"Time and a Half's the American Way"

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

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Abortive Statutory Amendments to Exclude Even More White-Collar Workers: 1938 to World War II

There can be little dispute over this measure. The 40-hour maximum work week and the 40 cent per hour minimum wage are admirably modern. Few industries that can by any stretch of the imagination be called interstate...would have to increase their wage costs materially or revise their operating methods under its terms.¹

As the act took effect, the chief kick in the Northern industrial belt was against paying time and a half to salaried office workers.²

Although the legislative history of the FLSA during the Seventy-Fifth Congress (1937-38) is almost totally barren of explanation of Congress’s intent in excluding “any employee employed in a bona fide executive, administrative, [or] professional...capacity” from the act’s minimum wage and overtime provisions,³ the House debates during the Seventy-Sixth Congress (1939-40) over proposed amendments to this exclusion of white-collar workers shed virtually the only light on congressional intent that has ever emanated from the legislature.⁴ The focus of those proposals was a blanket exclusion of all employees paid a guaranteed (monthly) salary in excess of a certain fixed dollar amount. The targeted group was not definitionally confined to white-collar workers, but the requirement of a salary guarantee practically brought about that result. In any event, for the strata above that salary threshold, the duties tests would have been dispensed with. Thus the only opportunity that Congress ever seized to discuss the need for white-collar workers’ right to governmental protection against overly long workweeks was marked by an exclusive reliance on income level. The representativeness and

³See above ch. 9.
political usefulness of these deliberations may be questioned on the grounds that, despite two years of debate, Congress never enacted any legislation. However, this ineffectualness of the initiative, which fell victim to a complex web of party-political and sectional-geographic circumstances, was more than compensated for by the virtual absence of any congressional or even Roosevelt administration opposition to the shift to a single-criterion identification of exempt-worthiness.5

Employers' Hostility Toward Overtime Regulation in General

[I]t is quite true that excessive work even for two completely disassociated employers may also be detrimental to the well-being of workers. Perhaps Congress should have gone further and prohibited any employee from working over 42 hours in any event. This, however, it did not see fit to do. ... True, the detriment to well-being of workers exists as much in a case where overtime is worked and paid for as where it is worked without being paid for. Had it desired to do so, Congress might have absolutely forbidden the employment of any worker beyond a certain number of hours in a workweek. Presumably, however, it felt it more desirable to attempt to achieve the same result by merely imposing a penalty for the overtime hours....6

It was not made clear why a work-week longer than 42 hours with overtime payment is more conducive to “health, efficiency and general well-being of workers” than a work-week of the same length paid for at straight time. [T]he Wage and Hour Division finds that the Act allows an employee to work far longer than 42 hours a week without overtime pay at all. The trick is to hold more than one job, but work no more than 42 hours a week for any employer.7

One controversy that employers successfully unleashed as soon as the FLSA went into effect in 1938 focused on the scope of the overtime penalty in general—did it apply only to minimum wage workers and the minimum wage or also to

5For this reason the undocumented claim that “[e]xempting a broader range of employees on the basis of income alone...was not politically acceptable” is inexplicable. Deborah Malamud, “Engineering the Middle Classes: Class Line-Drawing in the New Deal Hours Legislation,” Michigan LR 96(8):2212-2321, at 2291 (Aug. 1998).
Abortive Statutory Amendments to Exclude Even More White-Collar Workers

higher-paid employees?—and its applicability to white-collar workers in particular.\textsuperscript{8} While the first Wage and Hour Administrator, Elmer Andrews, was busy advertising the FLSA as “‘a wonderful piece of legislation’” that “‘might better be called the better business act,’”\textsuperscript{9} employers seized the upper hand in this struggle by implanting in public discourse the notion of the FLSA as merely “‘the Magna Charta of marginal workers in America...’”\textsuperscript{10} Even liberal newspapers, such as the New York Post, lent credence to this image by characterizing the FLSA’s purpose as “put[ting] a floor under wages in some of the most shockingly underpaid industries...and...fix[ing] a limit to impossibly long hours.”\textsuperscript{11} In contrast, no counter-discourse succeeded in forging an equally compelling image conveying universal coverage. Consequently, the forces advocating broader applicability often fell back on legalisms, which were distinctly second-best rhetorical weapons.

One propagandist who at times rose above legalisms was the second Wage and Hour Administrator, Philip Fleming, a colonel in the Army Corps of Engineers, who succeeded Elmer Andrews in October 1939. The CIO was not favorably impressed with Fleming, who “is best known...to readers of sport pages” as graduate manager of athletics at West Point in 1936 and later president of the Eastern Football Association. More importantly, from the industrial unions’ point of view, “Fleming had an opportunity for contacts with leading industrialists” from 1924 to 1926 as member of War Department board on contracts.\textsuperscript{12} However, despite these perceived deficiencies, during the brief period until the accelerated military build-up in 1941, Fleming was continually engaged in “‘Selling’ Wage-Hour Law to Public” as “one of countless restrictions on free enterprise” and on a “market that always has functioned, and always must function, under a large number of restraints imposed by custom, voluntary organization, and law.”


