities for unanticipated absences, severe weather conditions, peak traffic conditions, or continuous equipment surveillance." Consequently, the FAA did not look at the bill as the remedy to a "rather crucial manpower problem," but as a means to remedy the unfairness of a pay system to which that problem and its impact had helped call attention.

Thomas went on to point out that as a result of the Title 5 ceiling, a controller whose annual base pay was $14,409 or $6.93 an hour, would earn only $6.71 performing overtime work. Yearly the controller worked about 50 overtime days at $40 a day, generating $2,000 in additional income, which "he does not want. He would much rather not have the overtime pay and not do the overtime work."

This disclosure prompted Udall to wax philosophical on hours standards:

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107The hearings also dealt with miscellaneous unrelated bills.
108Federal Employee Fringe Benefits at 52.
109Federal Employee Fringe Benefits at 54.
I have always been a little troubled by this arbitrary GS-10 limitation on overtime pay. Of course, sometimes you have to have an arbitrary rule or cutoff point. I want you to philosophize a little bit about that. The philosophy of that rule is that sometimes after you climb the ladder you leave the ranks of the hourly employee and begin to have executive and administrative duties. The vice president of a big company, for example, does not punch a timeclock. The idea was at some point in the Federal Establishment to have...a cutoff point and say beyond this point we will not continue to have overtime pay. We placed it at GS-10. What I am asking you now is, if GS-10 is not the proper cutoff point, what is?110

The deputy administrator failed to rise to the philosophical occasion, confining himself instead to expressing sympathy with the notion of limiting overtime pay and perhaps even with reducing overtime work to discourage it for those who were able to control their time.111 The controllers, on the other hand, had “no control over whether they work overtime or not. I can delay answering a letter, but they have no control. ... They can’t schedule their time. ... I think their pay is given them not because of their executive ability, but in recognition of the demanding work they are doing and their safety responsibilities. ... Of course, we have no GS-18 employees in this work, but if we did, I would suggest the legislation be applied to them.” Udall and Thomas then agreed to GS-14 as the appropriate overtime cutoff point.112

Turning away from the pay issue, Indiana Democrat Lee Hamilton finally directed the committee’s attention to the underlying issue of the overwork and its possible safety consequences (if not for the workers’ health):

Mr. Hamilton. I would think a man’s efficiency would go down after he puts in a full day.
Mr. Thomas: So do we.
Mr. Hamilton. So there is some risk, at least in overtime?
Mr. Thomas. There is no doubt they are getting tired. We would prefer not to work them 60 hours a week as we are doing to some of them now. We are making studies and, if we knew no man should work more than 6 hours a day 5 days a week, we would like to eliminate the overtime. However, if we went to a 5-day week immediately, we would almost close down some airports now.113

After eliciting from Thomas that controllers on average worked six-day, 48-

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110Federal Employee Fringe Benefits at 54.
111Federal Employee Fringe Benefits at 54.
112Federal Employee Fringe Benefits at 55.
113Federal Employee Fringe Benefits at 58.
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to 60-hour weeks at the busiest airports, and that the optimum workweek would be 30 hours on control duty and 10 hours on other activities, Hamilton inquired: “So some are working twice the number of hours you think would be best from the standpoint of safe operation?” Evasively, Thomas replied: “Well, I won’t say safe. But I will say more efficient, and much more useful.”

Labor’s inconsistent and confused approach to overtime was impressively on display in the testimony of Stephen Koczak, the assistant research director at the American Federation of Government Employees, who appeared in place of the union’s president. Although it represented only 5 percent of controllers, AFGE testified because of its interest in the ramifications of any possible resolution—the union urged extending the bill’s provisions to other emergency situations in other departments—viewing the issue “primarily from the standpoint of the safety factor.” The safety of air travel, which was becoming increasingly “dangerous,” depended primarily on the controllers’ “heroic” work. From this praise the AFGE jumped unmediatedly to the “incredible fact” that, because of the GS-10/1 overtime ceiling (of $4.47 straight time and $6.71 time and a half an hour), 2000 (of 6,803) controllers were paid less for their overtime than during their regular 40 hours. In the by this time ritualized hyperbolic universalization of FLSA coverage, the union requested that controllers “receive at least the same treatment afforded every private employee in the United States; that is, that they be paid time and one-half for every hour of overtime, with the computation being determined on their own base rate of pay....”

Koczak then took the next logical step by noting that “if the concept of comparability with private industry is applied,” then if a federal employee “would be receiving one and one-half times his base pay in private employment, he should receive one and one-half times his base pay in Federal employment.” Because, presumably, his congressional interlocutors were as ignorant as he was, no committee member pointed out to him that many federal administrative, executive, and professional employees were entitled to overtime pay, whereas their private-sector counterparts were not.

At this point Udall posed his “philosophical” question to Koczak: “Are you in agreement that if we remove the GS-10 ceiling we should have another kind of limitation, or do you think the Assistant Secretary of Transportation should be paid

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114Federal Employee Fringe Benefits at 58.
115Federal Employee Fringe Benefits at 62, 65 (quote).
116Federal Employee Fringe Benefits at 60.
117Federal Employee Fringe Benefits at 62. To be sure, since air traffic controllers are presumably neither executive, nor professional, nor administrative employees, they would all be entitled to full overtime compensation under the FLSA.
over time?” Insisting again on comparability with the private sector, Koczak merely expressed a preference for GS-15/1 as the ceiling because it would eliminate the inequity for thousands of employees in GS-12/5 and above, where straight time pay exceeded 150 percent of GS-10. In fact, one of the reasons that the AFGE believed that “there should be no arbitrary GS levels on overtime” was precisely that federal agencies often engaged in little or no planning for similar emergencies “because by the GS-10 overtime limitation, you can sweat people in Federal employment and get more out of them. ... So the controller shortage problem...might not have arisen at all if we had not had this GS-10 limitation.”

One organization representing controllers did direct the subcommittee’s attention to the impact of long hours on the workers themselves. James Hill, general counsel of the Air Traffic Control Association, testified that, despite the absence of relief at lunch or for short breaks and the resulting unrelieved pressure and exhaustion: “Yet the same agency which finds it necessary to work controllers on a 48-hour week, has a regulation which forbids airline pilots to fly more than 200 hours a month, a limitation imposed for air safety, and by their labor contracts with their companies most airline pilots have a ceiling of 75 to 85 hours per month.” (In contrast, one controller testified that controllers wanted the right to refuse overtime not because of the grueling conditions, but “because it costs them so much money.”) Reverting to the issue of compensation, Hill conceded that “some limitation must be placed on the categories of Federal employees who are entitled to be paid premium compensation for overtime. Certainly, high executives should be expected to work overtime as a normal responsibility of their job. But an across-the-board limitation to the lowest pay of a GS-10 is not realistic to a class of employees in which the normal nonsupervisory journeyman grade is GS-12....” Kenneth Lyons, the national president of the National Association of Government Employees, went so far as to recommend revising the bill to provide 2.5-time after 30 hours per week or 6 hours a day.

119 Federal Employee Fringe Benefits at 63. Strongly supporting this legislative initiative, the AFGE magazine Government Standard offered members extensive excerpts from Koczak’s testimony. In addition to repeating his universalist exaggeration of the FLSA’s coverage, the article failed to explain how higher pay could enable fatigued controllers to make air traffic safer. “AFGE Backs FAA Overtime Bill,” GS, Aug 9, 1968 (3:3-5).
120 Federal Employee Fringe Benefits at 70.
121 Federal Employee Fringe Benefits at 84 (testimony of Robert Smith, Los Angeles air traffic control center).
122 Federal Employee Fringe Benefits at 72-73.
123 Federal Employee Fringe Benefits at 81.
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At the close of the hearings Udall introduced a substitute bill, H.R. 19136, which was identical with H.R. 18630, except that, reflecting the consensus at the hearings, it limited the overtime entitlement to positions in GS-14 or below.\(^{124}\) A month later the committee reported out H.R. 19136, emphasizing that an increase in the lower ceiling from GS-10/1 to GS-14/maximum did not exempt controllers' premium pay from the GS-15 maximum rate. In plainly pragmatic terms, the committee admitted that there was a need to hire additional controllers, but argued that overtime was essential for the time being. The committee justified the innovation on the grounds that controllers' overtime compensation became less than their regular rates from GS-12/6 ($6.83) and above: "This situation creates gross inequities and inevitably generates employee morale problems, as well as reluctance by employees to remain available for frequent callback for overtime work."\(^{125}\) The counterpart Senate committee reported out a bill with the same content, but urged more circumspection. Because the bill singled out one group for preferential treatment, it recommended that the Transportation Secretary use the utmost care in determining that overtime pay was justified. Moreover, once additional controllers were available, the practice of paying full overtime to those classified above GS-10 should be limited and/or discontinued.\(^{126}\) Provoking little controversy, H.R. 19136 as introduced by Udall was passed without change by both Houses of Congress\(^{127}\) and became law in October 1968.\(^{128}\) The AFGE's newspaper hailed enactment for making controllers "a happier group of Federal employees," but failed to make the union's members better informed, confusing a long-standing congressional policy with some vague administrative or judicial decision: "This situation occurred because of a ruling that all overtime pay would be compensated on the basis of time and one-half for a GS-10, step one. All employees above this level were being unfairly compensated for their overtime."\(^{129}\)


\(^{127}\)Only two nays were cast in the House, where Rep. Broyhill warned that overtime pay would not completely solve the air traffic controller problem. CR 114:27031 (1968).

\(^{128}\)Act of Oct. 10, 1968, Pub. L. 90-556, 82 Stat 969 (adding subsec (3) to 5 USC sect. 5542(a)).

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The Application of the FLSA to the Civil Service and the Creation of a Dual Overtime System in 1974

We should like to see Federal workers treated by and large in the same way as any other workers. We do not think that they should be set off in a separate class by themselves with either special privileges or special hardships. If anything, the Government should be a model employer, blazing a trail of progressive labor standards for private industry to follow—a situation which has not prevailed up to the present time.130

Two important legislative-administrative campaigns were both initiated in 1970 and their confluence enduringly shaped overtime pay regulation for federal employees. First, the Job Evaluation Policy Act of 1970 required the Civil Service Commission to reassess its job evaluation and ranking systems; and second, Congress began to consider proposals to integrate federal employees into the FLSA overtime system.

The Job Evaluation Policy Act was driven by a congressional finding that “the tremendous growth required in the activities of the Federal Government in order to meet the country’s needs during the past several decades has led to the need for employees in an ever-increasing and changing variety of occupations and professions, many of which did not exist when the basic principles of job evaluation and ranking were established by the Classification Act of 1923.... The diverse and constantly changing nature of these occupations and professions requires that the Federal Government reassess its approach to job evaluation and ranking better to fulfill its role as an employer and assure efficient economical administration.” Congress also found that “the large number and variety of job evaluation and ranking systems in the executive branch have resulted in significant inequities in selection, promotion, and pay of employees in comparable positions among these systems.”131 Congress then charged the CSC with preparing a comprehensive plan for creating such a coordinated system of job evaluation and ranking for executive branch civilian positions.132

During the following two years the Job Evaluation and Pay Review Task Force

130Overtime Compensation to Government Employees: Hearings Before a Subcommittee of the Committee on Civil Service United States Senate 93 (78th Cong., 1st Sess., Feb. 25-Mar. 2, 1943) (supplementary statement by United Federal Workers of America (CIO)).
that was established to report on this system became embroiled in a controversy with the AFL-CIO over the reformation of the overtime system for federal employees, while bills were being filed in Congress to amend the FLSA to make it applicable to federal employees. These proposals put forward by a Congress with a much diminished Democratic majority—the number of Senate Democrats fell from 68 in 1965-66 to 54 in 1971-72, while their House majority declined from 295-140 in 1965-66 to 243-192 in 1969-70 and 1973-74—were resisted by the Nixon administration and its CSC. Initially such bills merely redefined the term "employer" in the FLSA to include the United States Government.133 At a House Education and Labor Committee FLSA hearing in 1970, AFL-CIO president George Meany, in addition to recommending that the FLSA be amended to provide for double time—because supplements as a proportion of total wages and salaries had risen from 4.5 percent in 1938 to 23 percent, time and a half had lost its deterrent effect—which would kick in after eight hours in a day and 35 hours in a week, urged coverage of all workers within the reach of federal authority.134 In April 1971 the leading pro-labor House Democrats introduced H.R. 7130, The Fair Labor Standards Amendments of 1971, which again redefined "employer" to include the federal government (as well as state and local governments).135

At the House hearings on the bill in the spring, Labor Secretary James Hodgson testified that the Nixon administration could not support coverage of federal or state and local employees. To be sure, the objection to the extension to the latter two groups he explained on constitutionally based federalism grounds; for the opposition to federal coverage, however, he offered no reason.136 Congressman John Dent, the Pennsylvania Democrat and former Rubber Workers union official who chaired the General Subcommittee on Labor, informed Hodgson that although his opposition seemed to be based on the assumption that there was no

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public employee coverage then in existence, 2,665,000 federal employees were already covered and the bill’s intent was to cover an additional 1,672,000. (Dent’s first figure was off: the number of already covered federal workers—blue collar workers incorporated into the FLSA in 1966—was 693,000.) “The principal [sic] behind it being that it is hardly justifiable for a local, State, or the Federal government to require that certain employers have to pay minimum wages, but their own government employees [sic] are not under such protection. That is the only purpose behind the proposal.” The ubiquitous John Griner, national president of the AFGE went on record in favor of certain of the bill’s provisions, including the granting of protection and coverage to all government employees, but said nothing about overtime.

The bill reported out by the Committee in November 1971 still included the extension of overtime coverage to federal employees. Notably, despite the administration’s rejection of overtime coverage for government employees at all levels, the committee’s Republican minority did not include among the bill’s “most glaring defects” the extension of coverage to federal employees as it did with respect to overtime coverage of state and local government employees. The Republicans accused the majority of having departed from a subcommittee agreement that, whereas compliance with the minimum wage was economically feasible for state and local governments, “one and one half times the regular hourly rate of pay, regardless of how high that rate was (except perhaps for a very small number in supervisory, executive or professional positions who would probably be exempt from the requirement), would be applicable to the vast majority of such employees, many of whom, although they presently are paid for their overtime work, generally receive it at their regular hourly rate of pay, and not at a higher premium rate.” In contrast to this argument based solely on financial incapacity, the minority members also targeted the original congressional intent in 1938 of using time and half to encourage additional hiring; for them it was “plain to see that government employers are not as free to hire additional employees whenever additional work beyond the normal work time is required. Government hiring, at all levels, is...
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governed by law, and is limited by legislated budgets." Thus despite this express
extension to the federal government of the critique that the deterrent of overtime
premiums could not operate in the public sector, the Republicans did not object to
incorporating federal employees into the FLSA overtime system. In contrast "the
basic purpose of the premium overtime pay" was, "practically speaking, entirely
inapplicable to" state and local government employment; consequently, instead of
creating additional jobs, mandatory overtime pay would, given the financial
problems of state and local government, result in job loss.143

In March 1972, Illinois Republican John Erlenborn introduced a stripped down
FLSA bill, H.R. 14104, which was much closer to the Nixon administration's
perspective in general, but also specifically with respect to providing no extension
of coverage to government employees.144 In May, during the floor debate, one of
the bill’s co-sponsors, Minnesota Republican Albert Quie, sought to defend this
exclusion on the grounds that whereas “an acceptable logic justified” periodic
increases in the minimum wage, the reasons that proponents had historically
assigned for narrowing or eliminating premium overtime exemptions “usually do
not bear close examination.” H.R. 7130 was, in Quie’s opinion, “no exception,”
because

all Federal civil service employees making less than $12,150 per year receive time and one
half in overtime pay. Many State and local government employees receive similar or
equivalent overtime compensation. Nevertheless their employers would all be subject to
inspection, investigation, and to the recordkeeping requirements of the law with all the
costs and burdensome procedures and inconveniences which these impose. There are no
valid reasons justifying this particular expansion of coverage.145

Quie’s argument was oddly under- and overinclusive. Although he correctly
stated that federal employees in and below the minimum GS-9 grade were already
entitled to time and a half, he failed to point out that many earning much more
would also become overtime-entitled under H.R. 7130—perhaps because this dis­
closure would have required him to mention as well that many of those in grades
through the highest GS-15 were entitled to some premium overtime pay, despite
the fact that under the FLSA they would have been totally excluded as bona fide
administrative, executive, or professional employees. To be sure, because no sup­porter of H.R. 7130 came forward to furnish this information either, the opportuni-

145CR 118:16602 (May 10, 1972). In addition, to Quie, Florida Democrat Don Fuqua
was a co-sponsor.
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ty for a public and substantive debate over the comparative merits and defects of the two overtime systems was squandered. Rather than undermining his own argument as to the FLSA’s excessiveness by revealing that Title 5 was, in certain respects, even more generous, Quie focused on the paperwork burden that would be imposed on public agencies—as if any (government) employer that was legally required to pay premium overtime were not already and should not be subject to an enforcement apparatus. In the event, the following day, after a lengthy general debate, the House substituted Erlenborn’s bill for H.R. 7130 by a vote of 217 to 191.146

This outcome, which resulted from a substantial number of southern Democrats’ joining almost all the Republicans—blatant proof that the Democrats, despite holding a 255-180 formal majority, did not constitute a programmatic voting majority—was “something of a defeat for the Democratic leadership,” which had made amending the FLSA a key part of its legislative program. However, relying on the Senate to pass a more radical revision, the pro-labor House Democrats refused to admit defeat. As Representative Dent himself told the press: “‘In conference we will write that kind of legislation that will provide the greatest good for the greatest number.’”147

In May 1971, one of the most pro-labor senators, New Jersey Democrat Harrison Williams, who was chairman of the Labor and Public Welfare Committee, introduced a generally quite expansive FLSA bill, S. 1861, which, inter alia, extended FLSA coverage to public employers.148 At the committee hearings in May, Labor Secretary Hodgson repeated his House testimony opposing coverage of federal employees without explanation.149 When Williams’s committee reported out the bill (in lieu of H.R. 7130) in June 1972, S. 1861, in addition to retaining the expanded definition of “employer,” specifically defined “employee” in the case of a person employed by the United States, to include a civilian in the military

146 CR 118:16872 (May 11, 1972). With the outcome of the test of strength ascertained, the House parties then regrouped and formally passed the bill 330 to 78. Id. at 16873.
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departments, executive agencies, the Postal Service, the Library of Congress, and in competitive service positions of the legislative and judicial branches, and the District of Columbia government. The committee explained that "[a] major argument" for extending coverage to public employees was "moral": "Government should be willing to apply to itself any standard it deems necessary to apply to private employment. ... Equity demands that a worker should not be asked to work for subminimum wages in order to subsidize his employer, whether that employer is engaged in private business or in government business." In an interpretive comment that would prove to be of overriding significance, the committee declared that although it "did not intend to extend FLSA coverage to those persons for whom the general tangible rewards of government employment are of secondary significance, for example, Peace Corps and VISTA volunteers[,] by the same token, the Committee intended to cover all employees in the competitive service (except professional, executive, and administrative personnel who are exempted under section 13 of the law) in all civilian branches of the Federal Government." In committee the amendment offered by Senator Robert Taft Jr. to strike coverage of federal employees was defeated 14 to 4, yet in expressing their minority views in the committee report, Taft and his colleagues failed to mention federal (as contradistinguished from state and local) coverage.

In July 1972, S. 1861 passed the Senate 65 to 27 with federal coverage, but a conference with the House never took place because House supporters of H.R. 14104, forewarned by Dent's aforementioned announcement and thus skeptical that a majority of the House conferees appointed by the Democratic leadership would fight for an acceptable compromise with the Senate, for the first time ever in the history of the House of Representatives, defeated a motion to go to conference by a narrow margin. Thus the effort to confer FLSA overtime coverage

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150S. 1861, § 2(a) and (b) (92d Cong., 2d Sess., June 8, 1972).

151Fair Labor Standards Amendments of 1972, at 18 (S. Rep. 92-842, 92d Cong., 2d Sess., June 8, 1972). The AFGE reported in its newspaper that although the Senate Labor Committee action would have little effect on federal employees with respect to the minimum wage since their wages were equal to or greater than the proposed minimum, the overtime provisions could affect employees who received differentials in lieu of overtime pay and could revise the prevailing overtime ceiling for General Schedule employees: "Under S. 1861...no federal employee would receive less than his present overtime schedule." "Congress Acts on Vital Federal Employee Bills," GS, June 30, 1972 (9:4-5). Most of this information went beyond what the committee had discussed publicly.


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on federal employees died for the Ninety-Second Congress. The fact that overtime coverage for federal workers was merely a side-show to the most brisant issues of the size and timing of the increase in the minimum wage and the coverage of domestic employees meant that it could escape strict scrutiny, especially since disputes between the federal government and its employees generally lacked the intensity of class-war-like antagonisms with private employers and few members of Congress understood the proposed dual FLSA-Title 5 overtime system.

In the meantime, during 1971-72, as the House and Senate were proceeding toward a stalemate on overtime pay coverage for federal employees under the FLSA, the Job Evaluation and Pay Review Task Force was, in its own convoluted way, contributing to the same debate. As early as June 1971 the task force, in developing evaluation systems, “adopted the basic concept” of the FLSA: “Private employers, to aid themselves in observing” its provisions, “have grouped their employees into those who are covered by the act and those exempt from the act. Further, in many instances, they have developed job evaluation and pay systems to coincide with these two groupings. ... It is the task force’s thinking that the grouping of Federal employees in conformity with the categories and concepts of the act will facilitate the achievement for Federal employees of congressionally mandated comparability with the private sector.”

The next month, at a House Post Office and Civil Service Committee hearing on the task force’s interim progress report, its director, Philip Oliver, went much further in spelling out the rationale for reorienting the civil service pay system toward the FLSA. Indeed, he declared that the task force was approaching the charge that Congress had given it “from the basic concept that the philosophy expressed in” the FLSA, which specifically did not apply to Federal workers could, in fact, be used as a guide.” Private firms, in complying with the FLSA, “found the division between exempt and nonexempt employees a convenient and logical division of workers and hence this act assumed an aspect beyond that originally conceived by its designers.” Consequently, since more than 46 million private-sector workers were “administered under job evaluation and pay systems specifically designed by private employers in compliance with the concepts and philosophies expressed by” the FLSA and its regulations, the task force grouped 2.2 million federal workers into the two broad categories: exempt and nonexempt.


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as defined by the FLSA and the division was almost exactly 50-50.\textsuperscript{156} Asked why basic concepts underlying FLSA were applicable to classifying federal jobs, Oliver stressed comparability with the private sector as the crux:

\textit{[I]}f, in fact, we are going to provide equal pay for equal work and we are going to be comparable and we are going to get our fair share of workers in a particular labor market, I feel we have to look like the other users of labor, that is, the private sector, or State and municipal governments. If the vast majority of workers in the United States are under job evaluation and pay systems that recognize differences such as exempt and nonexempt under the FLSA..., and we want to be comparable with private sector employers, perhaps we ought to structure like them so that we can measure our job evaluations and we can measure our pay scales more accurately.

And we become in the communities a part of the community, not something elite or separate, that is, the Federal Government, but a part of the community...and compete for labor and in terms of classification and pay with the private sector workers where we live.\textsuperscript{157}

After having outlined such exempt/nonexempt systems—the Administrative, Professional, and Technological Evaluation System with 600,000 nonsupervisory positions similar to exempt jobs as defined by the FLSA, and the Clerical, Office Machine Operation, and Technician Evaluation System, including 525,000 nonsupervisory positions similar to nonexempt jobs as defined under the FLSA\textsuperscript{158}—Oliver asked the members of the task force's advisory committees whether meaningful groupings of federal employees under rubrics such as exempt/nonexempt, white-/blue-collar, supervisory-nonsupervisory helped the evaluation process. (He informed them that the FLSA, which among other things defined overtime pay requirements for private employees, "is not specifically applied to Federal employees.")\textsuperscript{159}

The responses he received were instructive. Comments by members of the


\textsuperscript{157}Interim Progress Report at 161.


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Federal Personnel Directors Advisory Committee included the following: Beyond the purpose of regulating overtime procedures, the exempt/nonexempt concept "may not have any real justification or value." "The exempt/nonexempt distinction is linked to the blue-collar/white-collar distinction." "Any attempt to achieve comparability with the private sector has some merit." "The evolution of salaries and wages throughout our nation indicates a separation of 'blue-collar' wages is no longer valid. [T]he term 'blue-collar' should be discontinued. There might be one system for supervisory employees and a single compensation plan for non-supervisory employees." Oliver's bias in favor of imposing the FLSA scheme on the civil service system was manifest in his summary of these comments: "The consensus on the exempt/nonexempt distinction was that the approach was useful and worth exploring. It might not be desirable, however, to make the distinction precisely as is done by the FLSA." Among the members of the Industry Advisory Committee, Richard Fremont, the director of salary administration at Bell Telephone Laboratories, "[d]id not think adoption of the FLSA by the Federal Government would contribute anything to job evaluation." David Lederer, the assistant secretary of the Rand Corporation, "[f]elt FLSA would help the Federal Government maintain comparability of practice with private industry." Nevertheless, Oliver pressed these kinds of disparate comments into this "Consensus[:] Jobs should be grouped by occupational content and not by artificial divisions such as exempt/nonexempt..."

After the Oliver Task Force had submitted its final report, the House Post Office and Civil Service Committee held hearings in 1972 on various proposals to reform the federal classification systems at which Oliver had another opportunity to advocate incorporation of the FLSA overtime exclusion regime into the civil service classification and pay system and AFL-CIO witnesses appeared in order to criticize that approach. Oliver explained that: "The first decision reached by the Task Force with regard to job evaluation was that, if, in fact, it was the intent of the Congress that the Federal Government as an employer be both competitive and comparable with the private sector, all effort should be made to structure Federal employees in the most common fashion found in the private sector." For him this precept meant the FLSA's division of more than half of all employees in the United States "into the exempt/nonexempt dichotomy.... Private employers have found it convenient to develop evaluation and pay systems for their employees built around this division. Hence, over many years the ranking or relative worth

of jobs, one to another, in both an evaluation and pay sense have been developed around the definitions in this law.” Having divided the federal workforce into two approximately equal groups with one million employees in each, the task force “built its evaluation plan around this dichotomy and at the same time tested this concept with its Advisory Committees, the Civil Service Commission, and other interested parties.” He then misrepresented the reaction of the Industry Advisory Committee, which he claimed had “strongly supported this division. It is one with which they have long been familiar and the only one which they regard as being expedient and equitable.” Oliver was unable to deny that the AFL-CIO Advisory Committee had “major objections,” but he quickly added that “[w]ithin the Civil Service Commission there was acceptance of this by the executive staff and the Commissioners.” At this point, however, he was compelled to advert to a different kind of dichotomy: “In talking to groups throughout the country, I have found no serious objections to this concept from an evaluation standpoint. From a pay viewpoint, I have found some apprehension...”

That Oliver’s talks might have engendered such fears is made plausible by the transcript—gleefully made available to the House Post Office and Civil Service Committee by the AFGE—of an address that Oliver made to civilian personnel representatives at an air force base in Alabama in 1972:

The very first decision we made, that is we the Task Force because I made it in the beginning, was that we would try to look like the non-federal sector. ... I believe you have to look like the non-federal sector if you want to compete with the non-federal sector because that’s where our people in the government come from.

Now in the non-federal sector the Fair Labor Standards Act...forced on these people a division of labor between exempt and non-exempt.... So I believe the federal government, which is specifically excluded from the Fair Labor Standards Act should consider this approach.

Since Oliver was recommending that Congress “force” the FLSA’s exclusions of white-collar workers on civil servants, no wonder that his listeners feared the cut-backs in the more capacious Title 5 overtime system. But this consideration was not uppermost in the mind of Oliver, who, according to AFGE president John Griner, “harbored such passionate antiunion sentiments against us and other AFL-CIO affiliates that he was incapable of considering objectively our suggestions for

163Proposals to Reform Federal Classification Systems at 287.
improving Federal classification."\textsuperscript{164} Rather, in meshing pay relationships with job evaluation, he was primarily concerned to keep the latter "as pure as possible" and to insure that there be maximum freedom to develop pay structures to meet competitive requirements. [T]he exempt/nonexempt dichotomy enables one, from a pay view, to develop a policy of competitiveness and comparability much more closely atuned [sic] to the pay patterns in the non-Federal sector. The reaction of the Civil Service Commission was favorable and the chairman has publicly stated several times his belief that this philosophy of pay treatment should be undertaken by the Government. Among the hundreds of people exposed to this concept of an exempt/nonexempt split, with its pay implications, I have found no serious objections, with one exception: the AFL-CIO. They have indicated that they are opposed to this concept of pay treatment. This is understandable because when the two categories are treated as a single entity, the lower levels enjoy the benefits from the steeper payline of the professional and administrative personnel.\textsuperscript{165}

Whatever sense this final argument may have made with regard to the entire sweep of the salary hierarchy under the General Schedule, it overlooked the separate and analytically distinct detriments to federal workers that would have resulted from substituting the FLSA "dichotomy" for the more gradually tapering Title 5 overtime pay system. The AFL-CIO economist Rudy Oswald basically made this point in arguing that the task force's recommendation to use the FLSA's exempt/nonexempt categories for job evaluation purposes "flies in the face of present overtime laws as applied to the Federal Service. ... There is no justification for attempting to artificially draw some new dividing line for payment of overtime. The current overtime regulations applicable to Federal employees are related to grade level and not to the pay system. Similarly, the Fair Labor Standards Act makes no reference to job evaluation in regard to overtime payments." Here Oswald himself manifestly misrepresented the FLSA, whose white-collar duties tests performed precisely the function he denied.\textsuperscript{166}

\textsuperscript{164}Proposals to Reform Federal Classification Systems at 284.
\textsuperscript{165}Proposals to Reform Federal Classification Systems at 10.
\textsuperscript{166}Proposals to Reform Federal Classification Systems at 283. Oswald also criticized the task force for not having used the collective bargaining standards of the NLRB—by which he presumably meant the broad definition of "supervisor" in the Taft-Harley Act, which has deprived a large group of workers of the right to self-organization—with regard to exempt/nonexempt instead of the FLSA, which related only to overtime; consequently, Oliver had "tried to make some very ambiguous connection between that and job evaluation and to use that as a justification for fragmenting the current classification system into separate parts. The question of overtime is not relevant to the classification system"
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In any event, the AFL-CIO Advisory Committee strenuously opposed the creation of "exempt" and "non-exempt" Federal employee groupings" on the grounds that the "proposal has no purpose, but could later present a serious obstacle to unions attempting to represent the interest of high level professional, technical and administrative employees." To be sure, this attack raised the question as to why the AFL-CIO was vigorously pushing for FLSA coverage of federal employees at this very time. Instead of solving this mystery, AFGE president Griner deepened it by adding "that if—and I hope it will come to pass—amendments to the Fair Labor Standards Act should be passed and certain parts of the Senate version adopted, that would erode the position that has been taken by Mr. Oliver's report."

Contrary to Oliver's claim about the CSC's enthusiasm for adopting the FLSA "dichotomy," not only did the Commission oppose its inclusion in the FLSA amendment bills introduced in 1973-74, but, more generally, it publicly stated that because the Job Evaluation and Pay Review Task Force had proposed "radical changes," extensive consultation with agencies and unions was required and it would be premature to propose legislation.

As the congressional Democratic leadership had promised, the 93rd Congress (1973-74) witnessed a renewed effort to enact amendments to the FLSA, which included extension of FLSA overtime coverage to federal workers. In February 1973 Dent introduced H.R. 4757, which once again redefined "employer" to include the federal and state and local governments. At the hearings on the bill, Nixon's new Labor Secretary, Peter Brennan, the former president of the Building and Construction Trades Council of Greater New York, testified that the FLSA "is not the place...to establish standards of pay for Federal employees. This is the role of the Civil Service Commission, and Congress has enacted detailed laws relating to the pay of Federal employees. We must avoid a division of authority over Federal pay practices between the Labor Department and the Civil Service Commission." Since all federal employees were already receiving at least the equivalent of these particular people according to the requirements of the Fair Labor Standards Act.

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167 Proposals to Reform Federal Classification Systems at 283.
168 Proposals to Reform Federal Classification Systems at 316.
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lent of the proposed minimum wage, extending minimum wage coverage to them “would be an empty gesture.” In contrast to the quantitative precision that enabled Brennan to brand minimum wage coverage as superfluous, his testimony on the comparative reach of overtime coverage was evasive: “All Federal employees below GS-10 also receive time and one-half for overtime. Employees above that level are authorized to receive overtime based on the top step of GS-10 rather than their own salaries.”172

Following the hearings, Dent introduced H.R. 7935, which replaced H.R. 4757 as the chief House bill. Although it also redefined “employer” to include federal, state, and local government, it excluded from overtime coverage any federal employee other than those (blue-collar workers) to whom the 1966 FLSA amendments had already given that entitlement,173 thus extending merely Brennan’s “empty gesture” of minimum wage coverage to federal civil servants. This overtime exclusion remained in the bill as reported out by the Education and Labor Committee at the end of May.174 To be sure, the House Education and Labor Committee understated this massive exclusion by declaring that only “certain Federal employees...will not be subject to the overtime requirements of the Act.”175 More misleadingly, in consecutive sentences the committee asserted that the proposed “amendments result in the extension of minimum wage and overtime coverage of all Federal...employees” and that pursuant to the aforementioned amendment, “Federal employees (other than those covered by the 1966 amendments) are exempt from overtime coverage.”176

Two days later, Representative Erlenborn introduced H.R. 8304, which, like his H.R. 14104 from the 92nd Congress, did not extend coverage to federal or state and local government employees,177 and in early June the House debated the FLSA


173H.R. 7935, §§ 201(a)(1) and (b) (93d Cong., 1st Sess., May 21, 1973).


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bills. During the floor debates, Dent, in refuting a claim that Erlenborn had circulated in a letter that, if H.R. 7935 were passed, House members would have to pay their staffs time and a half for their 50- and 60-hour weeks, stressed that his bill "does not extend overtime coverage to one single Federal employee." Without ever explaining why the overtime coverage for federal workers had been withdrawn, Erlenborn and the pro-labor California Democrat Phillip Burton virtually vied with each other for the most extreme assessment of how "very, very modest" the coverage of federal workers was. (When Erlenborn, misspeaking, stated that the committee bill "brings six additional workers" under the FLSA, Burton joked that the bill was "very modest at best, and at least give us what little credit we would like to claim.")

When Erlenborn offered H.R. 8304 as an amendment in the form of a substitute for H.R. 7935, the House, reversing its 1972 tally, defeated the amendment 218 to 199. Despite this action, North Carolina Democrat David Henderson then offered an amendment to strike out from the bill the United States Government as an employer and to eliminate the overtime coverage that had been conferred on federal blue-collar workers in 1966. Henderson argued that overtime coverage made even less sense than a minimum wage entitlement because those workers' Title 5 overtime pay benefits "are more liberal and have broader coverage" than the FLSA's. Not only did Title 5 entitle them to time and a half after eight hours a day, but "many employees, such as supervisors and professionals, who are exempt from overtime pay under the Fair Labor Standards Act, are entitled to overtime pay under section 5544 of title 5." The most serious problem that this additional coverage would create, in Henderson's view, was the complications and confusion of dual administration and enforcement by the CSC and DOL. In his brief response, Dent evaded these issues—some of which would reappear later in the context of extending overtime coverage to white-collar workers—but the amendment was nevertheless handily defeated 249 to 167. And shortly thereafter the House passed Dent's bill by the even larger margin of 287 to 130.

The legislative focus then shifted to the Senate where, already in early May, two conservative Republicans who had resisted the FLSA amendments in 1972,

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179 *CR* 119:18151.
180 *CR* 119:18154.
182 *CR* 119:18365, 18366.
184 *CR* 119:18383-83 (June 6, 1973).
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Taft and Peter Dominick of Colorado,\textsuperscript{185} introduced S. 1725, which redefined “employer” and “employee” to include most federal workers, but then excluded all the newly covered employees from overtime pay.\textsuperscript{186} Two weeks later Harrison Williams introduced a bill once again designated S. 1861, offering the same broad overtime coverage for federal employees as its namesake.\textsuperscript{187}

At the Senate Labor Subcommittee hearings in June, which coincided with the House floor debate, the most important testimony\textsuperscript{188} was contained in a letter to Williams from the chairman of the CSC, Robert Hampton, repeating the concerns raised by Representative Henderson about adding FLSA coverage to that of Title 5, which already “ensures benefits on the whole equal to or greater than those prescribed by” the FLSA.\textsuperscript{189} Observing that “many employees” were covered under Title 5 “who would be ‘exempt’ under the FLSA,” Hampton maintained that:

The primary effect of the action would be the application of the FLSA time-and-one-half overtime provisions to a small number of Federal employees, mostly technicians at higher levels. This will not result in equal treatment between Federal and non-Federal employees, however, because Federal supervisors and professionals who would fall in the ‘exempt’ category under the FLSA would continue to receive the overtime benefits in title 5....

The premium pay provisions in title 5...have been tailored over a period of time to meet the specific needs of the Federal service. They are, in certain respects, based on a policy which recognizes the need for comparability with the private sector but at the same time covers unusual work situations which often are unique to the Federal workforce. ...

With all of these special premium pay provisions in title 5..., it is illogical and most unwise to complicate the situation by covering Federal employees under another law which in some respects requires different treatment. Some of the problems involve the title 5 provisions for additional annual compensation rather than regular overtime pay for administratively uncontrollable overtime, compensatory time off in lieu of overtime pay, and the authorization of overtime work.\textsuperscript{190}

\textsuperscript{185}Dominick, a Wall Street lawyer, came from a family that owned a Wall Street brokerage house. “Peter H. Dominick Is Dead at 65,” \textit{NYT}, Mar. 20, 1981 (B5:5-6).

\textsuperscript{186}S. 1725, §§ 2(a), (b), (f) (93d Cong., 1st Sess., May 7, 1973).


\textsuperscript{190}\textit{Fair Labor Standards Amendments of 1973: Hearings at 616-17.}
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In sum, then, the CSC "strongly urge[d] deletion" not only of the provisions in S. 1861 creating FLSA overtime coverage for federal employees, but even of the minimum wage extension in Dominick and Taft's S. 1725. The Senate Labor and Public Welfare Committee took Hampton's criticisms into account when it reported out S. 1861 in early July with federal overtime coverage largely intact. In addition to repeating the guideline from its 1972 report that it did not intend to cover professional, executive, and administrative personnel exempted under section 13 of the FLSA, the committee declared that it had "resolved" the CSC's objections to dual coverage "by charging the Civil Service Commission with responsibility for administration of the Act so far as Federal employees" (except those of the Postal Service and Library of Congress) were concerned. The report then added this crucial policy directive: "It is the intent of the Committee that the Commission will administer the provisions of the law in such a manner as to assure consistency with the meaning, scope, and application established by the rulings, regulations, interpretations, and opinions of the Secretary of Labor which are applicable in other sectors of the economy. The provisions of the bill would leave the premium pay provisions of title 5, United States Code, in effect to the extent that they are not inconsistent with the Fair Labor Standards Act." Significantly, the committee evaded the question of whether "consistency" meant that civil servants who would clearly be excluded from overtime pay under the FLSA would continue to be entitled to it under Title 5—and if they were, why "consistency" did not require a revision of the FLSA white-collar regulations to give private-sector workers an equivalent entitlement. The amended bill itself merely provided that the Civil Service Commission was "responsible for administering the provisions of this Act with respect to any individual employed by the United States...."

