"Time and a Half's the American Way"

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

Marc Linder

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Part IV

The Fair Labor Standards Act: The Trinitarian Formula in the Age of White-Collar Industrialization

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 years⁴ 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 1938⁶—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


⁵Among 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).


⁷Remarks 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
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,

\(^8\)Three 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.

\(^9\)Fraser, 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. ... That 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

10 On 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).

11 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 1:1394, 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

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."18 Finally, two Su-
preme Court decisions in March and April of 1937 upholding the constitutionality
of a state minimum wage law19 and the NLRA20—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"21—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.22

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 Wyanski, 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 Wyanski 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

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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,"
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.

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27 A Bill To Safeguard and Promote the General Welfare, § 9(d).

28 E.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.


31 Confidential 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.”
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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."35

This brief, happenstational, haphazard, disjointed, opaque, and inconclusive dialog36 about one single group of white-collar workers—of which newspaper publishers sought to make the most at regulatory hearings in 194037—constituted the sole direct contribution to the subject during the entire hearings.38

One other comment appeared in a very lengthy filed statement submitted by Roy Cheney, the managing director of the Underwear Institute,39 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 month40—representing 70 percent of national production41 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


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.\(^{42}\) 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."\(^{43}\) 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.\(^{44}\) 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,\(^{45}\) and thus primarily focused on the bill's child labor provisions, attached to her internal memorandum to Perkins\(^{46}\) 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

\(^{42}\) *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..

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

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55 Sidney 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,


62Although 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."

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 “‘[e]mployee’...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.”

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:

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.

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.

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64 Fair Labor Standards Act of 1938, § 3(f), 52 Stat. at 1060.
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.
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.

68Fair 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.

69Fair 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.


71In 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. 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 *Independent Woman* on the question: "Should the Clerical Worker Be Included in Government Wage and Hour Regulation?" 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." 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: "The provisions as to maximum hours would seem to affect all workers, skilled and unskilled, in private employment regardless of rates of compensa-

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73 "Should the Clerical Worker Be Included in Government Wage and Hour Regulation?" *IW* 19(3):68-70, 90 (Mar. 1938).


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.”

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.
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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.80

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.81

Work-sharing in a period of enormous unemployment was doubtless one of the purposes of the FLSA’s overtime provision.82 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.83 That the Roosevelt


81Investigation 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.

82When 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).

83Linder, 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.  

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, 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.”

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).

Deborah Malamud, “Engineering the Middle Classes: Class Line-Drawing in the New Deal Hours Legislation,” 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.

See above ch. 6.

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-
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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93S. 2475, § 4(c) (75th Cong., 1st Sess., July 8, 1937).
94Benjamin 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.

95Complete 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.\textsuperscript{96} 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.\textsuperscript{97} As a result, a vastly increased proportion of employees worked hours above the previous code maximums.\textsuperscript{98} However, once the Great Depression

\textsuperscript{96}"Hours and Earnings in Manufacturing Industries, 1932 to 1939," \textit{MLR} 49(6):1466-69 at 1467 (Dec. 1939).

\textsuperscript{97}Harry Millis and Royal Montgomery, \textit{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.  

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.”  

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.  

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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).  


101 A 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....”\(^{102}\) 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.”\(^{103}\)

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 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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104Frank de Vyver, “Regulation of Wages and Hours Prior to 1938,” LCP 6(3):323-32, at 323-24 (Summer 1939).
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

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 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.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.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,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 then [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.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....¹¹⁵

Exclusion of white-collar workers from statutory protection against overreaching and overwork should have seemed especially out of place during the Great

¹¹⁵Walling, “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.  

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."  