\textsuperscript{10}Irving Dilliard, “United States Wage and Hour Law,” \textit{St. Louis Post-Dispatch}, May 12, 1940, reprinted in \textit{CR} 86:3293-95 (App.).


particular, Fleming sought to justify state intervention in the labor market as merely applying the principle of the “reservation price” to human labor that had guided businesses. In addresses to two employers organizations and a union in June 1940, he observed that during the depression:

The sale of new automobiles would have been greatly stimulated if they had been priced at $10. But such a price would have been far below the cost of the materials used in their manufacture. The result of a $10 price simply would have been the transfer of capital from Henry Ford, General Motors and others who manufacture automobiles, to those who use them.

Similarly, if all restrictions upon the labor market had been removed—if all labor legislation had been repealed and labor unions wiped out—much more labor might have been employed. But it is quite curious, I think, that while no sensible person expects automobile manufacturers to sell their wares at $10, many did advocate, and continue to advocate, that labor should be sold for any price it will bring, even though the result should be slow starvation. The worker’s “capital” is his ability to produce, which is directly related to his health. And many people, who seem to think it is all right to destroy the worker’s capital, would be horrified at the suggestion that the employer’s capital should be wiped out. A seller’s “reservation price”—a price below which he will not sell—is wholly acceptable to common sense where material goods are concerned. It is no less sensible where human labor is concerned.

The Wage and Hour Law introduces such a “reservation price” into the labor market. The “reservation price” can be maintained here only by legislation strictly enforced, because in periods of widespread unemployment the worker could be forced to accept a wage below the minimum needed to maintain his “capital”—his health and efficiency—and far less than his requirements as a participant in a democratic order.

To make a reservation price for labor effective, an alternative to starvation must be provided, else many workers will ignore the Act and accept any wage, however low. A socially acceptable alternative to starvation is provided in the form of relief, unemployment insurance and other forms of social security.

The Wage and Hour Law...has the immediate social utility of preventing “capital-destroying” sales of labor, and the long run utility of shifting the employment of labor to economically justifiable enterprises—from those that cannot exist without subsidies provided by the public in the form of charity or relief....

[T]he Wage and Hour Law is a restriction...upon the “free enterprise system as a way of life” for the employer. It is also a restriction upon the “free enterprise system as a way of life” for the employee. It very drastically interferes with his freedom to work for ten cents an hour. It limits his freedom to work 60 hours a week for $5.13

The chief flaw in this reservation-price analysis was the failure by the Wage and Hour Division or Congress to apply it to overtime in the sense that they

13"Selling’ Wage-Hour Law to Public,” WHR 3:257, 258 (June 24, 1940).
deemed the overtime premium as fair compensation regardless of the length of the workday or week. Consequently, by ignoring the impact of long hours on workers' physical or mental health (as well as on unemployment as a result of the cessation of work-spreading) so long as employers paid time and a half, the FLSA rendered invisible the undermining of the substance of workers' labor power that higher income could not prevent.

Even in this diluted and defective form, Fleming's position could scarcely have commended itself to many newspapers—which were hardly dispassionate observers since publishers were themselves challenging coverage of numerous employees such as reporters and news carriers14—which zealously agitated on behalf of employers' narrow conception of the FLSA's reach. The New York Times, for example, (erroneously) argued in July 1939 that even most congressmen who had voted for the FLSA thought it applied "only to submarginal labor. But by a combination of the so-called hours provisions with a joker inserted at the last minute by the conference committee the bill lent itself to a possible interpretation under which it fixed the hourly wages of all employees, no matter how high their compensation, except a few classes specifically exempted."15 In April 1940, as Congress was about to begin debating bills to expand exclusions from the law, the Times propagated a much more radical approach: "the present so-called hour provisions of the Federal law should be re-examined. In their present form they are really disguised wage provisions, which apply not merely to marginal or low-paid labor but to the overwhelming bulk of all labor. They have, moreover, been interpreted in such a way as in effect to set a different minimum wage for each employer." It despaired, however, that on the eve of a presidential campaign it was unlikely that any changes would be considered except the pressure-group type embodied in amendments to expand the exclusion of agricultural processing workers.16 And in October the newspaper was still complaining that the hours provision "brought under the act the overwhelming mass of all workers."17 The

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15"Mr. Andrews Changes His Mind," NYT, July 22, 1939 (14:2).
16"Amending the Wage-Hour Bill," NYT, Apr. 12, 1940 (18:2-3) (editorial).
17"Wage-Hour Rulings," NYT, Oct. 16, 1940 (22: 3). The original FLSA bill reflected the interpretation favored by the Times, but that language failed to survive enactment: "it shall be the policy of the Board to establish such minimum wage standards as will affect only those employees in need of legislative protection without interfering with the voluntary establishment of appropriate differentials and higher standards for other employees in the occupation to which such standards relate." S. 2475, § 12(6) (75th Cong., 1st Sess.,
New York Herald Tribune agreed that Congress intended to apply the act “only to sweatshop labor incapable of effecting through organization proper standards of its own devising.”18

Not coincidentally, the claim that the FLSA was designed to protect only “marginal labor” was coupled with undisguised hostility toward the statute altogether. Thus the Times repeatedly raised the issue of whether minimum wage regulation was the proper province of the federal government and would not be better left to the states. Since the whole point of federal intervention was to avoid a competitive race to the bottom and to act on behalf of workers in (especially southern) states whose legislatures would never enact any minimum wage legislation for men, the newspaper’s argument made little sense that devolution to the states would terminate “the effort to force a procrustean uniformity on wage rates throughout the nation regardless of great differences in local conditions.”19