During the Senate floor debates in July, Dominick and Taft offered their bill S. 1725 as an amendment in the nature of substitute for S. 1861, the effect of the adoption of which would have been to exclude federal employees from overtime under the FLSA. After the Senate had defeated this move 57 to 40, Williams, acting as floor manager, stressed that S. 1861 covered virtually all nonsupervisory

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194 S. 1861, § 6(g) (93d Cong., 1st Sess., July 6, 1973).
government employees at all government levels. He failed to note the self-contradiction that he constructed by then asserting that the bill did not apply to many nonsupervisory federal workers:

We want to cover all employees—except professional, executive, and administrative personnel who are exempted under section 13 of the law—in all civilian branches of the Federal Government because the Federal Government must be a model employer and must not be allowed to treat its workers any less decently than private employees, particularly where payment of overtime is concerned.

All Federal employees probably now receive minimum wage, but many suffer from excessive hours with only compensatory time off or straight-time pay.

Although it was certainly true that many civil servants were paid only straight time (or even less) for their overtime work, Williams ignored the equally important fact that the counterparts (in terms of salaries and job duties) of many of these federal employees were entitled to no overtime pay at all under the FLSA; indeed, many private-sector white-collar workers with even lower salaries were also excluded from overtime pay.

In the event, on July 19 the Senate passed the bill (as H.R. 7935) by an almost two to one margin (64 to 33), thus necessitating a House-Senate conference, at which the House receded with respect to the federal overtime issue. In the beginning of August both the Senate and House agreed to the conference report by large majorities, but after Labor Day President Nixon, engaged in a more general struggle with Congress over domestic measures, vetoed the bill. Among the numerous reasons that he adduced for his veto, the president included the superfluousness of minimum wage coverage for federal employees and the undesirability of “impos[ing] a second, conflicting set of overtime premium pay rules.... It would be virtually impossible to apply both laws in a consistent and

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198 CR 119:24817.
199 CR 119:24829.
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equitable manner. As they themselves had correctly predicted, House Demo­
crats proved unable to override the veto, falling short by 23 votes. Although the
Democratic leadership was not interested in compromising, the day after Congress
sustained the veto, Republican Representative Quie introduced a compromise bill,
which would have continued to exclude federal white-collar workers from the
FLSA overtime regime. The Congress took no action before the first session
adjourned on this bill or on the one that Dominick, Taft, and Beall and another
that Williams introduced in the Senate in late November, both of which were
similar to their earlier bills. In introducing S. 2747, Williams remarked that Nixon
was the first president ever to have vetoed a minimum wage bill: "The demon­
strated catastrophe of executive isolation we have seen manifested in the energy
crisis, mismanagement of the economy, and other areas, has hopefully brought the
administration to a realization that detente is in order, not only with the Soviet
Union, but also with the Congress." In fact, as the Watergate-related impeach­
ment crisis began to engulf his presidency, Nixon increasingly lost the capacity to
mobilize enough Republicans to make his veto threats credible.

At the start of the second session, Dent introduced H.R. 12435, which
together with Williams’s S. 2747 became the chief vehicle for amending the
FLSA. With regard to overtime coverage of federal employees and administration
by the CSC, the bills were indistinguishable. In reporting out their respective bills
in February and March, the Senate and House committees both used the same
language that had already appeared repeatedly in Senate committee reports con­
cerning the exclusion of federal "professional, executive, and administrative per-

204 CR 119:30292 (Sept. 19, 1973) (259 to 164); Richard Madden, "House Sustains
Wage Bill Veto," NYT, Sept. 20, 1973 (1:4, 52:4). The day the House sustained the veto,
Representative Burton inserted into the Congressional Record the AFL-CIO’s “Myth
Versus Facts: Analysis of President Nixon’s Veto Message on Minimum Wage.” Al­
though it mentioned that 54,000 federal employees already covered by the minimum wage
earned less than the proposed $2.00 an hour minimum, it did not refer to any myths about
overtime. CR 119:30271, 30272. See also “Failure to Override Minimum Wage Veto
206 S. 2727, § 2 (93d Cong., 1st Sess., Nov. 19, 1973). The bill would have created
minimum wage but not overtime coverage for federal employees. Dominick announced
on the Senate floor that the bill did not extend any coverage to professional, executive, or
administrative personnel. CR 119:37700.
sonnel who are exempted under section 13 of the law” and charging the CSC with administration of the FLSA for federal employees “in such a manner as to assure consistency with the meaning, scope, and application established by the rulings, regulations, interpretations, and opinions of the Secretary of Labor which are applicable in other sectors of the economy. The provisions of the bill would leave the premium pay provisions of title 5...in effect to the extent that they are not inconsistent with the Fair Labor Standards Act.”210 By 1974 relatively little overt resistance to overtime coverage for federal employees was on display; the congressional debates barely touched on the question.211 Even President Nixon in a conciliatory letter to Senator Williams merely mentioned that if Congress wanted to cover federal employees, “who are already protected by other laws,” it should place enforcement in the CSC—a superfluous proposal since the pending bills had already done so. Both Houses passed the bills by very large majorities,213 and,  


211 The only substantive discussion was triggered by Representative Henderson, who in 1973 had offered an amendment that would have excluded federal employees from the FLSA altogether. Henderson now opined that the language in the committee report on the CSC’s authority to administer the FLSA “seems to be in conflict with the bill”; he assumed that the CSC would have the authority to determine which federal workers were covered and how the existing (Title 5) overtime law for them was to be administered when in conflict with the FLSA. Dent replied that Henderson was “absolutely correct, and if there is any conflict in the report as opposed to any understanding” that Henderson had “given to the situation at this point,” Dent assured him that Henderson’s views were “correct.” Henderson then commended Dent and the committee for their action regarding the administration of the coverage of federal employees “as opposed to” the previous session’s bill. CR 120:7335 (Mar. 20, 1974). Unfortunately, neither Henderson nor Dent specified the alleged conflict between the bill and the report. Already by August 1, 1974, the CSC’s general counsel interpreted this “colloquy” [sic] as showing that “Congress was aware of the difficulties that would arise upon enactment of the Fair Labor Standards Amendments of 1974 and the problem of resolving conflicts between other laws, and gave the Civil Service Commission the authority to resolve such conflicts.” US CSC, FPMS Letter No. 551-4, Attachment No. 2 at 5 (Oct. 31, 1974). Much later the D.C. Circuit Court of Appeals interpreted the colloquy as showing that Congress intended the CSC (and later OPM) “to have a great deal of authority to determine how the FLSA would be administered in the civil service....” AFGE v. Homer, 821 F.2d 761, 770 (D.C. Cir. 1987).

212 Letter from Nixon to Williams (Feb. 27, 1974); CR 120:4706 (Feb. 28, 1974).

213 The vote in the Senate was 69 to 22; CR 120:5743 (Mar. 7, 1974). In the House the vote was 375 to 37; id. at 7337 (Mar. 20). The House also ultimately passed the Senate bill in lieu of its own; id. at 7349.
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since there were no differences, the conference committee did not need to deal with the issue of federal coverage. The House and Senate agreed to the report, again, by large majorities, and "with possible impeachment hanging over his head, Mr. Nixon could not afford to risk a second veto." Before Nixon had even approved the law, the AFGE was already demanding time and a half after 35 hours for federal employees.

Thus in April 1974, after almost four years of congressional and presidential stalemate, and almost four decades since the FLSA's enactment, federal workers were finally covered by that law's time-and-a-half regulation. Congress amended the definition of "employer" to include a "public agency," which embraced the Government of the United States or that of any state or political subdivision thereof and any agency of these governments (including the U.S. Postal Service). Coordinately, "employee" was amended to mean, in the case of a person employed by the United States Government, anyone employed as a civilian in the military departments, in any executive agency, in any unit of the legislative or judicial branch having positions in the competitive service, in a nonappropriated fund instrumentality under the jurisdiction of the armed forces, in the Library of Congress, or the U.S. Postal Service. And finally, Congress authorized the CSC to

215 In the House 345 to 56 and in the Senate 71 to 19; CR 120:8605, 8769 (Mar. 28, 1974).
216 R. W. Apple, Jr., "President Signs Rise in Pay Base to $2.30 an Hour," NYT, Apr. 9, 1974 (1:8).
217 "'35-Hour Workweek, No Cut in Pay,' That's AFGE's Position," GS, Mar. 1974 (10:1-3). Three decades later, the AFGE, with considerable exaggeration, took credit for the creation of the dual overtime compensation system for federal employees: "In 1974, after decades of letter writing and intense lobbying, AFGE...was able to have the definition section of the FLSA to include, for the first time, federal employees." American Federation of Government Employees, Fair Labor Standards Act Manual 3 (n.d. [2003]).
218 Fair Labor Standards Amendments of 1974, Pub. L. No. 93-259, § 6(a)(1) and (6), 88 Stat. 55, 58, 60 (Apr. 8, 1974) (codified at 29 USC §§ 203(d) and (x)).
219 Fair Labor Standards Amendments of 1974, § 6(a)(2)(A) and (B), 88 Stat. at 58-59 (codified at 29 USC §§ 203(e)(2)(A) and (B)). The amendments did not cover anyone employed by a state or local government who was not subject to its civil service laws, and who either held a public elective office, or was selected by such officeholder to serve on his personal staff, or was appointed by such officeholder to serve on a policymaking level, or was an immediate adviser to such an officeholder regarding his office's constitutional or legal powers. Fair Labor Standards Amendments of 1974, §6(a)(2)(C), 88 Stat. at 59 (codified at 29 USC § 203(e)(2)(C)).
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administer the provisions of the FLSA "with respect to any individual employed by the United States" (except those employed by the Postal Service, Library of Congress, or TVA).\textsuperscript{220}

The Initial Administration of the FLSA for the Civil Service

[Doris] Hausser [senior adviser to the OPM director] said an undetermined number of the government's blue-collar supervisors may lose their FLSA overtime under the Labor Department plan, but said the supervisors should not suffer any pocketbook losses because they will shift to civil service coverage and receive premium pay for extra work hours.\textsuperscript{221}

Barely one month after the president had signed the FLSA amendments, the Civil Service Commission, exercising its new authority and attempting to provide "as much guidance as possible" under time pressure,\textsuperscript{222} issued interim instructions for implementing the FLSA stating that the revised statute does not repeal, amend, or otherwise modify any existing Federal pay laws. However, it does require a new determination (long required in the private sector) as to which employees are "nonexempt" and which are "exempt" from the minimum wage and overtime provisions of the Act...

While the FLSA does not modify any existing pay laws, it does establish a minimum standard to which nonexempt employees are entitled. To the extent that the FLSA would provide a greater benefit to a nonexempt employee (e.g., a higher overtime rate) than the benefit payable under other existing pay rules, the employee is entitled to the FLSA benefit. If other existing pay rules provide a greater benefit, of course the employee continues to receive that benefit. Exempt employees continue to be paid for overtime work in exactly the same way as in the past..."\textsuperscript{223}

The CSC also stressed to federal managers that henceforth they had to conform

\textsuperscript{220}Fair Labor Standards Amendments of 1974, § 6(b), 88 Stat. at 60 (codified at 29 USC § 204(f)).
\textsuperscript{221}Stephen Barr, "Labor Department's Plan to Change Overtime Pay Gets a Going Over," \textit{WP}, Apr. 21, 2004 (B2).
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to FLSA’s concept of “employ” as including “to suffer or permit to work,”224 which is far more capacious than Title 5’s framework, which provides for compensation only of overtime work “[o]fficially ordered or approved.”225 Thus under the FLSA it became “insufficient to issue a rule that employees covered by the Act may not perform work outside normal work hours unless ordered to do so, or that they may not perform such overtime work without a clear indication from the responsible manager or supervisor that it will be approved after the fact. Management must assure that supervisors enforce that rule.” Consequently, under the FLSA any work performed by covered employees before or after established shift hours or during prescribed lunch periods “is working time if the manager or supervisor knows of or has reason to believe it is being performed.”226

The CSC announced that it was in the process of reviewing the FLSA white-collar exemptions, but that it “anticipated that most supervisory positions will meet the executive exemption and that professional and comparable administrative positions will be exempted.”227 Already at this time, however, the CSC had “predetermined” that all employees at GS-4 and below were nonexempt.228 (In 1974 the maximum GS-4 salary rate was $9,358,229 compared with FLSA long-test salary levels of $6,500 for executive and administrative, and $7,280 for professional employees, and a short-test salary of $10,400.)230 With regard to (non-professional) administrative occupations—and, according to the AFGE, the administrative exemption was by far the basis for exemption most often claimed by the federal government as its justification for denial of overtime pay231—the CSC instructed management that they “require the kind of knowledge, evaluation [sic] judgment and breadth of outlook expected of competent college graduates. Employees are


226US CSC, FPMS Letter No. 551-1, at 2-3. The CSC’s interpretation, however, failed to appreciate the breadth of the “suffer or permit to work” standard; see Goldstein et al., “Enforcing Fair Labor Standards in the Modern American Sweatshop.”

227US CSC, FPMS Letter No. 551-1, Attachment 2 at 1.

228US CSC, FPMS Letter No. 551-1, Attachment 2 at 2.


230See above ch. 15.

231AFGE, Fair Labor Standards Act Manual at 4. To be sure, the AFGE has never had a case in which a federal agency claimed an executive exemption because by definition bargaining unit members cannot be supervisors. Id. at 9.
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required to apply this breadth of knowledge and perspective in solving problems for which guides, precedents, and instructions are not fully controlling. Quality of judgment required at the full performance levels depends primarily on reasoning ability and perceptiveness rather than on knowledge, gained through first hand experience or otherwise, of how prior similar cases, problems, etc., have been treated or decided upon."\textsuperscript{232} Initially, at least, the CSC conceived of excluded administrative workers with regard to their educational background and job duties much more narrowly than did or does the DOL.\textsuperscript{233} The CSC then appended a three-page list of administrative job titles with GS grades at and above which the positions "typically meet these criteria."\textsuperscript{234} They included such titles as internal revenue agent, public health program specialist, tax law specialist, coal mine and immigration inspectors, foreign language broadcasting, wage and hour compliance, and finger print identification, all of which were GS-7 or GS-9, which at the time encompassed salaries ranging from $9,969 to $15,821.\textsuperscript{235} The preliminary definition of professional occupations was also more capacious than the FLSA's in stressing that the work involved "personal responsibility to keep abreast of and exercise judgment and broad perspective in the application of an organized body of knowledge that is constantly studied to make new discoveries and interpretations and to improve the data, materials, and methods." The list of professional job titles encompassed largely GS-9 with a sprinkling of GS-7.\textsuperscript{236} Finally, the commission pointed out that any overtime paid under the FLSA was not subject to the salary limitation imposed under Title 5.\textsuperscript{237}

At this early point in the process of coordinating Title 5 and the FLSA there seemed to be general agreement that Congress had given federal employees the best of both worlds. In 1974 the Comptroller upheld the CSC's interpretation that workers were entitled to whichever overtime benefit was greater,\textsuperscript{238} while the

\begin{flushright}
\textsuperscript{232}US CSC, \textit{FPMS} Letter No. 551-1, Attachment 2 at 4.
\textsuperscript{233}See above ch. 2.
\textsuperscript{234}US CSC, \textit{FPMS} Letter No. 551-1, Attachment 2 at 4.
\textsuperscript{235}US CSC, \textit{FPMS} Letter No. 551-1, Attachment 2 at 5-7; EO 11739, \textit{FR} 38:27581.
\textsuperscript{236}US CSC, \textit{FPMS} Letter No. 551-1, Attachment 2 at 7-11 (quote at 7).
\textsuperscript{237}US CSC, \textit{FPMS} Letter No. 551-1, Attachment 5 at 3; 5 USC § 5547.
\textsuperscript{238}In the Matter of Overtime Compensation for Canal Zone Government Employees, 54 Comp Gen 371, 374-75 (1974). The outgoing Carter administration codified this interpretation at 5 CFR § 551.113: "An employee entitled to overtime pay under this subpart and overtime pay under § 550.113 of this chapter, or under any other authority, shall be paid under whichever authority provides the greater overtime entitlement in the workweek. This overtime pay shall be paid in addition to all pay, other than overtime pay, to which the employee is entitled under title 5, United States Code, or any other authority."
\end{flushright}
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AFGE interpreted congressional intent as insuring that "all provisions of the Act apply to Federal employees unless workers enjoy greater benefits under the terms of Title V."239 And the Commission itself observed in an additional set of implementing instructions that if an employee had a greater overtime benefit under the FLSA, he nevertheless continued to be entitled to other kinds of non-overtime premium pay under Title 5 such as a night differential.240

In spite of this rosy view, however, signs were also emerging that the integration of the two overtime pay systems might not be frictionless. As the Commission darkly noted in its first FLSA-era annual report: "Because Public Law 93-259 does not repeal, amend, or otherwise modify any existing Federal pay laws, this provision of the act conflicts with certain other Federal pay laws."241 And by mid-1975 the CSC had developed a broader interpretation of an excluded "administrative" employee. On July 1, the agency both published in the Federal Register partial regulations governing exemptions as a new Part 551 of Title 5 of the Code of Federal Regulations and issued more detailed instructions for applying the FLSA's exemption provisions that superseded the interim regulations issued a year earlier. The instructions were designed as guidelines to "integrate FLSA exemption determination with Federal classification systems to the extent possible, while maintaining results consistent with the basic exemption criteria and interpretations established by" the DOL.242

The guidelines were notable for perpetuating the DOL's long tradition of rigorously avoiding any and all explanation of the rationale for treating white-collar workers differently than blue-collar workers, let alone of the relationship between that rationale and the excruciatingly detailed job descriptions. For example, the Commission's conclusion that administrative employees who carried out assignments that "are inherently varied, involving problems susceptible of differing interpretations, approaches, and solutions" and who performed work requiring "substantial discretion and judgment in the development, analysis, and interpretation of facts and inferences" "qualify for exemption"243 failed to explain why such workers were any less deserving of overtime pay than those performing "non-exempt" work presenting "recurrent kinds of situations that are covered by established guidelines."244


239"FLSA—Boon OR Bane for Federal Workers?" GS, Aug. 1974 (3:2-4).
244US CSC, FPMS Letter No. 551-7, Attachment at 18 (July 1, 1975).
The problematic character of such logical gaps should have emerged more concretely into view with the CSC announcement in its “General principles governing exemptions” that “[e]xemption criteria shall be narrowly construed to apply only to those employees who are clearly within the terms and spirit of the exemption.”245 Like the DOL, the CSC never explained how it would be possible to identify, let alone operationalize, the “spirit” of an exemption whose purpose has remained totally opaque since 1938.

The CSC’s initial definition of “exempt” executive employee tracked that of the FLSA with several differences. First, such an employee had to supervise at least three subordinate employees, whereas the FLSA required only two. Second, the FLSA specified that an exempt executive either had to have the authority to hire or fire or his recommendations as to hiring, firing, or promotions had to be given particular weight, whereas the CSC more broadly or vaguely required the performance of “significant personnel management duties.” Third, Title 5 called for the regular exercise of discretion and independent judgment, whereas the FLSA required only discretion. Finally, under the CSC regime an exempt executive employee could be classified no lower than GS-5, whose lowest salary at the time was $8,055, while the FLSA long- and short-test salaries were $6,500 and $10,400.246

245 5 CFR § 551.202(a) in FR 40:27640 (July 1, 1975). The current version of the regulation is identical except that “shall” has been replaced by “must.” 5 CFR § 551.202(b) (2002). The current version also includes these additional constraints on exclusions: “(e) There are groups of General Schedule employees who are FLSA nonexempt because they do not fit any of the exemption categories. These groups include the following: (1) Nonsupervisory General Schedule employees in...most clerical occupations...; (2) Nonsupervisory General Schedule employees performing technician work in positions properly classified below GS-9...and many, but not all, of those positions properly classified at GS-9 or above...; and (3) Nonsupervisory General Schedule employees at any grade level in occupations requiring highly specialized technical skills and knowledges that can be acquired only through prolonged job training and experience, such as the Air Traffic Control series...unless such employees are performing predominantly administrative functions rather than the technical work of the occupation.”

246 5 CFR § 551.203(a) in FR 40:27640; 29 CFR § 541.1 (1974); EO 11739, in FR 38:27581. The executive short test required only the primary duty of management of a department or subdivision and supervision of two employees. Two decades later, the Clinton administration OPM deleted the requirement that an exempt executive had to direct the work of at least three subordinate employees on the grounds that it was inconsistent with the DOL regulation. OPM rejected two unions’ comment that this change was a mistake because agencies would then claim that workers in teams with a team leader who makes recommendations regarding their co-workers’ work would qualify as exempt executives “simply if the employees exercise some independence in their own work.” FR
The CSC’s definition of an “administrative employee” was both somewhat more stringent and more capacious than the FLSA’s. On the one hand, the Commission required the performance of “office or other predominantly nonmanual work” which was either “[i]ntellectual and varied in nature, or...of a specialized or technical nature that requires considerable special training, experience, and knowledge,” whereas the FLSA did not require anyone to meet the former criterion and permitted as substitutes for the latter either assisting a proprietor or bona fide executive or administrative employee or the execution of “special assignments and tasks” under merely general supervision—an extraordinarily vague criterion absent from Title 5. On the other hand, however, the CSC added “supporting services of substantial importance to the organization serviced” to the FLSA’s capacious primary duty of “work directly related to management policies or general business operations.” Finally, an exempt administrative employee had to be classified no lower than GS-7, whose lowest salary in 1974 was $9,969, which was about 50 percent higher than the FLSA long-test salary, but somewhat lower than the short-test salary.247


2475 CFR § 551.203(b) in FR 40:27640; 29 CFR § 541.2 (1974); EO 11739, in FR 38:27581. The short test required only work related to management policies or general business operations requiring exercise of discretion or independent judgment. More than 20 years later a labor union commenting on a set of revised OPM FLSA regulations recommended that OPM add a provision modeled on the DOL regulations’ distinction between exempt administrative operations and production work involving the nonexempt performance of activities carrying out the employer’s day-to-day functions, but OPM dismissed the proposal without explanation on the grounds that the existing definition was “legally correct.” FR 62:67240. The current definition of “Management or general business function or supporting service, as distinguished from production functions, means the work of employees who provide support to line managers. (1) These employees furnish such support by—(i) Providing expert advice in specialized subject matter fields, such as that provided by management consultants or systems analysts; (ii) Assuming facets of the overall management function, such as safety management, personnel management, or budgeting and financial management; (iii) Representing management in such business functions as negotiating and administering contracts, determining acceptability of goods or services, or authorizing payments; or (iv) Providing supporting services, such as automated data processing, communications, or procurement and distribution of supplies. (2) Neither the organizational location nor the number of employees performing identical or similar work changes management or general business functions or supporting services into production functions. The work, however, must involve substantial discretion on matters of enough importance that the employee’s actions and decisions have a noticeable impact on the effectiveness of the organization advised, represented, or serviced.” In
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The CSC’s professional employee exemption tracked the FLSA’s more closely with the significant exception that it broadened the primary duty to include the performance of work merely “comparable to that performed by professional employees, on the basis of specialized education or training and experience which has provided both theoretical and practical knowledge of the specialty, including knowledge of related disciplines and of new developments in the field.” Here, too, GS-7 was the floor.248

The Reagan Administration’s Attack on FLSA Overtime Pay for the Civil Service

In the long run the rank and file of the American labor would prefer to work overtime rather than to have the sublabor standards of a dictator country imposed on them.249

In March 1983, the Reagan administration’s Office of Personnel Management, which had replaced the CSC in 1979, announced that it was proposing to revamp the regulations applying the FLSA exemption criteria to federal workers on the grounds that the existing regulations were “difficult to administer” and “inconsistent with the exemption standards...applicable to private sector employees.”250 The move was part and parcel of Reagan’s recently announced drive to cut personnel costs251 and put an end to automatic salary step-increases.252 OPM was, inter alia, determined to do away with federal workers’ privileged overtime pay

addition, “[p]articipation in the executive or administrative functions of a management official means the participation of employees, variously identified as secretaries, administrative or executive assistants, aides, etc., in portions of the managerial or administrative functions of a supervisor whose scope of responsibility precludes personally attending to all aspects of the work. To support exemption, such employees must be delegated and exercise substantial authority to act for the supervisor in the absence of specific instructions or procedures, and take actions which significantly affect the supervisor’s effectiveness.” 5 CFR § 551.104 (2002).

248 5 CFR§ 551.203(c) in FR 40:27640-41. For the FLSA short-test duties, see 29 CFR § 541.3(e).
249 CR 86:7026 (May 28, 1940) (Rep. Robert Allen (Dem. PA)).
entitlements. The fact that federal employees were entitled to overtime pay under the FLSA or Title 5, "depending upon which law provides the greater benefit," presumably did not sit well with the OPM, which the following year issued a study characterizing federal workers as overpaid; the result was much lower quit rates than in the private sector: "Compensation rates should be lowered to reduce the Government's unfair competitive advantage over the private sector."

The three main differences, in OPM's view, between the FLSA and Title 5 were: (1) how hours of work were counted; (2) how the overtime rate was computed; and (3) the absence of overtime caps or limits under the FLSA. However, OPM's principal concern seemed to be that: "When OPM's current exemption regulations were promulgated in 1975 there was a rough equivalency between the regulations and the [short-test] exemption criteria applied by the Department of Labor to the private sector. Since that time, however, OPM's grade-level criteria have grown to be dramatically out of line with the flat salary criteria applied by the Department of Labor to the private sector. This discrepancy is not evident in the application of the 'primary duty test.'" Under the DOL regulations, an employee with a weekly salary of more than $250 was exempt so long as his primary duty was administrative, executive, or professional; if his salary was less than $250, he was subject to the long test requiring that no more than 20% of his duties be nonexempt. In contrast, however:

The equivalent cutoff point for GS employees is GS-10, which means a weekly salary of at least $429 a week [i.e. an annual salary in 1983 of $22,307]. This discrepancy results in the application of the long test to many employees who would be subject to the primary duty test if they were employed in the private sector. Therefore, OPM is proposing to establish the cutoff point for application of the primary duty test at GS-7. Since the minimum salary of a GS-7 is $318 per week, this change would still leave OPM's cutoff point well above the $250 standard applied by DOL ...

Under the current regulations the minimum grade level at which an exemption can be applied is GS-5 for the executive exemption, and GS-7 for the administrative and professional exemptions. OPM is proposing to standardize the minimum grade level for applying all three exemptions at GS-5. Consequently, all GS employees at GS-5 and GS-6 would be subject to the long test, and could be exempted only if they perform 80% or more exempt work in a representative workweek. All employees classified below GS-5 would be nonexempt. [I]t can be expected that it would be unusual for employees properly classified at GS-5 or GS-6 to meet the long test for exemption. Nonetheless, the proposed change is needed because the General Schedule recognizes the existence of administrative

253 FR 48:13374.
255 FR 48:13374.
and professional work below GS-7, and because OPM's minimum grade levels for exemption are unrealistically high in comparison to the standard applied by DOL to private sector employees.\textsuperscript{256}

On the grounds that the statutory definition of GS-11 showed that properly classified GS-11 employees presumptively performed executive, administrative, or professional work within the terms of the FLSA, the Reagan administration also proposed to change the definition of "primary duty...so that employees properly classified at GS-11 or above would be presumed to meet the primary duty test." Since existing OPM instructions already exempted almost all categories of employees at GS-11 and above, the proposed change would exempt only those few categories of employees at GS-11 and above who were non-exempt and "who, if properly classified, should be presumed to be performing exempt work."\textsuperscript{257} Consequently, OPM proposed that any employee properly classified below GS-5 be non-exempt, whereas any employee properly classified at GS-11 and above be "presumed to have a primary duty which is executive, administrative, or professional." Finally, as an additional primary duty criterion, employees classified below GS-7 would also have to spend 80 percent or more of the worktime in a representative workweek on supervisory, administrative, or professional work.\textsuperscript{258}

Within two weeks of their publication, the OPM's proposals had prompted a hearing before the Senate Civil Service, Post Office, and General Services Subcommittee of the Governmental Affairs Committee. The proposed revisions had sparked considerable opposition, but many members of Congress, including the Republicans who controlled the Senate and its relevant committees during the 98th Congress, were also concerned that the changes were potentially so far-reaching that they should perhaps be undertaken legislatively rather than by an administrative agency.\textsuperscript{259} Although unions and the Congress focused more on issues pertaining to performance and its impact on promotions and reductions in force and limitations on the subjects open to labor-management negotiations, the Senate subcommittee also expressed concern about the reduction in the number of federal employees who would receive overtime pay under the FLSA.\textsuperscript{260} In his testimony

\textsuperscript{256}FR 48:13374.
\textsuperscript{257}FR 48:13375. The word "non-exempt" is used here, although "exempt" appeared in the \textit{Federal Register}, which was manifestly a typographical error.
\textsuperscript{258}FR 48:13376.
\textsuperscript{259}CR 129:22445-50 (Aug. 3, 1983).
\textsuperscript{260}\textit{Merit Pay and Proposed Pay-for-Performance Regulations: Hearings Before the Subcommittee on Civil Service, Post Office, and General Services Subcommittee of the Committee on Governmental Affairs United States Senate}, Part 1 at 1 (98th Cong., 1st
before the subcommittee, OPM director Donald Devine (a conservative academic and Reagan election campaign official) distorted the congressional purpose in applying the FLSA to the civil service by claiming that in 1974 Congress had "intended to bring Federal overtime standards under the act closer into line with those administered by the Department of Labor for the private sector"—as if the pro-labor Democrats who passed the measure with union support against Republican opposition had been seeking to reduce civil servants’ level of protection. Devine then asserted that after the CSC had “followed through on the requirement that the Federal standards match those in the private sector” by establishing “Federal cutoff points at grade levels for which salaries matched” the DOL dollar-amount standards, during the intervening nine years the DOL had not increased those amounts, while the GS salaries for the cutoff-grades had risen substantially, with the result that the Federal cutoff was now $429 a week compared to $250 in the private sector. OPM was proposing to reduce the federal cutoff from GS-10 to GS-7 or $318 a week. In his prepared statement Devine charged that this “substantial difference” between the two regimes not only failed to “meet the requirements” of the 1974 FLSA amendments, but “imposes very heavy costs on the government.” However, in his response to “technical questions” that subcommittee chairman Ted Stevens had posed by letter after the hearing, Devine admitted that OPM estimated that the proposed changes would save the government only five to seven million dollars annually (which would otherwise be owed to about 20,000 employees) out of a total executive branch overtime cost of $2.6 billion. Devine’s claim that OPM’s reduction would still leave the federal standard “somewhat more generous” was undercut by Stevens’s written question as to why OPM was reducing the short-test salary to $318, while the last DOL proposal would increase the private-sector short-test salary to $345. Devine’s justification that that proposal had been indefinitely postponed in 1981 suggested


261 That Devine’s inaccurate account may have been the product of ignorance rather than conscious manipulation and bias is suggested by his mistaken claim in his prepared statement that the FLSA short test applied to workers with salaries below the cutoff point and the long test to those with salaries above it. In fact, he inverted the correspondence. Merit Pay and Proposed Pay-for-Performance Regulations at 19.

262 Merit Pay and Proposed Pay-for-Performance Regulations at 8.

263 Merit Pay and Proposed Pay-for-Performance Regulations at 19.

264 Merit Pay and Proposed Pay-for-Performance Regulations at 37, 62.

265 Merit Pay and Proposed Pay-for-Performance Regulations at 19.

266 Merit Pay and Proposed Pay-for-Performance Regulations at 61. On the suspension of the increase, see above ch. 15.
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the possibility that the Reagan administration was engineering a coordinated race to the bottom to render the salary tests in both sectors nonfunctional.

As a result of "widespread criticism" of the March proposals, OPM published and solicited comment on a second version in July 1983. Thus at the same time that it published modified regulations for comment designed to "alleviate the discrepancy between OPM's exemption criteria and the exemption criteria which are applicable in the private sector," it responded to the comments that it had received from federal agencies and unions to the first round of proposed rulemaking. In response to several unions that had questioned OPM's authority to issue regulations under the FLSA even for federal employees, the agency argued that Congress had given it such authority to administer the FLSA precisely in order to reconcile the differences between the FLSA and conflicting federal salary and classification statutes. Unions also objected to the OPM's presumption that employees at GS-11 or above were exempt on the grounds that it would be inconsistent with DOL regulations and irrebuttable. While conceding that DOL regulations lacked an identical presumption, OPM asserted that it can justifiably presume that employees at a certain level of responsibility or above are performing exempt work. It should not be necessary to require agencies to perform a separate evaluation for FLSA purposes when the exhaustive evaluation required by the classification process results in a determination that an employee is performing duties at a very high level of responsibility, difficulty, and complexity.

It must be noted that title 5 divides the General Schedule into two distinct categories. Those employees paid at less than the rate of GS-10, step 1, are entitled to time-and-a-half of their basic rate for overtime work. Those employees paid at the GS-10, step 1, rate or above are paid at the overtime rate of GS-10, step 1, regardless of grade level. In effect, title 5 provides a statutory division point above which employees are entitled to overtime compensation, but not to time-and-a-half. To determine that employees paid above the statutory break point are nonexempt creates pay distortions which frustrate the distinctions made by the General Schedule. Consequently, OPM believes that a presumption that employees above GS-10 are exempt is an appropriate reconciliation of title 5 and the FLSA and gives the fullest effect to both statutes while preserving the protective features of the FLSA for the segment of the workforce it was designed to protect.

With respect to the presumption of exemption, several labor organizations expressed additional opposition to the proposal on the grounds that FLSA exemption determinations should not be based in any part on classification. The labor organizations state that exemption determinations must be based on actual duties performed. We agree with this

268 FR 48: 32280 (July 14, 1983).
269 FR 48:32280.
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principle, but we do not agree that it precludes the relevance of classification in the exemption determination process. First, the primary use that OPM makes of the classification is as an equivalent to the DOL salary test. Since in all cases the salaries for the proposed grade levels exceed the DOL salary levels, the classification decision is sufficient for this purpose. The only additional use which this proposal is making of the classification grade decision is to establish a presumption that at the highest GS levels, properly classified employees are exempt. The classification decision demands a comprehensive evaluation of duties which when properly done is more than sufficient basis for this presumption. While it is true that the classification process focuses more on the position than on the employee, proper classification is ultimately based on the duties of a position as performed by an employee. Classification in the Federal sector is much more than the assignment of a job title. Rather, it is a statutorily required process which requires the assignment of an occupational series and grade level which is commensurate with the level of responsibility, complexity, and qualifications required. For GS employees all pay determinations flow from the proper classification of the employee's position. Therefore, we do not believe that a presumption of exemption of a position at a defined high level of responsibility and pay, can be equated to the simplistic, prohibited practice of assigning exemption by reference to generic job titles. Rather, it represents the appropriate exercise of OPM's authority to implement the FLSA in a manner which is consistent with the Federal position classification process.

Furthermore, it must be remembered that exemption from the FLSA for a Federal employee does not mean that the employee cannot receive overtime benefits. Exempt employees are subject to the statutory overtime entitlements of title 5. Exemption for employees at the highest grade levels generally means a reduction in overtime benefits, not their elimination.270

OPM rejected the even more radical proposals of several agencies "that the grade level at which exemption is presumed should be lowered, on the grounds that, since the cutoff for time and a half was GS-10, it did "not believe that exemptions should be presumed at levels in the General Schedule where exemption begins to become problematic."271 By the same token, OPM also rejected proposals by unions (and one agency) that "DOL should raise its salary tests, rather than OPM adjusting its grade level test to DOL standards. It is the responsibility of OPM to follow the general criteria determined by DOL to the extent possible within the context of Federal pay and classification statutes. Because OPM's grade cutoff period is so dramatically out of line with the DOL criteria, we believe that OPM cannot honor this mandate without adjusting its criteria to reflect more closely the DOL criteria. The fact that OPM criteria remain above the DOL salary tests and are tied to grade rather than salary reflect OPM's other mandate to

270FR 48:32280-81.
271FR 48:32281.
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integrate the exemption criteria into its pay and position classification processes."\textsuperscript{272}

To unions' objection to the standardization of the minimum grade level for exemption at GS-5, OPM responded that it in fact expected that only few employees would qualify for exemption at these grade levels: "However, the General Schedule recognizes the existence of administrative and professional work at these levels. As adjusted, OPM's minimum grade levels for exemption would be higher than the high salary test of DOL, and far above DOL's minimum salaries for exemption. Therefore, we believe that the standardization of the minimum level at GS-5 makes OPM's criteria more consistent with the DOL criteria and with OPM position classification standards."\textsuperscript{273}

OPM also found it necessary to point out that "[m]any of the objections to the changes in the FLSA regulations were based on the misconception that OPM" was lowering the overtime rate payable under Title 5: "A key feature of the FLSA change is the lowering of the point at which the 'short test' is applied from GS-10 to GS-7. Apparently many people interpreted this action to be related to the statutory overtime cap under title 5 which limits overtime payable to GS employees to the rate payable to a GS-10, step 1. The assumption was that OPM was lowering the point at which the overtime cap is applied under title 5 from GS-10 to GS-7. The FLSA exemption regulations, however, affect only how exemption status under the FLSA is determined and have no effect whatsoever on overtime pay under title 5, or any other pay system." OPM also noted that some comments had erroneously assumed that exempt employees were not entitled to overtime compensation. In fact, however, exempt employees were covered by Title 5's overtime provisions.\textsuperscript{274}

By the summer of 1983, Congress was still dissatisfied with OPM's proposed regulations\textsuperscript{275} and in August passed an appropriations bill prohibiting the agency from spending any funds to adopt, issue, or carry out before October 15, 1983, any regulation based on those published in March and July.\textsuperscript{276} Ten days after this deadline expired, on October 25, 1983, when OPM published the final rules (and promulgated the aforementioned contested regulations more or less unchanged), it also responded to the set of comments submitted to the July version of the proposals. Contending that most of the opposing commenters had misunderstood

\textsuperscript{272}FR 48:32282.
\textsuperscript{273}FR 48:32282.
\textsuperscript{274}FR 48:32282.
\textsuperscript{275}CR 129:22445-50 (Aug. 3, 1983).
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OPM's role as the FLSA administrator, the agency argued that "Congress realized that...the FLSA would cause conflicts with existing...Federal pay and classification statutes...and that it is OPM's responsibility to reconcile these conflicts to the maximum extent possible, while preserving the basic purpose of the FLSA." OPM chose to illustrate its role by reference to the application of the long and short tests—an area in which OPM was "dramatically out of line" with DOL's private-sector regime:

Under the DOL criteria, an employee paid at a salary of $250 or more per week is subject to the less stringent "short test" for exemption. OPM's current regulations make the cutoff for applying the "short test" at the GS-10 level, which currently has a minimum salary of $429 per week. A key feature of the revised regulations is to adjust this cutoff point from GS-10 to GS-7, which currently has a minimum salary of $318 per week. While this adjustment would alleviate somewhat the discrepancy between the OPM criteria and the DOL criteria, it would still leave the standard for Federal employees significantly above that which is applied to employees in the private sector. Under the President's proposal for the Federal pay comparability increase, the minimum weekly salary for a GS-7 would rise to $328 in January. If the "short test" cutoff point were left at GS-10, the equivalent weekly salary in the Federal sector would rise to $486, almost doubling the standard applicable in the private sector.

As can readily be seen from these figures, the proposed cutoff points, even after adjustment, remain higher than the private sector standards. If OPM were to literally interpret its responsibility to be consistent with DOL it would apply a pure salary test, tied directly to the DOL figures. This would mean that the cutoff point for applying the short test should be dropped to approximately GS-4, step 3. However, OPM is concerned not only with its mandate for consistency, but also with its concurrent responsibility to integrate the administration of the FLSA into the Federal pay and position classification process. OPM believes that defining the FLSA minimum grade levels for exemption, and the cutoff points for applying the "short test" in terms of the classification system, make [sic] more sense than using only absolute dollar figures. ... Furthermore...the position classification system is a job evaluation process which is a more logical system for defining exemption for Federal employees than gross weekly salary.