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, which is discussed in greater detail below. A need for unionization

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117 "Overtime Work by Salaried Employees" at 90.
118 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.
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.\footnote{Overtime Work by Salaried Employees} 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.\footnote{NYT, Mar. 6, 1939 (14:6) (letter from Industrialist, Pittsburgh).}

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.\footnote{The White Collar Worker: Industry's Forgotten Men and Women, MI, Nov. 15, 1941, at 25, 26.}

Despite such realistic management appraisals of white-collar workers' situation

\footnote{Supplementary Compensation for Nonproduction Workers, 1963, tab. 28 at 63 (Bull. No. 1470, 1965).}
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-

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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 employee may work as many hours in a week as he and his employer may desire, if the employee 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 employee 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).
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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.123 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 half124—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.”125

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.’”126 Much later, at the 1940 WHD white-collar overtime hearings, Hanson asserted that

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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." 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." Within two weeks of the October 3 meeting Andrews was supposed to announce whether reporters were excluded professionals. 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.

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.

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

\[127\text{Official Report of the Proceedings Before the Wage and Hour Division of the Department of Labor In the Matter of: Definition of "Executive, Administrative, Professional" Employees and "Outside Salesman" at 282 (Washington, D.C., July 26, 1940), in RG 155--Wage & Hour/Pub. Contracts Div. Location: 530, 47:9-3-4/Boxes 10-14 ("1940 WHD Hearings Transcript"). In 1940 Hanson protested that: "The sending of hordes of inspectors into the field with the equivalent of the notorious writs of assistance so vigorously condemned and universally hated in our colonial period has upset the orderly and regular procedure of business." id. at 293. Hanson's theatrics were on display here, since the writ was an open-ended search warrant, whereas the WHD sought only wage and hour records.} \]

\[128\text{418} \]
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

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.
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

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136 Transcript 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 SSIC\(^ {142}\) 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.” \textit{Id.} at 6.

\(^{141}\)“Transcript of the Record of the Question and Answer Period Following the Speech of Elmer F. Andrews” at 10.

\(^{142}\)For additional information on the SSIC, see below ch. 11-12.

\(^{143}\)McMillan, 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,” \textit{NYT}, Dec. 11, 1964 (39:3).

\(^{144}\)E.J. McMillan, “Opening Remarks,” in \textit{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 represented.


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).


147"Wage Rules Issued on 4 Types of Help,” JC, Oct. 15, 1938 (1:6). It is unclear what the definitions were supposed to be amendments of. Sifton had been Andrews’ Deputy Industrial Commissioner in New York State. New York State DOL, Annual Report of the Industrial Commissioner for the Twelve Months Ended December 31, 1937, at 44 (State of New York Legislative Doc. No. 21, 1938).

148"Wage Rules Issued on 4 Types of Help” (12:3)
sented in these meetings was extremely helpful in working out the final product.\(^\text{149}\)

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,"\(^\text{150}\) 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....\(^\text{151}\)

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

\(^{149}\)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).
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Labor representatives included: Robert Watt, American Federation of Labor; John Abt, Amalgamated Clothing Workers (C.I.O.); Jonathan Eddy, Newspaper Guild (C.I.O.); and William C. Hushing, Legislative Representative of the A. F. of L.

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” peak organization, the Special Organizing Committee formed in 1919.

Notes:

152 In 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).

153 Whiteside had presided over several NRA code hearings; see above ch. 7.

154 A 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).

155 Abt, 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).

156 On Eddy, one of the founders of the Guild, see above ch. 7.


158 Gordon, 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.
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." 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.

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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.”

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.”

The regulations that the WHA issued on October 19, 1938, five days before the FLSA went into effect on October 24—\(^{169}\) and which had generated so much interest that *The New York Times* published them in full beginning above the fold on its front page\(^{170}\)—specified in part that:

**SECTION 541.1 Executive and Administrative.** The term “employee employed in a**
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 interwovenness 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

177Webster’s New International Dictionary of the English Language 34, 892 (1942 [1934]).
181Interim Report of the Administrator of the Wage and Hour Division For the Period August 15 to December 31, 1938, at IV-7-IV-8.
182Chester Barnard, The Functions of the Executive 6 (1968 [1938]).
183On “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]).