The Herald Tribune’s call for repeal or devolution to the states was more concrete and incendiary and more accurately reflected non-sweatshop employers’ impatience with a statute they had not realized would cost them anything. Though designed to “prevent sweatshop conditions in the so-called marginal trades,” the law had been interpreted by the WHD in such a “fantastic” manner as to “govern all industry, marginal or other....” The editors illustrated what they viewed as the Division’s perverse enforcement policy by reference to a test case it had brought against a commercial building owner in New York City, which paid, pursuant to a union contract, its building service employees an average weekly wage of $29, “far above the minimum required” by the law, for a 48-hour week. Since the FLSA at the time set 42 hours as the threshold for overtime premiums, the WHD demanded back overtime wages: “to blazes with the fact that these toilers are not engaged in a marginal industry, that by collective bargaining they have made their own terms....” As written and administered, the FLSA, in the Herald Tribune’s view, would soon rival the NLRA in its destruction of free enterprise.20

May 24, 1937).


19“Amending the Wage-Hour Law,” NYT, Apr. 12, 1940 (18:2,3). Even the Washington Post, which did not promote devolution to the states, agreed editorially that a “great mistake was made initially in providing for comprehensive coverage of industries in all parts of the country. The establishment of uniform minimum-wage rates and maximum-hour standards was likewise a blunder.” It therefore urged revisions aimed at a “more workable and less rigid” law. “The Barden Bill,” WP, Apr. 18, 1940, reprinted in CR 86:2202, 2203 (App.) (1940).

20Wage-Hour Absurdities.”
Abortive Statutory Amendments to Exclude Even More White-Collar Workers

Seventy-Sixth Congress First Session: 1939

A major sore point, partly administrative, partly legal in origin, is the illiberality of exemptions from overtime provisions for persons in executive, administrative or professional positions.21

With the law barely in effect and despite the WHA’s “Christmas gift” to the first violators—Andrews had postponed prosecutions until after the holidays—22—the Republicans’ “stunning gains” at the November 1938 congressional elections and the strengthened position of anti-New Deal conservative Democrats23 galvanized pro-employer efforts to seek regulatory or statutory changes, which their diluted strength made it more difficult for labor’s supporters to resist.24 By the end of November, Georgia Democratic Representative Robert Ramspeck—a southerner who had supported the FLSA during the Seventy-Fifth Congress—criticized the hours provisions as inflexible and “suggested that it might be advisable to exempt all persons in higher wage brackets.” He recommended that the House Labor Committee review the FLSA to determine where the line should be drawn.25 A week later, Representative Fred Hartley (who in 1947 gained abiding notoriety for his role in radically amending the National Labor Relations Act) told the Toy Manufacturers’ annual convention that he would urge amending the FLSA to “eliminate the provisions on hours...on the ground that the hours regulations have an ‘adverse effect upon salaried employees.’”26 A few days later, The New York Times reported that on his cross-country tour Andrews had heard employers frequently refer to the overtime provision and “not understand why men who might be earning as much as $300 a week should receive time-and-a-half pay after forty-four hours of work in a week.... ‘Business men...see no reason why the men in the higher range of income should be classed with those who punch the time clock....

21Kelty, “‘Fair’ Labor Standards in Name Only” at 24.
24Even before the FLSA went into effect, the AFL had declared that it intended to seek perfecting amendments during the 1939 congressional session. “Andrews Sworn in on Wage-Hour Job,” NYT, Aug. 17, 1938 (5:3). It is unclear what the AFL had in mind.
26“Toy Makers Seek Spread in Orders,” NYT, Dec. 9, 1938 (38:1).
They say that these men can go fishing when they like and have other advantages.’’ The amendment that employers had most frequently proposed to him was that “salaried employees guaranteed $150 a week or more and who have vacations with pay should be excluded from the overtime provisions....” The intensity of employers’ objections sufficed to prompt Andrews to conclude that they “‘may lead to a suggestion to Congress’ that employees be classified by income.”27 (The following day it was reported that the figure Andrews had heard on his trip was $150 per month, not per week.)28 Andrews also recounted at his first press conference following that trip that businessmen also wondered why “a fellow not actually an executive or a professional, but perhaps engaged to the Boss’ sister” should be treated like time-clock punchers. He went on to state in answer to a question as to whether “this question of executive, professional, etc. needs Congressional clarification” that he “wouldn’t say that,” but that “there may be a certain salaried group—let’s take a man, suppose the Act provided that a man would have a guaranteed monthly income of $150 or $200; it might perhaps be a simplification to say that that class [of] worker might be excluded from the benefits of the Act if it could be written very definitely into the Act that that was a guaranteed monthly sum, and the man would not be docked, would be given a vacation with pay.” Andrews also clarified that he meant “the higher salaried people who still don’t come under executives....”29

With momentum for revision developing, the WHA announced at the end of December that he was “inclined to favor exempting” “permanent and comparatively well-paid workers...earning $300 to $400 a month...if it could be done ‘without causing any harm.’’’ The harm Andrews had in mind was clear: “‘Certainly no class of workers needs the protection of this law more than the low-paid white-collar group.... But I am talking about the worker with a guaranteed monthly wage of $300 to $400 a month who has a certain amount of discretion and who does not have to punch a time clock.’” Andrews, who expressed the hope that a regulatory rather than a legislative solution could be found, announced that he had asked his legal staff to “determine whether well-paid groups...might be exempted from the overtime provisions by amending the definition of ‘administrative’ and ‘executive’ employees.” If it was found that the definitions were too narrow, excluding many who should have been covered (i.e., by the exclusion), he might hold hearings.30