Paradoxically, those who object to the reference to classification in exemption determinations also urge that the cutoff point for applying the "short test" be left at the classification level of GS-10. In other words, it appears that the objection to the proposal is not that OPM is using the classification system in the exemption determination process, but rather that OPM is honoring its other mandate to attempt consistency with DOL in applying more realistic standards by lowering the classification reference points for exemption.

This confusion in the objections to the proposal is well illustrated by the reaction to the assertion of a presumption of exemption for employees classified at GS-11 and above.

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Although this presumption affects only a relatively few highly classified employees (the overwhelming majority of employees at these grade levels are already exempt), it has been objected to on the grounds that it is inconsistent with DOL regulations. We believe that it is reasonable to presume exemption of employees at defined high grade levels, particularly since they are classified at these grades precisely because of the high level of complexity and responsibility of their positions.278

OPM justified its presumption that employees at GS-11 and above were all exempt on the grounds that during almost a decade’s experience it had found “almost all employees” at those levels properly exempt; it estimated that the population of high-graded non-exempt employees who might potentially become exempt under the change did not exceed 20,000.279

On October 18, 1983, a week before OPM issued its final rule, the legislative-executive dispute over the OPM regulations intensified when the House Appropriations Committee reported out a bill that, inter alia, prohibited obligating or expending funds appropriated pursuant to that bill to implement, promulgate, administer, or enforce the March or July regulations.280 The bill that the House passed on October 27281 found its way into a continuing resolution that Congress passed in mid-November.282 Because the bill had been reported out before OPM issued the final rule, and because the continuing resolution was not updated to reflect that issuance, OPM announced on November 21 that the regulations would go into effect; bizarrely, however, Director Devine, while recognizing the congressional intent to prohibit OPM from administering or enforcing the regulations, concluded that each agency would have to perform those activities without OPM’s assistance.283 Already on November 7, the National Treasury Employees Union had filed a complaint in the Federal District Court for the District of Columbia requesting that the regulations be declared void, which it amended two weeks later, requesting that OPM be enjoined to withdraw the regulations based on the con-
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The district court did declare the regulations void and enjoined the OPM from taking any action with regard to them, and the appeals court affirmed that judgment. Then in another continuing appropriations act in October 1984, Congress extended the prohibition on the use of funds for implementing, administering, enforcing, reissuing, or revising the regulations until July 1, 1985. As this date approached, the AFGE sought a temporary restraining order blocking implementation of the regulations, which was denied by the district court; the D.C. Circuit Court of Appeals then reversed that ruling, but the Supreme Court vacated the reversal.

After the regulations published as final rules in October 1983 became effective on July 3, 1985 (and began to be implemented 120 days later), OPM republished them as proposed regulations in August 1985 allowing for further comment. In the meantime, the unions unsuccessfully sought a preliminary injunction against implementation of the regulations. In March 1986 OPM adopted the regulations again as a final rule and responded once again to comments. In response to several unions' objection to the use of the classification system for determining a presumed exemption and a recommendation of a cut-off salary of $21,798 for determining presumed exemption, OPM argued that "defining the FLSA minimum grade levels for exemption, and the cutoff points for applying the 'short test' in terms of the classification system makes more sense than using only absolute dollar figures." OPM also took the position that "a presumption that employees above GS-10 are exempt is an appropriate reconciliation of title 5 and the FLSA and gives the fullest effect to both statutes while preserving the protective features of the FLSA for the segment of the workforce it was designed to protect." The unions, however, persisted in their judicial attacks on the validity of the regulations. Although the district court dismissed their complaint at the end of

291 FR 51:7426.
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June 1986, the federal workers’ challenge to OPM’s regulatory presumption that employees classified above GS-10 were excluded from overtime pay under the FLSA ultimately prevailed before the D.C. Circuit Court of Appeals, where the AFGE took the position that OPM’s argument that in establishing the General Schedule for classifying positions GS-11 or above it applied DOL’s criteria for determining the FLSA executive and administrative exemptions had to fail: “It is apparent that OPM has arbitrarily selected the GS-11 salary level as a cut-off for making FLSA exemption decisions rather than attempting to make the more difficult factual determination by applying the tests enunciated by DOL” To be sure, it was difficult to regard the cut-off as arbitrary since it coincided with the cut-off for the entitlement to full time-and-a-half pay under Title 5.

The National Federation of Federal Employees devised a more far-reaching argument. Since a primary difference between Title 5 and FLSA overtime pay was the former’s limitations for employees classified above GS-10, OPM, by presuming an exemption from the FLSA at GS-11, avoided “the logical implication of Congress’s grant of FLSA coverage to federal employees, that overtime pay availability over GS-10 would be based on FLSA exemption categories, not the limited Title 5 categories.” OPM’s argument that allowing employees at GS-11 and above to be FLSA nonexempt created pay distortions frustrating the General Schedule’s distinctions turned, in the NFFE’s view, “Congress’ intent on its head. These ‘distortions’ are caused by paying time and a half to employees who are properly considered non-exempt. When Congress rejected the Civil Service Commission’s claim that the FLSA was inappropriate in the federal sector, it specifically endorsed the ‘distortions’ which OPM is now trying to obliterate.”

The NFFE also argued that the Classification Act was inappropriate for FLSA purposes because “classifying an employee at GS-11 creates no implication about the employee’s FLSA exemption status, as those classifications are based primarily on the difficulty of the work and expressly include types of duties which are non-exempt FLSA duties.” The specific point about GS-11 was factually correct, but the broader claim about the GS classifications themselves was overdrawn since

difficulty of work can be a component of a determination of professional or adminis-
trative exclusions under the FLSA.

The D.C. Circuit straightforwardly rebuffed OPM’s approach. Starting from
the position that when the civil service and FLSA systems conflict, OPM must
defer to the FLSA so that any employee entitled to receive overtime pay under the
latter receives it under the former, the court pointed out that the challenged
regulations conflicted with the FLSA in important ways. Although the OPM
regulations, like the FLSA, purported to exempt “only tightly defined executive,
administrative, and professional employees from overtime eligibility,” these
provisions were “completely undermined” by 5 CFR 551 § 203(c), which stated
that “‘any employee properly classified at GS-11 or above [without regard to the
nature of his duties]...shall be presumed to be exempt....’” The conflict between the
OPM regulations and the FLSA was, in the court’s view, quite apparent in the case
of a GS-11 employee who worked as a skilled technician. Although technical
employees were eligible for overtime pay under the FLSA and OPM recognized
as much, GS-11 nevertheless included employees performing technical duties.
Under the new regulations, all GS-11 employees were presumed ineligible and had
to file a complaint with OPM or a suit in court to overcome the presumption. OPM
insisted that few government employees would suffer such inconvenience and
claimed that its presumption was easily rebuttable, but the D.C. Circuit found that
“OPM’s position seems disingenuous. The regulation appears designed to make
it difficult for the employee to rebut the presumption....” Since the presumption
appears to guide or direct the agency to act inconsistently with the FLSA and
places an unwarranted and, at minimum, confusing burden on the employee, sec-
tion 551.203(c) is flawed and must be vacated as inconsistent with the ‘meaning,
scope, and application’ of the FLSA.”296 A half-year after the court vacated 5 CFR

296American Federation of Government Employees v. Office of Personnel
Management, 821 F.2d at 770, 771 (quotes). The United States Government had argued
that OPM’s reversing the burden of proof by placing it on the worker was appropriate
because job classification in the federal sector was not subject to the kind of manipulation
in which private employers engaged by creating meaningless job titles to avoid overtime
pay obligations; consequently, federal employees did not need the same kind of protection
from mislabeling. Brief for Appellees at 54-55, American Federation of Government
Employees v. Office of Personnel Management, 821 F.2d 761 (DC Cir. 1987) (Nos. 86-
5456, 86-5457, 86-5461) (filed Dec. 15, 1986). An interesting refutation of this claim
stems from a decision involving a deputy U.S. marshal who acted in “‘front line’ capacity
‘protecting jurors, judges, and witnesses,’” and at times worked 12-hour days seven to
eight days in a row. He filed suit under the FLSA because, being classified as a GS-11
step 7 employee, he had been paid less than full time and a half and subjected to the total
earnings limitation. Rejecting the government’s claim that the plaintiff was a FLSA-
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§ 551.203(c), the OPM removed the regulation. Thus currently, "[a]ny employee in a position properly classified at GS-4 or below...is nonexempt," whereas "[a]ny employee in a position properly classified at GS-5 or above...is exempt only if the employee is an executive, administrative, or professional employee." 298

In 1990 the Bush administration resumed the efforts of previous administrations to restructure federal white-collar compensation systems, inter alia, to substitute merit for automatic pay increases. 299 In introducing, by request, OPM’s Federal Pay Reform Act of 1990, 300 Senator William Roth transmitted the agency’s justification for the bill: “The General Schedule system with its monolithic structure and rigid underpinnings is incapable of adapting to this increasingly diverse and dynamic economic environment.” 301 As one minor substantive provision the bill included an amendment that would “eliminate the current duplicative overtime computations for employees covered by both subchapter V [of Title 5, ch. 55] and the Fair Labor Standards Act. Such employees will have their overtime computed only under the Fair Labor Standards Act, but hours in excess of eight hours in a day are deemed overtime hours.” 302 OPM’s proposal was not enacted in its entirety, 303 but the amendment was incorporated into the Federal Employees Pay Comparability Act (FEPCA) of 1990, 304 which revised § 5542, the exempt administrative employee, the U.S. District Court for the District of Columbia found that his position required the physical strength and stamina of running, stooping, bending, climbing, lifting, and carrying heavy objects and that his “work environment is not that of the white collar office worker but rather includes ‘a wide variety of potentially dangerous’ and physically stressful situations.” Roney v. United States of America, 790 F. Supp. 23, 24, 25 (quote), 28 (quote) (D.D.C. 1992).

300CR 136:8905 (May 1, 1990) (S. 2547).
301CR 136:8917.
302CR 136:8922. The provision itself read that § 5542 “shall not apply to an employee who is subject to the overtime pay provisions of section 7 of the Fair Labor Standards Act.... In the case of an employee who would, were it not for the preceding sentence, be subject to this section, hours of work in excess of 8 hours in a day shall be deemed to be overtime hours for the purposes of such section 7 and hours in a paid nonwork status shall be deemed to be hours of work.”
303In particular the original merit pay increase proposal was not enacted, but locality pay was introduced. Making Appropriations for the Treasury Department 87-90 (H. Rep. 101-906, 101st Cong., 2d Sess., Oct. 20, 1990) (FEPCA conference report).
304Neither House took any action on OPM’s S. 2547, but the overtime provision was
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principal overtime provision for white-collar workers in Title 5, so that its "[s]ub-section (a) shall not apply to an employee who is subject to the overtime pay provisions of section 7 of the Fair labor [sic] Standards Act.... In the case of an employee who would, were it not for the preceding sentence, be subject to this section, hours of work in excess of 8 hours in a day shall be deemed to be overtime hours for the purposes of such section 7 and hours in a paid nonwork status shall be deemed to be hours of work."305

As explained by OPM’s implementing interim regulations in 1991, FEPCA eliminates the need to calculate and compare an FLSA nonexempt employee’s overtime pay entitlement under two laws in order to pay the greater overtime benefit. Instead, employees who are nonexempt under the Fair Labor Standards Act...will always receive overtime pay under the FLSA, as provided in part 551 of title 5, Code of Federal Regulations.


305The Federal Employees Pay Comparability Act of 1990, Pub. L. 101-509, § 210, 104 Stat 1427, 1460 (Nov. 5, 1990) (adding subsect. (c) to 5 USC § 5542). Two years later, Congress enacted “technical amendments” pursuant to which the second sentence of the FEPCA amendment of 5 USC § 5542(c) was revised to read: “In the case of an employee who would, were it not for the preceding sentence, be subject to this section, the Office of Personnel Management shall by regulation prescribe what hours shall be deemed to be hours of work and what hours of work shall be deemed to be overtime hours for the purpose of such section 7 so as to ensure that no employee receives less pay by reason of the preceding section.” Technical and Miscellaneous Civil Service Amendments Act of 1992, Pub. L. 102-378, § 2(41)(B), 106 Stat. 1346, 1360 (Oct. 2, 1992). In other words, the specific reference to daily working hours beyond eight was replaced by requiring OPM to ensure that federal employees not receive less overtime pay pursuant to the FLSA computation than under FEPA. Aaron v. United States, 56 Fed. Cl. 98, 100 (2003). The relevant provision currently reads: “(a) An agency shall compensate an employee who is not exempt under subpart B of this part for all hours of work in excess of 8 in a day or 40 in a workweek at a rate equal to one and one-half times the employee’s hourly regular rate of pay.... (d) The maximum earnings limitations described in §§ 550.105, 550.106, and 550.107 of this chapter do not apply to overtime pay due the employee under this subpart.” 5 CFR § 551.501 (2003). In promulgating this revision, OPM noted that Title 5 and FLSA overtime pay would be earned on the same basis beyond eight hours per day and 40 per week FR 56:20343 (May 3, 1991). In 1980 OPM added the statement that the maximum aggregate earnings limitation (including overtime pay) of Title 5 did not apply to overtime under the FLSA at the request of an agency. FR 45: 85662 (Dec. 30, 1980).
Federal employees who are exempt from the FLSA, but covered by the overtime pay provisions of title 5...will continue to have their overtime pay benefit calculated and paid under the title 5 provisions.... [E]limination of the requirement to perform an overtime pay comparison for nonexempt employees does not affect their entitlement to premium pay under title 5....

Consequently, as OPM specified in its final rule the next year, “overtime pay for nonexempt employees is computed and paid only under the FLSA.”

**Overtime Pay Even for Lawyers: The Unique Scope of Title 5**

Companies simply do not want to get into the position of paying overtime to employees whose work cannot be measured, and who can, to a large extent, determine the amount of overtime they work.

One director of labor relations put his company’s position bluntly:

> There is a little bit of larceny in every man’s heart. If you provide premium pay, some engineers are going to manufacture reasons for working a pot full of overtime. No one is looking over the engineer’s shoulder to see whether he is really working the first eight hours on the job. After all, the engineer who has his feet on his desk or who is staring out of the window may be having his most productive moments. There is no way to check abuses.

The potential power of Title 5 to create entitlements to overtime pay for workers who are unambiguously excluded from the FLSA was demonstrated by a 1998 class action, successfully prosecuted before the U.S. Court of Federal Claims on behalf of 10,000 Department of Justice trial lawyers for overtime pay under §§ 5542, 5543, and 5545(c)(2). According to the facts, as found by the trial court,

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307FR 57:59277 (Dec. 15, 1992). But as an overtime compensation expert at OPM confirmed: “OPM regulations assure that someone covered under the FLSA will receive no less pay than someone covered under title 5 (5 USC § 5542(c)).” Email from Robert Hendler, OPM, Philadelphia (July 21, 2003).


309Doe v. United States of America, 54 Fed. Cl. 404 (2002). For official documents and background material, see http://www.dojclass.com. A lawyer in the AFGE general counsel’s office specializing in the FLSA basically dismissed Title 5 overtime law as of
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the lawyers were expected to and did work overtime on a regular basis; they were induced to do so by their direct supervisors, and the overtime work was well known at the highest levels of DOJ, which recognized that it could not function properly within its budget constraints without officially induced and approved overtime. The plaintiffs alleged not that they had been explicitly ordered to work overtime by an authorized official, but that management’s expectations and case-loads required it. The class members were covered by the premium pay provision under the FEPA unless they were paid at GS-15 step 10 or higher. To be sure, as already noted in another context, lawyers classified above GS-10 were not necessarily entitled to overtime pay even if they were ordered to work: instead, at its discretion, the DOJ was empowered to require them to take compensatory time off (5 USC § 5543(a)(2)).

Consistent with the DOJ Attorneys’ Manual statement that lawyers “should expect to work in excess of regular hours without overtime premium pay,” uncompensated overtime hours were not only expected by management, but also used as a basis for evaluations, promotions, and awards. One United States Attorney had, in the court’s words, “an innovative means of encouraging overtime”: with assistant U.S. Attorneys averaging 60 overtime hours per month, he ordained that “[a]ny AUSA failing to meet this average will be expected to pay $1.00 per hour for every hour under 60 hours of overtime a month.” The court further found that the assistant attorney general and deputy assistant attorney general had explained to Attorney General Reno that lawyers were working five to nine additional hours per week and that ordered, approved, or induced overtime should be paid; they also suggested legislation exempting DOJ lawyers from

little help because of the impediment that the overtime work has to be authorized/approved in advance (whereas the FLSA’s “suffer or permit to work” standard creates no such obstacles). Nevertheless, he acknowledged, after extended discussion of Title 5’s much higher salary ceilings and its lack of exclusions of administrative, executive, and professional employees, that it was perhaps worth rethinking Title 5’s advantages. He also speculated that if challenged, probably half of the federal employees classified as FLSA-exempt would be found to be nonexempt. Telephone interview with Joe Goldberg, General Counsel’s Office, American Federation of Government Employees, D.C. (July 22, 2003). The appellate reversal of Doe—which turned not on whether the overtime work had been ordered or approved, but on whether such order or approval had been in writing—in part vindicated Goldberg’s view. See below.

310 Doe v. United States of America, 54 Fed. Cl. at 405-406.
311 Doe v. United States of America, 54 Fed. Cl. at 408. For a similar system in engineers’ collective bargaining agreements, see above ch. 2.
313 Doe v. United States of America, 54 Fed. Cl. at 415 n.10.
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overtime compensation, in which Reno concurred, but the Office of Management and Budget objected to the proposal.314

The next group of arguments advanced by the DOJ appeared so redolent of overreaching that the trial judge handily dismissed them:

Defendant argues that the Manual does not establish inducement, but merely advises attorneys what they should expect. The Manual states that “attorneys are professionals and should expect to work in excess of regular hours without overtime premium pay.” Defendant suggests that this phrase was artfully drafted to distinguish it from overtime that will have been “officially approved.” The phrase “work in excess of regular hours” is important in defendant’s view, but we see it as more support for the conclusion that official policy at the Department of Justice has been to accept overtime work from its attorneys without paying for it.

Defendant complains that a judgment here would result in damages being paid retroactively to attorneys who did not ask for overtime pay when it was performed, and therefore did not give the Government the opportunity to make other arrangements. It is essentially an attempt by attorneys to raise their own salaries unilaterally, after the fact. This is an appealing argument, but the fact remains that the work was done. The United States benefitted from overtime that was actually performed. Denial of benefits to which members of the Class are otherwise entitled would require the court to elevate form over substance. ...

The Justice Department Manual states, “United States Attorneys are NOT authorized to approve overtime premium pay for attorney personnel. Assistant United States Attorneys are professionals and should expect to work in excess of regular hours without overtime premium pay.” The Government now argues that this section of the Manual advises prospective employees that they will not be paid overtime, and that this language prevents overtime from ever being “ordered or approved.” This language from the Manual could mean that the Justice Department does not pay overtime, so attorneys should not work overtime; or that overtime is common and expected in this business but the Department does not pay overtime, so do not ask for it. In any event, agencies may not exempt themselves from the law by the simple expedient of issuing a policy stating that it will not pay overtime.315

The DOJ argued at trial that the fact that the lawyers handled their cases with professional judgment under largely self-imposed deadlines precluded payment for such overtime, but the court dismissed this argument on the grounds that whether lawyers should qualify for overtime pay under FEPA was not an issue since they were subject to FEPA “and for whatever reason Congress has not exempted them

314Doe v. United States of America, 54 Fed. Cl. at 415.

315Doe v. United States of America, 54 Fed. Cl. at 416-17.
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from overtime compensation...."316 The court then went on to offer an extended explanation as to why the professional character of the lawyers’ work was in no way inconsistent with an entitlement to overtime compensation:

Defendant argues most persuasively that a system of paying litigating attorneys overtime would affect their professionalism adversely.

The Department wanted to promote professionalism because treating lawyers professionally, rather than as hourly workers, is consistent with the way attorneys see themselves. Ordering and approving overtime work would be inconsistent with and harmful to this professional atmosphere because ordering overtime requires direction concerning when, where, and for how long work is performed. That type of direction detracts from an attorney’s autonomy, discretion, and control of his or her work product. It is this level of control possessed by individual attorneys which makes the Department so attractive to its highly qualified lawyers in the first place.

We agree entirely with this statement and commend it. For the purposes of this litigation, however, it is irrelevant. Attorneys in the Class are covered by the Federal Employees Pay Act and they are entitled to overtime if they meet its requirements. ... Though one may speculate on the effects of an award of back pay in this case, including possible changes in procedure, or its impact on professionalism in the Department, those issues are beyond the scope of this court’s jurisdiction.317

Even before the trial court handed down its decision, Congress had reacted to the litigation by writing into the appropriations bill for the DOJ a prospective prohibition on using funds to pay its attorneys premium compensation under Title 5.318 Then in 2004 a panel of the Federal Circuit reversed the lower court’s decision on the subordinate issue of the plaintiffs’ alleged failure to have demonstrated that the DOJ had ordered or authorized the overtime work in writing. The appellate judges, whose opinion did not engage the larger questions raised by the lower court, nevertheless apparently felt queasy enough about having exculpated the DOJ from any liability for having induced the plaintiffs to work overtime to add that “we do not wish to be seen as countenancing any effort by DOJ or any other agency to evade the requirements of FEPA....” The DOJ’s candid admissions that its “attorneys were expected to work overtime without compensation” could

316 Doe v. United States of America, 54 Fed. Cl. at 415.
317 Doe v. United States of America, 54 Fed. Cl. at 417.
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not, however, move the court to admit candidly that the Department, as the claims court had found the government to have done in the past, "in effect was coercing uncompensated overtime." The only (hypothetical) ground that the judges would cede was that "an adverse personnel action...against an employee who declined to work uncompensated overtime...might well be found to be invalid." But even such a judicial finding could not justify "awarding overtime compensation that was not ordered and approved in strict compliance with the regulation." Consequently, the only consolation that the judges offered the plaintiffs was the suggestion that the executive branch "might do well to reexamine the whole overtime question for employees not subject to the FLSA and seek a government-wide legislative solution."\(^{319}\)

In spite of the reversal by the Federal Circuit of the Federal Claims Court's ruling in favor of the DOJ lawyers, it remains true that the FEPA, unlike the FLSA, does not exclude professional employees. Consequently, the DOJ is, for the time being at least, "[t]he glaring exception," while attorneys in numerous executive agencies and departments are paid for their overtime work.\(^{320}\)

Not With a Bang But a Whimper: Stealth Enactment of a Higher Salary Ceiling

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[S]uperpay for supermen.\(^{321}\)

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At the end of 2003, 37 years after Congress had last adjusted either of the overtime ceilings, a tiny provision embedded deeply within the mammoth Pentagon appropriations bill finally effected the change. Five years earlier, Republican Representative Thomas Davis, who represents a district in Virginia in which many federal employees live, had introduced a bill, the Federal Employees Overtime Pay Act of 1998, which would have amended § 5542 of Title 5 to raise the ceiling for full overtime to the minimum rate for GS-15.\(^{322}\) Congress took no action on the


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bill, but the next year Davis introduced an identical bill with a number of sponsors, including several noted liberals not representing districts near Washington, D.C.\textsuperscript{323} No action was taken on this bill either, but later the same session Davis introduced yet another bill, this one raising the upper ceiling only to the minimum rate of GS-12, but also requiring that any employee whose salary exceeded that rate be paid an overtime rate at least equal to his hourly basic rate.\textsuperscript{324} This bill, too, died without any action having been taken on it, but in the meantime even OPM had submitted a legislative proposal to Congress, modifying both the lower and upper ceilings.

OPM's Federal Employees' Overtime Pay Limitation Amendments of 1999—which Davis co-sponsored\textsuperscript{325}—would have provided both that no employee whose basic pay exceeded the minimum rate of GS-10 would receive less than straight time for overtime work and that the aggregate pay limit be changed from the maximum rate for GS-15 maximum to the lesser of 150 percent of the GS-15 minimum rate or the rate payable for level V of the Executive Schedule.\textsuperscript{326} In 2004, this latter change would have disadvantaged the highest paid employees since, for example, in San Francisco GS-15 maximum was $136,000, one and a half times GS-15 minimum is $158,440, and level V of the executive schedule is $127,300.\textsuperscript{327} (In fact, when Congress amended this provision in 2001, the limitation became the greater of the maximum GS-15 rate or that for Executive Schedule level V.)\textsuperscript{328}

\begin{itemize}
\item \textsuperscript{323}H.R. 582 (106th Cong., 1st Sess., Feb. 4, 1999). Barney Frank, Lynn Woolsey, and Patsy Mink were among the sponsors.
\item \textsuperscript{324}H.R. 2696 (106th Cong., 1st Sess., Aug. 4, 1999).
\item \textsuperscript{325}H.R. 1770 (106th Cong., 1st Sess., May 12, 1999).
\item \textsuperscript{326}Proposed Bill attached to letter from Janice Lachance, director, OPM, to Speaker of the House Dennis Hastert (n.d. [Apr. 28, 1999]).
\item \textsuperscript{327}http://www.opm.gov. It should be borne in mind that the impact might be limited by the fact that many GS-15 employees are bosses who, because they work overtime on their own discretion, would rarely have had that work “ordered and approved,” as required by Title 5. Email from Robert Hendler, OPM (Feb. 3, 2004). In addition, as a practical matter, employees receiving FLSA overtime would not often exceed the GS-15 cap anyway. Email from Robert Hendler, OPM (Feb. 13, 2004).
In an accompanying letter to the Speaker of the House, OPM Director Janice Lachance, who characterized the proposals as seeking to accommodate managers’ and supervisors’ concerns, argued that Title 5’s overtime pay limits had been designed in recognition of the fact that private sector supervisors and other non-Federal workers who are exempt from the overtime pay provisions of the... FLSA...typically do not receive overtime pay. Instead of eliminating overtime pay altogether for employees at higher grades, however, 5 U.S.C. 5542(a)(2) reduces overtime pay entitlements gradually for FLSA-exempt supervisory and non-supervisory General Schedule employees by using the GS-10, step 1, rate as the maximum base for computing overtime pay. ... To the maximum extent possible, we believe the Federal Government’s overtime pay practices should continue to reflect non-Federal overtime pay practices. Information available to us about private sector overtime pay practices indicates that the majority of private sector employers still do not pay overtime to supervisors and other FLSA-exempt staff. Nevertheless, it does appear that the percentage of private sector supervisors and other FLSA-exempt employees who receive overtime pay is increasing and that the most prevalent method of paying such employees is at the straight-time rate (not time and one-half). Therefore, we believe the law should guarantee that no Federal employee receives less than his or her hourly rate of basic pay for overtime work. This would eliminate the reduced hourly rate for employees at GS-12, step 6, and above.329

Although OPM continued to maintain that the Title 5 overtime regime merely mimicked the FLSA’s, even it had to concede that they differed without, however, mentioning that the greatest difference was the former’s much higher salary ceiling (even if it were not increased again). The momentum for change was sustained in 2000 when OPM submitted another proposal, this time suggesting merely that no employee receive less than straight time for overtime work.330

Pressure for increasing the overtime ceilings was in large part generated by structural shifts over time in the compensation hierarchy. Using GS grades as ceilings may have marked an advance over fixed dollar amounts, but eventually the grades themselves became obsolete. Thus whereas the average grade for GS employees had been 6.73 in 1960, by 2001 it had risen to 9.71.331


even more impressive in terms of absolute numbers: whereas in 1986 the modal grade was GS-5 (209,664 employees), already by 1990 the modal group had become GS-12, which by 2001 encompassed 226,421 employees. As a result, whereas in 1986 GS-11 to GS-15 had encompassed only 38.9 percent of all GS employees, by 2001 the proportion rose to 53.3 percent.332

This structural shift has also preoccupied OPM, whose director in 2002 issued a white paper advocating “modernization” of federal pay declaring: “When the General Schedule was created [in 1950], the Federal Government was largely a ‘Government of clerks.’ But most Government work no longer revolved around the execution of established, stable processes or the application of physical effort. Instead,...Federal white-collar work has become highly skilled and increasingly specialized ‘knowledge work’ that is properly classified at higher grade levels.”333 This trend was reflected in an accompanying bar chart revealing that in 1950 GS-3 had been the modal grade, with GS-4, 2, and 5 the next most populous grades, whereas by 2000 GS-12, 11, and 13 were the most densely occupied.334

In 2003, the National Commission on the Public Service (or Volcker Commission) picked up on the same theme, observing that in 1950, when 62 percent of the nonpostal white-collar workforce was located in GS 1-5 and only 11 percent in the highest five grades, “[f]or most federal employees, the work was process oriented and routinized. It required few specialized skills.” But in the course of the second half of the twentieth century, “the character of federal responsibilities and the nature of work began to changes in ways that would dramatically alter government functions and revolutionize the workplace.... Nearly every aspect of government became more technically complex”—from administering and regulating foreign aid and trade and insuring the safety of food, drugs, travel, and the workplace, to engaging in scientific research, complex litigation, and financial regulation. Little wonder, then, that by 2000 the GS structure had been reversed: the lowest five grades encompassed only 15 percent of the workforce compared to 56 percent in the highest five.335

These commentaries, which ominously resembled contemporaneous judgments by employers and their federal executive and legislative supporters as to why the

(2002).


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FLSA overtime regime was increasingly unsuited to private-sector white-collar-dom, were shaped by overarching frameworks advocating less government administration of the federal labor force and more free marketization. Although this perspective did not bode well for expansion of overtime pay for federal white-collar workers, in the interim progress continued to be achieved for the higher-paid administrators, executives, and professionals. On April 1, 2003, in the wake of the release of the Volcker Commission report, the House Committee on Government Reform, which Davis now chaired, held a hearing on Federal Employee Compensation Reform. One of the witnesses, Karen Heiser, a member of the Federal Managers Association (FMA), which represents 200,000 federal managers and supervisors, explained to the Subcommittee on Civil Service and Agency Reorganization that one dimension of the government’s worker retention problem was the “disincentives for moving up the career ladder” caused by the overtime caps. She explained that one of the side-effects of the reduction by several hundred thousand in the size of the nonpostal executive-branch civilian workforce since 1994 had been the increasing prevalence of the performance of overtime work and payment of overtime compensation. Heiser instanced a supervisor at GS-13, step 9, whose $36.14 regular hourly pay rate was transformed by the GS-10, step 1 ceiling into an overtime pay rate of only $26.64. The FMA therefore urged raising the ceiling as one way of eliminating such disincentives. Unmentioned was the unlikelihood that a $75,000-a-year supervisor in the private sector would be entitled to any overtime compensation under the FLSA.

Later in April 2003, Davis introduced the Civil Service and National Security Personnel Improvement Act, which included a stripped-down version of his earlier bills: it proposed to amend § 5542(a)(2) of Title 5 so that employees whose salaries exceeded GS-10, step 1 were at the very least entitled to overtime pay equal to their straight-time pay rate. When Davis’s committee reported out the bill on May 19, it included some interesting data compiled and/or estimated by OPM and the Congressional Budget Office. About 680,000 federal employees, or 36.7 percent of the GS workforce at or above GS-10 were exempt from the FLSA. The change in the law, which would affect only employees at GS-12, step 6 and above, would raise their overtime rate above the fixed GS-10, step 1 overtime rate of about $32 an hour; the cost was estimated at $100 million for 2004 and $700 million for

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2004-2008. Three days earlier, the House Armed Services Committee had reported out the National Defense Appropriation Act for the Fiscal Year 2004, which in its original version lacked any overtime cap provision, but now included § 1101, drafted by Davis, containing the same wording as Davis’s bill. The committee report stated that the provision was designed to “ensure that Federal employees who are exempt from the FLSA, and are paid above step 5 of grade 12, do not suffer a pay cut when they work overtime.” The Senate bill lacked such a provision, but in conference the Senate receded on the issue; consequently, when it was approved by the president on November 24, 2003, the military appropriations bill in the midst of the U.S. war in and occupation of Iraq became the almost silent and uncontested vehicle for the first increase in either of the overtime ceilings since 1966.

As to why such a seemingly implausible route finally effectuated this objective—and, to boot, without any overt opposition—the FMA’s executive director noted that:

With the current transformation of the civil service—and an eye towards significant compensation reform—the DOD Authorization bill seemed like the right vehicle to address

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341Letter from Michael Styles, president FMA, to Rep. Duncan Hunter, chairman, House Armed Services Committee (July 29, 2003), on www.fedmanagers.org/MStyles%2520Ltr%2520to%2520House%2520DOD%2520Conference%2520on%2520Overtime%2520Provision.pdf+%22defense+authorization+act%22+%22federal+managers+association%22+overtime&hl=en&ie=UTF-8. During the House floor debates on the military appropriations bill it was Davis who spoke up about raising the overtime ceiling. CR H4547 (May 22, 2003).
344Act of Nov. 24, 2003, Pub. L. No. 108-136, § 1121, 117 Stat. 1392, 1636 More than two months after the fact, the largest government defense employee union, the AFGE, when asked about the new provision, was embarrassed to admit that the union’s legislative department had been entirely unaware of it although it benefited thousands of its members. Telephone interview with Joe Goldberg, general counsel’s office, AFGE (Jan. 29, 2004).
345Email from Didier Trinh, executive director, FMA (Washington, D.C.), to Marc Linder (Feb. 2, 2004).
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overtime pay for managers and supervisors. FMA has been the chief advocate for this relief for years, and given DOD’s push to revamp their pay structure as part of the legislation, this was a good opportunity to make the change to Title 5 regarding overtime pay to ensure government-wide application. ...

Although this was not our goal years back when we sought to get the cap to GS 12, Step 1, we believe this is a positive incremental step that begins to bring fairness into the equation.  

The measure failed to “provide full overtime relief to Federal managers and supervisors,” but the FMA president, in expressing his gratitude to Davis “for championing this provision,” declared: “As we tackle the current human capital crisis we must seek to eliminate those retention barriers that prevent our government from maintaining the strongest possible management cadre.”

346 Email from Didier Trinh, FMA (Washington, D.C.), to Marc Linder (Jan. 30, 2004).
347 FMA, News Release: “FMA Hails Congressional Passage of Overtime Relief for Managers” (Nov. 12, 2003), on www.fedmanagers.org. Other organizations, including the National Weather Service Employees Organization, which together with other groups had lobbied for such a change for several years, also welcomed the amendment. NWSEO, “FLSA Exempt Employees Get Overtime Boost” (Dec. 2003), http://www.nwseo.org/OT%20Flyer.pdf.
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Appendix I

Comparison of Title 5 Overtime Ceilings and the FLSA
Long- and Short-Test Salary Levels

Under Title 5 of the U.S. Code, the lower salary ceiling marks the highest salary at which an employee, whose duties are irrelevant, is entitled to full time and a half for overtime; the higher ceiling marks the highest salary at which no employee is entitled to any overtime compensation. Under the FLSA, until the regulatory revisions of 2004, which collapsed the long and short tests into a "standard" test, the long-test salary marked the point below which all salaried employees were entitled to time and a half; workers with salaries between the long-test and short-test salaries were subject to stricter duties-test scrutiny; workers with salaries above the short-test salary were subject to relaxed duties-test scrutiny. Thus the FLSA long-test salary was more like the Title 5 lower ceiling.

The FLSA long-test salary for executives never equaled Title 5’s lower ceiling: from 1950 to 1954 it came closest, falling short by an annualized $120; the long-test salary for administrative and professional employees did exceed the Title 5 lower ceiling from 1950 to 1954 by $920 or 30.9 percent. But once the Title 5 system ceiling was converted from the fixed $2,980 to one keyed to the minimum GS-9 salary in 1954 (and GS-10 in 1966), the FLSA long-test salary for these two groups fell behind. Thus by 1955 the gap was $5,440/$3,900 or 39.5 percent, and when Title 5 shifted to GS-10 in 1966, the gap rose to $8,421/$5,200 or 61.9 percent for administrative employees, but declined slightly to $8,421/$5,980 or 40.8 percent for professional employees, whose long-test salary had been increased above that for administrative employees in 1963. By 1975, the last time the FLSA salary-test levels were increased until 2004, the gap had widened to $14,117/$8,060 or 75.1 percent for executive and administrative employees, and $14,117/$8,840 or 59.7 percent for professional employees. By 2004, after 29 years of the DOL’s failure to adjust the FLSA salary tests, the gap had become as dysfunctional as the salary tests themselves had become nonfunctional: the minimum GS-10 (actual locality) salary of $43,708 was more than 5.4 times greater than the executive and administrative long-test salary and almost five times greater than the professional long-test salary.

The FLSA short-test salary, which, despite efforts by the chairman of the Civil Service Commission in 1966 to characterize it as the relevant point of comparison to the Title 5 lower ceiling, was, if anything, more comparable to the higher ceiling, above which employees are no longer entitled to any overtime pay, and under-

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348See above chs. 16-17.
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went a somewhat different development than the long-test salary. When introduced in 1950 at $100 weekly (an annualized $5,200) for all three white-collar divisions, it exceeded Title 5’s lower ceiling of $2,980 by 74.5 percent. When the lower ceiling became keyed to the minimum GS-9 salary of $5,440 in 1955, it exceeded the short-test salary by 4.6 percent, but did not increase this small difference beyond 8.6 percent in 1975, when the short-test salary was increased for the last time. By 2004, the lower ceiling was three times greater than the short-test salary. If, on the other hand, Title 5’s higher ceiling is used as the point of comparison, it was already twice as high at the inception of the short test in 1950, three times as high in 1975, and (using the actual highest locality pay) ten times as high by 2004.

For 2004, federal employees up to the GS-15 step 10 level were entitled to overtime pay. The highest such locality salary\textsuperscript{349} was $136,000 or $5,213.60 bi-weekly for San Francisco and Houston; the lowest such salary was $123,682 or $4,740.80 bi-weekly for numerous locations.\textsuperscript{350} The highest GS-10 step 1 locality salary was paid in San Francisco and amounted to $48,528; the lowest locality pay was $43,708, which prevailed in many locations.\textsuperscript{351} Thus, even after the DOL abolished the long and short tests in 2004 and replaced them with the standard test, whose salary threshold was set at $455 a week or an annualized $23,660,\textsuperscript{352} Title 5’s lower ceiling remained twice as high.


\textsuperscript{350}The upper salary cap has been keyed to the biweekly pay period (rather than an annual salary) since 1954.

\textsuperscript{351}http://www.opm.gov

\textsuperscript{352}See ch. 17 above.
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Table 8: Title 5 Base Salary Overtime Ceilings ($)

<table>
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<tr>
<th>Year</th>
<th>For full time-and-a-half overtime pay</th>
<th>For any overtime pay</th>
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<tbody>
<tr>
<td>1945</td>
<td>2,980</td>
<td>10,000</td>
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<tr>
<td>1946</td>
<td>2,980</td>
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### The Post-World War II Period

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<th>Year</th>
<th>Population</th>
<th>Total</th>
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<td>Number of Federal Employees</td>
<td>Number of Civilian Federal Employees</td>
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<td></td>
<td></td>
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<tr>
<td>------</td>
<td>----------------------------</td>
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</table>

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### Table 9: FLSA Weekly and Annualized Salary Tests ($)*

<table>
<thead>
<tr>
<th>Year</th>
<th>Executive</th>
<th>Administrative</th>
<th>Professional</th>
<th>Short Test</th>
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<tbody>
<tr>
<td>1938</td>
<td>30 [1,560]</td>
<td>30 [1,560]</td>
<td>none</td>
<td>none</td>
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</table>

*The amounts in square brackets are annual equivalents. Source: Ch. 15 above.
As of March 2003, the federal government employed 1,414,716 white-collar workers classified in the 15 grades of the General Schedule system; 789,066 or 55.8 percent were excluded from the FLSA’s overtime provision. The proportion of excluded workers rose univocally from 0.1 percent at GS-1 to 99.6 percent at GS-15; the big break came between GS-8 (14.6 percent) and GS-9 (51.5 percent). Workers excluded from the FLSA are covered by the Title 5 overtime system, which offers full time-and-a-half overtime pay up to the minimum rate of GS-10. The total number of employees classified in GS-11 through GS-15 amounted to 770,819 or 54.5% of all 1,414,716; 664,484 or 86.2 percent of all employees in these five grades were both excluded from the FLSA and not entitled to full time and a half under Title 5. To this group must be added an unknown number of employees in GS-10 steps 2-10.