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For example, the chief executive George Washington was also an “adminis-
trator.”\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 \textit{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 em-
ployees.\textsuperscript{187} In 1930 the same firm proposed an unemployment benefit for its
employees classified as commercial, manufacturing, engineering, and administra-
tive.\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 Aluminium Ad-
ministrative Workers Union, Local 20661 (AFL), began meeting with the man-

\textsuperscript{184}White, \textit{The Federalists} at 97.

\textsuperscript{185}Leonard White, \textit{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....”\textit{ Id.} at 84.

\textsuperscript{186}White, \textit{The Federalists} at 475. White also prominently mentioned as within “the
literature of administration...Necker’s two-volume work, \textit{Du Pouvoir Exécutif}....”\textit{ Id.} at 477. In discussing the early nineteenth century, Wilfred Binkley, \textit{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,” \textit{NYT}, Mar. 16, 1924 (sect. 9,
at 8:7-8).

\textsuperscript{188}“Swope Tells Plan to Stay Job Crises,” \textit{NYT}, July 19, 1930 (17:1).

\textsuperscript{189}“U.S. Steel Reports First Operating Loss,” \textit{NYT}, Mar. 15, 1933 (25:8).

\textsuperscript{190}Before 1939 only two federal or state cases used the term “administrative em-
ployees” 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).
Management 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. 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...” 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....”

Even employers that pleaded for and proposed their own separate definitional category of administrative employees at the WHD’s white-collar overtime hearings

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192 Aluminum 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.

193 Fruehauf Trailer Co. of Kansas, 25 NLRB 766, 770 (July 27, 1940).

194 Bendix 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....”\(^\text{195}\) 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.\(^\text{196}\)

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.”\(^\text{197}\) The \textit{OED}, for example, defined an “administrator” in 1933 as “[o]ne who administers; one who manages,”\(^\text{198}\) while in \textit{Webster’s} it denoted “one who administers; a manager, esp. one who directs, manages, executes....”\(^\text{199}\) 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”\(^\text{200}\) more complex and less obviously an instrumentalist intrigue. After all, a few days before the regulations were published the \textit{Journal of Commerce} had Deputy WHA Sifton speaking not of “administrative employees,” but of “administrative officers,”\(^\text{201}\) 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.\(^\text{202}\) 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

\(^\text{195}\) “1940 WHD Hearings Transcript” at 197 (June 4) (Clarel Mapes, Mid-Continent Oil and Gas Association).

\(^\text{196}\) “1940 WHD Hearings Transcript” at 556 (July 29).

\(^\text{197}\) See above ch. 2.


\(^\text{199}\) \textit{Webster’s New International Dictionary of the English Language} at 34.

\(^\text{200}\) \textit{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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\(^{203}\)See below ch. 13.


\(^{205}\)See below ch. 15.

\(^{206}\)29 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

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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." \(^{211}\) 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." \(^{212}\)

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\(^ {213}\) 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’”\(^ {214}\)—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

\(^{212}\) \textit{Proceedings Fourth National Convention of the Federation of Architects, Engineers, Chemists & Technicians CIO} 87 (Dec. 9-11, 1938).
\(^{213}\) "CIO Charters National Union of Office & Professional Workers,” \textit{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,” \textit{The Ledger}, 3(6):4:1 (June 1937). A regional meeting in April in New York City of 13 locals, dominated by the BS&AU, 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,” \textit{NYT}, Apr. 26, 1937 (10:6-7). The inability of the New York City-based BS&AU 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,” \textit{NYT}, Aug. 16, 1937 (9:1).
\(^{214}\) "Lewis Hails New Union,” \textit{NYT}, June 3, 1937 (16:5).
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to liberalize the Wage and Hour Bill which will become apparent when the measure is put into effect." 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 workers 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.

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

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216Eugene 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 theretofore. “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.\textsuperscript{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.

\textsuperscript{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.