29“Proposal to Amend FLSA to Exempt Salaried Aides,” WHR 1:410 (Dec. 19, 1938).
30“May Ease Wage Act on Well-Paid Jobs,” NYT, Dec. 23, 1938 (40:4-5). See also the account of Andrews’ speech at the Brookings Institution and a press conference on
Abortive Statutory Amendments to Exclude Even More White-Collar Workers

In his statutorily required report to Congress\(^3\) in mid-January 1939 Andrews reviewed under the heading “Administrative Problems”\(^4\) a “problem on which sufficient evidence has not yet come to hand to permit a comprehensive discussion but which has been of great interest to employers throughout the country...the application of the statute to certain high-salaried employees who receive, say, $400 a month or more.” Although he professed that he had defined the three white-collar terms, “after careful...consultation with employers and employees, in a manner which is consistent with...definitions of similar terms in State Legislation,” some employers had contended “that certain employees who do not fall within these categories of administrative and executive or professional as defined are, nevertheless, paid rather high salaries and are engaged steadily in work which is of a very responsible nature.”\(^5\) Because neither the number of such employees nor the extent to which the overtime provision might impose changes on firms’ personnel policies was known, Andrews had asked all interested employers “to furnish a detailed description of the nature of their individual problems and suggestions for action which might be taken for meeting this general situation.” Without ever identifying the “problem” inherent in regulating the overtime work and pay of relatively well-paid non-bosses, Andrews informed Congress that after sufficient material had been submitted to clarify the situation, it might be possible to present a definite recommendation. Nevertheless, he advised the legislature that “all parties” had agreed that, in connection with any contemplated statutory amend-
Abortive Statutory Amendments to Exclude Even More White-Collar Workers

ments, "any line of demarcation placing these high-salaried employees into a separate category for special treatment would have to be drawn very carefully in order not to diminish the protection which the Act now furnishes to the vast majority of clerical employees."34

Then in late January 1939 Andrews announced that he would schedule regulatory hearings within a few weeks. However, the momentum receded again in February, when he stated that he was putting off the scheduling because he interpreted a lack of interest in the hearings as an absence of any need for the exemption of high-salaried employees.35

In the meantime, employers, and especially the National Association of Manufacturers, which had been campaigning against the applicability of the FLSA's overtime provision to non-minimum-wage workers since the law went into effect,36 began focusing specifically on white-collar employees. NAM's general counsel, John Gall, argued in an address to the Pennsylvania State Chamber of Commerce on February 16 that if administrative interpretations of the FLSA were sustained by courts, important congressional changes in the act would be needed:

[T]here should be exempt from the overtime provisions of the law all office, clerical, supervisory and technical employees being paid on a full-time salary basis of over a certain amount. Obviously if the purpose of the law is to protect the under-privileged, that can be accomplished without regulating the hours and overtime compensation of those receiving satisfactory compensation on a salary basis. ... Consideration should be given to the averaging of work hours over longer periods. ... It is questionable whether there is any necessity for fixing the maximum work week at less than 44 hours. It has a definite tendency to encourage decreases in employment and the substitution of technological improvements in order to avoid the payment of overtime rates. Impartial studies indicate that even on a 44-hour basis we would not produce the goods necessary to sustain and improve our material standard of living. Certainly there can be no basis from the standpoint of health for reducing the maximum work week below 44 hours.37

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34Interim Report of the Administrator of the Wage and Hour Division For the Period August 15 to December 31, 1938, at IV-8.
36Marc Linder, The Autocratically Flexible Workplace: A History of Overtime Regulation in the United States 263-78 (2002). Similarly, during his first Senate campaign a few months after the FLSA had been passed, Robert Taft supported a minimum wage law, but opposed national regulation of working hours. James Patterson, Mr. Republican: A Biography of Robert A. Taft 175 (1972).
Abortive Statutory Amendments to Exclude Even More White-Collar Workers

Based on the initial experience with the FLSA, the NAM also developed a list of grievances pertaining to the economic effects of the white-collar regulations. Its secretary and economist, Noel Sargent, itemized these complaints in an issue of Law and Contemporary Problems, a prestigious scholarly law journal, dedicated to the new wage and hour law:

(1) The Act has resulted in forcing payment of overtime to clerical and office workers who customarily work relatively short hours, and have steady employment, but occasionally must work longer hours, as in getting out reports and audits. Many covered employees should, as a matter of fact, be excluded. ...

(2) The Act has resulted in increased use of time-clocks in industrial offices, a tendency which is both resisted and regretted by many leading personnel experts. ...

(4) The Act has prevented technical workers from working voluntarily weekends or evenings in order to increase their knowledge and efficiency; practically every large company has many cases of this kind.

(5) Many companies who have paid certain groups of workers on a weekly, or even monthly, basis are being compelled to employ them on an hourly basis; this is resented by the employees.