Table 10: Proportion of Federal White-Collar Employees Excluded from the FLSA by GS-Grade (March 2003)

<table>
<thead>
<tr>
<th>Grade</th>
<th>Total</th>
<th>Exempt</th>
<th>Nonexempt</th>
<th>% exempt</th>
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</thead>
<tbody>
<tr>
<td>1</td>
<td>2,900</td>
<td>4</td>
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<tr>
<td>2</td>
<td>5,403</td>
<td>123</td>
<td>5,280</td>
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<tr>
<td>3</td>
<td>23,854</td>
<td>746</td>
<td>23,108</td>
<td>3.1</td>
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<tr>
<td>4</td>
<td>65,539</td>
<td>3,116</td>
<td>62,423</td>
<td>4.8</td>
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<tr>
<td>5</td>
<td>114,781</td>
<td>7,977</td>
<td>106,804</td>
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<td>6</td>
<td>88,866</td>
<td>9,445</td>
<td>79,421</td>
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<td>7</td>
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<td>16,961</td>
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<td>8</td>
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<td>9</td>
<td>131,219</td>
<td>67,632</td>
<td>63,587</td>
<td>51.5</td>
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<tr>
<td>10</td>
<td>17,496</td>
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<td>11</td>
<td>190,932</td>
<td>139,086</td>
<td>51,846</td>
<td>72.8</td>
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</table>
## The Post-World War II Period

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<table>
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</thead>
<tbody>
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<td>187,608</td>
<td>41,531</td>
<td>81.9</td>
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<tr>
<td>13</td>
<td>198,258</td>
<td>186,957</td>
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<tr>
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<td>92,989</td>
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<tr>
<td>15</td>
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<td>57,844</td>
<td>230</td>
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<tr>
<td>Total</td>
<td>1,414,716</td>
<td>789,066</td>
<td>625,650</td>
<td>55.8</td>
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<tr>
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<td>136,469</td>
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<td>Total</td>
<td>1,644,432</td>
<td>925,535</td>
<td>718,897</td>
<td>56.3</td>
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</table>

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Appendix III

State Employees in California and New York State

The federal government may have been a leader in creating an overtime compensation regime for its white-collar employees during World War II, but it had few followers. The wartime lengthening of work schedules to compensate for manpower shortages and to create the opportunity for higher earnings was, according to a high ranking CSC official, not as widespread as might have been expected based on surveys of city governments and jurisdictions. To meet staffing requirements and increase production, President Roosevelt issued Executive Order No. 9301 on February 9, 1943, declaring that no place of employment was making the most effective use of its manpower if its minimum workweek was less than 48 hours; it excepted state and local government, but some cities voluntarily adopted it.

However, two states that have generally been labor legislation pioneers, California and New York, did develop overtime pay systems for their white-collar workers that are more inclusive than the FLSA’s private-sector system. Before and even after the enactment of an overtime pay statute for state employees, the Supreme Court of California took the position that: "When the employee is paid by time, as by the day, week, or month, rather than by the amount of work which he does, he is bound, in the absence of statute, to render services without regard to the number of hours worked." In 1943, the California legislature declared that


354 Ismar Baruch, “The Wartime Salary Problem,” PPR 5(2):77-88 at 83-84 (Apr. 1944). In January 1943, one fourth of 938 cities surveyed provided overtime pay or compensatory time for extra hours by salaried or wage employees; of these, two-fifths paid the salaried employees and two-thirds the wage employees money. For example, the city of Flint Michigan paid time and a half after 44 hours by salaried or wage employees; of these, two-fifths paid the salaried employees and two-thirds the wage employees money. For example, the city of Flint Michigan paid time and a half after 44 hours, but this program did not apply to supervisory personnel, some of whom were to be paid straight time; the highest six of 16 classifications were excluded from any overtime pay. Id.; Municipal Year Book 1943 at 208-209 (Clarence Ridley and Orin Nolting eds. 1943). E.O. 9301 §5 stated: “Nothing in this Order shall be construed as superseding or in conflict with any Federal, State, or local law limiting hours of work or with the provisions of any individual or collective bargaining agreement with respect to rates of pay for hours worked in excess of the agreed or customary work week, nor shall this Order be construed as suspending or modifying any provision of the Fair Labor Standards Act...or any other Federal, State, or local law relating to the payment of wages or overtime.” FR 8:1825 (Feb. 11, 1943).

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during the then-prevailing emergency the lack of manpower had made it necessary
to pay overtime to state employees so that their services could be used beyond the
normal workweek; if they could not be obtained, it would be necessary to try to
find less experienced "help" at a greatly increased cost. Thus California amended
its Civil Service Act to provide: "Every State employee compensated on a monthly
basis required and ordered to work in excess of a normal work week...shall receive
overtime compensation based on his regular rate of pay for all overtime; provided,
that no overtime compensation shall be paid on any portion of an employee’s
regular rate of pay in excess of two hundred fifty dollars...per month.” Compens­
sating time off in lieu of overtime could be granted within 30 days of the date
worked if it did not impair delivery of the agency’s services.356

After declaring in 1949 that it was state policy “to avoid the necessity for
overtime wherever possible,”357 in 1955 the state legislature required the State
Personnel Board to establish a method by which ordered overtime or overtime in
times of critical emergency was to be compensated; it gave the board discretion to
set the rate as equal to or less than the regular rate. The only guideline that it
offered was that: “The provisions made under this section shall be based on the
practices of private industry and other public employment, the needs of state
service, and internal relationships.”358 Then in 1971 the State Personnel Board was
authorized, with respect to ordered overtime or “overtime in times of critical
emergency,” to provide for cash compensation or compensating time off at a rate
not to exceed time and a half.359 However, after the FLSA became definitively
applicable to state employees in 1985, the descendant of the original overtime law,
though still on the books,360 fell into virtual disuse: since the California Department
of Public Administration has declared that state professional, supervisory, and
managerial employees exempt from the FLSA “receive no overtime compensa­
tion,”361 and the state’s collective bargaining agreements with its employees’
unions reiterate that such salaried employees “may not receive any form of over­
time compensation, whether formal or informal,”362 state employees by and large

Cranston, 362 P2d 492 (Cal. 1961).
3561943 Cal. Stat. 2976-77, ch. 1041, §§ 1-3 (June 7, 1943).
3581955 Cal. Stat. 3296, ch. 1787, § 3.
3591971 Cal. Stat. 147, ch. 111 § 1.
362Agreement Between American Federation of State, County, and Municipal
Employees (AFSCME) and State of California Covering Bargaining Unit 19 Health and
Social Services/Professional, art. 6.1.B.1 at 22 (July 3, 2001-July 2, 2003), on
receive no overtime compensation to which the FLSA does not entitle them.\textsuperscript{363}

As early as 1901 the New York State legislature passed a law classifying, grading, and establishing compensation rates for clerks and other state employees. It applied to all clerks, bookkeepers, stenographers, copyists, messengers, and all other employees with duties of a clerical character in all the state departments, bureaus, commissions, and offices—except division or bureau deputies, heads, chiefs, and assistant heads and chiefs—creating for them ten grades from $360 to $2,400. As to these workers it declared: "No person holding a position or employed in any department, bureau, commission or office to which this act applies and for which a definite salary or compensation has been appropriated or designated, shall receive any extra salary or compensation in addition to that fixed."\textsuperscript{364}

Almost half a century later, in 1947, the legislature amended the Civil Service Law with respect to overtime compensation of state employees. The new law provided that the workweek for basic annual salary shall not be more than 40 hours for all state officers and employees except of the legislature and judiciary; any such state officers or employees authorized or required to work more than 40 hours "shall receive compensation for the hours worked in excess of forty in each week at the hourly rate of pay received by such employee...or shall be allowed an equivalent amount of time off in lieu of such overtime compensation." The legislature then directed the budget director to promulgate regulations that "may exclude any title or individual position or positions, when the nature of the duties performed or the difficulty of maintaining adequate time controls makes it impracticable to apply to such title or position or positions the provisions of this section...."\textsuperscript{365} Two decades later, the state legislature raised the overtime rate to time and a half and eliminated the alternative of compensatory time off,\textsuperscript{366} and this framework has remained law ever since.\textsuperscript{367}

It is instructive to examine the regulations issued to implement this overtime law for state white-collar workers. Their underlying principle is overtime work rather than pay: "It is the policy of the State that overtime work be held to a minimum consistent with the needs of sound and orderly administration of State government. The State requires supervisors to hold overtime work to such a minimum by the proper scheduling and assignment of activities, simplification of work

\textsuperscript{363}Telephone interview with Edmund Brehl, Labor Relations Counsel, Cal. Dept. of Public Administration, Sacramento (Jan. 30, 2004)

\textsuperscript{364}1901 N.Y. Laws ch. 521, §§ 1, 3, 4, at 1281, 1282 (quote from § 4).

\textsuperscript{365}1947 N.Y. Laws ch. 270, § 1, at 664, 665.

\textsuperscript{366}1967 N.Y. Laws ch. 615, § 1, at 1422.

\textsuperscript{367}N.Y. Civ. Serv. § 134.1 (Consol. 2003).
processes and requiring compliance with realistic standards of performance.\footnote{368}

The regulations then set out the excluded categories of employees. In this context it is important to note that certain categories are excluded without reference to salary, while for others a salary in or above grade 15, which in 2002 was fixed at $36,398\footnote{369}—almost three times higher than the FLSA short-test salary—was a prerequisite for exclusion:

Officers and employees in positions or types of positions meeting the following criteria shall not be eligible to earn overtime pay:

(a) The head of every department, institution or other State agency and the head and members of boards and commissions.

(b) Deputies of principal executive officers.

(c) Administrative and staff personnel. This group includes those officers and employees in grade 15 and above and officers and employees in unallocated positions paid a salary equal to or in excess of that paid for the minimum of grade 15:

(1) whose primary duty consists of the management of a bureau, division or major subdivision of a department or agency; or

(2) who are in charge of independent offices or physically separated branches; or

(3) whose primary duty consists of administrative or staff work not performed under close and proximate supervision.

(d) Professional and technical personnel. This group includes those officers and employees in grade 15 and above and officers and employees in unallocated positions paid a salary equal to or in excess of that paid for the minimum of grade 15:

(1) whose positions require, as a minimum qualification, four or more years of study beyond a high school education, or equivalent experience, in a specialized intellectual field, as distinguished from apprenticeship or training in the performance of routine mental, manual or physical processes; and

(2) whose primary duty consists of the performance of work of such a character that the output produced or the results accomplished cannot be standardized in relation to a given period of time; and

(3) whose work is not performed under close and proximate supervision.

(e) Personnel whose duties involve:

(1) a close working relationship with an individual executive; and

(2) work which is exclusively, or almost exclusively, for such executive; and

(3) a work schedule which depends on the personal needs and specific directions of such executive.

(f) All positions for which time records showing actual hours worked each day are not required to be maintained.

\footnote{368}{Official Compilation of Codes, Rules and Regulations of the State of New York, title 9, § 135.0 (1995).}
\footnote{369}{N.Y. Civ. Serv. § 130 (Consol. Supp. 2003) (administrative payroll); for the professional, scientific, and technical payroll the corresponding threshold was $34,549.}
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(g) All positions, including field positions, in which the incumbents exercise personal discretion in the scheduling of their hours worked, whether or not the number of hours worked exceeds the basic workweek. This group includes any officer and employee:

(1) whose hours of work are controlled by him or the work situation, rather than subject to the direction and control of a supervisor; or

(2) who, subject to appropriate clearance with his supervisor, has substantial freedom in planning his work assignments to make adjustments in the schedule for his basic workweek to meet work requirements efficiently.

(h) All full-time officers and employees whose normal work schedule does not consist of five working days and two days off in a workweek as defined under subdivision (a) of section 135.1.370

Thus the excluded categories can be summarized as follows: (1) the highest-ranking executives (not subject to a salary test but whose salaries are presumably high); (2) (a) high-ranking administrators; (b) vaguely defined administrative and staff work not closely or proximately supervised; (3) professional and technical employees with at least four years of post-secondary education or equivalent experience in a specialized intellectual field, the results of whose work cannot be time-standardized and whose work is not closely and proximately supervised; (4) vaguely and ambiguously defined personal and confidential subordinates of individual executives (not subject to a salary test and whose salaries may not be high); (5) undefined employees who are not required to punch a time-clock (and not subject to a salary test); and (6) undefined employees who schedule and control their own hours (not subject to a salary test).

Overall, then, even apart from the much higher salary test, the executive exclusions are much narrower than the FLSA's, while the administrative exclusions are either somewhat narrower or possibly narrower; the professional exclusions are similar to the FLSA's, but because they are vastly less specific, they may be narrower. In contrast, the exclusions for confidential employees and those who exercise greater formal freedom to set their working hours are absent from the FLSA and, because they lack a salary-level test, considerably expand the universe of excludibles.

Title 5 Overtime Provisions

5 USC § 5542 (2003): Overtime rates; computation:

(a) For full-time, part-time and intermittent tours of duty, hours of work officially ordered or approved in excess of 40 hours in an administrative workweek, or (with the exception of an employee engaged in professional or technical engineering or scientific activities for whom the first 40 hours of duty in an administrative workweek is the basic workweek and an employee whose basic pay exceeds the minimum rate for GS-10 (including any applicable locality-based comparability payment under section 5304 or similar provision of law and any applicable special rate of pay under section 5305 or similar provision of law) for whom the first 40 hours of duty in an administrative workweek is the basic workweek) in excess of 8 hours in a day, performed by an employee are overtime work and shall be paid for, except as otherwise provided by this subchapter, at the following rates:

(1) For an employee whose basic pay is at a rate which does not exceed the minimum rate of basic pay for GS-10 (including any applicable locality-based comparability payment under section 5304 or similar provision of law and any applicable special rate of pay under section 5305 or similar provision of law), the overtime hourly rate of pay is an amount equal to one and one-half times the hourly rate of basic pay of the employee, and all that amount is premium pay.

(2) For an employee whose basic pay is at a rate which exceeds the minimum rate of basic pay for GS-10 (including any applicable locality-based comparability payment under section 5304 or similar provision of law and any applicable special rate of pay under section 5305 or similar provision of law), the overtime hourly rate of pay is an amount equal to one and one-half times the hourly rate of the minimum rate of basic pay for GS-10 (including any applicable locality-based comparability payment under section 5304 or similar provision of law and any applicable special rate of pay under section 5305 or similar provision of law), and all that amount is premium pay.

(3) Notwithstanding paragraphs (1) and (2) of this subsection for an employee of the Department of Transportation who occupies a nonmanagerial position in GS-14 or under and, as determined by the Secretary of Transportation,

(A) the duties of which are critical to the immediate daily operation of the air traffic control system, directly affect aviation safety, and involve physical or mental strain or hardship;

(B) in which overtime work is therefore unusually taxing; and

(C) in which operating requirements cannot be met without substantial overtime work;

the overtime hourly rate of pay is an amount equal to one and one-half times the hourly rate of basic pay of the employee, and all that amount is premium pay.

...
The Post-World War II Period

(c) Subsection (a) shall not apply to an employee who is subject to the overtime pay provisions of section 7 of the Fair Labor Standards Act.... In the case of an employee who would, were it not for the preceding sentence, be subject to this section, the Office of Personnel Management shall by regulation prescribe what hours shall be deemed to be hours of work and what hours of work shall be deemed to be overtime hours for the purpose of such section 7 so as to ensure that no employee receives less pay by reason of the preceding sentence.

5 USC § 5543 (2003): Compensatory time off

(a) The head of an agency may--

(1) on request of an employee, grant the employee compensatory time off from his scheduled tour of duty instead of payment under section 5542 or section 7 of the Fair Labor Standards Act of 1938 for an equal amount of time spent in irregular or occasional overtime work; and

(2) provide that an employee whose rate of basic pay is in excess of the maximum rate of basic pay for GS-10 (including any applicable locality-based comparability payment under section 5304 or similar provision of law and any applicable special rate of pay under section 5305 or similar provision of law) shall be granted compensatory time off from his scheduled tour of duty equal to the amount of time spent in irregular or occasional overtime work instead of being paid for that work under section 5542 of this title.

(b) The head of an agency may, on request of an employee, grant the employee compensatory time off from the employee’s scheduled tour of duty instead of payment under section 5544 or section 7 of the Fair Labor Standards Act of 1938 for an equal amount of time spent in irregular or occasional overtime work. An agency head may not require an employee to be compensated for overtime work with an equivalent amount of compensatory time-off from the employee's tour of duty.

5 USC § 5547 (2003): Limitation on premium pay:

(a) An employee may be paid premium pay under sections 5542, 5545 (a), (b), and (c), 5545a, and 5546 (a) and (b) only to the extent that the payment does not cause the aggregate of basic pay and such premium pay for any pay period for such employee to exceed the greater of--

(1) the maximum rate of basic pay payable for GS-15 (including any applicable locality-based comparability payment under section 5304 or similar provision of law and any applicable special rate of pay under section 5305 or similar provision of law); or (2) the rate payable for level V of the Executive Schedule.

(b) (1) Subject to regulations prescribed by the Office of Personnel Management, subsection (a) shall not apply to an employee who is paid premium pay by reason of work in connection with an emergency (including a wildfire emergency) that involves a direct threat to life or property, including work performed in the aftermath of such an emergency.

(2) Notwithstanding paragraph (1), no employee referred to in such paragraph may be paid premium pay under the provisions of law cited in subsection (a) if, or to the extent
that, the aggregate of the basic pay and premium pay under those provisions for such employee would, in any calendar year, exceed the greater of--

(A) the maximum rate of basic pay payable for GS-15 in effect at the end of such calendar year (including any applicable locality-based comparability payment under section 5304 or similar provision of law and any applicable special rate of pay under section 5305 or similar provision of law); or

(B) the rate payable for level V of the Executive Schedule in effect at the end of such calendar year.

(3) Subject to regulations prescribed by the Office of Personnel Management, the head of an agency may determine that subsection (a) shall not apply to an employee who is paid premium pay to perform work that is critical to the mission of the agency. Such employees may be paid premium pay under the provisions of law cited in subsection (a) if, or to the extent that, the aggregate of the basic pay and premium pay under those provisions for such employee would not, in any calendar year, exceed the greater of--

(A) the maximum rate of basic pay payable for GS-15 in effect at the end of such calendar year (including any applicable locality-based comparability payment under section 5304 or similar provision of law and any applicable special rate of pay under section 5305 or similar provision of law); or

(B) the rate payable for level V of the Executive Schedule in effect at the end of such calendar year.
I am not much concerned with the exemptions. They must not be so many that labor will be discouraged or disgusted. They must not be greater in volume or amount than to make up the invariable exception that proves the rule—the rule being in this case universal wage and hour levels at a fair standard throughout America.¹

The Exclusion of White-Collar Workers from Overtime Regulation in the Rest of the World

In Central European countries today members of the professional and salaried classes, all save the top layer of the exceptionally successful, are included by the designation white-collared proletariat.¹

Almost every foreign country has enacted laws limiting hours of work generally and also fixing minimum standards to enable the state to exercise a general supervision over conditions of employment. In most foreign countries regulations of this kind have been applied to industry in general, there being no question of constitutional powers involved, as in this country. In other words, foreign countries have been able to deal with these problems on a national scale by general enactment, except those countries which have a constitutional form of government with limited powers vested in the central or federal government.²

Because bosses of larger departments can check the adherence to the workday by the subordinates only if they are employed longer than the latter, they are not supposed to be subject to the rules of the working time regime.³

The burden of this chapter is straightforwardly to document the FLSA’s extraordinarily capacious exclusion of white-collar workers from overtime regulation. In particular, the FLSA’s broad exclusion of so-called administrative employees is internationally unique. The U.S. lead in exclusionism is significantly heightened by the fact that the proportion of workers employed in administrative and managerial occupations in the United States is two to four times higher than

the corresponding share in Western Europe and Japan and that this ratio grew
during the last decades of the twentieth century. At the same time, however, the
information assembled in this chapter underscores that the exclusion of some
white-collar workers from national hours regulation is virtually universal.

To be sure, it is necessary to bear in mind that, regardless of such formal legal
exclusions, to a much greater degree than in the United States, managers in western
European countries have been represented by organizations that engage in col­
clective bargaining on their behalf. For example, as long ago as the mid-1980s, the
Italian Confederation of Managers of Enterprises represented 95 percent of senior
managers (dirigenti) in Italy. In the United Kingdom in 1994, 20 percent of all
managers and 50 percent of all professionals were unionized. And more gener­
ally, in France, Germany, Italy, Sweden, and the United Kingdom, while some
collective bargaining agreements have contained provisions on working hours that
“still stem from the idea that managerial and supervisory staff must devote what­
ever time is necessary to their duties,...some agreements...show a trend towards
putting them on the same footing as other workers (compensatory rest or leave, the
right to overtime under certain conditions).” Indeed, the Council of European
Professional and Managerial Staff (Eurocadres), which was founded in 1993 and
is associated with the European Trade Union Confederation, has more than five

4David Gordon, *Fat and Mean: The Corporate Squeeze of Working Americans and
the Myth of Managerial “Downsizing”* 42-48 (1996). Gordon relied on reworked and
standardized data in ILO, *Yearbook of Labour Statistics*; unfortunately, by the mid-1990s,
a number of European countries switched to a different occupational classification system,
which no longer made it possible to segregate managerial and administrative employees.

5The Confédération général des cadres (CGC), which was founded in 1944, by 1970
admitted any employee with “une parcelle d’autorité.” Paul Meunier, “Le Syndicalisme
Communist Party was seeking an alliance with these cadres, engineers, and technicians,
whose role was “complex”: “At the same time producers of surplus value and collectors
of surplus value, they are not responsible for the mechanism of exploitation, to which they
are also subjected.” Joë Metzger, “Les Cadres et le changement démocratique,” *CC*
50(9):31-40 (Sept. 1974).

6Yves Delamotte, “Managerial and Supervisory Staff in a Changing World,” *ILR*
represented 51.8 percent or 150,774 of 290,580 “cadres supérieurs ou dirigeants d’entre­

7Emmanuel Mermet, *Professional and Managerial Staff, Organisation, Collective
Publications/PMSENfinal.PDF.

8Delamotte, “Managerial and Supervisory Staff in a Changing World” at 9.
Exclusion of White-Collar Workers in the Rest of the World

million members whom it supports and represents in a variety of forums, including collective bargaining. Of particular relevance here is that Eurocadres, which is recognized by the European Commission as a social partner, has been involved in official consultations concerning the EU’s Working Time Directive. It has, for example, called for the abolition of the latter’s so-called opt-out provision, which has been abused, especially by employers in the UK, to circumvent the limits on the maximum length of the workweek.

The first section offers a tabular overview of U.S. state overtime laws, showing that all states with an overtime law have adopted some version of the FLSA’s administrative, executive, and professional exclusions. The second section presents a comprehensive overview from a large number of countries; without the ambition of being complete or totally up to date, this set nevertheless identifies essential trends. Finally, the third section explores in greater detail the content and history of the white-collar exclusions in several of the larger countries or of laws of special relevance.


11Abbreviations for this section: “bf”=bona fide; “AEP”=administrative, executive, professional. For a similar tabular listing for the mid-1970s, see US ESA, Executive, Administrative and Professional Employees: A Study of Salaries and Hours of Work, tab. Q at 105-12 (May 1977). For an analysis of the impact of the DOL’s 2004 regulations on state overtime laws, see “DOL’s Overtime Final Rule Is Not Final Word on Eligibility in 18 States,” DLR, No. 102, at B-1-B-2 (May 27, 2004). Several states that lack an overtime law have nevertheless adopted the FLSA or FLSA-like regulations to exclude many white-collar workers from their minimum wage law: Delaware: bf AEP (Del. Code, tit. 19 § 901(5)(c)); Idaho: bf AEP (Idaho Code § 44-1504); Iowa: in detail and en masse virtually all the DOL Part 541 regulations, but setting the salary thresholds at $310/500 (347 Iowa Adm. Code ch. 218); Nebraska: bf AEP or as a superintendent or supervisor (Rev. Stat. Neb. § 48-1202(3)(c)); New York: bf AEP (NYCL Labor Law art. 19 § 651.5); Oklahoma: bf AEP (Okla. Stats. title 40, §197.4(e)(8)); Wyoming: bf AEP (Wyoming Stats. Ann. § 27-4-201(a)(iv)(C)). In addition, Georgia excludes “clerical force” from its maximum 60-hour week for the cotton and woollen manufacturing plants (34-3-1 Official Code of Georgia Ann.).
### Exclusion of White-Collar Workers in the Rest of the World

#### U.S. State Laws and Regulations

<table>
<thead>
<tr>
<th>State</th>
<th>Content/Code section</th>
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<tbody>
<tr>
<td>Alabama</td>
<td>No overtime law</td>
</tr>
<tr>
<td>Alaska</td>
<td>bf AEP (AK Stats. § 23.10.055(9)) + supervisory (§ 23.10.060)</td>
</tr>
<tr>
<td>Arizona</td>
<td>No overtime law</td>
</tr>
<tr>
<td>Arkansas</td>
<td>bf AEP (AR Code Ann. § 11-4-203(7)(A))</td>
</tr>
<tr>
<td>California</td>
<td>AEP: similar to FLSA (stricter re primary duty) and monthly salary = at least 2x state min. wage; or profession of law, medicine, dentistry, pharmacy, optometry, architecture, engineering, teaching, or accounting. (Industrial Welfare Commission Order #1-2001Regulating Wages, Hours, and Working Conditions in Mfg Industries, § 1(A). <a href="http://www.dir.ca.gov/IWC/IWCArticle1.html">http://www.dir.ca.gov/IWC/IWCArticle1.html</a>)</td>
</tr>
<tr>
<td>Colorado</td>
<td>AE(or Supervisor)P. A: “directly serves the executive, and regularly performs duties important to the decisionmaking process of the executive.” Regularly exercises discretion/indep. judgment in matters of significance, primarily nonmanual, directly related to management policies or general business operations. E/Supervisor: earns in excess of the equivalent of min. wage for all hours worked in workweek. Wage order for retail, service, commercial support services, food/beverage, health/medical (7 CO Code Regs 1103-1: MW Order No. 22 § 5(a)-(c))</td>
</tr>
<tr>
<td>State</td>
<td>Exclusion Details</td>
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<tr>
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<td>-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------</td>
</tr>
<tr>
<td>Connecticut</td>
<td>bf AEP; regs like FLSA w/ $125/175 long and short tests (§ 31-58(f) Conn Gen Stats; §§ 31-60-14, 15, 16 Regs Conn State Agencies)</td>
</tr>
<tr>
<td>Delaware</td>
<td>No overtime law</td>
</tr>
<tr>
<td>District of Columbia</td>
<td>bf AEP as defined by FLSA (DC Code § 36-220.3(1))</td>
</tr>
<tr>
<td>Florida</td>
<td>No overtime law</td>
</tr>
<tr>
<td>Georgia</td>
<td>No overtime law</td>
</tr>
<tr>
<td>Hawaii</td>
<td>bf AEP + supervisor (HI Rev. Stats. § 38-1(5)); guaranteed comp. $1250/mo (38-1(1))</td>
</tr>
<tr>
<td>Idaho</td>
<td>No overtime law</td>
</tr>
<tr>
<td>Illinois</td>
<td>bf AEP as defined by FLSA (820 ILCS 105/4a (2)(E)), but Senate Bill 1645 (Apr. 2, 2004), amended this provision to adopt the higher salary thresholds but to opt out of whatever expansions of the exclusions the DOL issues after Mar. 30, 2003</td>
</tr>
<tr>
<td>Indiana</td>
<td>AEP “who have the authority to employ or discharge” and earn more than $150/wk (Ind Code § 22-2-2-3(n))</td>
</tr>
<tr>
<td>Iowa</td>
<td>No overtime law</td>
</tr>
<tr>
<td>Kansas</td>
<td>bf AEP (KS Stats. Ann. § 44-1202(e)(3)). Definitions: E: (like FLSA long test) (KS Adm. Regs. § 49-30-1(i)). A: when performance is of office/nonmanual work directly related to office management policies or general business operations and such individual supervises at least 2 others [no salary $ mentioned] (KAR § 49-30-1(j)). P like FLSA (KAR § 49-30-1(k).</td>
</tr>
<tr>
<td>State</td>
<td>Overtime Law and AEP Definitions</td>
</tr>
<tr>
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</tr>
<tr>
<td>Kentucky</td>
<td>AEP+Supervisory (KY Rev. Stats. § 337.010(2)(a)(2)). Reg. def of AEP like FLSA (803 KY Adm. Regs. 1:070 §§ 1-3). Definition of Supervisory: customarily/regularly directs work of 2 or more employees, does not devote more than 20% of time to activities performed by supervisees; $155. At $250 needs only supervise 2 or more (803 KAR 1:070 § 4)</td>
</tr>
<tr>
<td>Louisiana</td>
<td>No overtime law</td>
</tr>
<tr>
<td>Maine</td>
<td>AEP and whose annual compensation exceeds 3000x min wage (ME Rev. Stats. § 663 3.K.)</td>
</tr>
<tr>
<td>Maryland</td>
<td>AEP (Ann. Code MD § 3-403(1))</td>
</tr>
<tr>
<td>Massachusetts</td>
<td>AEP (MA Gen. Laws Ann. ch. 151 § 1A(3))</td>
</tr>
<tr>
<td>Michigan</td>
<td>AEP (MI Compiled Laws § 408.384a(4)(a))</td>
</tr>
<tr>
<td>Minnesota</td>
<td>AEP (MN Stats § 177.23 subd. 7(6)). Reg. definition: similar to FLSA but somewhat stricter re discretion and recommendations (MN Adm. Code R. 5200.0180, 0190, 0200, 0210)</td>
</tr>
<tr>
<td>Mississippi</td>
<td>No overtime law</td>
</tr>
<tr>
<td>Missouri</td>
<td>AEP (MO Rev. Stats. 290.500(3)(a))</td>
</tr>
<tr>
<td>Montana</td>
<td>AEP (MT Code Ann. § 39-3-406(1)(j))</td>
</tr>
<tr>
<td>Nebraska</td>
<td>No overtime law</td>
</tr>
<tr>
<td>Nevada</td>
<td>AEP (NV Rev. Stats. Ann. § 608.018.2(e))</td>
</tr>
</tbody>
</table>
### Exclusion of White-Collar Workers in the Rest of the World

<table>
<thead>
<tr>
<th>State</th>
<th>Criteria</th>
</tr>
</thead>
<tbody>
<tr>
<td>New Hampshire</td>
<td>No express criteria (NH Rev. Stats. Ann. 279:21.VIII(b)), but employers are not required to keep hours records for employees exempt under FLSA § 213(a); NH Code of Adm. Rules ch LAB § 803.04(g); and all salaried employees are exempt from overtime (NH W&amp;H Div., tel interview, Feb. 12, 2004)</td>
</tr>
<tr>
<td>New Mexico</td>
<td>Bf AEP or foremen, superintendents, supervisors (NM Stats. Ann. § 50-4-21(C)(2))</td>
</tr>
<tr>
<td>New York</td>
<td>Min. wage orders (including overtime): similar to FLSA but $318.75 salary (e.g. restaurant industry, NY Code of Rules § 137-3.2(c)(1))</td>
</tr>
<tr>
<td>North Carolina</td>
<td>Bf AEP as defined in FLSA (Gen. Stats. NC § 95-25.14(b)(4))</td>
</tr>
<tr>
<td>North Dakota</td>
<td>Bf AEP (ND Adm. Code § 46-02-07-02.4.a). Def like FLSA but no salary levels (46-02-07-01.1,.6,.9)</td>
</tr>
<tr>
<td>Ohio</td>
<td>Bf AEP as defined in FLSA (OH Rev. Code Ann. § 4111.01(D)(4))</td>
</tr>
<tr>
<td>Oklahoma</td>
<td>No overtime law</td>
</tr>
<tr>
<td>Oregon</td>
<td>AEP: performs tasks predominantly intellectual, managerial or professional, exercises discretion/independent judgment, paid on salary basis (OR Rev. Stats. § 653.020(3)(a)-(c)). Definition like FLSA but salary level is min. wage ($6.50) (OR Adm. Rules § 839-020-0005(1)-(3))</td>
</tr>
</tbody>
</table>
### Exclusion of White-Collar Workers in the Rest of the World

<table>
<thead>
<tr>
<th>State</th>
<th>White-Collar Exclusion Details</th>
</tr>
</thead>
<tbody>
<tr>
<td>Pennsylvania</td>
<td><code>bf AEP (PA Stats. § 333.105(a)(5)). Reg. definition like FLSA incl. salary levels (PA Adm. Code tit. 34 § 231.82-.84)</code></td>
</tr>
<tr>
<td>Puerto Rico</td>
<td><code>AEP (PR Laws Ann. tit. 29 §288)</code></td>
</tr>
<tr>
<td>Rhode Island</td>
<td><code>bf AEP as defined by FLSA and at least $200/wk (Gen. Laws RI § 28-12-4.3(a)(4)), unless the wages if computed on hourly basis would violate applicable min. wage law (Gen. Laws RI § 28-12-4.3(a)(5))</code></td>
</tr>
<tr>
<td>South Carolina</td>
<td>No overtime law</td>
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<tr>
<td>South Dakota</td>
<td>No overtime law</td>
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<tr>
<td>Tennessee</td>
<td>No overtime law</td>
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<tr>
<td>Texas</td>
<td>No overtime law</td>
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<tr>
<td>Utah</td>
<td>No overtime law</td>
</tr>
<tr>
<td>Vermont</td>
<td><code>bf AEP (VT Stats. Ann. tit. 21 § 383(2)(E))</code></td>
</tr>
<tr>
<td>Virgin Islands</td>
<td><code>bf AEP also for more than 8 hours/day (VI Code Ann. tit. 24 ch. 1 § 2(2))</code></td>
</tr>
<tr>
<td>Virginia</td>
<td>No overtime law</td>
</tr>
<tr>
<td>Washington</td>
<td><code>bf AEP (Rev. Code WA § 49.46.010(5)(c)). Reg. definition like FLSA (WA Adm. Code §§ 296-128-510, -520, -530)</code></td>
</tr>
<tr>
<td>West Virginia</td>
<td><code>bf AEP (WV Code § 21-5C-1(f)(6))</code></td>
</tr>
<tr>
<td>Wisconsin</td>
<td><code>AEP; reg. definition similar to FLSA (WI Adm. Code § DWD 274.04(1))</code></td>
</tr>
<tr>
<td>Wyoming</td>
<td>No overtime law</td>
</tr>
</tbody>
</table>
Exclusion of White-Collar Workers from Hours of Work and Overtime Pay Laws in All Countries Listed in the ILO Legislative Series

1966—Albania 1: Act No 4170 to Promulgate a Labor Code for the People’s Republic of Albania (Sept. 12, 1966): § 21: “Wage and salary earners engaged in work which by its nature cannot be done within a specified period of time shall not be deemed to work overtime.”

1993—Albania 1: Act No. 7724 of 22 June 1993 relating to the Regulation of Hours of Work, Rest Periods and Holidays: § 2: “The provisions of this Act shall apply without exception to all categories of workers and employers.”

1929—Argentina 1: Act and Decree: Hours of Work. Ley no. 11,544 (Jornada de ocho horas de trabajo): § 3: Exceptions shall be authorized (a) in the case of persons holding positions of supervision or management.

1933—Argentina 1: Decree numero 16115: Reglamentación de la ley 11544 sobre jornada legal del trabajo. § 11(a): Management/supervision includes the head, manager, director, principal person in charge of the undertaking. (b) superior managing or technical employees who replace persons in (a); assistant manager, liberal professions, secretarial staff employed for purposes of management or supervision and not merely in a subordinate capacity; foremen.

1969—Austria. 4: Bundesgesetz vom 11. Dezember über die Regelung der

\[12\]Since World War I, the ILO has published a comprehensive series of (English translations of) the texts of national labor laws and regulations indexed according to subject matter. The following alphabetical list—if there is more than one entry for a country, the laws are listed chronologically—includes all laws indexed as incorporating “hours of work” or “overtime” provisions. The symbol \(\circ\) before the entry means that the text of the law or regulation does not mention an exclusion of white-collar workers. Since the ILO published many statutes without accompanying regulations, and since legislatures in many countries empower the relevant labor-protective agencies to issue regulations excluding groups of workers from various statutory provisions, the mere fact that a statute does not expressly exclude any group of white-collar workers does not necessarily mean that none is excluded. The details of statutes, codes, and regulations lacking an express exclusion of white-collar workers have been omitted. In the early 1990s, the ILO replaced its Legislative Series with Labor Law Documents. In a few instances laws are included from sources other than the ILO.
Exclusion of White-Collar Workers in the Rest of the World

Arbeitszeit (Arbeitszeitgesetz)/A Federal Act to Regulate Hours of Work: § 1.(2)8: Does not apply to “salaried employees in managerial positions [leitende Angestellte] who are entrusted with high-level duties involving the direction of the work of other persons on their own responsibility.”

©1976—Bahrain 1

1921—Belgium. 1: Loi du 14 juin 1921 instituant la journée de huit heures et la semaine de quarante-huit heures: § 2: excludes persons invested with directive or confidential functions to be defined by royal order.

1923—Belgium. 2: Arrêté royal du 28 février 1922: Loi du 14 juin 1921—Détermination des personnes investies d’une poste de confiance. Appendix T: Directive/confidential functions; managers, undermanagers, factors and works superintendents; holders of power of attorney; engineers, chiefs and assistant chiefs of managing, commercial or technical services, chief chemists, laboratory directors and their assistants, head foremen, works foremen; department managers, shop foremen, electricians, maintenance workers; managing or private secretaries, and staff engaged exclusively in secretariat department.

1971—Belgium. 2: Labour Act (Mar. 16, 1971): Ch. 1, 3, § 1.6: Hours provisions do not apply to physicians, veterinarians, surgeons, dentists, pharmacists, or chemists.

1939—Bolivia. 1: Supreme Decree to Issue the Labor Code (May 26, 1939): § 2: “Salaried employees” means those employed in offices whose work consists mainly of an intellectual character. § 45: Hours provision does not apply to salaried employees in supervisory, management, or confidential position, but it is unlawful to employ them more than 12 hours a day.

1943—Brazil. 1: Leg Decree No. 5452 to Approve the Consolidated Labour Laws 1 May 1943: § 62(c): Hours sections do not apply to managers, meaning “a person who holds a position of authority and performs managerial duties in pursuance of a legal instrument and who on account of the higher rate of his remuneration is in a different category from the other employees; managers shall be guaranteed a weekly rest period.”

1985—Brazil. 1: Legislative Decree No. 5452 to Approve the Consolidation of Labour Laws (May 1, 1943) § 62(c): Hours of work provision does not apply to “managers; the term ‘manager’ shall be deemed to mean a person who holds a position of authority and performs managerial duties in pursuance of a legal instrument and also on account of the higher rate of this remuneration is in a different category from the other employees.”

©1951—Bulgaria. 2
©1958—Bulgaria. 3
©1974—Cameroon. 1

1965—Canada. 1: An Act respecting hours of work, minimum wages, annual vacations, and holidays with pay in federal works, undertakings, and businesses,
Exclusion of White-Collar Workers in the Rest of the World

Mar. 18, 1965: § 2(c): Coverage of employees performing skilled or unskilled manual, clerical, technical, operational or administrative work. § 3(3): The Act does not apply to employees who are managers or superintendents or who exercise managerial functions; or to professions to be designated.