Five days after Gall’s speech, a radical amendatory bill was introduced in the House by Georgia Democrat Edward Eugene Cox, a racist and “bitter foe” of the New Deal who opposed the FLSA and by 1939 was “the real boss of the powerful House Rules Committee.” It would have excluded, regardless of salary level, “any clerical employees, such as bookkeepers, stenographers, pay-roll clerks, auditors, cost accountants, purchasing agents, statisticians, or other office help regularly employed on a straight salary basis and given vacations with pay.” A week later, Texas Democrat Albert Thomas—who opined that “the primary purpose of the act is to eliminate the sweat shop and child labor.... When you get away from those objectives your get away from the purpose of the act”—introduced a bill in the House that would have excluded “clerical employees, such as bookkeepers,
Abortive Statutory Amendments to Exclude Even More White-Collar Workers

Auditors, statisticians, and all other office help,” as well as writers and reporters, “all of whom are employed on an annual salary of $1,200 or more, with paid annual vacations, with no deductions in pay for reasonable sick leave.” Then on March 31 Arkansas Democrat John Miller introduced a bill in the Senate containing language virtually identical to Cox’s.46

At the beginning of March, Andrews, once again, stated that he favored settling the problem of the FLSA’s application to “high-salaried ‘white collar’ workers” by legislative amendment rather than administratively because Congress could deal with the problem “in a more clean-cut way by amendment of the statute than would be possible for me by administrative amendment of our definitions.” Consequently, instead of the administrative hearing that he had originally contemplated, he was weighing the alternative of proposing to Congress the consideration of an amendment. Despite being garbled in the Times report, Andrews’ concern clearly focused on the WHD’s failure to exclude non-supervisory administrative employees: “The main issue appeared to be whether the ‘white collar’ workers in question had sufficient administrative responsibility to allow the overtime exemptions to apply to them.” Nevertheless, House Labor Committee chairman Mary Norton had no plans for holding a hearing; in the meantime she was waiting to hear from Andrews as to whether he could adjust matters administratively or preferred legislation.47

Even at this early stage in the legislative process white-collar workers began expressing intense concern about the WHA’s acquiescence in employers’ demands for more extensive exclusions. On March 13, the General Aniline Employees’ Organization of New Jersey sent a letter, accompanied by a petition signed by 600 members, to their senator, William Barbour, who caused it to be printed in the Congressional Record. The employees, who may have been unaware that Andrews had mentioned salary floors in excess of the one they recommended, wrote:

The Federal wage and hour law was designed to protect all workers, including so-called “white collar” or salaried men, against excessive working hours without adequate compensation and to spread employment.

45H.R. 4645 (76th Cong., 1st Sess., Mar. 1, 1939). The bill’s unorthodox wording converted the salary clause, which was presumably intended as a condition, into an empirically false description.
46S. 2022 (76th Cong., 1st Sess., Mar. 31, 1939). The white-collar amendment was section 1 of a longer FLSA bill, whereas Cox’s bill consisted only of this section.
47“Andrews Favors Wage-Hour Change,” NYT, Mar. 3, 1939 (19:3). Andrews said that although the American Newspaper Guild and the publishers held opposing views on the inclusion of reporters, since neither had asked for a ruling, there had been no decision.
Abortive Statutory Amendments to Exclude Even More White-Collar Workers

It is the announced intention of Administrator Elmer Andrews to ask Congress to amend the law to exempt "white collar" workers from its provisions, and a bill has already been introduced by Representative Thomas of Texas to exempt all "white collar" workers earning $1,200 or more annually and [sic] which is aimed specifically at the exemption of all office workers. This bill would destroy the design and intent of the law.

Therefore, we, the undersigned "white collar" workers (salaried)...and nonmembers of the salaried group of this organization advise you of our firm conviction that any bill to amend the wage-hour law to exempt "white collar" men should specifically apply only to those earning $2,500 or more annually and that no amendments should be adopted to defeat the ultimate object of the law to standardize the workweek at 40 hours.48

Although the workers did not anticipate that their own employer would try to take advantage of any FLSA changes "to extend the regular workweek for salaried workers without compensation," they did recognize that it might "be compelled to do so" if its competitors did.49 (Ironically, General Aniline Works, Inc., was a subsidiary of the powerful German chemical oligopoly, I.G. Farben, which in October 1939 had the subsidiary change its name to General Aniline and Film Corporation, which I.G. Farben then adopted as its U.S. name in order to avoid anti-German "prejudice"; after Germany declared war on the United States, the federal government seized the firm.)50

By mid-March, Andrews was able to rely on a WHD background memorandum on "High Salaried Employees" supporting his proposed legislative amendment.51 The memo, which expressed the belief that the salary level for the

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49 CR 84:2803.
50 "Chemical Unit Changes Name," NYT, Oct. 31, 1939 (40:2).
51 Memo. on High Salaried Employees, in NA, RG 174--Dept of Labor, Records of Chas. McLaughlin, Location: 530, 48:44:5/Box 9--As Tabbed. The overall memorandum was untitled, but dealt with the proposed legislative amendments, which were also appended in draft bill form. Only the first four and a half pages of the 15-page memo bore the title "High Salaried Employees." The exact provenance of the memo is unclear. The copy in the National Archives was attached to a note (on DOL letterhead), dated March 17, 1939, from Miss [Mary] LaDame, who was special assistant to Secretary Perkins, to Mr.[Charles V.] McLaughlin, who as Assistant Secretary of Labor was the second-highest ranking DOL official: "As a result of your inquiry yesterday, I telephoned Mr. Andrews for a copy of the proposed amendment to the Fair Labor Standards Act. He had left, but Miss Pope, his assistant, said she would send me down material. The attached has come. If you need other copies, I suggest you contact Miss Pope." Attached was also "A Bill To amend the 'Fair Labor Standards Act of 1938,'" which resembled, but was not identical with, the bill that Norton introduced on March 29. In particular, it left blank the salary level in the revision of the white-collar exclusion. § 4 at 3. Andrews promptly passed the
Abortive Statutory Amendments to Exclude Even More White-Collar Workers