1934—Canada. 8: British Columbia: Act to Amend and Consolidate the “Hours of Work Act, 1923” Mar. 29, 1934: § 4: Hours provision does not apply to “persons holding positions of supervision or management or employed in confidential capacities” (the same provision was already contained in 1923 act).

1935—Canada 7: Nova Scotia: An Act respecting the limitation of the hours of work in certain industrial undertakings, Apr. 30, 1931: § 4: does not apply to supervision, management, or confidential capacity.

1935—Canada. 13: British Columbia: An Act to Amend the Hours of Work Act, 1934: § 4: [adds] “so long as the duties performed by him are entirely of a supervisory or managerial character and do not comprise any work or duty customarily performed by other employees.”


1971—Canada. 3: An Act to Amend the Canada Labour (Standards) Code (June, 30, 1971): § 3(3)(a): Does not apply to employees who are managers or superintendents or exercise management functions.

1924—Chile 2: Lei numero 4053, que dispone que el contrato de trabajo se rejira por las disposiciones de la lei que se espresa/Act no. 4,053 providing that contracts of employment shall be regulated by the provisions laid down therein (Sept 8, 1924): § 1: does not apply to work performed in commercial business. § 11: Normal hours of 8 and 48 do not apply to persons occupying posts with supervisory, directive or confidential functions.

1925—Chile 1: Decreto no. 857 que aprueba el texto de la Ley de Empleados Particulares/To Approve the Text of the Act Respecting Salaried Employees (Nov. 11, 1925): § 1: Regulates the relations between employers and salaried employees, “whatever the nature of the employment, its importance within the establishment, or the system of remuneration.” Salaried employees “perform work in which the intellectual effort predominates over the physical effort required....” § 17: 8 and 48 hours.

1978—Chile 1: Decreto-ley núm. 2200 por el cual se fijan normas relativas al contrato de trabajo y a la protección de los trabajadores (Legis. Decree No. 2200 to make provision for contracts of employment and the protection of workers), May 1, 1978, in Diario Oficial, June 15, 1989, No. 30090, p. 1 at 4: § 34: Normal hours of 48 per week shall not apply to managers or administrators [administradores],
workers holding power of attorney, and all other persons working without any immediate supervision.

1984—Chile 1
1994—China 1
1967—Congo (Kin.) 1
1933—Cuba 4
1934—Cuba 1,4

1984—Cuba 1: Act No. 49 to Promulgate the Labour Code (Dec. 28, 1984): § 78: “Managers and other workers with special characteristics stated by the law shall be excluded” from overtime compensation.

1934—Columbia 1: Decreto núm. 895 (abril 26 de 1934): § 2(a): Hours provision does not apply to supervision, management, or confidential employees.

1965—Czechoslovakia 1 [Labour Code]
1975—Czechoslovakia 2
1967—Dahomey 1


1992—Dominican Republic 1: Act No 16-92 of May 29, 1992, promulgating the Labour Code: § 150(1) and (2): Hours provisions do not apply to representatives or agents of the employer or to managers or inspectors.

1928—Ecuador 2: Act respecting the maximum duration of the daily hours of work and weekly rest (Oct. 6, 1928): § 6.3: Hours provision excludes positions of trust, management, and supervision.

1978—Ecuador 1: Labour Code (June 30, 1978): § 57: “Time worked in excess of the ordinary working day shall not be regarded as overtime for purposes of remuneration in the case of employees who have positions of trust or managerial functions, namely: employees who in any way represent or replace the employer....”


1975—Ethiopia 1 Labour Proclamation No. 64 of 1975 (Dec. 6, 1975): “Worker” shall not include manager or deputy manager of an undertaking or any of its branches or all those officials accountable to such manager or deputy manager.
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1993—Ethiopia: Labour Proclamation No. 42/1993: § 3(c): Proclamation does not apply to “contracts relating to persons holding managerial positions who are directly engaged in major managerial functions of an undertaking and giving decisions within the power delegated by the law to the employer....”

1917—Finland: Act respecting the eight-hour day (Nov. 27, 1917), in BILO 13(1-10):36 (1918): Excludes commercial and office work.

1946—Finland. 4: An Act respecting hours of work, No. 604 (Aug. 2, 1946): § 3: “This Act shall not apply to any employee belonging to the managerial staff or carrying out duties of supervision, who takes no part, or takes part only occasionally, in the work performed by the employees placed under his direction or supervision.”

1955—Finland. 1: An Act to Amend the Act Regulating Hours of Work (Feb. 11, 1955): § 3 of the 1946 act was amended to: “This Act shall not apply to any person in a [leading] managerial post in a business, establishment, or undertaking.” “This Act, with the exception of sections 10, 13, and 14, shall apply to every employee whose principal duties consist in personally directing or supervising work, and also takes no part, or takes part only occasionally, in the work performed by employees placed under his direction or supervision.”

1980—Finland. 1(B): Act respecting Hours of Work in Commercial Establishments and Offices (May 26, 1978): § 1(2): Does not apply to “work done by the manager of an undertaking or by any person in a managerial position who takes part as the manager’s direct subordinate in the management of an undertaking or establishment.”

1996—Finland: Working Hours Act No. 605/1996 (June 1996): § 2(1): “[T]his act does not apply...to work which must considered management of an undertaking, corporation or foundation or an independent part thereof by virtue of the relevant duties and of the employee’s position otherwise, or independent work directly comparable to such management.”

1977—German Democratic Republic. 1: Labour Code of the GDR (June 16, 1977): § 178(1): (1) “Managers of undertakings, manager associates and other workers holding particularly responsible posts shall not be entitled to” overtime remuneration. (2) Salaried employees not covered by (1) whose jobs require them to have been trained at a college or technical school shall be granted corresponding time off.

1932—Greece. 2A: Hours of Work (Commercial Establishments) (Apr. 8, 1932): § 18: Salaried employees with salaries in excess of 5,000 drachmas monthly are excluded from supplementary compensation.

1961—Guatemala. 1: Decree No. 1441 Labour Code (May 5, 1961) § 124(a): Does not apply to persons who exercise directive or managerial functions in the
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employer’s name such as managers, directors, administrators.

1960—Guinea 1
1948—Haiti. 2


1961—Haiti. 1: Labor Code: § 107(c): Does not apply to employees in management or confidential capacity.

1984—Haiti. 1: Decree to Revise the Labor Code (Feb. 24, 1984): § 104(b): Overtime hours provision does not apply to persons holding managerial positions or employed in a position of trust.

1959—Honduras. 1 Labour Code (June 1, 1959: § 325(a): Does not apply to managerial or supervisory posts or positions of trust.

1952—Iceland. 1: An Act respecting Safety Precautions in Workplaces, No. 23 (Feb. 1, 1952): § 1: “This Act shall not apply to...ordinary office work.” § 28: “Work shall be so arranged that each worker can have not less than eight consecutive hours of rest from his work in every 24-hour period.”


1936—Irish Free State. 1
1951—Indonesia. 1
1959—Iran 1
1987—Iraq
1951—Israel. 2: Act respecting Hours of Work and Rest: § 30: “This Act shall not apply to...(5) persons holding managerial posts or positions of trust; (6) persons employed in work which by its nature and conditions does not permit the employer to supervise hours of work and rest.” (The Israeli Ministry of Labour and Social Affairs website translates subsect. 5 differently: “persons employed in administrative duties or duties requiring a special degree of confidence.” http://molsa.gov.il/ZhuitOvdim/LaborRel/documents/pdf/7.pdf.)

1923—Italy 1: Decree of Eight-Hour Day (Mar. 15, 1923), nr 692: § 1: Maximum hours do not apply to managing staff.
1923—**Italy** 7: Regio Decreto Sept. 10, 1923 nr 1955: § 3(2): Does not apply to managing staff defined as “persons in charge of the technical or administrative management of the undertaking or a branch thereof, who are directly responsible for the conduct of the work, i.e., administrators, managers, technicians or managing directors, chief clerks (*capi ufficio*) and section heads (*capi reparto*) who perform manual work in exceptional cases only; it shall not include shop assistants and other salaried employees of lower grades....”


1960—**Jordan.** 1: Labor Code Law No. 21 (May 14, 1960): § 43(1): Council of Ministers may issue regulations specifying that the hours provision does not apply to supervisory, management, or confidential employees.

1994—**Laos** 1

1922—**Latvia.** 1: Act respecting hours of work (Mar. 24, 1922): § 1: Normal hours of work of wage earners in manual labor are eight. § 2: Normal hours of work of nonmanual workers shall be six hours. Note: Hours of nonmanual workers shall be equal to hours of those engaged in manual work insofar as former’s work is inevitably dependent on latter’s work hours.

1946—**Lebanon.** 1

1967—**Lesotho.** 1: An Act to Amend and Consolidate the Law relating to the Employment and Recruitment of Employees to Lesotho No. 22 of 1967: § 57(1)(ii): Does not apply to management or confidential employees.

1970—**Libya** 1: Labour Code (May 1, 1970): § 90: Regulations may prescribe that hours do not apply to supervisory, management, or confidential or special employees. Regulations shall fix maximum hours for them.

1980—**Luxemburg** 1: Consolidated Text of the Acts respecting the Legal Regulation of the Contracts of Service of Salaried Employees in Private Employment: § 17(c): Hours provision does not apply to “persons occupying positions of actual management and senior staff whose presence in the undertaking is necessary for its operation and supervision.”

1975—**Madagascar.** 1

1982—**Malaysia.** 2

1962—**Mali** 1

1963—**Mauritania.** 1

1975—**Mauritius.** 1: An Act to Amend and Consolidate the Law relating to Labour (Dec. 24, 1975): § 2: Covered worker does not include person whose basic wage/salary exceeds 18,000 rupees/year
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- 1969—Mexico
- 1959—Mongolia
- 1985—Mongolia

1931—**Moroccan Spain**: Regulation respecting the Statutory Daily Hours of Work (Sept. 7, 1931): § 8.2: Does not apply to directors, managers, and high officials in undertakings, who owing to the nature of their duties cannot be subjected to a strict limitation of their hours.

- 1985—Mozambique
- 1992—Namibia
- 1992—Nepal

1922—**Netherlands**: Decree promulgating the text of the Labour Act, 1919, as amended (July 21, 1922): § 91: It may be stipulated by public administrative regulations that chapter IV (including hours) shall not apply to (a) the work of persons exclusively or mainly responsible for management of the undertaking or department or for scientific research or scientific supervision; (b) work of persons whose annual income in the undertaking they work in exceeds the limit indicated by Royal Decree but not less than 3,000 gulden.

1937—**Netherlands**: Hours of Work Decree for Offices (May 8, 1937): § 7: Does not apply to heads of office or department, chief clerks, heads of managing departments, chief accountants, chief cashiers, heads of drawing office, persons responsible for scientific work necessitating a scientific education meaning a university degree; person whose remuneration exceeds 3,000 gulden.

1962—**Netherlands**: Hours of Work (Shops) Decree (May 15, 1962): § 17: Does not apply to the head of a shop or department, chief clerk, head of department services, or chief accountant.

1952—**Netherlands Antilles**: Ordinance to Regulate Hours of Work (Aug. 22, 1952): § 1(1)(a): Does not apply to managers (c) or those with incomes of 10,000 florins/mo.

1945—**Nicaragua**: Labour Code (Jan. 12, 1945): § 99(1): Hours provision does not apply to supervisory or management position or those of trust.

- 1974—Nigeria

1967—**Norway**: An Act to Amend the Act of 7 Dec. 1956 respecting the Protection of Workers. No. 2 of 10 May 1968: § 18: Hours provision does not apply to (1) managerial or supervisory positions (except foremen) or (2) particularly confidential positions.

1995—**Norway**: Act No. 4 of Feb. 4, 1977 respecting Workers’ Protection and the Working Environment amended to Act No. 2 of Jan. 6, 1995: § 41(a): Hours provisions do not apply to work of a managerial nature and work performed by others who have particularly independent positions.

1969—**Pakistan**: An Ordinance to Amend and Consolidate the Law relating to the Hours and Other Conditions of Work and Employment of Persons Employed in...
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1914—Panama: Ley 6a de 1914 por la cual se reglamenta el trabajo de los obreros y los empleados de comercio (Oct. 29, 1914), in BILO 11(1, 2): 24-25 (1916): Eight-hour working day: No person shall be bound to work a greater number of hours. All hours beyond those stipulated in this act are overtime and “shall be remunerated accordingly.”

1981—Panama 1

1961—Paraguay. 1: Act No. 729 to Promulgate the Labour Code (Aug. 31, 1961): § 24: The Code does not apply to managing directors, managerial staff “or other employees who, on account of their character representative [sic] of the undertaking, their high technical qualifications, the amount of their remuneration and the nature of their work, may be considered to be independent in the manner in which they carry out their duties.” § 206: Hours provision does not apply to people in mentioned in § 24 or those in supervisory or trust positions.

1974—Philippines. 1A: Presidential Decree No. 44 Instituting a Labour Code (May 1, 1974): § 82: Hours provision does not apply to managerial employees—those whose primary duty consists in management of the enterprise or department or subdepartment or other officers or members of the managerial staff.

1974—Poland 1: Labour Code (June 26, 1974): § 136: Overtime pay provision does not apply to “workers whose hours of work, in view of the nature of their jobs and their conditions of work, can only be determined by the extent of their tasks. The tasks of such workers shall be determined in such a way that the workers concerned are able to perform them within the limits of the normal hours of work.”

1969—Portugal. 1: Legis Decree No. 49408 to Approve a New Set of Rules Governing Individual Contracts of Employment (Nov. 21, 1969): § 50(3): Overtime pay “can be waived by workers not working under a schedule who are exercising managerial functions in the undertaking.”

1971—Portugal 1: Legis Decree No. 409 to Establish New Statutory Provisions respecting Hours of Work (Sept. 27, 1971): § 13: At the employer’s request, employees holding managerial, confidential, or supervisory posts may be exempted from the working schedules (and thus from overtime § 17(a)).


1922—Russia 1: Kodeks Zakonov o trude 1922 goda (Labour Code of the R.F.S.S.R. (1922 ed.)), in Kodeks zakonov o trude: C prilozheaniem obzora kratkikh raz'yanenii i vazheishikh rasporyazhenii po trudu (Prakticheskii Komentarii) (E. N. Danilova comp. 1923), § 95 at 46 (went into effect Nov. 15, 1922; originally in Sobranie Uzakonenii, 1922, No. 70, Art. 903): § 94: Normal hours in production and accessory work necessary to it shall not exceed eight hours. Note:
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Narkomtrud in agreement with the All Russian Central Council of Trade Unions may specify the "groups of responsible workers in political, trade union, and council offices whose work shall not be subject to the restriction of hours specified in section 94." § 95: Duration shall not exceed six hours (a) for persons 16-18 years old; (b) for persons employed in intellectual or office work [lits, zanyatykh ymstvennym i kontorskim trudom], other than those who work in direct connection with production. Less than three years later, the press reported that until then, manual workers had been considered proletarian and white-collar workers bourgeois, but that the Central Executive Committee of the Communist Party had eliminated the distinction. Walter Duranty, "Bourgeois Russians to Have New Rights," NYT, Aug. 25, 1925 (4:2-3).

1936—Russia 1: Labor Code with amendments to May 1, 1936: § 95 (same as 1922)


1967—Rwanda. 1

1963—Salvador, El. 1

1961—San Marino 1: Act No. 7 respecting the Protection of Labor and of Workers (Feb. 17, 1961): Schedule A: Hours provision does not apply to: "Persons entrusted with the technical or administrative management of the undertaking or with a section of the latter and directly responsible for the smooth running of the same."


1969—Saudi Arabia 1

1922—Serb-Croat-Slovene Kingdom: Workers Protection Act (Feb. 22, 1922): § 3: Does not apply to persons to whom duties of a relatively high grade are
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entrusted (managers, bookkeepers, cashiers, engineers).


- 1972—Somalia. 1

- 1920—Spain. 4-5: Real orden de 15 enero de 1920 estableciendo las normas generales de aplicación de la jornada maxima de ocho horas/Royal order issuing general rules for the adoption of the maximum working day of eight hours: § 1: Directors, managers, and other higher officials of undertakings, who owing to the nature of their duties cannot be subject to a strict limitation of their hours shall be exempt

- 1931—Spain. 9: Decree to Fix the Maximum Statutory Daily Hours of Work at Eight Hours (July 1, 1931): § 2.1: Does not apply to directors, managers, and high officials “who on account of the nature of their duties cannot be subjected to a strict limitation of their hours of work.”


- 1977—Sweden 4: Working Environment Act (Dec. 19, 1977): ch. 4 § 3: Work shall be so arranged that an employee can take any necessary breaks in addition to his rest periods.


- 1972—Thailand 2A: Announcement of the Ministry of the Interior respecting Labour Protection (Apr. 16, 1972): § 36: Excludes from overtime pay any employee doing “(1) any types of work in which the employee has the title of director, managerial, departmental head or supervisor and is authorised to act on behalf of the employer with regard to hiring, the reduction of wages, the termination of employment, the grant of rewards, disciplinary action, and the settlement of grievances.”

- 1966—Tunisia 1

- 1983—Turkey 3

- 1975—Uganda. 1: A Decree to Regulate Employment (June 2, 1975): § 38(5): Hours provision does not apply to supervisory, management, or confidential employees.

- 1980—United Arab Emirates 1: Federal Law to Regulate Employment Relationships No. 8 of 1980: § 72: Hours chapters shall not apply to “1. persons holding responsible managerial or supervisory positions, if such positions confer upon the holders the powers of an employer over employees.”

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1920—Uruguay 3-5: Decree Issuing New Regulations under the Act Respecting Hours of Work (May 21, 1920): § 2: Actual hours of those who direct the work of others and act independently of continuous and direct supervision of the employer are equal to the hours of the staff under them. § 6: Does not apply to directors or managers of commercial or industrial undertakings or technical directors of industrial processes, when their duties do not involve regular hours of work.

1944—Uruguay 1

1957—Uruguay 1: Hours of Work in Industry, Commerce and Offices (Oct. 29, 1957): § 1(3): Does not apply to directors, managers, heads or principal representatives of commercial or industrial undertakings or supervision or management.

1970—USSR. 1: Act No. 2.VIII of the Supreme Soviet of USSR to Approve Final Principles Governing the Labor Legislation of the USSR and the Union Republics

1945—Venezuela. 1: Act to Amend the Labor Act in Certain Respects (Apr. 4, 1945): § 4: Salaried employee (empleado) “in whose work intellectual effort predominates over physical effort.” § 52: Normal hours are 8 and 48 for wage and salary workers, but hours of work of salaried employees in commercial undertakings and offices shall not exceed 44 in the week. § 53: Maximum hours (8 and 48) shall not apply to supervisory, management, or confidential employees. “Nevertheless such persons shall not remain at work more than twelve hours a day, and shall be entitled to a break of not less than one hour during the day.”

1983—Venezuela 1: Labor Act, as Amended up to 30 June 1983: § 61: Maximum hours section “shall not apply to persons holding positions of supervision or management or employment in a confidential capacity.”

1994—Vietnam. 1
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More Detailed Examination of Selected Countries’ Laws

Canada

Alberta

The hours of work, overtime, and overtime pay provisions of the Employment Standards Regulation do not apply to “(a) an employee who is employed in (i) a supervisory capacity, (ii) a managerial capacity, or (iii) a capacity concerning matters of a confidential nature and whose duties do not, other than in an incidental way, consist of work similar to that performed by other employees who are not so employed.”

British Columbia

The Employment Standards Regulation defines a “manager” as “(a) a person whose principal employment responsibilities consist of supervising or directing, or both supervising and directing, human or other resources, or (b) a person employed in an executive capacity.

Excluded from the Employment Standards Act entirely is an employee who is (a) an architect, as defined in the Architects Act, (b) a member, other than an honorary member, of the Institute of Chartered Accountants under the Accountants (Chartered) Act or a person enrolled as a student under that Act, (c) a member of the Law Society of British Columbia under the Legal Profession Act or a person enrolled as an articled student under that Act, (d) a person registered under the Chiropractors Act, (e) a member of the College of Dental Surgeons under the Dentists Act, (f) a professional engineer, as defined in the Engineers and Geoscientists Act, or a person who is enrolled as an engineer in training under the bylaws of the council of the Association of Professional Engineers and Geoscientists of the Province of British Columbia, (g) a person licensed as an insurance agent or adjuster under the Financial Institutions Act, (h) a member in good standing of the Corporation of Land Surveyors of the Province of British Columbia under the Land Surveyors Act or a person admitted as an articled pupil under that Act, (i) a member of the College of Physicians and Surgeons of British Columbia under the Medical Practitioners Act, (j) a naturopathic physician, as defined in the Naturopaths Act, (k) an optometrist, as defined in the Optometrists Act, (l) a person authorized to practise podiatry under the Podiatrists Act, (m) a person licenced as an agent or salesman under the Real Estate Act, (n) a person registered under section 35 of the

13Employment Standards Regulation, Alberta Reg 14/97, § 14(1)(a).
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Securities Act, (o) a member of the British Columbia Veterinary Medical Association under the Veterinarians Act, or (p) a professional forester as defined in the Foresters Act, so long as that person is carrying on the occupation governed by the Acts referred to in paragraphs (a) to (p).15

The hours of work and overtime requirements of the Employment Standards Act do not apply to any of the following: (a) a fishing or hunting guide; (b) a person, other than a percussion drill or diamond drill operator or a helper of either operator, employed in any of the following activities while exploring for minerals other than oil or gas: (i) staking; (ii) line cutting; (iii) geological mapping; (iv) geochemical sampling and testing; (v) geophysical surveying or manual stripping; (c) a teacher; (d) a person employed as a noon hour supervisor, teacher’s aide or supervision aide by (i) a board as defined in the School Act, or (ii) an authority as defined in the Independent School Act; (e) a person employed part time by an institution that (i) provides training or instruction in a trade, occupation, vocation, recreational activity or hobby, and (ii) is owned or operated by a municipality, regional district or the government; (f) a manager;...(j) a police officer employed by a municipal police board established under the Police Act; (k) a fire fighter employed by a paid fire department as defined in the Fire Department Act; (l) a commercial traveller who, while travelling, buys or sells goods that (i) are selected from samples, catalogues, price lists or other forms of advertising material, and (ii) are to be delivered from a factory or warehouse;...(r) any of the following who are employed by a charity to assist in a program of therapy, treatment or rehabilitation of physically, mentally or otherwise disabled persons: (i) a counsellor; (ii) an instructor; (iii) a therapist; (iv) a childcare worker;...(s) a faculty member as defined in the University Act or the University of Northern British Columbia Act; (t) a professor as defined in the Royal Roads University Act; (u) an instructor, counsellor, librarian or administrator who is employed by an institution as defined in the College and Institute Act or by the British Columbia Institute of Technology; (v) a senior tutor, or tutor, who is employed by the Open Learning Agency; (w) a night attendant; (x) a residential care worker; (y) a live-in camp leader; (z) a teaching staff member as defined in the Technical University of British Columbia Act.16

To be sure, according to a former official of the B.C. Employment Standards Branch: “Employees who are ‘managers’ within the meaning of the Employment Standards Regulations are not entitled to overtime but are entitled to extra wages (at regular wage rate) for extra work—if the employment contract stipulates, for example, the employee is to be paid $40,000 a year for a 40 hour work week, but the employee works in excess of 40 hours a week, the employee is entitled to be

15Employment Standards Regulation, B.C. Reg. 396/95, § 31.
16Employment Standards Regulation, B.C. Reg. 396/95, § 34.
paid for that additional work. The Interpretation Act and the Courts require regulations to be read down—as the Courts have said—it requires the clearest possible language to deny an employee access to basic standards of compensation. Only those employees who can control their hours of work, such as managers, are not entitled to overtime because of the potential conflict between being efficient for the sake employer’s business and getting other than efficient for the sake of increasing one’s wages.” 17

Manitoba

The hours of work and overtime provisions of the Employment Standards Code do not apply to an “employee who is qualified to practise and is practising or employed in a profession that is governed under an Act of the Legislature that applies solely to the profession.”18 Weekly day of rest provision does not apply to “employees employed in supervisory, managerial or confidential positions.”19

Logically, these provisions suggest that supervisory, managerial, and confidential employees are covered by the hours of work and overtime provisions. This conclusion is correct, according to Dave Dyson, the executive director of the Manitoba Employment Standards Division, but subject to two major limitations. First, the Employment Standards Division itself advises employers that they can avoid the applicability of the overtime provision to these (as well as any other) employees by simply “building into the employment contract” an agreement that the firm will, for example, pay the employee $1,000 a week—there is in fact no exclusionary salary level and in principle an employee may be entitled to overtime pay regardless of how high his salary is—and the employee, in turn, will work up to 70 hours per week; as long as the firm then pays the employee $1,000 a week, even when the employee works fewer than 70 hours a week, no premium pay is owing for the hours between 40 and 70 because the Division recognizes as valid the justification that employers everywhere have always offered—namely, that the overtime pay has already been built into the salary. The Division finds this arrangement acceptable because it enables the employee at the time of hire to calculate how much he is actually being paid per hour for a 70-hour week and to decide whether this amount is acceptable to him. If he works more than 70 hours per week, he is entitled to overtime pay, but only if the employer (at the very least implicitly) authorized the overtime work and/or was aware of it. Thus, if the

17 Email from Graeme Moore (July 21, 2003).
worker simply took work home unbeknownst to the employer and then announced after the fact that he had worked hours beyond 70, the employer would not be liable for extra pay.20

The second limitation removes the managers in question entirely from the applicability of the hours and overtime provisions. Because the Employment Standards Code defines an “employer” as a “person that has control or direction of, or is directly or indirectly responsible for, the employment of an employee or the payment of wages to an employee,”21 the Division takes the position that any manager who “has true self-direction and -control and direction and control of his staff” is excluded from the Code not because he is a manager, but an employer. Dyson observed that the test for such employer status was similar to that for an independent contractor. The manager of a McDonald’s restaurant would, for example, not be an excluded manager because that firm is sufficiently centralized that it directs and controls its restaurant managers; by the same token, however, managers of other retail or service establishments might well qualify as employers as would a plant manager.22

Dyson stated that these exclusionary interpretations were not embodied in any regulations or internal directives; instead they derived from rulings of the Manitoba Labor Board, of which he cited two. The first, from 1986, was decided under the earlier Payment of Wages Act, which included a definition of “employer” almost identical to that of the Employment Standards Code.23 Unlike the Code, however, the Payment of Wages Act also specified that “employee” did not include an employer as defined above;24 in contrast, the Code—into which the Payment of Wages Act was folded in 1998—merely states that “employee means an individual who is employed by an employer to do work...but does not include a director of a corporation in relation to that corporation.”25 Consequently, the Code does not expressly preclude an employer from being an employee for purposes of

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20Telephone interview with Dave Dyson, Winnipeg (Feb. 23, 2004).
22Telephone interview with Dyson.
23When the Payment of Wages Act was first enacted in 1970, its definition of “employee” did not include the exclusion of employers, whereas its definition of “employer” was as it remained. Payment of Wages Act, Acts of Manitoba, 1970, ch. 44, §§ 1(c) and (d), at 383. The Employment Standards Act when first enacted in 1957 contained the same structure as later. Employment Standards Act, Acts of Manitoba, 1957, ch. 20, §§ 2(h) and (i), at 119, 120.
24Payment of Wages Act, Acts of Manitoba, 1985-86, ch. 52, § 1(c), at 1731 (July 11, 1985).
overtime pay.\textsuperscript{26} And indeed, in 1981 the Manitoba County Court held in an appeal of a Payment of Wages Act case from the Board—which had ruled in the manager’s favor—that “a person employed in a managerial capacity may, at the same time be an employee...depending on the circumstances...”\textsuperscript{27} The Board in 1986, dealing with a self-described production and personnel manager, found that he met the definition of “employer” under an act that “prevents anyone who is an employer...from being an employee” and that therefore the act’s provisions were not available to him. To be sure, the Board, noting that the issue was one of first impression (following the 1985 amendments), was “concerned that the legislation, as it is written, disenfranchises many individuals who ought to be able to have access to the Act.”\textsuperscript{28} The second decision under the Payment of Wages Act merely stated conclusorily that the responsibilities and authority of three managers brought them within the statutory definition of “employer,” thus triggering dismissal of their claims.\textsuperscript{29}

Finally, Dyson noted that although in principle highly paid managers’ entitlement to overtime pay was not and should not be means-tested, since his mission was to enforce minimum standards and prevent exploitation, overtime (or other) complaints from such employees would “go to the bottom of the pile”—despite the lack of any legislative authority for such a policy.\textsuperscript{30}

**Newfoundland**

The Labour Standards Act does not cover an employee qualified in or training

\textsuperscript{26}Dyson acknowledged that in general it was possible for a managerial “employer” also to be a covered “employee” under the Code, but insisted that the overtime provision could constitute an exception to this coexistence because the employer had to authorize the overtime. While conceding that this authorization requirement was neither statutory nor regulatory, he contended that it could not be gotten around because otherwise it would not be possible to hold the employer liable. When confronted with the FLSA’s “suffer or permit to work” standard as a much more capacious marker of employment, he readily agreed, adding that the doctrine of implicit authorization used by his Division was akin to it. Telephone interview with Dave Dyson (Feb. 24, 2004).

\textsuperscript{27}Halbrick v. Sutherland, 14 Manitoba Reports 418, 423 (1981). The court found that it was not a reasonable interpretation of the language and objectives of the law to conclude that it was intended to protect “the controlling minds of the company, which would include the directors.” \textit{Id.} at 425.

\textsuperscript{28}Progress Plastics Ltd., [1986] MLBD No. 30 (Nov. 17, 1986) (Quicklawamerica).


\textsuperscript{30}Telephone interview with Dave Dyson (Feb. 24, 2004).
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for qualification in and working for an employer in the practice of (i) accountancy, architecture, law, medicine, pharmacy, professional engineering, surveying, teaching, veterinary science, and (ii) other professions and occupations that may be prescribed.31

Nova Scotia

The hours of labor provisions of the Labour Standards Code do “not apply to persons holding positions of supervision or management, nor to persons employed in a confidential capacity.”32 Excluded by regulation are “[d]uly qualified practitioners or students while engaged in training for (a) architecture; (b) dentistry; (c) law; (d) medicine; (e) chiropody; (f) professional engineering; (g) public or chartered accounting; (h) psychology; (i) surveying; (j) veterinary science.”33

Ontario

The hours, overtime pay, minimum wage, holidays, and vacations provisions of the Employment Standards Act “do not apply to a person employed, (a) as a duly qualified practitioner of, (i) architecture, (ii) law, (iii) professional engineering, (iv) public accounting, (v) surveying, or (vi) veterinary science; (b) as a duly registered practitioner of, (i) chiropody, (ii) chiropractic, (iii) dentistry, (iv) massage therapy, (v) medicine, (vi) optometry, (vii) pharmacy, (viii) physiotherapy, or (ix) psychology; (c) as a duly registered practitioner under the Drugless Practitioners Act; (d) as a teacher as defined in the Teaching Profession Act;... (g) as a registered salesperson of a broker registered under the Real Estate and Business Brokers Act; (h) as a salesperson, other than a route salesperson, who is entitled to receive all or any part of his or her remuneration as commissions in respect of offers to purchase or sales that (i) relate to goods or services, and (ii) are normally made away from the employer’s place of business.” The hours provisions of the Act do not apply to “(a) a person employed as a firefighter as defined in section 1 of the Fire Protection and Prevention Act, 1997; (b) a person whose work is supervisory or managerial in character and who may perform non-supervisory or non-managerial tasks on an irregular or exceptional basis;... (f) a person employed

31Labour Standards Act RSNL 1990 ch. L-2, § 2(b).
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as an embalmer or funeral director.”

Prince Edward Island

The Employment Standards Act does not appear to have any white-collar exclusions. According to the provincial Chief Labour Standards Inspector, the regulations are very minimal and do not address the issue. He stated that the problem was that if the employer and the salaried employee failed to contract on the number of hours in the workweek, and if the actual number of hours fluctuated or rose constantly (e.g., if the worker said that he had been hired to work 48 hours but in fact the weekly hours kept rising from 48 to 60), the labor standards enforcement agent would have no way of determining what the regular rate was on which to figure time-and-a-half pay. The result is that salaried employees get nothing. Asked how the government could acquiesce in such a ruse, the Chief Labour Standards Inspector replied that, in principle, if a salaried top manager were making $5000 a week and worked 48 hours a week according to an agreement and were suddenly required to work 60 hours, he would be entitled to $5000/48 for hours 48 to 60, but the agency has never had such a case during his 32-year tenure. The foregoing is merely the agency’s written internal policy. Although the inspector stated that the PEI statute was copied from Nova Scotia’s, the latter does expressly exclude managers.

Quebec

Managerial personnel are excluded from the Act respecting Labour Standards.

Saskatchewan

The hours provision of the Labour Standards Act, Rev. Stat. Sask. Ch. L-1: § 4(2): “does not apply to an employee who performs services that are entirely of a managerial character.” By regulation the hours provision does not apply to “employees who are professional practitioners registered or licensed in accordance with any Act or who, while learning their profession, are interns, students-at-law,

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34Employment Standards Act 2000, Ontario Regulation 285/01, §§ 2(1) and 4(1).
students in accountancy or other trainees or students."\textsuperscript{38}

**Yukon Territory**

The hours of work section of the Employment Standards Act "does not apply to...an individual whose duties are primarily of a supervisory or managerial character."\textsuperscript{39} According to the Labour Services Branch, since "[primarily' is defined in Webster's dictionary as 'for the most part' or 'in the first place,'...an employee would be excluded from the provisions of Part 2 only if their primary or main duties are supervisory or managerial and if those duties occupy over 50\% of their time." The Branch applies the following tests to determine supervisory or manager status: "Does the employee have the authority to: 1. supervise and/or discipline other employees; 2. hire and/or fire other personnel; 3. expend funds on behalf of the employer and to what extent; 4. make decisions as to when and where work is to be done and by whom; 5. participate in policy or management planning?"\textsuperscript{40}

**Czechoslovakia**

The eight-hour working time law of 1918, which applied to enterprises subject to the Commercial Code as well as to agricultural and forestry enterprises, mentioned no exclusions.\textsuperscript{41} The official interpretation of the law provided that it regulated the hours of all workers and applied not only to workmen in the narrower sense, but to officials, manual and professional workers, as well as to agricultural and domestic service. In the industrial world it applied to: persons engaged in production and commerce; persons employed in law courts, and by notaries, stockbrokers, civil engineers, in doctors' consulting rooms, hospitals, banks and insurance offices, public places of entertainment, in connection with the production of periodical publications, to cooperative societies, commercial travellers, firemen, and school attendants.\textsuperscript{42}

\textsuperscript{38}Labour Standards Regulations, 1995, ch. L-1, Reg. 5, § 7(2)(a).
\textsuperscript{40}Yukon Territory, Labour Services Branch, Branch Policy Statement: Supervisor/Manager (March 21, 1985).
\textsuperscript{41}Gesetz vom 19. Dezember 1918 über die achtstündige Arbeitszeit, §§ 1.1 and 1.4, Sammlung der Gesetze und Verordnungen des Čechoslovakischen Staates, Nr. 91 (1918).
\textsuperscript{42}Circular of the Ministry of Social Welfare to All Administrative Authorities respecting the Interpretation of the Provisions Relating to the Eight-Hour Day, §1 (Mar. 21,
European Union

The EU’s 1993 Working Time Directive\(^\text{43}\) required the member states to ensure that the workweek not exceed 48 hours—averaged over a reference period that can extend as long as four months (and up to 12 months by collective agreements).\(^\text{44}\) Even from this weak protection the member states are permitted to “derogate...when, on account of the specific characteristics of the activity concerned, the duration of the working time is not measured and/or predetermined or can be determined by the workers themselves, and particularly in the case of...managing executives or other persons with autonomous decision-taking powers.”\(^\text{45}\)

The EU has created even greater scope for subversion of protection of white- and blue-collar workers by including a so-called opt-out provision, which empowered employers for seven years (through 2003, at which time the Council of the European Union was required to reexamine the matter) to dispense with the 48-hour average workweek if they have “obtained the worker’s agreement to perform such work” and the employer does not subject the worker to any detriment “because he is not willing to give his agreement....”\(^\text{46}\)

Unsurprisingly, a large proportion of


\(^{46}\)Council Directive 93/104/EC of 23 November 1993 Concerning Certain Aspects of
professional and managerial staff received no compensation (in money or time off) for their overtime work. 

Although the Commission of the European Union has paid lip service to the need for “[e]nsuring compatibility between work and family life,” its insistence on “greater flexibility” for “companies, which need to be able to respond to user and customer demand for extended operating hours or to adapt rapidly to sharp fluctuations in demand,” has resulted in inaction. In response, the European Parliament in February 2004 voted 275 to 229 to call on the Commission to phase out the opt-out provision. The Commission was conflicted by its goal of giving “companies and Member States greater flexibility in managing working time” and avoiding “imposing unreasonable constraints on companies,” while allowing “greater compatibility between work and family life....” In May the Commission stated that

the Organization of Working Time, Art. 18(1)(b)(i), in OJ L 307/22. The opt-out provision had been demanded by the UK and was used primarily by UK employers; see below.


if the social partners failed to enter into negotiations, it envisaged proposing: a tightening of the conditions for the individual opt-out to strengthen its voluntary nature; a stipulation that derogations from the maximum weekly hours be possible only through collective agreements; and phasing out the opt-out as soon as possible.51

The Council of European Professional and Managerial Staff reacted with “astonishment” to the Commission’s document both because it had failed to “recognise the abuses of law that have led, mainly in the United Kingdom, to a generalised use of the opt-out provision which was originally intended to be exercised on an individual basis,” and because it had ignored the problems of the wording in the aforementioned derogation clause in the Directive, “which is far too vague and permits the waiving of most of the provisions in the case of managing executives or other persons with autonomous decision-taking powers.”52 Eurocadres insisted that excluding managerial and professional staff from the Directive’s protections “has the effect of increasing work overload, with inevitable consequences for health and safety.”53 Another organization, the European Confederation of Executives and Managerial Staff/Confédération Européenne des Cadres, which represents 1.5 million executives and professionals in national federations,54 went even further, taking the position that the derogation should apply only to CEOs and senior managers.55

**France**

The draft bill that the French government published in July 1999 for a second
35-hour statute setting forth more detailed provisions excluded large numbers of professional and managerial employees (cadres). The bill created three catego-

The first was Loi no 98-461 du 13 juin 1998 d'orientation et d'incitation relative à la réduction du temps du travail. Following the election of a conservative government in 2002, a law was passed on Jan. 17, 2003, which, while formally retaining the 35-hour week, increased the annual overtime quota from 130 to 180 hours and permitted employers to pay only a 10-percent premium rather than 25 percent through the end of 2005. Michel Husson, "Les 35 heures en question" (Aug. 26, 2004), on http://www.eiro.eurofound.eu.int/2004/08/word/fr0408108ffr.doc.