blanket exclusion of employees with a guaranteed salary “should be not more than $250 and not less than $200,” pointed out that the existing exemption applied to employees “who have duties involving a combination of management, direction and discretion” and a salary of at least $30 a week. It then went on to explain why employers were dissatisfied with the scope of that exclusion, although it also seemed to place the WHD’s imprimatur on these complaints:

There are...many employees in the higher salaried group, whose functions are not clearly managerial or supervisory, to which this exemption is not applicable. The inclusion under the Act of this class of employee has given rise to many administrative problems and numerous protests from employers. ... In some cases, a few responsible but non-supervisory salaried workers are required to fit their hours of work to the varied requirements of business. During emergencies they may work for very long hours, while during slack periods they may feel free to leave early or be absent altogether without regard to standard working periods. If such responsible workers are guaranteed relatively high earnings, regardless of their exact working hours, the requirement that they be paid at overtime rates during the period of long hours may be an annoyance to all persons concerned, without contributing to any of the purposes which the Act was designed to achieve.\(^52\)

Having accepted at face value, without any representative and independently gathered evidence, employers’ claims that such workers did not systematically work long hours all year round, the WHD was, in effect, condoning the very hours-averaging that the NRA had condemned and finally prohibited in new codes because it drastically impeded transparency and labor standards enforcement.\(^53\) Without explaining why levels of responsibility should play any part in determining an entitlement to protection against overwork—after all, it is conceivable that great responsibility was accompanied by debilitating nervous tension—the memo went on to argue that § 13(a)(1) “does not meet the situation of high-salaried workers whose work is responsible and whose hours are flexible,”\(^54\) but who were neither managers, supervisors, nor professionals. Unfortunately, a dysfunctional tension and perhaps even contradiction could be discerned as resulting from any attempt to propitiate employers by revising the regulatory definitions, which did

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\(^{52}\)Memo. on High Salaried Employees at 1.

\(^{53}\)See above ch. 7.

\(^{54}\)Memo. on High Salaried Employees at 2.
not appear to offer a satisfactory solution. Among the types of employees as to whom it is most frequently urged that subjecting them to a time clock is irritating and undesirable and [sic; must be "are"] private secretaries, executive assistants, cashiers, buyers, and, in general, higher paid clerical workers. Any form of description, used in an administrative definition, which would exempt such persons would also probably exempt the great mass of clerical workers or else the definition would be impossible to interpret in any given case. Thus, a relaxation of the existing definition might seriously undermine the broad coverage of the Act intended by the Congress.55

To be sure, the incumbents of several of the named occupational groups hardly appeared to be ones who could come and go as they pleased at the workplace. Not only did work-spreading appear plausibly applicable to them, but the WHD offered no evidence whatsoever that, unlike other workers, they were not harmed by long hours.

To undergird empirically the claim of the “importance of retaining the mass of clerical workers under the Act,” the memo referred to results of recent censuses in Michigan and Pennsylvania: Half of 247,000 male and female clerical workers in Michigan earned less than $1,000 in 1934; among 150,000 clerical workers in Pennsylvania, 42 percent earned less than $17.50 per week in February 1934 in contrast with 56 percent of 73,000 female clerical workers. Since salaries in those two states were somewhat above the national average, it was “clear that a large proportion of all clerical workers earn less than the ultimate standard of $16.00 per week” under the FLSA.56 Against this distributional background, the memo then sought to justify a monthly salary cut-off in the range of $200 to $250:

It is well known that the hours of work of many thousands of clerical employees are far in excess of the maximum hours standard set by the Act. Indeed, it may be said that the benefits of the hours provisions of the Act are as necessary and as beneficial to the ordinary clerical workers as to almost any other class of employees subject to the Act.

By amending the Act to exempt all regular salaried workers who are guaranteed more than a stated salary, it should be possible to keep the mass of clerical workers under the Act while avoiding the unnecessary avoidance of applying the Act to high-salaried persons with regular income but irregular hours. An exemption on the basis of monthly salary should also be satisfactory to those who are asking for an exemption of higher-salaried workers, as such class of employees are generally employed, or can easily be employed, on a monthly basis.

An amendment to exempt salaried workers who earn more than a stated salary each month will afford the Administrator more time to concentrate on the problem of raising the wages and improving the hours and other conditions of exploited workers. The reasons

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55Memo. on High Salaried Employees at 2.
56Memo. on High Salaried Employees at 2.
which dictated the enactment of Federal minimum wage and maximum hour standards for lower-paid workers are inapplicable to these higher-salaried employees. Their health and efficiency are seldom jeopardized by poor working conditions and the conditions of their employment do not lead to labor disputes or constitute a burden or obstruction to interstate commerce.\textsuperscript{57}

Ominously, the memorandum thus embraced the basis of employers' attack on the application of overtime regulation to higher-salaried workers. Why long hours did not impair the health of higher-paid white-collar workers, however, the memo did not explain; it failed even to raise the issue of work-spreading. But it did try to explain how it had calibrated the salary level:

A guaranteed monthly salary of either $200 or $250 would be a satisfactory basis of exemption from the Act. A lower figure than $200 would undoubtedly exempt a considerable number of salaried workers to whom the overtime benefits of the Act should extend. Exemption of all salaried workers who receive $200 or more or $250 or more a month would exclude from the Act...a considerable proportion of those whose work requires flexibility of weekly hours and whose salaries are commensurate with their responsibility.\textsuperscript{58}

Precise data on the proportion of workers who would be excluded by these thresholds were fragmentary, but estimates could be based on the aforementioned data for Pennsylvania, where $200 would have exempted less than 3 percent of non-executive, non-professional clerical workers, while less than 1 percent would have been excluded by a $250 salary. Disaggregated by gender, the $200 cut-off would have applied to 5 percent of male clerical workers, but less than 0.5 percent of females; $250 would have excluded less than 1 percent of males. Broken down by occupation, $200 would have exempted nearly one-third of male secretaries, but less than one-twentieth of male stenographers, less than 2 percent of female secretaries and hardly any female stenographers. Among males, the following proportions would have been exempted at $200/$250: one-fifth/one-tenth of accountants; one-thirtieth/one one-hundredth of bookkeepers; one-fourth/one-seventh of cashiers; one-tenth/one-thirtieth of tellers; one-fourth/one-seventh of editors-authors-reporters; and one-eighth/one-fiftieth of proofreaders.\textsuperscript{59} The memorandum therefore concluded that the foregoing data appeared "to justify an exemption of salaried workers who regularly earn $200 per month or more."\textsuperscript{60}

\textsuperscript{57}Memo. on High Salaried Employees at 3.
\textsuperscript{58}Memo. on High Salaried Employees at 3.
\textsuperscript{59}Memo. on High Salaried Employees at 4.
\textsuperscript{60}Memo. on High Salaried Employees at 5.
Abortive Statutory Amendments to Exclude Even More White-Collar Workers

The vital point about this exclusively salary-level-oriented approach is that the WHD recognized the exclusionary dangers inherent in the alternative of trying to reconceptualize the category of "administrative" employees. Because the Division and Andrews were acutely aware of the linguistic difficulties, if not impossibility, of surgically segregating out the subgroups that they believed deserved protection, they chose to draw the line according to income alone; this criterion was almost preordained to attain monopoly status since the WHA appeared tacitly to dismiss work-spreading and protection from the harms of long hours as operative concerns for higher-salaried office workers. Whatever the failings of this approach as sociology of work, at least its adherents recognized that once they began excluding non-boss administrative employees, they ran the risk of exposing run-of-the-mill clerical workers to the kind of employer overreaching that they divined Congress had been seeking to suppress. In contrast, when, the following year, the WHD plunged into writing duties tests to identify the administrative employees who could safely be left to their own devices, it abandoned these earlier self-doubts—despite the fact that by also adopting the same $200-a-month salary level, it theoretically made misclassification less probable.61

After an executive session of the House Labor Committee on March 15, Andrews announced that he was prepared to recommend several amendments, including exemption from the overtime provision of all salaried employees with salaries in excess of $200 or $250 per month. House Labor Committee chairman Mary Norton, who regarded the FLSA as one of her greatest achievements and was personally opposed to opening the statute to the amending process, stated that she was drafting an omnibus FLSA amendment bill embodying the proposals offered by Andrews and others to create a basis of discussion; at the same time, she was reluctant to let a bill go to the House floor where she feared that more radical changes might emasculate it.62 However, Norton displayed no reluctance whatever to amend one aspect of the FLSA:

"Take for instance, the inclusion under the hours provisions of the so-called white-

61See below ch. 12.
62"Eight Changes for FLSA," WHR 2:147, 148 (1939); "House Group Talks Wage Law Change," NYT, Mar. 16, 1939 (7:4). In spite of Norton's view of her relationship to the FLSA, just days after she became chairman in the wake of William Connery's death, "Mrs. Norton indicated that her personal opinion of the matter is that wage and hour legislation is unnecessary...." "Senate Group Due to Take Vote Today on Wage, Hour Bill," JC, July 8, 1937 (1:6). Based on archival correspondence, Landon Storrs, *Civilizing Capitalism: The National Consumers' League, Women's Activism, and Labor Standards in the New Deal Era* 334 n.26 (2000), also found that in 1937 Norton had "actually opposed the wage-hour bill and only supported it under heavy pressure from FDR."
collar workers, regardless of the wages or salaries they receive. Who thinks the Congress intended that white-collar workers receiving $2,000 or $2,400 a year be covered into this law. I don’t think so and I know it didn’t.

“When an office or other worker commands a salary of $2,000 or $2,400 a year, he should not be compelled to demand overtime at time-and-one-half pay if the exigencies of his work require him to remain on the job more than the allotted 44 hours.... On the contrary, he should expect to have to work overtime sometimes.”

Norton added that a majority of her committee favored a $2,000 white-collar exemption threshold, while the next day Andrews said that a $200 per month threshold might be too low, declaring his preference for a $3,000 annual threshold for salaried employees, a level familiar from the Social Security Act. Nevertheless, at a press conference on March 16 he said that it was likely that the House Labor Committee would recommend a salary threshold of not less than $200—which he thought might be too low—as well as an amendment permitting employers to average 44-hour workweeks over a month.