The translator of a French sociological study of “cadres” treated it (including in the title) “as though it were an English word” on the grounds that the dictionary definitions (“salaried staff,” “officials,” “executives, managers, managerial staff”) “are all misleading…. One point of the book is that terms of social classification are never natural or neutral and hence should always be approached as though taken from a foreign language; the impossibility of translation should drive this point home for English-speaking readers.” Luc Boltanski, The Making of a Class: Cadres in French Society xiii (Arthur Goldhammer tr., 1987 [1982]). The Paris-based International Herald Tribune reported that what cadres, who included both top executives and nearly all skilled professionals, and almost one-fourth of the French workforce, had in common was a “quasi-executive social status—and a tradition of working long, often irregular hours without claiming overtime.” It was precisely to “end this practice as part of its campaign to force companies to shorten hours and create more jobs” that the socialist-led government enacted the 35-hour law. Joseph Fitchett, “French Workaholics Beware: The Law Is Moving In,” IHT, June 12, 1998, at 18. According to the 1999 census, the liberal professions, public function cadres, intellectual and artistic professions, and company cadres numbered about 3 million or 13 percent of a total working population of 22.8 million; company cadres accounted for 9.7 percent of industrial employment and 6.1 percent of commercial employment. http://www.recensement.insee.fr/EN/ST_ANA/F2/EMPALLEMP3EMP3AF2EN.html. At the time of the 1968 census, the two million cadres, technicians, and engineers—whom the French Communist Party regarded as intermediate salaried strata who at the same time produced and collected surplus value—had accounted for only 10 percent of the active population. Le Capitalisme monopéliste d'état: Traité marxiste d'économie politique 1:231, 238 (1971). An earlier study estimated the number of cadres in industry and commerce in the early 1950s at 250,000 to 350,000 or 3.75 to 4 percent of total employment. François Jacquin, Les Cadres de l'industrie et du commerce en France 64-69, 72 (1955). The term, which was borrowed from the army, first began to be used at the time of the Popular Front in 1936 and was given official legal existence during the Vichy regime and then by the arrêté Parodi (of Sept. 22, 1945). Nevertheless, it has remained fluid without explicit or unanimously recognized membership criteria or distinct boundaries. Luc Boltanski, Les Cadres: La Formation d’un groupe social 66, 128, 473 (1982); Jacquin, Les Cadres de l’industrie et du commerce en France at 243. For an overview of the social politics surrounding the special treatment of cadres in French social legislation, see Peter Baldwin,
ries to be incorporated into the Labor Code (Code du Travail): (1) senior executives (les cadres dirigeants) to whom are entrusted responsibilities whose importance implies great independence in organizing their work schedule, who are entitled to make decisions in a largely autonomous manner, and who receive compensation at the highest levels in their firm or establishment; to be sure, such higher staff (cadres supérieurs), who are numerically a very small group, had long been excluded from French hours legislation on the grounds that they either exercised "true managerial power" in an enterprise or, by the very nature of their functions, enjoyed great independence in the organization of their work and, moreover, benefited from compensation that was calculated taking into account, implicitly, the time necessary for the accomplishment of their functions; (2) so-

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60Traité de droit du travail (G. Camerlynck ed.), vol. 3: Jean Blaise, Réglementation du Travail et de l'emploi 37-38 (1966). However, according to Michaël Amado, prior to the Lex Aubry (the 35-hour law), even senior executives were covered by working time laws if they were CEO (président) of a Société Anonyme, but are now excluded as cadre dirigeant; the CEO (gérant) of a Société à Responsabilité Limitée owning more than 50 percent of the shares was and is not covered by the working time laws. Email from Michaël Amado (Mar. 16, 2004). The first French eight-hour law of general applicability was enacted in the aftermath of World War I and in anticipation of the International Labor Organization convention. Loi du 23 avril 1919 sur la journée de huit heures, in JORF 76:4266 (Apr. 25, 1919). See also Ministère du Travail, Circulaire du 28 mai 1919, in JORF 51:5510-12 (May 28, 1919). See generally, David Saposs, The Labor Movement in Post-War France 230-35 (1931). The scope of the law's coverage, which encompassed all personnel without exception of all industrial and commercial enterprises, was "as comprehensive as possible" and reproduced the coverage of the day of rest law of 1906. J. Cavaillé, La Journée de huit heures: le Loi du 23 avril 1919, at 53 (1919). The Loi établissant le repos hebdomadaire en faveur des employés et ouvriers of July 13, 1906 did not protect employers or heads of companies, agricultural workers, or—because their occupations lacked a commercial character—professors, lawyers, physicians, veterinarians, dentists, artists, or domestic servants. Lois annotées ou lois décrets, ordonnances (n.s.)

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called integrated *cadres*, who constitute the largest group\(^6^1\) and are subject to collective agreements;\(^6^2\) and (3) and an intermediate group, which must benefit from reductions in the duration of work.\(^6^3\) The draft bill excluded the senior executives from the provisions on working time; the integrated group working within a team according to the employer’s collective work timetable (*les cadres intégrés dans une unité de travail et suivant des horaires collectifs*) were included in all the regulations governing working time, just like other employees—i.e., the statutory 35-hour week, overtime, night work, time off, holidays and supervision of working time; finally, the intermediate managerial and professional staff were covered by a 217-day a year rule, subject only to a compulsory 11-hour daily rest between one working day and the next. By September 1999, three studies had been published confirming that all these groups of workers both worked longer hours than other employees (46 versus 41 hours) and perceived their hours as excessive. Unions, too, were critical of the government’s approach, complaining that it was regressive for managerial workers and permitted employers to work them 13 hours a day, 78 hours per week, and up to 2,800 hours annually (in contrast to the then prevailing maximum 10-hour day, 44-hour week, and 1,730-hour year). Instead, the unions called for equality with other workers and organized a large demonstration of *cadres* on October 12, 1999, while the National Assembly was debating the bill. In spite of further union demonstrations in November, the law as passed in January 2000 contained the provisions to which the unions had objected.\(^6^4\)

The Confédération Française de l’Encadrement-Confédération Générale des Cadres, a national union confederation, which organizes only managerial and professional staff, technicians, and supervisory staff, has sought the intervention of supra-national European bodies to annul the statute. Claiming that the law discriminated against managerial and professional employees, the union first brought suit before the European Court of Human Rights, which, however, was not ex-
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expected to produce a ruling for two to three years. The CFE-CGC also filed a complaint with the Council of Europe’s European Committee of Social Rights, which is charged with verifying that the Council’s European Social Charter is correctly applied. The CFE-CGC asked the Committee for a ruling that the law passed in 2000 violated certain provisions of the European Social Charter and to order the French government to pay 78 billion francs in damages suffered by the profession collectively. The union argued that the law violated Article 2 paragraph 1 of the Charter, by which the member states undertake to “provide for reasonable daily and weekly working hours, the working week to be progressively reduced to the extent that the increase of productivity and other relevant factors permit,” on the grounds that the law failed to provide for any daily or weekly limits on working time, so long as the maximum number of 217 annual working days was not exceeded; the only legal limits were the daily rest of 11 hours and weekly rest of 24 hours. The union also complained of discrimination because the managerial staff’s weekly working time, unlike other workers’, had not been reduced. In reply, the French government contended that since the law’s purpose was to reduce working time and the proportion of affected workers was less than 5 percent, it had complied with its obligation to apply the Charter to “the great majority of workers concerned.” In addition, the government maintained that managers’ particular situation justified reducing their work time by means affording “fair and realistic treatment” compared to that of other workers. The Committee found that the aforementioned daily and weekly rests permitted managers to work as many as 78 hours a week, which was “manifestly excessive” and thus violated the Charter. The union also complained that the law violated Article 4 paragraph 2 of the Charter, under which the member states undertake to “recognise the right of workers to an increased rate of remuneration for overtime work, subject to exceptions in particular cases,” inasmuch as the practical abolition of any reasonable limit to daily or weekly hours associated with the regime of 217 annual working days eliminated the possibility of overtime pay for managers. While acknowledging that the law created a system not subject to the obligation to pay for overtime work, the French government urged that this exception applied to only very few workers and was thus encompassed by the Charter’s permissible exemptions. The Committee found another violation of the Charter because the number of hours worked and not paid for at a higher rate was “abnormally high” and the hours-averaging period of one year was “excessive.” On the other hand, the Committee rejected without explanation the union’s demand for monetary damages.

66European Committee of Social Rights, Complaint No. 9/2000: Confédération Fran-
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On March 26, 2002, the Committee of Ministers adopted a resolution, which, even if it had accepted the findings that the law violated the Charter, would still not have bound the French government. Instead, however, it merely:

1. Takes note of the fact that the aim of the measures in question is to enable autonomous managerial staff, whose working hours cannot be determined in advance, to benefit from a real reduction in their working time;
2. Notes that these managerial staff represent only a minority of salaried workers (approximately 5%);
3. Notes that under French law, the rules governing the working time of the workers in question must be laid down in an agreement drawn up between the social partners;
4. Notes that the provisions of ordinary law on working time have been brought into line with the system based on the number of days and that in particular the law establishes a maximum annual number of days and leaves it up to employees and employers to monitor actual working time;
5. Notes that the provisions of ordinary law on pay have also been brought into line with the system based on the number of days and that the pay awarded to the managerial staff is commensurate with their workload and working time.

Germany

The exclusion of white-collar employees from labor-protective laws in Germany has a long and unbroken tradition of focusing on the group of so-called leitende Angestellt.e The Commercial Code of 1897 and the amendments to the

çaie de l'Encadrement-CFE-CGC v. France ¶¶21-31, 38, 42-45, 51-58 (Dec. 11, 2001), on http://www.humanrights.coe.int/cseweb/gb/GB3/GB40c.htm. The Committee also rejected the union's complaint that the law also violated Article 27 of the Charter which requires states to take measures favoring workers with family responsibilities because the lack of a maximum workweek prevented managers from reconciling family and work life; the Committee found that the argument was irrelevant because the law's purpose was not directly related to that end.

67Math, "La loi sur les 35 heures contestée par une juridiction européenne."
69The concept of "leitende Angestelltte" has, according to one German labor law scholar, no direct equivalent in any other western language; in addition to the English approximations executive, manager, supervisor, professional employee, director, and managerial employee, he mentioned the French cadres and the Italian dirigenti; the closest
Industrial Code of 1900 excluded salaried employees with an annual salary of 5,000 marks or more from protection against dismissal on the grounds that there was no need to cover people in such an economic and social position. Until then the salary limit of 1,200 marks in the Garnishment Law of 1869, and of 2,000 marks in the Bismarckian Sickness Insurance Law of 1883, Accident Insurance Law of 1884, and Disability and Old-Age Insurance Law of 1889 had marked the upper limit of the working class. At this point, as the social question also began to encompass salaried employees, the boundary of the need for protection shifted from workers/salaried employees to salaried employees/leitende Angestellte. For the first time it was not the function as the employer's deputy that was the starting point, but the lack of need for protection; the exclusions thus affected salaried employees who were not managers or bosses, but enjoyed a comparable socioeconomic position. In other words, for the first time, too, salaried employees in proliferating staff positions were legally categorized together with their line counterparts. Given the small number of those with salaries above 5,000 marks, insurance-financial considerations were presumably not decisive in the adoption of this new regulatory approach; rather, the legislature may have identified this stratum as qualitatively distinct from the rest of the salaried employees.

Then in 1911, for the first time, leitende Angestellte were expressly mentioned term he found to be the Spanish alto directivo. Rolf Birk, "Der leitende Ange­stellte—Einige rechtsvergleichende Bemerkungen," RA 41(4):211-17 at 213 (July-Aug 1988).

Handelsgesetzbuch, May 10, 1897, § 68, RGB 219, 233 (excluding clerks (Handlungsgehilfen) with an annual salary in excess of 5,000 marks from § 67 requiring at least one month’s notice).

Gewerbe Ordnung für das Deutsche Reich, July 7, 1900, §§ 133a, 133aa, 133ab, RGB 871, 959 (excluding plant officials (Betriebsbeamten), foremen (Werkmeister), and technicians who manage or supervise an establishment or department and those performing higher technical services such as machine and construction technicians, chemists, and draftsmen, from the requirement of at least one month’s notice).

Gesetz, betreffend die Beschlagnahme des Arbeits- oder Dienstlohnes, June 21, 1869, § 4 (4), BGB des Norddeutschen Bundes 242, 243 (does not apply to the salary of persons permanently employed in private service insofar as the sum exceeds 400 talers).

Gesetz betreffend die Krankenversicherung der Arbeiter vom 15. Juni 1883, § 1, RGB 73, 74 (covering Betriebsbeamte with salaries up to 6 and two-thirds marks per day).

Unfallversicherungsgesetz vom 6. Juli 1884, § 1, RGB 69.


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(as "Angestellte in leitender Stellung") and included in the occupational disability, old age, and survivors insurance law for salaried employees, which also embraced plant officials, foremen, and other salaried employees in a similar "elevated or higher position," as well as salaried office employees insofar as they were not occupied with inferior or merely mechanical services. By 1919, however, in the wake of the social-political transformation wrought by Germany's defeat in World War I, the statutory introduction of the eight-hour day for salaried employees—following by four months its achievement by industrial workers—expressly excluded "Angestellte in leitender Stellung, who are the supervisors of, as a rule, at least twenty salaried employees or fifty employees or whose annual labor earnings exceed seven thousand marks." Wolfgang Hromadka, the leading legal historian of the treatment of leitende Angestellte, viewed this "generously" expansive exclusion—which affected virtually all higher salaried employees—as a quasi-

77 Versicherungsgesetz für Angestellte vom 20. Dezember 1911, § 1, RGB 989. The use of the term had become necessary because on the one hand the legislature wanted to include in the new insurance all salaried employees with an annual salary of no more than 5,000 marks, but on the other hand the Reichsversicherungsamt had found that persons "in leitender Stellung" with autonomous responsibility such as company directors could not be subsumed under any of the occupational groups in the catalog of § 1 of the older 1889 Disability and Old-Age Insurance Law. Hromadka, Das Recht der leitenden Angestellten at 103.

78 Anordnung über die Regelung der Arbeitszeit gewerblicher Arbeiter vom 23. November 1918, RGB I:1334. Already one day after the armistice, the Rat der Volksbeauftragten declared that the political leadership of the government that had emerged from the revolution was "purely socialist" and that it was setting about to implement its "socialist program," which by January 1, 1919, would include the eight-hour maximum working day. Aufruf des Rates der Volksbeauftragten an das deutsche Volk, Nov. 12, 1918, RGB I:1303-1304.

79 Verordnung über die Regelung der Arbeitszeit der Angestellten während der Zeit der wirtschaftlichen Demobilmachung vom 18. März 1919, § 12.2, RGB. I:315, 318. The salary limit was keyed to the obligatory insurance limit. Also excluded were general managers or general agents (Generalbevollmächtigte) and the registered corporate representatives. Id. § 12.1. The eight-hour law also provided for a half-hour break after six hours (§ 2); the eight-hour norm did not apply to work that had to be undertaken immediately in emergencies, in the public interest, or to prevent the destruction of goods (§ 4); on 20 days a year the employer was permitted to employ salaried employees up to 10 hours (§ 5); it was permissible for collective bargaining agreements to deviate from these norms so that 48-hour weeks or 96-hour biweekly periods were permitted and on at most 30 days per year overtime could be performed, unless the overtime was compensated for by short hours at certain times of the year (§ 7); coverage extended to a broad group of office employees (§ 11). Hromadka, Das Recht der leitenden Angestellten at 146.
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foregone conclusion since an employee’s freedom to shape his hours was considered one of the chief characteristics of autonomy, which in turn was characteristic of the activities of leitende Angestellte. Then collecting contradictory reasons for the exclusion, Hromadka added that protection was unnecessary because their working hours were as a rule not longer but shorter than those of covered workers; contrariwise, however, to promote their careers, they also had to keep open the possibility of extra working hours.80

The length of the workday and workweek was a focal point of class struggle in Germany during the Weimar Republic in ways that found no counterpart in the United States. Actuated by what they declared to be the impossibility of sustaining on the basis of an eight-hour day the requisite profits, standard of living, and reparations payments to the victors of Versailles, powerful employer interests tenaciously resented and resisted the revolutionary imposition of the eight-hour day and continuously pushed for a restoration of the pre-World War regime. The intensity of this specific conflict with the labor movement, which was primarily concerned with the negative impact on employment of overtime work during periods of high and rising unemployment, formed an important and integral part of the shifting party-political composition of successive national coalition governments during the 1920s. Because the original eight-hour laws were explicitly characterized as provisional measures of the economic demobilization period, as early as 1919 the government began work on a permanent statute. An analysis of the evolution of the numerous iterations of such a law under complex political constraints is unnecessary to rehearse here,81 especially because the legal treatment of white-collar workers, not being contentious, underwent virtually no change, not only during the Weimar Republic,82 but also during the Nazi period and the post-World War II

80Hromadka, Das Recht der leitenden Angestellten at 145-46. Though hardly peculiar to leitende Angestellte, Hromadka also alluded to “practical considerations” such as that not every type of mental work could be forced into a time table and that some activities like maintaining contacts could not be pressed into fixed time limits. Id.

81For a detailed archive-based reconstruction of the course of the numerous unenacted and enacted drafts of the working time law from 1918 to 1933, see Sabine Bischoff, Arbeitszeitrecht in der Weimarer Republik (1987). On the more detailed provisions of drafts that failed to become law in 1923, see Hromadka, Das Recht der leitenden Angestellten at 147-50.

82The only change occurred in 1923, when the law, which was promulgated reserving subsequent “definitive” regulation, was amended to permit overtime work of two hours a day on 30 days a year; the salary limit of 7,000 marks was eliminated and instead keyed to the maximum annual earnings set in the Insurance Law for Salaried Employees. Verordnung über die Arbeitszeit vom 21. Dezember 1923, §§ 3, 14, RGB I:1249, 1251. This provision was retained in the Bekanntmachung der neuen Fassung der Arbeitszeit-
Federal Republic of Germany.

Of greatest relevance in this context was the draft of a comprehensive labor protective law—of which the regulation of working hours was the core component at a time when the linkages between high and rising unemployment and overtime work were gaining attention—the inception of which dated back to 1926. Although the considerably revised draft that the Social Democratic Minister of Labor Rudolf Wissel submitted to the parliament in January 1929 never became law because political and economic events, especially catastrophic unemployment, rendered labor protective legislation moot, although its proposed statutory provisions excluding certain groups of white-collar workers and the extensive accompanying justificatory discussion shed important light on the grand coalition party government’s reasons for treating these workers differently than their manual-labor counterparts.

The draft excluded from the definition of covered employees and thus from the proposed law altogether “general managers, plant managers, and other higher salaried employees, whose activity requires a special responsibility or who are to a considerable extent empowered to make autonomous decisions, and salaried employees who work in a confidential position for a leading figure [leitende Persönlichkeit] of the plant.” In addition, the provisions on working hours did not apply

verordnung vom 14. April 1927, § 14, RGB I:110, 112. A Ministry of Labor draft law from 1920 would have excluded “persons who exercise supervision or occupy a managing or confidential position.” Entwurf des Reichsarbeitsministeriums zu einem Gesetz über die Regelung der Arbeitszeit gewerblicher Arbeiter vom 14. September 1920, reprinted in Bischoff, Arbeitszeitrecht in der Weimarer Republik at 167. The draft as a whole and this provision in particular were designed to comply with the provisions of the 1919 ILO convention. Id. at 42-48. Bischoff did not report on any archival materials explaining why the Labor Ministry chose to reproduce the convention’s more exclusionary white-collar provision in lieu of the more protective coverage of the 1919 law. The draft did not become law and Germany also failed to ratify the convention. The only other draft document discussed by Bischoff that dealt with white-collar workers—another Labor Ministry product—was a 1921 working time law for salaried employees that apparently at one point had contained a provision excluding salaried employees engaged in “higher mental activity [höherer geistiger Tätigkeit],” but unions objected to this kind of “elastic clause” on the grounds that employers would use it to withhold the eight-hour day from numerous employees, and the phrase (and eventually the draft itself) was dropped. Id. at 70-71.


85Entwurf eines Arbeitsschutzgesetzes, § 2(2), at 3.
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to the “employment of salaried employees with scientific, artistic, instructional, pedagogical, pastoral, or religious activity” or to the patient-care or housekeeping personnel in hospitals and patient-care institutions.86

In explaining the reasons or grounds for these exclusions, the Labor Minister observed that the higher-salaried employees were excluded from the concept of “the employee” because, based on the entirety of their activity or their social position, they did not need labor protection. Removing this group from “the necessarily schematic provisions of a general labor-protective statute” was an “absolute necessity” since the people who worked in closest touch with the entrepreneur and often took his place had to have the same freedom in engaging in their activity that he did. Moreover, the ILO Washington Convention of 1919 (which Germany did not ratify) provided for the same exemption.87 Although the salaried employees’ superior position generally found expression in their salary level, it could not, according to the Labor Minister, be used as a general conceptual marker. Finally, with regard to people in confidential positions such as private secretaries who worked directly for a leading figure, who necessarily had to rely on them in their activity, this necessary cooperation with those not covered by the law compelled the exemption of such assistants as well.88

Significantly, the Working Time Law bills that parliamentary members of the Communist Party of Germany introduced in 1924, 1925, and 1926 included no exclusions whatsoever.89 When the Nazis promulgated the first version of an executive decree on working time (Working Time Code) in 1934, the provision on salaried employees in a leading position was identical with the wording of the original law from 1919.90 And the final working time law issued four years later differed only in dropping the alternative definitions of supervising 20 salaried employees or 50 employees in favor of 20 members of the following (Gefolg-

86Entwurf eines Arbeitsschutzgesetzes, § 10(1), at 5-6.
87“Begründung zum Entwurf eines Arbeitsschutzgesetzes” in Entwurf eines Arbeitsschutzgesetzes at 34.
88“Begründung zum Entwurf eines Arbeitsschutzgesetzes” in Entwurf eines Arbeitsschutzgesetzes at 60.
89VRSB vol. 382, no. 303 (June 27, 1924); VRSB vol. 397, no. 100 (May 1, 1925); VRSB vol. 411, no. 2691 (Nov. 23, 1926). Whereas the last bill was titled, Draft of a Law regarding Working Time for All Wage- and Salary-Earners, the first two expressly applied to all industrial and agricultural workers, commercial and technical salaried employees, and officials, domestic employees, hospital personnel, restaurant employees, all government employees, and ship and fishing crews (§ 1).
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(schaftsmitglieder) in the Nazis’ pseudo-medieval jargon for the collectivity of a plant’s employees. In turn, this law remained in effect throughout the entire existence of the Federal Republic of Germany.

By the 1960s, leitende Angestellte were, according to Hromadka, at least in one respect, worse off than other employees: increasing pressure to legitimate themselves through performance and the fear of losing their occupational and social position and possibly even being exposed to economic privation led to extended working hours, more intensive work, and often longer hours than those of other workers. The resulting extreme stress (“manager disease”) was a constantly recurring theme in their journal. Indeed, excessively long working hours became so characteristic for leitende Angestellte that they even turned into an indicator of their jobs.

For the first time during the economic crisis of 1966-67—which punctured the myth of the post-World War II economic miracle—leitende Angestellte were significantly affected in terms of dismissal; the accompanying public discussion of the threat of loss of social position was quickly linked to the discovery that leitende Angestellte were also in need of the protection of labor law. This shift was signaled in 1967 when the obligatory insurance limit as an alternative salary-level definition of leitende Angestellte in the Working Time Order was voided, in effect bringing about the incorporation of a large segment of leitende Angestellte into the statute. Recognition of their need for legal protection was reinforced two years later when the Law on Protection Against Unfair Dismissal was amended to include them. At this point, as their conditions of employment increasingly approximated those of other workers, while top management moved further upwards, leitende Angestellte drifted downward from an industrial upper stratum to middle management. That leitende Angestellte in the 1970s nevertheless continued to rank overly long working time first on their list of complaints may be linked to the perception that the Working Time Code was a “dead letter.”

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91Arbeitszeitordnung vom 30. April 1938, § 1(2), RGB I:447.
92Hromadka, Das Recht der leitenden Angestellten at 206 and 206 n.114.
94Hromadka, Das Recht der leitenden Angestellten at 242, 246.
95Hromadka, Das Recht der leitenden Angestellten at 250-51.
97Hromadka, Das Recht der leitenden Angestellten at 254.
98Hromadka, Das Recht der leitenden Angestellten at 254 n.98, 331 (quote), 331 n. 19. Hromadka argued that legal limitations on working time became oriented less toward
Following the reunification of Germany, the Weimar- and Nazi-era Working Time Code was finally replaced by the Working Time Law in 1994, which does not apply to "leitende Angestellte within the meaning of subsection 5(3) of the Works Constitution Act and senior medical officers" or to "leitende Angestellte in the public service and their deputies, and workers in the public service who are authorized to make independent decisions in personnel matters." The Works Constitution Act, in turn, defines a leitender Angestellter (whom it also largely excludes) as one who by contract of employment and position in the enterprise or works

1. is authorized independently to hire and dismiss employees in the works or in the works department, or

2. has a general power of attorney or full power of representation, and the full power of representation is also not insignificant in relation to the employer, or

3. regularly attends to other duties that are of importance for the existence and the development of the enterprise or of a works and the performance of which presupposes special experience and knowledge, if in doing so he either essentially makes decisions free of directives or substantially influences them; this can also be the case with given standards, especially those based on legal provisions, plans or guidelines as well as when cooperating with other leitenden Angestellten.

In keying exclusions from the regulation of working hours to those from the Works Constitution Act, the legislature imposed the purposes of the latter on the former’s. The intent of the exclusion from the Works Constitution Act is to exclude employees who “assume important executive functions in the company...and thus by their very functions are very close to management and consequently cannot both act on behalf of the entrepreneur and elect or be elected to the works council.” Regardless of whether employees close to management should have the individual protection and more toward macroeconomic considerations of limiting the supply of labor. Id. at 331.


right to vote for or be elected to the works council—a question that is itself contested\textsuperscript{102}—it is unclear why proximity to management per se should deprive employees of protection against mandatory overtime work. In terms of the relative numbers of \textit{leitende Angestellte}, those with hire- and fire-power are small, since that power has largely been assigned to other bodies within the firm; indeed, such centralization has made the criterion obsolete.\textsuperscript{103} In contrast, those grouped under the aforementioned third heading "who perform executive functions of...an economic, technical, organisational, staff or scientific nature" comprised the majority. These senior staff duties “have to be performed on a level which is subordinated to the management (e.g. production, sales, operation); mere ‘important duties’, or those relating to preplanned entrepreneurial decisions or to a mere supervisory function are not sufficient.” If these executive duties are performed in a partial sector of the firm, it must be one that is “still important for the well-being of the whole company or the establishment” and “leaves sufficient room for individual creativity....” Two dimensions, however, that have not played a significant part in identifying \textit{leitende Angestellte} are income and academic qualifications.\textsuperscript{104} Unlike the law governing bona fide executive or administrative employees under the FLSA, under the German law the execution of entrepreneurial decisions does not constitute the requisite entrepreneurial management task excluding a salaried employee from coverage.\textsuperscript{105} German labor law scholars have repeated for decades that \textit{leitende Angestellte} are “less in need of protection” in large part because their great importance for their firms as well as their commercial skills mean that they occupy a completely different position vis-à-vis their employer than the other employees and therefore as

\textsuperscript{102}By the end of 1988, 400 firms had voluntarily created committees for executives in order to permit them to represent their interests in relation to the employer; in 1988 the statutory executives committees became mandatory. Halbach et al., \textit{Labour Law: An Overview} at 329; Gesetz zur Änderung des Betriebsverfassungsgesetzes über Sprecherausschüsse der leitenden Angestellten und zur Sicherung der Montan-Mitbestimmung vom 20. Dezember 1988, \textit{BGB I S.} 2312-13, 2316-24.

\textsuperscript{103}Hromadka, \textit{Das Recht der leitenden Angestellten} at 332.

\textsuperscript{104}Halbach et al., \textit{Labour Law: An Overview} at 329-30. Nevertheless, a survey conducted in the early 1970s of firms with at least 2,000 employees revealed that only \textit{leitende Angestellte} received an annual salary of 55,000 marks or more. This finding prompted the researchers to remark that income was an appropriate identifying criterion; moreover, although its relevance was almost uncontested, it was not a causal, but an after-the-fact identifying characteristic. Eberhard Witte (with the assistance of Rolf Bronner), \textit{Die leitenden Angestellten: Eine empirische Untersuchung} 54-59, 92-97 (1974).

\textsuperscript{105}Karl Fitting et al., \textit{Betriebsverfassungsgesetz: Handkommentar} 232 (21st ed. 2002).
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a rule are sufficiently capable of looking after their own interests. On the other hand, by the 1970s, the justification for the exclusion was coming increasingly under attack. One of Germany’s leading labor law treatises recently observed that legal developments had revealed that the lack of a social need for protection was no longer a viewpoint on which to base classification as leitende Angestellte. Consequently, they had in principle been incorporated into the social protective regime covering employees—with the exception, to be sure, of the working time law. And with respect to hours regulation, labor-protective considerations were irrelevant and could not trump a finding that an employee is a leitender Angestellter.

In 1957 the number of leitende Angestellte was estimated at most at 1 percent of all employees; in 1965 the estimate was 1-2 percent at a time when the average gap between their income and that of other workers was in decline. During the 1970s a spate of studies came up with estimates of the number of leitende Angestellte in Germany ranging from 80,000 to 500,000. According to one estimate, they comprised 1 to 2 percent of all employees and as many as 5 percent in research-intensive branches such as the chemical and electrical industries. Another study estimated that 2.14 percent of employees and 6.03 percent of salaried employees were leitende Angestellte. At Daimler Benz 1,380 leitende Angestellte accounted for 4.8 percent of all salaried employees and 1.2 percent of all employees, while at the large Farbenwerke Bayer, Leverkusen, of 60,000 employees 3,100 or 5.2 percent were leitende Angestellte. In the late 1970s, one scholar estimated the number of leitende Angestellte at 0.4 million or 2 percent of the 19.3 million employees and 4.8 percent all salaried employees. Unsurprisingly, labor unions gravitated toward the lower estimates and employers to the higher

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106 Alfred Hueck and H.C. Nipperdey, Lehrbuch des Arbeitsrechts 1:60 (1928).
110 Hromadka, Das Recht der leitenden Angestellten at 205-206. Hromadka also adduced estimates ranging from 100,000 in 1952 to 600,000 in the 1970s during a time when their numbers were increasing. Id. at 255 n.100.
111 Hoffknecht, Die leitenden Angestellten im Koalitions- und Arbeitskampfrecht at 16-17. Wolfgang Däubler, Das Arbeitsrecht 2: Leitfaden für Arbeitnehmer 842 (11th ed. 1998), pointed to a new study showing that the proportion of leitende Angestellte fluctuates between 0.4 and 5.1 percent.
ones.\textsuperscript{112} Since the legal definition itself is amorphous and subject to intense controversy reflecting unions’ and employers’ self-regarding political goals, such data collection can hardly lay claim to objectivity or reliability.\textsuperscript{113}

Some German labor lawyers have observed that identifying \textit{leitende Angestellte} was difficult because the statutory criteria were imprecise, but nevertheless stressed that in practice their numbers were relatively few and confined to top management.\textsuperscript{114} But the confusion caused by the conceptual vagueness has prompted others to include middle management among them as well.\textsuperscript{115}

There is in fact no unanimity as to how far downwards the category of \textit{leitende Angestellte} extends. According to one broad view, it encompasses not only those, like personnel managers, who attend to typical employer functions, but also all who are simply engaged in a highly qualified and responsible activity of importance for the establishment. This approach would include staff who advise the corporate management as well as those engaged in relatively autonomous work in research departments (thus incorporating several dimensions of the FLSA’s administrative and professional exclusions). On the other hand, another much narrower view, includes among \textit{leitende Angestellte} only those who appear as the antagonist of the workforce und the works council.\textsuperscript{116} Nevertheless, Germany’s highest labor court,

\begin{itemize}
    \item \textsuperscript{112}Wolfgang Däubler, \textit{Das Arbeitsrecht 2: Ein Leitfaden für Arbeitnehmer} 389 (1979).
    \item \textsuperscript{113}According to Witte and Bronner, \textit{Die leitenden Angestellten} at 21-23, unions regarded \textit{leitende Angestellte} as employees who regularly, in place of the entrepreneur or the employer, took care of his managerial tasks independently; employers expanded the concept to include those who independently made decisions, supervised their execution, and provided top management with professional advice and information.
    \item \textsuperscript{114}Email from Gleiss Lutz Law Firm (Dr. Alexander Klett) (June 12, 2003). Delamotte, “Managerial and Supervisory Staff in a Changing World” at 3, characterized \textit{leitende Angestellte} as senior managers. Klett also observed that neither the manager of a McDonald’s restaurant nor a claims representative like the one discussed in ch. 2 could qualify as \textit{leitende Angestellte}.
    \item \textsuperscript{115}Birk, “Der leitende Angestellte” at 213, is certainly wrong in asserting that the term “supervisor” and “professional employee” in the Taft-Hartley Act are certainly...\textit{leitende Angestellte} within the meaning of German law\textsuperscript{a} on the grounds that a supervisor is essentially equivalent to a \textit{Personalchef} (personnel manager) in a German firm.
    \item \textsuperscript{116}Däubler, \textit{Das Arbeitsrecht 2: Ein Leitfaden für Arbeitnehmer} at 389 (1979). Some scholars have questioned whether even the head of a company research department qualifies as \textit{a leitender Angestellter}. \textit{BetrVG: Betriebsverfassungsgesetz} 356 (Wolfgang Däubler, Michael Kittner, and Thomas Klebe eds., 7th ed. 2000). For a catalog of Bundesarbeitsgericht decisions finding and denying that employees were \textit{leitende Angestellte}, see id. at 365-68. According to Witte and Bronner, \textit{Die leitenden Angestellten} at 6, the only prevailing universal agreement was that those ranking immediately below the
\end{itemize}

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the Bundesarbeitsgericht, has held that a leitender Angestellter need not necessarily occupy an immediate supervisory position; consequently, staff as well as line positions are potentially work sites for leitende Angestellte.117

According to Wolfgang Däubler, a leading German labor law scholar, the Works Constitution Act does not so much offer a definition of the concept of leitende Angestellte as presuppose one. He arrived at this conclusion from the ad absurdum argument that otherwise the aforementioned relatively capacious subsection 3 of the definition would exclude from the protection of the act a large proportion of all salaried employees, whereas in fact the Bundesarbeitsgericht has clearly sought to confine the scope of the category within relatively narrow limits. Däubler has argued that this implied concept of leitende Angestellte has three components. First, a leitender Angestellter must have polar-opposite interests to those of the other employees and, in terms of the functions he performs, be their antagonist. Second, he must engage in entrepreneurial functions in the sense that he exerts decisive influence on the economic, technical, commercial, organizational, personnel, or scientific management of the enterprise. And third, he has to have considerable discretion, which, for example, a branch manager would be lacking who merely executes the central headquarters’ directives.118 Once again, it remains unclear why this type of antagonistic relationship to the rest of the workforce should justify depriving such higher-ranked employees of protection from overreaching superiors.

Leitende Angestellte, who have the right to join unions and some of whom have done so, are high earners and occupy the top rungs of the income hierarchy, yet their income is not so high that they can live on interest. Because they are excluded from the Working Time Law and are obligated to perform uncompensated overtime work, in many cases they cannot even count on sufficient leisure time; consequently, their higher earnings, in Däubler’s view, are, as a rule, bought at the expense of a considerable expenditure of labor power. Thus, as with dependent employees, leitende Angestellte face job insecurity and the risk of premature wear and tear of their labor power.119 The extent to which employers take seriously the

corporate executive or managing body and representing the firm vis-à-vis the workers and outside contract partners were leitende Angestellte.


118Däubler, Das Arbeitsrecht 2: Ein Leitfaden für Arbeitnehmer at 389-90 (1979). According to Günter Schaub Arbeitsrechts-Handbuch: Systematische Darstellung und Nachschlagewerk für die Praxis 1750 (8th ed. 1996 with 1999 Supp.), “Leitende Angestellte are...only such persons who can influence enterprise planning,” not, however, those who, for example, merely execute it.

119Däubler, Das Arbeitsrecht 2: Ein Leitfaden für Arbeitnehmer at 391-93. Never-
exclusion of leitende Angestellte from hours regulation is indicated by a survey revealing that 94 percent of firms offered no offset for additional work, with only 3 percent providing time off and three percent compensation.120 This practice reflects the longstanding objections of German employers—which has been echoed in the United States and elsewhere—in negotiations and mediations to paying for overtime on the grounds that the additional work had already been taken into consideration in determining salaries, in which consequently "the overtime compensation was already included."121

Finally, it should be noted that in contrast to the situation under the FLSA, although there is no public-law recourse for those excluded from Working Time Law, general civil law principles may be of help. For example, a contractual agreement that demands from an employee a task that exceeds general human capacities and the limits of reasonable expectations may be null and void.122

Italy

As early as 1923 Italy excluded the managing staff (personale direttivo delle aziende) from its eight-hour legislative decree.123 The implementing decree of the

120Witte and Bronner, Die leitenden Angestellten at 57.
121Die wirtschaftliche und soziale Lage der Angestellten: Ergebnisse und Erkenntnisse aus der grossen sozialen Erhebung des Gewerkschaftsbundes der Angestellten 124 (complete expanded ed. 1931). In fact, however, a large-scale study in the 1930s showed that the longer the workweek, the greater the proportion of low-paid salaried employees. By the same token, 66.5 percent of male and 70.7 percent of female mercantile and office salaried employees received no pay for overtime work; the corresponding figures for the following occupations were: technical salaried employees 61.1 percent and 67.4 percent; pharmacists 89.5 and 86.8 percent; law office employees 78.7 and 76.0 percent. Id. at 124-25, 173. The survey also revealed that 39 percent of all salaried employees performed overtime work, with the highest proportion (54 percent) in banking. The longer the normal working time, the higher the proportion who worked overtime. Id. at 211-13.
122Baeck and Deutsch, Arbeitszeitgesetz at 480-81. These treatise authors cited a section of the Civil Code dealing with impossibility of performance and Art. 1 para. 1 of the Constitution (human dignity) as possible legal rights violations of which could nullify agreements for long hours. They also cited a decision of the Bundesarbeitsgericht concerning a hospital physician; BAG 38:69, Feb. 24, 1982 4AZR 223/80.
123LS 1923—It. 1: Regio decreto-legge 15 marzo 1923, n. 692, relativo alla limitazi-
same year went far beyond today’s understanding of excluded higher managers (dirigenti) by specifying that the law also did not to apply to chief clerks (capi ufficio) and section heads (capi reparto).\textsuperscript{124} It defined “managing staff” as “persons in charge of the technical or administrative management of the undertaking or a branch thereof, who are directly responsible for the conduct of the work, i.e., administrators, managers, technicians or managing directors, chief clerks and section heads who perform manual work in exceptional cases only; it shall not include shop assistants and other salaried employees of lower grades...nor persons who, though they are entrusted with the technical direction of a process, take part in the actual manual work involved in its execution.”\textsuperscript{125}

In Italy, as elsewhere, the predominating protective principle was limited in this case because the dirigenti, on the basis of their bargaining power, qualifications, and compensation levels, were deemed less in need of protection than other workers.\textsuperscript{126} Italian labor law scholars have been divided over the purpose of this exclusion. Some authors have argued that the work performed by executives was of an irregular character and thus associated with less wear and tear. Others have considered the view more persuasive that—especially the highest-level—executives were in a better position effectively to take care of their health, family, and social interests vis-à-vis employers’ excessive expectations. But in Italy even those managers who are excluded from working time regulation cannot be obligated to work to an unlimited extent. The Constitutional Court, dealing with the question of whether the exclusion is reconcilable with the principle of equality in article 3 of the constitution and that of appropriate compensation in article 36, has found a quantitative limit in the necessity of maintaining the dirigenti’s health. Even in the absence of a statutory or contractual maximum number of hours, an upper limit is set by the constitutional guarantee of health and physical and psychic integrity. In addition, although there is no statutory prescription of overtime pay for dirigenti,
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case law has created a basis for payment where there is an agreement as to the normal working time or a plant custom or the employer unilaterally sets it. The employer must pay for overtime work in those cases in which the scope of the demanded performance is expanded inappropriately in a way that produces an oppressive impact and wear and tear exceeding the limits on the protection of their health.127

Finally, in 2003 Italy issued a legislative decree embodying the EU’s directive including its permissive exclusions for managers and others with autonomous decision-making power, the duration of whose working time cannot be predetermined or can be determined by these employees themselves.128

Luxemburg

The hours provision (§ 17(c)) of the Consolidated Text of the Acts respecting the Legal Regulation of the Contracts of Service of Salaried Employees in Private Employment does not apply to “persons occupying positions of actual management and senior staff whose presence in the undertaking is necessary for its operation and supervision.”129 According to case law, these exclusions presuppose that the employees in question actually exercise managerial power, that their tasks confer a certain authority, that they enjoy great independence in organizing their work and their working time, and that they receive appropriate compensation, which, at least implicitly, has been fixed with regard to the time required for carrying out these tasks. The employee who must direct and control other employees, secure relations with third parties and suppliers, and generally look after the smooth running of the employer’s business, occupies a position of management and of superior rank and


129See also Loi du 1er août 1988 concernant le repos hebdomadaire, § 23: “Les dispositions du présent article ne sont pas applicables...c) aux personnes occupant un poste de direction effective ainsi qu’aux cadres supérieurs dont la présence à l’entreprise est indispensable pour en assurer le fonctionnement et la surveillance.”
therefore has no claim to payment for overtime work. In contrast, an assistant manager lacks the freedom of action in organizing work, independence in service, and compensation of such excluded positions.\textsuperscript{130}

**Netherlands**

The working hours law that the Netherlands enacted in 1919 did not apply to the “work of persons exclusively or mainly in charge of the management of an undertaking or part of it or of the scientific research or scientific control of it” or to the “work of persons whose annual income in the undertaking in which they work exceeds a limit indicated by Royal Decree which limit, however, shall not be fixed” at less than 3,000 gulden.\textsuperscript{131} The 1937 decree covering office work did not apply to office or department heads, chief clerks, heads of managing departments, chief accountants, chief cashiers, drawing office heads, persons responsible for scientific work requiring a scientific education (meaning a university degree), and to persons whose remuneration exceeded 3000 gulden.\textsuperscript{132} This tradition of using salary levels as a definitional exclusionary principle has been retained in the most recent (1995) Working Time Law,\textsuperscript{133} from whose hours and overtime provisions are excluded employees who are exclusively or mainly executives (including top management) with an annual wage at least twice the minimum wage (which, as of Jan. 1, 2003, was 32,400 euros, which, at an exchange rate of 1.13, amounted to $36,612) as well as “higher personnel” with an annual wage at least three times the minimum wage (which equaled 48,600 euros or $54,918).\textsuperscript{134}


\textsuperscript{131}Act Providing for the Regulation of Hours of Labor, § 91 (Nov. 1, 1919), in BILO, 14(1-3):150-81 (1919). In January 1920 the highest listed minimum weekly wages in guilders in collective bargaining agreements for Amsterdam were 42.75 for machine compositors, which for 52 weeks would have amounted to 2,223 guilders. C. Zaalberg et al., *The Netherlands and the World War: Studies in the War History of a Neutral*, Vol. II (fold-out chart opposite p. 342) (1928).

\textsuperscript{132}LS 1937—Netherlands. 2: Hours of Work Decree for Offices, § 7 (May 8, 1937). With the exchange rate of a Dutch gulden at 54.88 cents on May 8, 1937, 3000 gulden was about $1,646.40. “Foreign Exchange Rates,” NYT, May 10, 1937 (34:1).


\textsuperscript{134}Besluit van 4 December 1995 houdende nadere regels inzake de arbeids- en rusttijden, art. 2.1.5.1.a. and d, 2.1.6, on http://www.sodm.nl/Data/nieuw%20data/arbeids-
To be sure, as pointed out by Frank Tros, an expert on the regulation of employment conditions in the Netherlands, the fact that the working hours law excludes managers earning twice the minimum wage and workers earning three times the minimum wage does NOT mean that employers can require them to work unlimited hours because: these groups are also protected by the general doctrine of "fair employership" (or "fair practise of employment") in private law; 85% of Dutch employees - inclusive executives and higher salaried personnel - are under collective agreements (mostly only the very very high executives are excluded from the CA). These CA regulate general standards on working hours which are specifications of the standards in the Act and are mostly stricter norms than the legal norms. So, it is true that in cases of these workers' categories, employers cannot be sanctioned by public authorities, but that it is the responsibility of these workers to complain to trade unions or go to court. The trade unions are not making a point of the exclusion of higher categories of personnel. These workers are a small minority of their members. There is a general societal/political norm that these workers are able to have the responsibility to arrange their terms and conditions of employment without the protection of law or CA. The average gross income of employees in the NL was in 2002 23,200 Euro.

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Email from Frank Tros (Sept. 1, 2003). Tros is a senior researcher at the Hugo Sinzheimer Institute, an interdisciplinary research center on labor and law at the University of Amsterdam.
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Spain

The Worker’s Charter (Estatuto de los Trabajadores) of 1980 excludes employment relationships of a special nature including senior managerial staff (personal de alta dirección), although it still requires the regulation of their employment relationships to respect the basic rights conferred by the constitution. In 1985 a royal order was promulgated defining such senior managers and explaining the legal regulation of their working time. This group included “those workers who exercise powers inherent in the juridical ownership of the enterprise and relative to its general objectives, with autonomy and full responsibility limited only by the criteria and direct instructions emanating from the person or the higher organs of governance and administration of the Entity which respectively occupies that ownership.” The order provided that working time in terms of the working day, schedules, holidays, and leaves, as well as for vacations, “shall be that fixed in the provisions of the contract, provided they do not constitute performance on the part of the employee that markedly exceeds that which is customary in the relevant professional field.”

Sweden

The Act Concerning the Limitation of Working Hours of 1919 excluded fore-

136 Act No. 8 to Promulgate a Worker’s Charter (Mar. 10, 1980), § 2(1)(a). Employees in these positions are mentioned insofar as they are not covered by § 1(3)(c), which excludes from the act “activity restricted purely and simply to the holding of office as an adviser to or member of the management bodies of undertakings legally established in the form of companies, if such activity in the undertakings concerned merely consists in the performance of duties inherent in such office.”

137 Real Decreto 1382/1985 de 1 de agosto por el que se regula la Relación Laboral de Carácter Especial de Personal de Alta Dirección, Art. 1.2: “Se considera personal de alta dirección a aquellos trabajadores que ejercitan poderes inherentes a la titularidad jurídica de la Empresa y relativos a los objetivos generales de la misma, con autonomía y plena responsabilidad sólo limitadas por los criterios e instrucciones directas emanadas de la persona o de los órganos superiores de gobierno y administración de la Entidad que respectivamente ocupe aquella titularidad.” http://www.datadiar.com/actual/legislacion/laboral/L000029.htm.

138 Art. 7: “El tiempo de trabajo en cuanto a jornada, horarios, fiestas y permisos, así como para vacaciones, será el fijado en las clausulas del contrato, en cuanto no configuren prestaciones a cargo del empleado que excedan notoriamente de las que sean usuales en el ámbito profesional correspondiente.”
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men or other officials in a superordinate position, draftsmen, bookkeepers, and persons in a similar position, and porters or other subordinate office assistants, as well as shop assistants.\textsuperscript{139} The need for regulation of white-collar workers' working hours in Sweden was said to be less urgent because, with the exception of shop clerks, they worked shorter hours than manual laborers. The claim that salaried workers were employers' special confidential employees also played a part in the resistance to including them in the law.\textsuperscript{140}

United Kingdom

The UK is the only member of the EU that took full advantage of the aforementioned opt-out provision of the Working Time Directive so that its hours limitation “shall not apply in relation to a worker who has agreed with his employer in writing that it should not apply in his case....”\textsuperscript{141} In addition, UK regulations made the EU's already expansive exclusion of white-collar workers even broader by providing that: “Where part of the working time of a worker is measured or predetermined or cannot be determined by the worker himself but the specific characteristics of the activity are such that, without being required to do so by the employer, the worker may also do the work the duration of which is not measured or predetermined or can be determined by the worker himself,” the maximum workweek provision “shall apply only to so much of his work as is measured or predetermined or cannot be determined by the worker himself.”\textsuperscript{142}

In tandem with the UK government, which was reportedly “determined to retain the opt-out,”\textsuperscript{143} the Confederation of British Industry launched a campaign in 2003 to subvert what was left of the (only six-year-old) first modest effort ever in the UK to regulate the working hours of adult men. Its guiding propagandistic principle was a voluntaristic perspective directly contradictory of labor standards legislation: “workers must retain the right to say no, but they must also retain the right to say yes to work longer hours.”\textsuperscript{144} With regard to white-collar workers,

\textsuperscript{139}Lag om arbetstidens begränsning, §§ 2 and 1(j) (Oct. 17, 1919), in Svensk Författningssamling, Nr. 652 at 1787-91 at 1787 (1919). See also BILO 14(1-3):199-205 at 200 (1919).

\textsuperscript{140}Folke Schmidt, Tjänsteavtalet 216-17 (1959).


\textsuperscript{143}Mark Hall, “UK Reaction to EU Working Time Report” (Jan. 28, 2004), on http://www.eiro.eurofound.ie/2004/01/feature/uk0401104f.html

\textsuperscript{144}CBI, The Working Time Directive and the Individual Opt-Out: Maintaining a
while conceding that “the UK has the longest working hours in Europe” and that “longer hours are most common among managerial and professional staff,” the CBI could find no better self-contradictory justification for this “‘long hours culture’” than that there was “no evidence that they are forced to work these hours, rather they choose to do so voluntarily, for career reasons, for reasons of professional pride or commitment to their work.” The rhetorical vacuity of this allegation was underscored by a government survey revealing that “[t]he most common reason for working long hours, mentioned by 42% of employees who worked overtime, was because they had too much work to do in their normal working day.”

That the CBI “pledged to ‘fight tooth and nail’” against the European Commission’s aforementioned proposal to phase out the opt-out provision was no surprise, but the Labour government’s adoption of the same voluntarism that is antithetical of mandatory labor standards was breathtaking: “The Government believes strongly that the UK’s competitiveness should not depend on people working long hours but equally that people should be free to determine their own working patterns.” Equally astonishingly, whereas an empirical study of the opt-out provision had concluded that “[b]ecause the UK lacks effective mechanisms of employee representation, it does not have the means needed to implement the continental European model of annualisation and reduction of working time,” the

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149Catherine Barnard, Simon Deakin, and Richard Hobbs, “Opting Out of the 48-Hour Week: Employer Necessity of Individual Choice? An Empirical Study of the Operation of Article 18(1)(b) of the Working Time Directive in the UK,” *ILJ* 32(4):223-52 at 252 (Dec. 2003). Pessimistically, the authors also noted the likelihood that even if the individual opt-out were eliminated, “employers would shift their attention to the derogation for ‘unmeasured’ working time.” *Id.* at 251. This strategy would also have its most severe impact on white-collar workers. For a less critical view of the use of the opt-out provision published by the Labour Government, see Fiona Neathey and James Arrowsmith, *Implementation of the Working Times Regulations* 33-38 (Dept. of Trade and Industry, Employment Relations Research Series No. 11, 2001), on http://www.dti.gov.uk/er/emar/wtr.pdf.
Exclusion of White-Collar Workers in the Rest of the World

Labour government turned this argument on its head: with only 30 to 35 percent of the UK workforce covered by collective agreements, it would not be “fair” to exclude the other 65 percent from individually opting out of hours regulation.\(^\text{150}\) The consequences of such atomization of the labor market were predictable: the two occupational groups with the highest proportion of full-time employees working more than 48 hours a week—managers/senior officials (34 percent) and professional occupations (29 percent)—were also the two groups with the highest proportion preferring to work shorter hours (74 and 73 percent, respectively).\(^\text{151}\)

Uruguay

An Act Limiting the Daily Work of Workers, Employees, etc., to Eight Hours Throughout the Territory of the Republic of 1915 covered workers in factories, construction, and employees or assistants in industrial and commercial establishments.\(^\text{152}\) The Decree to Make Regulations under the Labour Laws Respecting the Limitation of the Hours of Work in Industry, Commerce and Offices of 1957 provided that the maximum hours prescribed in the laws and the International Labor Convention (No. 1 and 30), under which these regulations were made, did not apply to directors, managers, heads or principal representatives of commercial or industrial undertakings or persons holding positions of supervision or management, or to technical directors of industrial departments, in which they were not required to work according to a regular schedule. The following persons were deemed to occupy a position of management or supervision or to be employed in a confidential capacity: managers, undermanagers, accountants, consultants of every kind, senior administrative or technical employees replacing managers, undermanagers, heads or principal representatives in direction or charge of the workplace; secretarial employees assigned to duties of direction or management

\(^{150}\)DTI, *Working Time—Widening the Debate* at 12.

\(^{151}\)DTI, *Working Time—Widening the Debate* at 34-36.

\(^{152}\)Ley por la cual el trabajo diario de los obreros, dependientes, etc., se fija legalmente en ocho horas en todo el territorio de la República § 1 (Nov. 17, 1915), in *BILO* 11(1,2):29-30 (1916). The law also provided that workers shall not be employed anywhere if they have already worked the maximum number of hours elsewhere (§ 5); while the employer was subject to a fine of 10/15 pesos for violations, workers could be fined up to the amount they earned by extra work (§ 6). The eight-hour law of 1915 and other labor legislation were in part inspired by a Bismarckian attempt to integrate the urban working class into the Colorado party. M. Finch, *A Political Economy of Uruguay Since 1870*, at 41, 44 (1981).
and who were more than mere subordinates; persons in charge of a section, department, workshop, shift, mechanics, boiler personnel or a gang, and assistant chiefs for such time as they did the work of chiefs. Only employees with a salary of 1500 pesos per month or more were covered by this article. In the case of employees holding a management position or not subject to the continuous and direct supervision of the employer or owner, the hours of actual work were the normal working time of the personnel under their orders.\textsuperscript{153}

\textsuperscript{153}§§ 1(3) and (4), 5, and 7 (Oct. 29, 1957) in \textit{LS} 1957--Ur. 1.
Bibliography

Omitted are all newspaper and unsigned magazine articles.

I. Unpublished Sources

Collections

Bentley Historical Library, University of Michigan, Ann Arbor, MI: Roy Chapin Collection
Columbia University Rare Book and Manuscript Library: Francis Perkins Papers
Dinand Library, Holy Cross College, Worcester, MA: David I. Walsh Papers
Hagley Museum and Library, Wilmington, DE: Willis F. Harrington Papers and NAM Papers
Kheel Center for Labor-Management Documentation and Archives, School of Industrial and Labor Relations, Cornell University, Ithaca, NY: United Office and Professional Workers of America Collection
Minnesota Historical Society, St. Paul, MN: George E. MacKinnon Papers
National Archives, Washington, D.C.: Records of Wage and Hour Division (RG 155) and Department of Labor (RG 174)
Wirtz Labor Library, United States Department of Labor, Washington, D.C.: Wage and Hour Division Documents

Organizational and Personal Papers

"From the Report of the Committee on Working Periods in Industry of the Chamber of Commerce of the United States." N.d.. Hagley Museum and Library, Willis F. Harrington Papers, Box 17
"Harold Stein In Memoriam" N.d. (1966)
______. "Wage-Hour Legislation and the White Collar Worker: Memorandum submitted to the Wage and Hour Division United States Department of Labor in Opposition to Proposed Amendments to Part 541, Title 29, Chapter V, Code of Federal Regulations
Bibliography

pursuant to Section 13(a)(1) of the Fair Labor Standards Act of 1938, at a Special Hearing Held April 10, 1940”

Socialist Party of America Papers 1897-1963. Reel 111

Stein, Harold. Resume. N.d. (ca. 1946)

Stone, D[?],[L?], General Manager, Associated Industries of Massachusetts, to James Emery (Apr. 11, 1933). NAM Papers Box 851.2. Hagley Museum & Library


Government Documents

United States Federal


Brief for Appellants. United States v. Martin, 94 US 400 (1877)

Brief for Appellee. United States v. Martin, 94 US 400 (1877)


Brief for the Plaintiff in Error, Holy Trinity Church v. United States, 143 US 547 (1892)


Department of Labor. Wage and Hour Division. “Report on Proposal to Exempt Clerical
Bibliography

Employees from the Hours Provisions of the Fair Labor Standards Act.” Mar. 1, 1940
______. Press Releases. 1938-40. US DOL, Wirtz Labor Library; NA, RG 155
______. Wage and Hour and Public Contracts Divisions. Public Hearing: “Proposal to
Increase Salary Tests for Executive, Administrative, and Professional Employee
Exemption.” Sept. 16, 17, 18, 1969
Dickson, George. “History of the Code of Fair Competition for the Cotton Textile
Industry.” Oct. 1936. In NAMP, Microcopy No. 213: DSNRA 1933-36, Roll 41:
Code 1: Cotton Textile Industry
Earseman, G. S. “History of the Code of Fair Competition for the Rubber Tire
Manufacturing Industry.” Sept. 1935. In NAMP. Microcopy No. 213: DSNRA 1933-
36, Roll 151: Code 174: Rubber Tire Manufacturing Industry
Everitt, I. “History of the Code of Fair Competition for the Automobile Manufacturing
Automobile Manufacturing Industry to Baking Industry (Part)
Aluminum Industry.” Sept. 24, 1935. In NAMP. Microcopy No. 213: DSNRA 1933-
Industry.” May 20, 1936. In NAMP. Microcopy No. 213: DSNRA 1933-36, Roll 151:
Code 156: Rubber Manufacturing Industry
Letter from Secretary of Labor Elizabeth Dole to governors of Georgia, Idaho, Iowa,
Kansas, Maine, Maryland, Nebraska, Nevada, New Mexico, North Dakota, Texas,
Wisconsin, and Washington (July 27, 1989)
Manufacturing Industry.” Mar. 1936. In NAMP. Microcopy No. 213: DSNRA 1933-
36, Roll 49
Industry.” Feb. 24, 1936. In NAMP. Microcopy No. 213: DSNRA 1933-36), Roll 137:
Code 392: Real Estate Brokerage Industry
National Archives Microfilm Publications. Microcopy No. 213: Document Series of the
National Recovery Administration, 1933-36. 186 reels. 1953
National Recovery Administration. Hearings on the Codes of Fair Competition. 75 reels.
Industry
Official Report of the Proceedings Before the Wage and Hour Division of the Department
of Labor In the Matter of: Definition of “Executive, Administrative, Professional”
Employees and “Outside Salesman.” April 10-July 29, 1940. In NA, RG 155--Wage
& Hour/Pub. Contracts Div. Location: 530, 47:9-3-4/Boxes 10-14

1261
Bibliography


Vandenberg, A H (Senator) to Roy D Chapin (Apr. 1, 1933) (telegram). In Roy Chapin Collection, Box 25, Folder: April 1-5, 1933. In BHL, University of Michigan, Ann Arbor, MI


Comments on US DOL's Proposed Regulations in 2003


Letter from J[ames]PH[offa] to Tammy McCutchen. N.d. (June 30, 2003) (draft)


These and Dissertations


Telephone Interviews


Richard Brennan. Deputy Director. Office of Enforcement Policy. US DOL, WHD.
Bibliography

Washington, D.C. Mar. 29 and Aug. 20, 2004
John Fraser. (Former) Acting and Deputy Wage and Hour Administrator. Washington, D.C., July 19, 1993 and South Otselic, NY. July 14, 2004
Tammy McCutchen. Former Wage and Hour Administrator. Washington, D.C. Sept. 16, 2004

II. Published Sources

Government Documents

European Union

Bibliography


Germany


International


______. International Labour Conference, Tenth Session, Geneva, 1927. 1927


Bibliography

29.1919-November 29, 1919. 1920
First, Second and Third Parts (1929)
Third Part (Appendices). 1929
____. International Labour Conference: Fourteenth Session. Vol. I. — First and
Second Parts. 1930
____. International Labour Conference: Fourteenth Session Vol. 1 — Third Part
(Appendices). (1930)
____. International Labor Conference: Seventeenth Session: Geneva 1933: Report of
Proceedings. 1933
____. International Labor Conference: Eighteenth Session: Geneva 1934: Report of
Proceedings. 1934
Proceedings. 1935
____. Report I: Report on the Eight-Hours Day or Forty-Eight Hours Week (Item I of
the Agenda): Prepared by the Organising Committee for the International Labour
Conference, Washington, 1919. N.d. (1919)

United Kingdom

Bills, Public: Three Volumes (1) Administration and Justice [H.L.] to Housing (No. 2),
http://www.dti.gov.uk/er/work_time_regs/consultation.doc
Neathey, Fiona, and James Arrowsmith. Implementation of the Working Times Regu-
lations. Dept. of Trade and Industry. Employment Relations Research Series No. 11,
Reports of the Inspectors of Factories for the Half Year Ending 30th April, 1860. C.
2689. 34 Parl Pap. 1860

Committee on Remuneration Limit for Insurance of Non-manual Workers. 1936

United States Federal

Sess. Apr. 27, 1939
Amendments to the National Labor Relations Act: Hearings Before the Committee on
8-15, 1947

1266
Bibliography

Annual Reports of the Post-Office Department for the Fiscal Year Ended June 30, 1898. H. Doc. No. 4. 55th Cong., 3d Sess. 1898
Annual Reports of the Post-Office Department for the Fiscal Year Ended June 30, 1899. H. Doc. No. 4. 56th Cong., 1st Sess. 1899
Annual Reports of the Post-Office Department for the Fiscal Year Ended June 30, 1900. H. Doc. No. 4. 56th Cong., 2d Sess. 1900
______. Official Register of the United States, 1941: Persons Occupying Administrative and Supervisory Positions in the Legislative, Executive, and Judicial Branches of the Federal Government, and in the District of Columbia Government. 1941
_____ . 68th Annual Report for the Fiscal Year Ended June 20, 1951. 1952
_____ . 69th Annual Report for the Fiscal Year Ended June 20, 1952. 1952
Bibliography

Compensation for Overtime and Holiday Employment: Hearings Before a Subcommittee of the Committee on Post Office and Civil Service United States Senate on S. 354. 82d Cong., 1st Sess. Sept. 6-7, 1951
Conditions of Government Contracts: Hearing Before a Subcommittee of the Committee on the Judiciary House of Representatives on H. R. 11554. 74th Cong., 2nd Sess. 1936
Decisions of the Department of the Interior in Appealed Pension and Bounty-Land Claims. Vol. 8. 1897
_____. Annual Report: Wage and Hour and Public Contracts Divisions: Fiscal Year 1948. 1948
_____. Fair Labor Standards in Wartime: Annual Report, Wage and Hour Division, Public Contracts Division, For the Fiscal Year Ended June 30, 1942. 1943

1268
Bibliography


Employment and Earnings in the Engineering Profession 1929 to 1934. Bull. No. 682. 1941 (by Andrew Fraser, Jr.)


Hours and Earnings in the United States, 1932-40. Bull. No. 697. 1942 (written by Alice Olenin and Thomas Corcoran)

Laws Relating to Payment of Wages. BLS Bull. No. 408. 1926 (written by Lindley Clark and Stanley Tracy)


Trend of Earnings Among White-Collar Workers During the War. Bull. No. 783. 1944


Wages and Hours of Labor in the Hosiery and Underwear Industry 1907 to 1928. Bull. No. 504. 1929

Wages and Hours of Labor in the Men’s Clothing Industry 1911 to 1928. Bull. No. 503. 1929


Division of Labor Standards. “Chart Showing State and Federal Hours Limitations.” Oct. 15, 1939


Division of Public Contracts. Rulings and Interpretations under the Walsh-Healey Public Contracts Act: Rulings and Interpretations No. 1. 1937

Employment Standards Administration. Executive, Administrative and Profes-
Bibliography

sional Employees: A Study of Salaries and Hours of Work. May 1977 (written by Robert Turner)


_____. Minimum Wage and Maximum Hours Under the Fair Labor Standards Act: Groups with Historically High Incidences of Unemployment. 1991


_____. Report of the Secretary of the National War Labor Board to the Secretary of Labor for the Twelve Months Ending May 31, 1919. 1920


_____. Wage and Hour Division. Annual Report for the Fiscal Year Ended June 30, 1940. 1941

_____. Annual Report for the Fiscal Year Ended June 30, 1941. 1942

_____. "Executive, Administrative, Professional...Outside Salesman" Redefined: Effective October 24, 1940: Report and Recommendations of the Presiding Officer at Hearings Preliminary to Redefinition. [Oct. 10,] 1940 (Stein Report)


_____. "Findings and Recommendations of the Presiding Officer on the Objections Filed to the Survey Analyst's Recommendation of Job Classifications in the Motion Picture Industry." May 26, 1941

_____. First Annual Report of the Administrator of the Wage and Hour Division, United States Department of Labor, For the Calendar Year 1939. 1940

_____. Interim Report of the Administrator of the Wage and Hour Division For the Period August 15 to December 31, 1938. Jan. 1939

_____. Manual of Motion Picture Job Classifications. Feb. 1941


_____. Opinion Manual of the General Counsel Wage and Hour Division Department of Labor. Vol. 1. 1940

_____. 29 CFR Part 541: Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees: Proposed rule
Bibliography

______. Wage and Hour and Public Contracts Divisions. Earnings Data Pertinent to a Review of the Salary Tests for Executive, Administrative and Professional Employees as Defined in Regulations Part 541. Nov. 1955
______. Earnings Data Pertinent to a Review of the Salary Tests for Executive, Administrative and Professional Employees as Defined in Regulations Part 541. June 1969
______. Manual of Newspaper Job Classifications. Apr. 1943
______. The Employment of Women in Offices. Bull. No. 120, 1934. (by Ethel Erickson)
______. Office Work and Office Workers in 1940. Bull. No. 188. 1942
______. Office Work in Houston: 1940. Bull. No. 188-1. 1942
______. Summary of State Hour Laws for Women and Minimum Wage Rates. Bull. No. 137. 1936 (by Mary Pidgeon)
Economic Report of the President. 1964, 1994

1271
Bibliography

Expediting Naval Shipbuilding. H. Rep. No. 2257. 76th Cong. 3d Sess. May 22, 1940
Bibliography

Nov. 17, 1971


Fair Labor Standards Amendments of 1985: Hearings Before the Subcommittee on Labor of the Senate Committee on Labor and Human Resources. 99th Cong. 1st Sess. 1986


Federal Employee Fringe Benefits: Hearings Before the Subcommittee on Compensation of the Committee on Post Office and Civil Service House of Representatives. 90th
Bibliography

Bibliography


Hearing on H.R. 9822 to Expedite Naval Shipbuilding: *Hearings Before the Committee on Naval Affairs of the House of Representatives*. 76th Cong. 3d Sess., May 14-21, 1940. In *Hearings Before the Committee on Naval Affairs of the House of Representatives on Sundry Legislation Affecting the Naval Establishment 1942*. Committee Print No. 369. 77th Cong., 2d Sess. 1942

Hearing on Proposals to Simplify and Streamline the Payment of Employment Taxes for Domestic Workers Before the Subcommittee on Social Security and the Subcommittee on Human Resources of the Committee on Ways and Means House of Representatives 103d Cong., 1st Sess. Mar. 4, 1993

Hearing on Rewarding Performance in Compensation Act: *Hearing Before the Subcommittee on Workforce Protections of the Committee on Education and the Workforce House of Representatives*. 106th Cong., 1st Sess. 1999


Hearings on H.R. 6790, To Permit the Performance of Essential Labor on Naval Contracts Without Regard to Laws and Contracts Limiting Hours of Employment, to Limit the Profits on Naval Contracts, and for Other Purposes. In *Hearings Before the Committee on Naval Affairs of the House of Representatives on Sundry Legislation Affecting the Naval Establishment 1942*. 77th Cong., 2d Sess. 1942
Bibliography


Investigation of the National Recovery Administration: Hearings Before the Committee on Finance United States Senate. 74th Cong., 1st Sess. Mar. 7-13, 1935

Investigation of the National Recovery Administration: Hearings Before the Committee on Finance United States Senate. Part 5. 74th Cong., 1st Sess. Apr. 5-12, 1935


Mayer, Gerald. The "White-Collar" Exemptions to Overtime Pay Under Current and Proposed Regulations: An Economic Analysis. CRS. RL32349. Apr. 8, 2004


Method of Directing the Work of Government Employees: Hearings Before the Committee...
Bibliography

on Labor House of Representaives on H.R. 8665. 64th Cong., 1st Sess. Mar. 30-Apr. 4, 1916


National Emergency Relief: Hearings Before the Committee on Ways and Means House of Representatives on H.R. 12333. 72d Cong., 1st Sess. May 31-June 2, 1932


______. Codes of Fair Competition. 23 vols. 1933-35

______. The President's Reemployment Program. Bulletin No. 3. 1933


______. What the Blue Eagle Means to You. Bulletin No. 4. 1933


1277
Bibliography

8, 2004
Oversight of the Fair Labor Standards Act: Hearing of the Committee on Labor and Human Resources United States Senate. 104th Cong., 2d Sess. 1996
Pay Increases for Certain Civilian Employees and Members of the Uniformed Services: Message from the President of the United States. H. Doc. No. 170. 89th Cong., 1st Sess. May 12, 1965
Post Office Appropriations Bill, 1913: Hearings Before the Committee on Post Offices and Post Roads, United States Senate. 62d Cong., 2d Sess. 1912
Post Office Department Annual Reports for the Fiscal Year Ended June 30, 1913: Report of the...Postmaster General. 1913
Post Office Department Annual Reports for the Fiscal Year Ended June 30, 1914: Report of the... Postmaster General. 1914
Bibliography

No. 422. 66th Cong., 3d Sess. 1921
Proposed Amendment to the National Labor Relations Act: Hearings Before the Committee on Labor of the House of Representatives. 76th Cong., 1st Sess. July 26, 1939
Report of the Committee [on Education and Labor] of the Senate upon the Relations of Labor and Capital, and Testimony Taken by the Committee. Vol. 1. 1885
Report of the Select Committee on Immigration and Naturalization, and Testimony Taken by the Committee on Immigration of the Senate and Select Committee on Immigration and Naturalization of the House of Representatives Under Concurrent Resolution of March 12, 1890. H. Rep. No. 3472. 51st Cong., 2d Sess. 1891
Salary and Wage Administration in the Federal Service: Hearings Before the Committee on Civil Service United States Senate on S. 807. 79th Cong., 1st Sess. Apr. 25-May 2, 1945

1279

The Sales Incentive Compensation Act: Hearing Before the Subcommittee on Workforce Protections of the Committee on Education and the Workforce House of Representatives. Serial No. 107-17; 107th Cong., 1st Sess., June 7, 2001

Second Annual Report of the United States Civil Service Commission: January 16, 1884 to January 16, 1885. 2d ed. 1885

Secretary [of Labor]. Memorandum on the Eight-Hour Working Day: For the Members of the National War Labor Board. July 20, 1918


Six-Hour Day—Five-Day Week: Hearings Before the Committee on Labor House of Representatives on H.R. 14105. 72nd Cong., 2d Sess. Jan. 18-30, 1933

Sixth Report of the United States Civil Service Commission: July 1, 1888 to June 30, 1889. 1889

Stenographic Transcript of Hearings Before the Subcommittee No. 1, (Civil Service) of the Committee on Post Office and Civil Service United States Senate on S. 354. Mar. 7, 1951


Synopsis of the Decisions of the Treasury Department on the Construction of the Tariff, Navigation, and Other Laws for the Year Ended December 31, 1890. 1891

Temporary Additional Compensation for Civilian Employees for the Duration of the War: Hearing Before the Committee on the Civil Service House of Representatives on H. R. 7071 and H. R. 7144. 77th Cong., 2d Sess. June 2-11, 1942

Temporary Additional Compensation for Civilian Employees for the Duration of the War: Hearing Before a Subcommittee of the Committee on the Civil Service House of Representatives on H.R. 1860. 78th Cong., 1st Sess. Feb. 24-26, 1943


Thirty-Hour Week Bill. H. Rep. No. 124. 73d Cong., 1st Sess. 1933

Thirty-Hour Week Bill: Hearings Before the Committee on Labor House of Representatives on S. 158 and H. R. 4557. 73d Cong., 1st Sess. Apr. 25 to May 5, 1933

Thirty-Hour Week Bill: Hearings Before the Committee on Labor House of Represen-
Bibliography

tives on H.R. 7202, H.R. 4116, and H.R. 8492. 73d Cong., 2d Sess. Feb. 8-23, 1934
Thirty-Hour Work Week: Hearings Before a Subcommittee of the Committee on the
Judiciary United States Senate on S. 5267. 72d Cong., 2d Sess. Jan. 5-19, 1933
Thirty-Hour Work Week: Hearings Before a Subcommittee of the Committee on the
1935

Threatened Strike of Railway Employees: Hearing Before the Committee on Interstate

To Amend the Fair Labor Standards Act: Hearings Before the General Subcommittee on
Labor of the Committee on Education and Labor House of Representatives on H.R.

To Amend the Fair Labor Standards Act of 1938: Hearings Before the General Subcom­
mittee on Labor of the Committee of Education and Labor House of Representatives

To Clarify the Application of Contract-Labor Provisions of the Immigration Laws to In­

To Establish a National Health Program: Hearings Before a Subcommittee of the Com­
mittee on Education and Labor of the United States Senate on S. 1620. 76th Cong.,
1st Sess. 1939

To Expedite Naval Shipbuilding: Hearings Before the Committee on Naval Affairs United
States Senate on H. R. 9822. 76th Cong., 3d Sess. May 31-June 7, 1940

To Prohibit the Importation of Foreign Contract Labor into the United States, Etc. H.

To Regulate and Improve Civil Service of United States. S. Rep. No. 576. 47th Cong.,
1st Sess. May 15, 1882


To Regulate the Textile Industry: Hearings Before the Subcommittee of the Committee on
Labor House of Representatives. Pt. 3. 75th Cong. 1st Sess. 1937

To Rehabilitate and Stabilize Labor Conditions in the Textile Industry of the United
States: Hearings Before a Subcommittee of the Committee on Labor House of Repre­
sentatives on H.R. 9072. 74th Cong., 2d Sess. 1936

To Revise the Overtime Compensation Requirements of the Fair Labor Standards Act of
1938: Hearings Before the Subcommittee on Labor Standards of the House Com­
mittee on Education and Labor. 96th Cong., 1st Sess. 1980


Twenty-Fourth Annual Report of the Secretary of Labor for the Fiscal Year Ended June
30, 1936. 1936

Twenty-Seventh Annual Report of the Secretary of Labor for the Fiscal Year Ended June
30, 1939. 1939

1281
Bibliography

*Twenty-Eighth Annual Report of the Secretary of Labor for the Fiscal Year Ended June 30, 1940.* 1940


Works Progress Administration. *Government Aid During the Depression to Professional, Technical and Other Service Workers.* N.d. (1936)

United States State

1282
Bibliography


Secretary of State. Amendments to Constitution and Proposed Statutes with Arguments Respecting the Same To Be Submitted to the Electors of the State of California at the General Election on Tuesday, November 3, 1914. 1914

Annual Report of the Attorney General of the State of New York For the Year Ending December 31, 1912. 1913

New York State DOL. Annual Report of the Industrial Commissioner For the Twelve Months Ended on December 31, 1933. 1934

______. Annual Report of the Industrial Commissioner For the Twelve Months Ended December 31, 1936. 1937


______. Annual Report of the Industrial Commissioner For the Twelve Months Ended December 31, 1938. 1939

State of Oregon. Secretary of State. Proposed Constitutional Amendments and Measures with Arguments Respecting the Same to Be Submitted to the Electors of the State of Oregon at the General Election Tuesday, November 3, 1914. N..d. (1914)

[Oregon.] Secretary of State. Abstract of Votes: Cast in the Several Counties of the State of Oregon at the General Election held on the Third Day of November, A.D. 1914. Dec. 3, 1914

Secretary of State, State of Washington, A Pamphlet Containing a Copy of All Measures “Proposed by Initiative Petition,” Proposed to the People by the Legislature, “and “Amendment to the Constitution Proposed by the Legislature”: To Be Submitted to the Legal Voters of the State of Washington for Their Approval or Rejection at the General Election to be held on Tuesday, Nov. 3, 1914. N.d.


Treaties

1283
Treaty of Versailles. June 28, 1919
International Labor Organization. Convention Limiting the Hours of Work in Industrial Undertakings to Eight in the Day and Forty-eight in the Week. Nov 28, 1919
_____ . Forty-Hour Week Convention, 1935 (C47)
_____ . Reduction of Hours of Work (Public Works) Convention, 1936

Legislation

Canada


Czechoslovakia

Gesetz vom 19. Dezember 1918 über die achtstündige Arbeitszeit. Sammlung der Gesetze und Verordnungen des Çechoslovakischen Staates, Nr. 91 (1918)

European Union


France

Code du Travail. 2003
Loi du 23 avril 1919 sur la journée de huit heures. JORF 76:4266 (Apr. 25, 1919)

Germany

Anordnung über die Regelung der Arbeitszeit gewerblicher Arbeiter vom 23. November 1918. RGB I:1334
Arbeitszeitordnung vom 30. April 1938. RGB I:447
Aufruf des Rates der Volksbeauftragten an das deutsche Volk. Nov. 12, 1918. RGB I: 1303
Bibliography

Bekanntmachung der neuen Fassung der Arbeitszeitverordnung vom 14. April 1927. RGB I:110

Gesetz, betreffend die Beschlagnahme des Arbeits- oder Dienstlohnes. June 21, 1869. BGB des Norddeutschen Bundes 242

Gesetz betreffend die Invaliditäts- und Altersversicherung vom 22. Juni 1889. RGB 97

Gesetz betreffend die Krankenversicherung der Arbeiter vom 15. Juni 1883. RGB 73

Gewerbe Ordnung für das Deutsche Reich. July 7, 1900. RGB 871

Handelsgesetzbuch. May 10, 1897. RGB 219


Unfallversicherungsgesetz vom 6. Juli 1884. RGB 69

Verordnung über die Arbeitszeit vom 21. Dezember 1923. RGB I:1249

Verordnung über die neue Fassung der Arbeitszeitordnung vom 26 Juli 1934. RGB I: 803

Verordnung über die Regelung der Arbeitszeit der Angestellten während der Zeit der wirtschaftlichen Demobilmachung vom 18. März 1919. RGB. I:315

Versicherungsgesetz für Angestellte vom 20. Dezember 1911. RGB 989

Netherlands


Sweden


United Kingdom

6 Geo. 4, ch. 16 (1825)
1 & 2 Will. 4, ch. 37 (1831)
38 & 39 Vict., ch. 90, at 1016 (1875)

United States

Federal

Act of Aug. 19, 1841, 5 Stat. 440
Act of Dec. 21, 1861, 12 Stat 329
Act of July 16, 1862, ch. 184, 12 Stat. 587
Act of June 6, 1866, ch. 106, 14 Stat. 56
Act of Mar. 2, 1867, ch. 176, 14 Stat. 517
Act of June 25, 1868, ch. 72, 15 Stat. 77
Act of May 18, 1872, ch. 172, 17 Stat. 122

1285
Bibliography

Act of Mar. 3, 1873, ch. 234, 17 Stat. 566
Act of May 6, 1882, ch. 126, 22 Stat. 58
Act of Jan. 16, 1883, ch. 27, 22 Stat. 403
Act of Mar. 3, 1883, ch. 128, 22 Stat. 531
Act of June 26, 1884, ch. 126, 23 Stat. 60
Act of Feb. 26, 1885, ch. 164, 23 Stat. 332
An Act to Limit the Hours that Letter-Carriers in Cities Shall Be Employed per Day, ch. 308, 25 Stat 157 (1888)
Act of June 27, 1890, ch. 634, 26 Stat. 182
Act of Mar. 3, 1893, ch. 211, 27 Stat 675
Act of Jan. 12, 1895, ch. 23, 28 Stat. 601
Act of July 1, 1898, ch. 541, 30 Stat. 544
Act of June 2, 1900, ch. 613, 31 Stat 252
Act of June 25, 1910, ch. 434, 36 Stat. 865
Act of Aug. 24, 1912, ch. 389, 37 Stat 539
Act of Mar. 17, 1932, ch. 85, Pub. L. No. 61, 47 Stat. 67
Emergency Relief and Construction Act of 1932, ch. 520, Pub. L. No. 302, 47 Stat 709
Act of Mar. 28, 1934, ch. 102, Pub. L. No. 522, 48 Stat 509
Code of the Laws of the United States of America (1934 ed.)
Bibliography

Act of July 2, 1940, ch. 508, Pub. L. No. 703, 54 Stat 712
Act Establishing Overtime Rates for Compensation of Employees in the Field Services of the War Department, ch. 903, Pub. L. No. 873, 54 Stat 1205 (1940)
Act Authorizing Overtime Rates of Compensation for Certain Per Annum Employees of the Field Services of the War Department, the Panama Canal, the Navy Department, and the Coast Guard, ch. 168, Pub. L. No. 100, 55 Stat 241 (1941)
Joint Resolution Extending for Two Months the Period for which Overtime Rates May Be Paid, ch. 577, Pub. L. No. 728, 56 Stat 765 (Oct. 2, 1942)
Act to Provide for the Payment of Overtime Compensation to Government Employees, ch. 93, Pub. L. No. 49, 57 Stat 75 (1943)
Bibliography


State

1912 Ariz. Sess. Laws ch. 78, at 415
Ariz. Rev. Stat., Civil Code, § 3099 at 1039 (1913)
1935 Ark. Acts 150, at 424
1905 Cal. Stat. ch. DV, at 666
1909 Cal. Stat. ch. 181 at 279
1913 Cal. Stat. ch. 186 at 331
1913 Cal. Stat. ch. 352, at 713
1943 Cal. Stat. ch. 1041, at 2976
1949 Cal. Stat. ch. 208, at 438
1955 Cal. Stat. ch. 1787, at 3296
1971 Cal. Stat. ch. 111, at 147
1893 Colo. Sess. Laws ch. 113, at 305
1937 Colo Sess Laws ch. 113, at 413
Idaho Rev. Code 1909, § 1464 at 661
1936-37 Ky Acts (Extraordinary Session) ch. 7, at 54
1938 Ky Acts ch. 50, at 298
1941 Maine Laws ch. 294, at 380
Mass Laws 1935, ch. 200, at 189
Minn. Stat. §§ 177.23.7(6), 177.253-254 (2003)
1913 Mo. Laws at 399
1917 Nev. Stat. ch. 14, at 14
1921 NM Laws ch. 180, at 386
1848 NY Laws ch. 40, at 54
1853 NY Laws ch. 641, at 1223
1870 NY Laws ch. 385, at 919
1890 NY Laws ch. 388, at 741
1901 NY Laws ch. 521, at 1281
1909 NY Laws ch. 36, in Labor Law, Consolidated Laws, ch. 31, at 2038 (1909)
1912 NY Laws ch. 332, at 661
1921 NY Laws ch. 50, at 132
1935 NY Laws ch. 33, at 388
1935 NY Laws ch. 468, at 1028
1936 NY Laws ch. 117, at 388
1937 NY Laws ch. 142, at 580
1944 NY Laws ch. 705, at 1512
1947 NY Laws ch. 270, at 664
1956 NY Laws ch. 512, at 1234
1956 NY Laws ch. 539, at 1263
1966 NY Laws ch. 548, at 1293
1967 NY Laws ch. 615, at 1422
NY Labor Law §§ 190-93, 198-c (McKinney 2002)
NY Civ. Serv. §§ 130 and 134.1 (Consol. 2003)
1915 NC Sess. Laws ch. 148, at 232
1933 NC Sess. Laws ch. 35, at 27
1937 NC Sess. Laws ch. 409, at 849
1937 Ohio Laws Senate Bill 287, at 539
Bibliography

1915 Okla. Sess. Laws ch. 148, at 196
1919 Okla. Sess. Laws ch. 163, at 235
1913 Or. Laws ch. 102, at 169
1913 Pa. Laws ch. 466, at 1024
1937 Pa. Laws No. 322, at 1547
1937 Pa. Laws No. 567, at 2766
1938 SC Acts No. 943, at 1883
1913 Tex. Gen. Laws ch. 67, at 127
1913 Tex. Gen. Laws ch. 175, at 421
1915 Tex. Gen. Laws ch. 56, at 105
1896 Utah Laws ch. 72, at 219
1912 Va. Acts ch. 248, at 557

Administrative Opinion Letters

US DOL, WHD

WH-363, Nov. 10, 1975
WH-376, Mar. 5, 1976
Nov. 23, 1999 (1999 WL 33210905)
Nov. 19, 2002 (2002 WL 32406601 FLB-WHOL)

Judicial Opinions

Canada

Halbrick v. Sutherland, 14 Manitoba Reports 418 (1981)

Germany


United Kingdom

Bound v. Lawrence, [1892] 1 Q.B. 226
Heydon's Case, 3 Co. Rep. 7a, 76 Eng. Rep. 637 (1584)
In re National Health Insurance Act, 1924, [1934] 2 KB 265

United States

Aaron v. United States, 56 Fed. Cl. 98 (2003)
Bibliography

Abshire v. County of Kern, 908 F.2d 483 (9th Cir. 1990), cert. denied, 498 US 1068 (1991)
Adams v. United States, 27 Fed. Cl. 5 (1992)
American Federation of Government Employees v. Horner, 821 F.2d 761 (DC Cir. 1987)
American Federation of Government Employees v. Office of Personnel Management, 821 F.2d 761 (DC Cir. 1987)
Ex parte Aird, 276 F. 954 (ED Pa. 1921)
Albertson’s, Inc. v. United Food and Commercial Workers, 157 F.3d 758 (9th Cir. 1998)
In re All Star Feature Corp., 231 F. 251 (SDNY 1916)
Associated Press v NLRB, 301 US 103 (1937)
BA Properties, Inc. v. Government of the United States Virgin Islands, 299 F.3d 207 (3d Cir. 2002)
Backman v Bates, 279 AD 1115 (1952), aff’d, 305 NY 839 (1953)
Banker’s Surety Co. of Cleveland, Ohio v. Maxwell, 222 F. 797 (4th Cir. 1915)
Bothell v. Phase Metrics, Inc., 299 F.3d 1120 (9th Cir. 2002)
Bristor v. Smith, 157 NY 158 (1899)
Brock v Claridge Hotel & Casino, 846 F.2d 180 (3d Cir. 1988)
In re Carolina Cooperage Co., 96 F. 950 (ED NC 1899)
Coffin v. Reynolds, 37 NY 640 (1868)
Commissioner of Internal Revenue v. Jacobson, 336 US 28 (1949)
Conant v. Van Schaick, 24 Barbour 87 (1857)
Cowart v. Ingalls Shipbuilding, Inc., 213 F.3d 261 (5th Cir. 2000)
Craig v. Far West Engineering Co., 265 F.2d 251 (9th Cir. 1959)
Dalheim v. KDFW-TV, 918 F.2d 1220 (5th Cir. 1990)
Devoie v. Atlanta Paper Co., 40 F.Supp. 284 (ND Ga 1941)
Doe v. United States, 372 F.3d 1347 (Fed. Cir. 2004)
Donovan v. Burger King Corp., 672 F.2d 221 (1st Cir. 1982)
Donovan v. Burger King Corp., 675 F.2d 516 (2d Cir. 1982)
In re Ellis, 124 F. 637 (CC SDNY 1903)
Bibliography

Fanelli v. United States Gypsum Co., 141 F.2d 216 (2d Cir. 1944)
In Re Farmers Insurance Exchange Claims Representatives’ Overtime Pay Litigation, 300 F.Supp.2d 1020 (D. Or. 2003) (Lexis)
Field & Slocomb v. Consolidated Mineral Water Co., 25 RI 319 (1903)
First Nat. Bk. of Wilkes Barre v. Barnum, 160 F. 245 (MD Pa 1908)
Fleming v. Montgomery Ward & Co., 114 F.2d 384 (7th Cir. 1940), cert. denied, 311 US 690 (1940)
Freeman v. National Broadcasting Co., 80 F.3d 78 (2d Cir. 1996)
Gamboa v. Rubin, 80 F.3d 1338, vacated on other grounds sub nom. Gamboa v. Chandler, 101 F.3d 90 (9th Cir. 1996)
Geller v. Federal Communications Comm’n, 610 F.2d 973 (DC Cir. 1979)
Godcharles v. Wigeman, 6 A. 354 (Pa 1886)
In re Greenberger, 203 F. 583 (NDNY 1913)
Ex parte Gouthro, 296 F. 506 (ED Mich 1924)
In re Ho King, 14 F. 724 (D Or 1883)
Holy Trinity Church v. United States, 143 US 547 (1892)
IHC Health Plans, Inc. v. Cmm’r, 375 F.3d 1188 (10th Cir. 2003)
Klem v. County of Santa Clara, 208 F.3d 1085 (9th Cir. 2000)
Kormes v. Murphy, 9 AD2d 1003 (1959)
In re Lawsam Electric Co., 300 F. 736 (SDNY 1924)
Local 777, Democratic Union Org. Comm. v. NLRB, 603 F.2d 862 (DC Cir. 1978)
Lowell Sun Co. v. Fleming, 36 F. Supp. 320 (D. Mass 1940), vacated on other grounds, 120 F.2d 223 (1st Cir. 1941), aff’d, sub nom. Holland v. Lowell Sun Co., 315 US 784 (1942)
Marshall v. Erin Food Services, Inc. d/b/a Burger King, 672 F.2d 229 (1st Cir. 1982)
Martin v. Cooper Electric Supply Co., 940 F.2d 896 (3d Cir. 1991)
Martin v. Henderson, 255 P.2d 416 (Cal 1953)
Martin v. Malcolm Pirnie, Inc., 949 F.2d 611 (2d Cir. 1991), cert. denied, 506 US 905
Bibliography

(1992)
Martin v. United States, 10 Ct. Cl. 276 (1874)
McAllister v. Transamerica Occidental Life Ins. Co., 325 F.3d 997 (8th Cir. 2003)
McCandless v. United States ex rel. Rocker, 30 F.2d 652 (3d Cir. 1929)
Metropolitan Life Insurance Company v. New York State Labor Relations Board, 6 N.Y.S.2d 775 (Sup. Ct., Special Term, 1938)
Metropolitan Life Insurance Company v. New York State Labor Relations Board, 280 NY 194 (1939)
Mining Company v. Cullins, 104 US 176 (1881)
Moore v. Hannon Food Service, Inc., 317 F.3d 489 (5th Cir. 2003)
Mueller v. Reich, 54 F.3d 438 (7th Cir. 1995)
Murray v. Stuckey's Inc., 939 F.2d 614 (8th Cir. 1991)
National Employment Exchange v. Geraghty, 60 F.2d 918 (2d Cir., July 29, 1932)
NLRB v. Jones & Laughlin Steel Corp., 301 US 1 (1937)
National Treasury Employees Union v. Devine, 577 F. Supp. 738 (D DC 1983)
National Treasury Employees Union v. Devine, 733 F.2d 114 (DC Cir. 1984)
New Colonial Ice Co. v. Helvering, 292 US 435 (1934)
New York ex rel. Mizpah Lodge v. Burke, 228 NY 245 (1920)
New York ex rel. Watchtower Bible and Tract Society, Inc. v. Haring, 8 NY2d 350 (1960)
Packard Motor Co. v. NLRB, 330 US 485 (1947)
Paul v. Petroleum Equipment Tools, Co., 708 F.2d 168 (5th Cir. 1983)
People v. City of Buffalo, 11 NYS 314 (Sup. Ct., General Term, 5th Dept., 1890)
People v. Fernandez, 233 NYS2d 86 (City Ct of NY, Port Jervis, Orange Cty., 1962)
People v. Interborough Rapid Transit Co., 154 NYS 627 (Sup. Ct., App. Div. 1915)
People v. Myers, 11 NYS 217 (Sup. Ct., Spec. Term. NY County, Oct. 1890)
People ex rel. Cockcroft v. Miller, 187 A.D. 704 (Sup. Ct., App. Div., 1919)
People ex rel Tower v. State Tax Cmmn., 282 NY 407 (1940)
Phoenix Furniture Co. v. Put-in-Bay Hotel Co., 66 F. 683 (Cir. Ct. ND Ohio, 1895)
Piscione v. Ernst & Young, 171 F.3d 527 (7th Cir. 1999)
Poggas v. United States, 118 Ct. Cl. 385 (1951)
Post v. United States, 27 Ct. Cl. 244 (Mar. 7, 1892)
Reich v. John Alden Life Insurance Co., 126 F.3d 1 (1st Cir. 1997)
Bibliography

Reich v. Newspapers of New England, Inc., 44 F.3d 1060 (1st Cir. 1995)
Roney v. United States of America, 790 F. Supp. 23 (D DC 1992)
Rutlin v. Prime Succession, Inc., 220 F.3d 737 (6th Cir. 2000)
Simpson v. Cranston, 362 P2d 492 (Cal. 1961)
Strom v. Prince, 279 NYS 589 (Municipal Ct. NY, Borough of Manhattan, 1935)
Re Stryker, 158 NY 526 (1899)
Stryker v. Cassidy, 76 NY 50 (1879)
Teague v. Graves, 261 AD 652 (1941)
Tune v. Roselawn Florists, 1 WH Cases 784 (ND Tx. 1941)
Twenty Per Cent. Cases, 80 US (13 Wall.) 568 (1871)
United States v. Church of the Holy Trinity, 36 F. 303 (SDNY 1888)
United States v. Craig, 28 F. 798 (ED Mich. 1886)
United States ex rel. Deliannis v. Commissioners of Immigration at Port of New York, 298 F. 449 (2d Cir. 1924)
United States v. Gay, 95 F. 226 (7th Cir. 1899)
United States v. Laws, 163 US 258 (1896)
United States v. Martin, 94 US 400 (1877)
United States v. Post, 148 US 132 (1893)
United States v. Thompson, 41 F. 28 (CC SDNY 1889)
United States v. Townsley, 323 US 557 (1945)
Van Doren v. United States, 45 Ct. Cl. 476 (1910)
Wakefield v. Fargo, 90 NY 213 (1882)
Walling v. Yeakley, 140 F.2d 830 (10th Cir. 1944)
Webster v. Public School Employees of Washington, Inc., 247 F.3d 910 (9th Cir. 2001)
West Coast Hotel Co. v. Parrish, 300 US 379 (1937)
Wirtz v. Mississippi Publishers Corp., 364 F.2d 603 (5th Cir. 1966)

Administrative Adjudications

Aluminum Company of America, 9 NLRB 141 (1938)
American Locomotive Co., 92 NLRB 115 (1950)
Bell Aerospace, A Division of Textron Inc., 219 NLRB 384 (1975)
Bibliography

Bendix Aviation Corp., 32 NLRB 256 (1941)
Bendix Products Division of the Bendix Aviation Corp., 43 NLRB 912 (1942)
Chrysler Corporation and Society of Designing Engineers, 1 NLRB 164 (1936)
Citizen-News Co. v. Los Angeles Newspaper Guild, 21 NLRB 1112 (1940)
Eagle Grocery Co., 2 Decisions of the National Labor Relations Board 450 (1935)
Ford Motor Company (Chicago Branch) and United Office and Professional Workers of America, C.I.O., 66 NLRB 1317 (1946)
Fruehauf Trailer Co. of Kansas, 25 NLRB 766 (1940)
International Harvester Co., 2 NLRB 310 (1936)
In the Matter of Overtime Compensation for Canal Zone Government Employees, 54 Comp Gen 371 (1974)

Arbitration Decisions

Award of the National War Labor Board in the Case of Marine Workers' Affiliation of the Port of New York v. The Railroad Administration, Shipping Board, Navy Department, War Department, and Red Star Towing & Transportation Co., [Docket No.] 10 and 1036 (Feb. 25, 1919). In National War Labor Board: A History of Its Formation and Activities at 126, 127
New York Harbor Case 10 (Feb. 25, 1919). In US DOL, National War Labor Board. Report of the Secretary of the National War Labor Board to the Secretary of Labor for the Twelve Months Ending May 31, 1919, at 73. 1920

Newspapers, Periodicals, and Serials

American Federationist
American Socialist
Arkansas Gazette
Bulletin of the Public Affairs Information Service
Business Week
Chicago Tribune
Congressional Globe
Congressional Record
Daily Labor Report

1295
Bibliography

Daily Worker
Economist
Employment and Earnings
Editor & Publisher
Engineering News-Record
Evening Telegram (Salt Lake City)
Federal Register
Fortune
Government Standard
Guild Reporter
Journal of Commerce
Journal of the House of Representatives of the United States
International Herald Tribune
Labor Relations Reporter
Ledger
Literary Digest
Los Angeles Times
Monthly Report of the Federal Emergency Relief Administration
New Republic
New York Herald Tribune
New York Times
New-York Tribune
Newsweek
Office and Professional News
Official Bulletin
Official Journal of the European Communities
Official Opinions of the Attorneys-General of the United States
Official Register of the United States
Parliamentary Debates (House of Commons)
San Francisco Chronicle
Technical America
Time
Times (London)
United States News
UOPWA News
U.S. Law Week
U.S. News & World Report
Verhandlungen des Reichstages: Stenographische Berichte
Wage and Hour Reporter
Wall Street Journal
Washington Post

Documents on Websites
Bibliography


1297
Bibliography


Books and Articles


Altmeyer, Arthur. The Formative Years of Social Security. 1968


Bibliography


______. Recent Occupational Trends in American Labor: A Supplement to Occupational Trends in the United States. 1945


Association of American Law Schools. Directory of Teachers in Member Schools: 1937-38

______. Directory of Teachers in Member Schools: 1938-1939.

______. Directory of Teachers in Member Schools 1948-1949

______. Directory of Teachers in Member Schools 1949-1950

Baarslag, Karl. History of the National Federation of Post Office Clerks. 1945

Baeck, Ulrich, and Markus Deutsch. Arbeitszeitgesetz: Kommentar. 1999


Bambrick, Jr., James, Albert Blum, and Hermine Zagat. Unionization Among American Engineers. NICB Studies in Personnel Policy No. 155. 1956

Bambrick, Jr., James, and Harold Stieglitz. White Collar Unionization. NICB Studies in Personnel Policy, No. 101. 1949

Bibliography

Bellen, Eugene. *Cutting Clerical Costs*. 1931
Bollens, Leo. *White Collar or Noose? The Occupation of Millions*. 1947
Boltanski, Luc. *Les Cadres: La Formation d'un groupe social*. 1982

---

1300
Bibliography

Brooks, George. "Historical Background." In AFL-CIO. The Shorter Work Week 7-19. 1957


    ----. Wage and Hour Manual. 1943 ed.
    ----. Wage and Hour Manual. 1942 ed.


Cahill, Marion. Shorter Hours: A Study of the Movement Since the Civil War. 1932

    ----. U.S. Immigration Law and the Control of Labor: 1820-1924. 1984

California State Federation of Labor. Proceedings of the Thirteenth Annual Convention of the California State Federation of Labor Held at Germania Hall, San Diego, California October 7 to 12, 1912
    ----. Proceedings of the Fourteenth Annual Convention of the California State Federation of Labor Held at Old Armory Hall, Fresno, California October 6 to 11, 1913
    ----. Proceedings of the Fifteenth Annual Convention of the California State Federation of Labor Held at Moose Hall, Stockton, California October 5 to 9, 1914

Le Capitalisme monopoliste d'état: Traité marxiste d'économie politique. 1971

Cavaillé, J. La Journée de huit heures: le Loi du 23 avril 1919. 1919


Civil Service in Wartime. Leonard White ed. 1945


Cohen, Sanford. Labor Law. 1964

Commons, John, et al. History of Labour in the United States. 2 vols. 1918


Complete Presidential Press Conferences of Franklin D. Roosevelt. 25 vols. 1972


Bibliography

Corey, Lewis. *The Crisis of the Middle Class.* 1935

______. *The Decline of American Capitalism.* 1934


______. “When the Boss Works Late.” *NB,* 29(5):17-19, 114-15 (May 1941)


Cullinan, Gerald. *The United States Postal Service.* 1973


Dahrendorf, Ralf. *Class and Class Conflict in Industrial Society.* 1975 (1959)


______. *Das Arbeitsrecht: Leitfaden für Arbeitnehmer.* Vol. 2. 11th ed. 1998


Davies, Margery. *Woman’s Place Is at the Typewriter: Office Work and Office Workers 1870-1930.* 1982


de Vyver, Frank. “Regulation of Wages and Hours Prior to 1938.” *LCP* 6(3):323-32 (Summer 1939)


“Determination of Length of Workday in Metal Mines.” *MLR* 52(5):1254-55 (May 1941)


Downey, E. *Workmen’s Compensation.* 1924


Edson, Katherine. “Student Nurses and the Eight-Hour Law in California.” *Survey* 31(7):499-500 (Jan. 24, 1914)


Bibliography


*FDR’s Fireside Chats*. Russell Buhite and David Levy eds. 1993


______. *Proceedings 5th National Convention*. May 31-June 2, 1940

“Federal Eight-Hour Law and Executive Orders Pertaining Thereto.” *MLR* 7:193-96 (1918)


______. *Without Blare of Trumpets: Walter Drew, the National Erectors’ Association, and the Open Shop Movement*. 1903-57. 1995


Bibliography


Fraser, Jill. White-Collar Sweatshop: The Deterioration of Work and Its Rewards in Corporate America. 2001

Freund, Ernst. Standards of American Legislation. 1965 (1917)


Galambos, Louis. Competition and Cooperation: The Emergence of a National Trade Association. 1966


Garson, Barbara. All the Livelong Day: The Meaning and Demeaning of Routine Work 1981 (1975)

______. The Electronic Sweatshop: How Computers Are Transforming the Office of the Future into the Factory of the Past. 1988


Glasson, William. Federal Military Pensions in the United States. 1918


Goldthorpe, John, David Lockwood, Frank Bechhofer, Jennifer Platt. The Affluent Worker in the Class Structure. 1969


González Blanco, José P. Protection of Wages. 1959


Gottlieb, E. Overtime Compensation for Exempt Employees. AMA Research Study 40. 1960


Bibliography


Hanson, Elisha. “Official Propaganda and the New Deal.” *AAPSS* 179:176-86 (May 1935)


Herring, E. Pendleton. *Public Administration and the Public Interest*. 1936


Hoos, Ida. *Automation in the Office*. 1961

“Hours and Earnings in Manufacturing Industries, 1932 to 1939.” *MLR* 49(6):1466-69 (Dec. 1939)

Bibliography

Hourwich, Isaac. *Immigration and Labor: The Economic Aspects of European Immigration to the United States.* 1912
Howe, Louise. *Pink Collar Workers: Inside the World of Women's Work.* 1977
Hromadka, Wolfgang. *Das Recht der leitenden Angestellten im historisch-gesellschaftlichen Zusammenhang.* 1979
______. *Report of the General Executive Board to the 24th Convention.* May 27-June 8, 1940
Irish, Kerry. *Clarence C. Dill: The Life of a Western Politician.* 2000
Isserman, A. J. “How Wages Bill Will Function.” *GR,* Aug. 8, 1938 (8:2-3)
Jackson, Vincent. *Labour-Saving Office Appliances.* 1925
Kammerer, Gladys. *Impact of War on Federal Personnel Administration 1939-1945.* 1951
Klingender, F[rançois]. *The Condition of Clerical Labour in Britain.* 1935
Knights of Labor. *Record of the Proceedings of the Seventh Regular Session of the General Assembly, Held at Cincinnati, Ohio, Sept. 4-11, 1883*
Bibliography


Kodeks zakonov o trude: C prilozheinim obzora kratkikh raz'yanenii i vazhneishikh rasporyazhenii po trudu (Prakticheskii Kommentarii). E. N. Danilova comp. 1923


*Labor Looks at the White Collar Worker: Proceedings of Conference on Problems of the White Collar Worker, Industrial Union Department, AFL-CIO*. Feb. 20, 1957


Leffingwell, W. *Scientific Office Management*. 1917


Linder, Marc. *The Autocratically Flexible Workplace: A History of Overtime Regulation*
Bibliography

in the United States. 2002
______. Migrant Workers and Minimum Wages: Regulating the Exploitation of Agricultural Labor in the United States. 1992
______. Void Where Prohibited Revisited: The Trickle-Down Effect of OSHA’s At-Will Bathroom-Break Regulation. 2003

Lockwood, David. The Blackcoated Worker: A Study in Class Consciousness. 2d ed. 1989 (1958)


______. “Practice Regarding the Payment of Punitive Overtime Rates.” MLR 10(3):703-11 (Mar. 1920)


Martindale-Hubbell Law Directory. 72d, 85th, and 94th eds. 1940, 1953, and 1962


McDonald, William. *Federal Relief Administration and the Arts.* 1969

McGovern, Mary. “Wages and Hours.” *IW* 19(3):90 (Mar. 1938)

McKenney, L. “Effect of Shorter Work Week on Vacation Policies for Office Workers in 1934.” In AMA. *Office Management Series O.M.* 65:33-44 (1934)


Melman, Seymour. *Dynamic Factors in Industrial Productivity.* 1956


Miller, Scott. “Revitalizing the FLSA.” *HLEU* 19(1):1-124 (Fall 2001)


Millis, Harry, and Royal Montgomery. *Labor’s Progress and Some Basic Labor Problems.* 1938


________. *White Collar: The American Middle Classes.* 1967 (1951)

Mink, Gwendolyn. *Old Labor and New Immigrants in American Political Development:*
Bibliography

Union, Party, and State, 1875-1920. 1986
Mitford, Jessica. The American Way of Death. 1963
Moore, Wilbert. Industrial Relations and the Social Order. Rev. ed. 1957 (1946)


Municipal Year Book 1943. Clarence Ridley and Orin Nolting eds. 1943


Oppenheimer, Martin. White Collar Politics. 1985


“Overtime for Supervisors.” Personnel 20(2):60-6 (Sept. 1943)


Oxford English Dictionary. 1961 (1933)

Packard, Vance. The Status Seekers. 1959


The Papers of Walter Clark. 2 vols. Aubrey Brooks and Hugh Lefler eds. 1948-50

1310
Bibliography


______. *Mr. Republican: A Biography of Robert A. Taft*. 1972


"The Problem of Defining a 'Salaried Employee.'" *ILR* 37(6):764-87 (June 1938)


Public Papers and Addresses of Franklin D. Roosevelt: *The Year of Crisis*: 1933. Vol. 2. 1938

______. *Public Papers and Addresses of Franklin D. Roosevelt: The Court Disapproves*: 1935. Vol. 4. 1938


______. *Public Papers and Addresses of Franklin D. Roosevelt: 1938: The Continuing Struggle for Liberalism*. 1941

______. *Public Papers and Addresses of Franklin D. Roosevelt: 1940 Volume: War—And Aid to Democracies*. 1941

______. *Public Papers and Addresses of Franklin D. Roosevelt: 1943 Volume: The Tide Turns*. Samuel Rosenman ed. 1950


Public Policy and Policy Development: *A Case Book*. Harold Stein ed. 1952


Railroad Wages and Labor Relations 1900-1946: *An Historical Survey and Summary of Results*. Harry Jones, Executive Committee of the Bureau of Information of the Eastern Railways, ed. 1947

1311
Bibliography

"Regulation of Hours of Work in European Industry." *ILR* 18(1-5): 58-74, 216-40, 375-405, 574-610 (July-Nov. 1928)
______. "The Trainmen's Eight-Hour Day II." *PSQ* 32(3):412-28 (Sept. 1917)
Roosevelt., Franklin D. Selected Speeches, Messages, Press Conferences, and Letters. Basil Rauch ed. 1957
______. *The Age of Roosevelt: The Politics of Upheaval*. 1960
Schmidt, Folke. *Tjänsteavtalet*. 1959
Schuman, Tony. "Professionalization and the Social Goals of Architects: A History of the Federation of Architects, Engineers, Chemists, and Technicians." In *The Design Pro-
Bibliography

essions and the Built Environment 12-41. Paul Knox ed. 1988
“Should the Clerical Worker Be Included in Government Wage and Hour Regulation?” IW 19(3):68-70, 90 (Mar. 1938)
Should the 40-Hour Week Be Suspended?” MI 15(3): 110-18 (Mar. 15, 1948)
Snyder, Carl. White-Collar Workers and the UAW . 1973
Socialist Party. Are the Workers of America Opposed to an Eight-Hour Law? N.d. (1915)
_____., The Labor Movement in a Government Industry: A Study of Employee Organization in the Postal Service. 1924
Stahl, O. Glenn. Public Personnel Administration. 4th ed. 1956 (1936)
Stern, J. David. Memoirs of a Maverick Publisher. 1962
Bibliography

Stevens, Rosemary. *In Sickness and in Wealth: American Hospitals in the Twentieth Century.* 1989


Stuart, Mai. “Robots in the Office.” *NR* 95:70-72 (May 25, 1938)


Tindall, George. *The Emergence of the New South 1913-1945.* 1967


United Automobile Workers. *Proceedings of the 1941 Convention of the International Union, United Automobile Workers of America.* Aug. 4-16, 1941

_____. *Proceedings of the Eleventh Convention 1947 of the United Automobile, Aircraft and Agricultural Implement Workers of America (UAW-CIO).* Nov. 9-14, 1947

_____. *Proceedings Twelfth Constitutional Convention United Automobile, Aircraft and Agricultural Implement Workers of America (UAW-CIO).* July 10-15, 1949


United Office and Professional Workers of America. *A Summary of the Proceedings of the Third Constitutional Convention of the United Office and Professional Workers of America.* Aug. 31-Sept. 6, 1940


Unofficial Observer. *The New Dealers.* 1934


Walling, William. Progressivism—And After. 1914


Ware, Norman. The Industrial Worker 1840-1860: The Reaction of American Industrial Society to the Advance of the Industrial Revolution. 1974 (1924)

_____. The Labor Movement in the United States, 1860-1895: A Study in Democracy. 1929


Webster’s New Collegiate Dictionary. 1981

Webster’s Third New International Dictionary of the English Language Unabridged. 1993

Weeks, David. Overtime Pay for Exempt Employees. NICB Personnel Policy Study No. 208. 1967


_____. The Republican Era: A Study in Administrative History, 1869-1901. 1965 (1958)


Who’s Who in America. Vol. 34. 1966-67


Whyte, William. The Organization Man. 1956


Williams, Whiting. “Guarding the Good Will of White-Collar Workers,” FMM 102(12):117-8 (Dec. 1944)

Wilson, Woodrow. An Address to a Joint Session of Congress (Aug. 29, 1916). In The
Bibliography

Die wirtschaftliche und soziale Lage der Angestellten: Ergebnisse und Erkenntnisse aus der großen sozialen Erhebung des Gewerkschaftsbundes der Angestellten. Complete expanded ed. 1931
Witte, Eberhard (with the assistance of Rolf Bronner). Die leitenden Angestellten: Eine empirische Untersuchung. 1974
Witte, Edwin Witte. The Government in Labor Disputes. 1932
Wolman, Leo. “Labor under the NRA.” In America’s Recovery Program 89-103. Clair Wilcox et al. eds. 1934
“Working Hours in War Production Plants, February 1942.” MLR 54(5): 1061-65 (May 1942)
Woytinsky, W., and E. Woytinsky. World Population and Production: Trends and Outlook. 1953
Yoder, Dale. Labor Economics and Labor Problems. 2d ed. 1939 (1933)
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Postscript

On November 21, 2004, while the printers were in the process of printing this book, Lucia Stein Hatch, the daughter of Harold Stein—the person who contributed more to the text of the white-collar overtime regulations than anyone else—discovered in her garage in the course of moving to another house a file of her father’s papers. Although it was too late in the printing process to integrate this material into Chapters 9-13 and although they are in no way inconsistent with the analysis in those chapters, the light that two of these documents shed on the mindset of government officials in 1940 with respect to the overtime law is so brilliant that it would have been irresponsible not to insert their text into the book together with a brief commentary.

The author of the first document, titled “White Collar Workers Under the Fair Labor Standards Act” and dated January 30, 1940, is unknown, but a faint handwritten note in the upper right-hand corner indicated that it was addressed “To Stein.” The accompanying secretarial shorthand notes apparently reappeared as the following small typed note stapled to the document: “Harold: This is the memo that [Wage and Hour Division Associate General Counsel Rufus] Poole perverted for [Wage and Hour Administrator Philip] Fleming to take to the White House. J.R.”

The document is crucially important for: (1) underscoring the intensity of employers’ across-the-board opposition to any regulation of white-collar workers’ hours regardless of their salaries; and (2) focusing on the key definition of “administrative” employees, which, if separated from that of “executive” employees by the WHD, would accommodate employers’ demand for exclusion of white-collar workers, but which in the author’s view “would seem to be contrary to the intent of Congress” (although Stein and the WHD nevertheless issued such a definition).

White Collar Workers Under the Fair Labor Standards Act

I. Factors in favor of applying Act to white collar workers.

(a) Widespread unemployment in the white collar field. It should be noted that the problem of applying the Fair Labor Standards Act to white collar workers is purely a maximum hour and overtime problem since the minimum wage provisions do not have any real application in this field. White collar workers are largely unorganized. The application of the law to white collar employees tends to shorten hours, spread employment and relieve unemployment.

(b) The Act has been gratefully received by the large number of white collar workers who have either had their hours shortened or have received
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overtime compensation. These white collar workers are among the most vigorous supporters of the Act.

(c) Congress probably intended the Act to apply to white collar workers.

II. Factors against applying the Act to white collar workers.

(a) The application of the Act to white collar workers has engendered a great deal of opposition on the part of employers. This opposition will not be removed by exempting high salaried white collar workers alone.

(b) The Wage and Hour Division probably has the power to exempt white collar employees through a definition of the word “administrative” in Section 13(a)(1) although this would seem to be contrary to the intent of Congress.

III. The question to be weighed thus is: Do the advantages of applying the Act to white collar workers outweigh the irritations against the Act by employers who object to having the hours of work of their white collar workers regulated? The Wage and Hour Division feels that the answer is “Yes.”

The second document is a confidential memo that Stein wrote to his boss, Merle Vincent, the Director of the Hearings Branch of the WHD, on May 17, 1940, under the immediate impression of Nazi Germany’s overrunning of western Europe and President Roosevelt’s request to Congress the previous day of more than one billion dollars for rearmament. Stein’s memo also came two weeks after the defeat of the FLSA amendments in Congress and in the midst of the white-collar overtime regulation hearings that he held between April and July. Although Stein nowhere specifically mentioned white-collar workers, he stressed the enormous pressure that was being exerted to relax the FLSA’s “maximum hours requirements” (in reality, presumably, by raising the threshold triggering overtime pay) in general. Fearing an express statutory or de facto administrative abolition of the hours provision, Stein proposed that Roosevelt request that Congress drastically revise the Act to authorize the Wage and Hour Administrator “to set maximum hours for American industry according to the needs of the country.” The wartime political-economic strains underlying the proposal and the accompanying discussion strongly suggest that in formulating and recommending revisions to the white-collar overtime regulations during the following months Stein himself may have felt constrained to follow his own advice by implementing what he (incorrectly) regarded as an inevitable relaxation of the FLSA’s overtime provisions.
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CONFIDENTIAL

May 17, 1940

Mr. Merle D. Vincent, Director
Hearings Branch

Harold Stein, Assistant Director
Hearings Branch

The Wage and Hour Division and the War

Anyone capable of reading the headlines in the newspapers is aware of the fact that there already exists a great demand for the relaxation of the maximum hours requirements imposed by our Act for war industries and related industries. It takes no prophet to foresee the lightning-like increase of that pressure to the point where it cannot be resisted. I am informed that at the President's press conference today, he indicated off the record that he too is thinking along the same lines.

The requirements of Section 7 can be relaxed by Congress by the simple device of eliminating that Section from the Act or by eliminating it for a large segment of industry. This will leave us at the end of the war with an imperfect Act and with a long uphill fight to restore the maximum hours provisions at a time when they will be particularly necessary. Alternatively, the maximum hours provisions can be evaded by announcing a series of administrative interpretations. With the war crisis hanging over us, no court would think of imposing a more rigid limitation on hours than the one assumed as proper by the Administrator. As a single example, the Administrator might decide to adopt Mr. Andrews' Birmingham Doctrine: in other words, to say that the requirements of the Act are fulfilled if overtime work is paid for at a rate of not less than 45 cents per hour. This action would destroy Section 7 permanently for all industries except those in which persons earn less than 45 cents an hour and even in those for such persons as earn that princely sum — 45 cents per hour. I for one look upon this solution as a necessarily permanent abrogation of Section 7.

There is, I think, a way out. Up till last Friday, Wage and Hour legislation for this session of Congress was dead. The President's Message yesterday and the break through in France make it entirely possible to revive amendments to the Law — amendments but not entirely the same amendments. I suggest that with the present temper of Congress there should be little difficulty in amending the Act so as to allow longer hours in war industries. I think further that the President is in a peculiarly good position to ask that this legislation grant full discretionary power over hours to the Administrator of the Wage and Hour Division. Personalities count in these matters. How could anyone in Congress ask for better assurance of complete understanding of the needs of war industries than from the present Administrator — Philip B. Fleming, Colonel, Corps of Engineers, United States Army?
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Discretionary power over maximum hours imposes a work burden upon the Wage and Hour Division but it means that at the end of the war the Administrator, without recourse to Congress, will have the power and the duty to cut down working hours at a time when shorter hours will be a national necessity.

A war crisis means longer hours – it also means higher wages. I do not believe that any bloc in Congress could effectively object to a wide extension of wage coverage in the light of the present situation and particularly when coupled with a relaxation of hours.

The moral of the foregoing appears to me obvious. The session probably will last only about a month longer. Nevertheless, I feel that the President can go to Congress with a bill which embodies the procedural provisions, the Puerto Rican Exemption and the agricultural processing wage coverage of the original Norton Bill plus wage coverage for fish canneries, for intrastate factories that compete with interstate products, etc., provided that all these desirable provisions are tied on to a drastic revision of Section 7 empowering the Administrator to set maximum hours for American industry according to the needs of the country. I feel that the President can go to Congress with such a bill and get it through without substantial change.

I make no claim to being an expert on legislative matters. As an amateur I have felt free to speak with complete assurance. This memorandum is submitted to you for whatever it may be worth, since I know that if any of its suggestions find merit in your eyes, you will be in a position to pass them on in a form in which they will be of use.1

Finally on the biographical level two other documents from Stein’s papers were of overriding interest. First, after having read Stein’s white-collar overtime report, Wage and Hour Administrator Elmer Andrews informed Stein in an undated handwritten letter: “The job is perfectly swell and I know how hard it must have been on you.” Second, on October 11, 1941, two weeks after he had resigned from the WHD, Stein wrote Fleming that on October 9 the latter had informed him that someone had accused Stein of being a Communist. After consultation with Secretary of Labor Perkins the matter had been referred to the FBI, which “cleared” Stein. In response to Perkins’ offer to make a statement for the file, which was being closed, Stein wrote: “I am not a Communist and I have never been a Communist either by membership in the party or by direct or indirect affiliation of any sort. I have in fact been actively opposed to attempts of Communist groups to gain control of various parts of our American life.”

1 Asked at his press conference earlier on May 17 whether there was “[a]ny prospect of suspending the 40-hour week,” Roosevelt had replied: “I do not know but we probably need some legislation.” Complete Presidential Press Conferences of Franklin D. Roosevelt 15:345 (1972).