After meeting with President Roosevelt on March 29, Norton filed the omnibus FLSA amendments bill (H.R. 5435) excluding from the overtime provision “any employee employed in a bona fide executive, administrative, professional...capacity...or on a monthly basis at a guaranteed monthly salary of $200 or more....” On the House floor that day Norton briefly explained the purpose of her proposed amendments as rectifying the inevitable “slight defects” in a “well-intentioned” law of tremendous scope: “We wrote and passed a law...so that business would not be disturbed. ... The practical application of the law has disclosed some situations where its rigid application causes undue hardship. This disturbance has tended to create hardships on employers, reduce employment, and in general dislocate the flow of business in a particular industry.” Continuing in the same vein as with her comments two weeks earlier, Norton revealed an astonishing willingness to preempt the FLSA’s opponents by emasculating the applicability of the Act’s overtime provision to white-collar workers herself:

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63“Eight Changes for FLSA” at 148.
64“Eight Changes for FLSA” at 148; “Wages-Hours Law Due to Be Changed,” NYT, Mar. 17, 1939 (36:6). The $3,000 taxable limit on employees’ compensation under the old-age pension provision of the Social Security Act was not limited to salaries; later in 1939 it was also extended to the federal Unemployment Insurance payroll tax. See above ch. 6.
Abortive Statutory Amendments to Exclude Even More White-Collar Workers

A good deal of the objection to the Fair Labor Standards Act comes from its application to so-called "white-collar" workers—men and women engaged in work not of a clearly administrative or executive nature but which frequently requires overtime work. In the case of bookkeepers, private secretaries, and so forth, high salaried office workers in the main, it is felt that the application of the law works great hardship both on the employers and employees. In many instances employees such as those described actually work in a quasi-executive capacity and it is utterly impossible to regulate their hours of work. I feel that a salary of $200 a month should protect a worker against exploitation and therefore I am proposing to exempt all employees receiving that salary or more from the hours provisions of the act by amending section 13 (a) to include all persons on a guaranteed monthly salary of $200 a month or more.67

Manifestly, Norton must have been informed of employers' displeasure with the DOL's failure to issue a separate regulation for non-supervisory administrative employees, but she appeared not to have grasped the real thrust of their complaints. Instead (presumably misled by the caricature of the bona fide administrative employee implanted by the aforementioned WHD memorandum), she focused on rather lowly bookkeepers and private secretaries, bizarrely characterizing them as high-salaried, quasi-executive employees, whose working hours could not possibly be regulated and who themselves were burdened by their entitlement to overtime pay. Unable to finesse the duties tests to identify those in need of protection, she, too, decided to rely exclusively on the $200 salary level, thus totally abandoning both the work-spreading and leisure-creating purposes of the FLSA for the newly excluded workers.

The decision by Andrews and Norton to acquiesce in employers' demands for exclusions of non-executive office workers—an "appeasement' policy" that the Communist Party in due course attacked as having "opened the way for more sweeping" amendments68—was at odds with the Report of the Committee on State Wage and Hour Legislation that the National Conference on Labor Legislation had adopted just a few months earlier: Taking as its point of departure recognition of "the growing opinion that the benefits derived from labor legislation should be made applicable to all workers without exception, as rapidly as possible,"69 it had submitted as its suggested language for the State Wage and Hour Bill: "Em-

67CR 84:3499. Inflation-adjusted, $200 in 1940 was the equivalent of $2,700.00 a month or $32,520 a year in August 2004.
ployee'...shall not include any individual employed...in a bona fide executive or professional capacity...."§70 This omission of administrative employees from coverage also characterized the AFL’s model state minimum wage and overtime bill.71

Norton’s willingness to downplay work-spreading also demonstrated why labor deemed her lacking stellar pro-labor or, at least, pro-CIO credentials72: just a few months earlier, at the CIO’s First Constitutional Convention, its chairman, John L. Lewis, in his report had declared: “[I]f maximum hour and minimum wage machinery is to seriously affect and aid the unemployment situation the maximum number of hours to be worked must be lowered considerably as against the present provisions of the Wage-Hour legislation. ... It will be essential for organized labor to press for more drastic maximum hour legislation in order to really meet the serious economic problems which confront us in the country today.”73 The convention then adopted a resolution that statutory maximum hours should be reduced.74

Even a WHD acting area director had advised the Southern States Industrial Council’s annual convention in November 1938 that, although the FLSA “is moderate in the extreme” in the sense that it “does not even satisfy that perennial demand of labor—the 8-hour day”: “We doubt that Congress intended such a thing as regular overtime work except where the peculiar and unusual nature of the work performed by an employee necessitated a longer workweek. Is there not something of the paradox in ‘regular overtime work’?” Earle Dahlberg warned the SSIC’s members that Congress wanted to put more people back to work, but “if the extra

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71“State Wage and Hour Legislation,” AF, 46(1):78-81 at 79 (Jan. 1939). In addition to those employed in a bona fide executive or professional capacity, it also excluded agricultural and domestic workers and federal and state government employees. The model state wage and hour bill adopted by the CIO was practically like that drafted by Secretary of Labor’s committee, the only real difference being that CIO draft did not exclude professional or domestic workers. Louise Stitt, “State Fair Labor Standards Legislation,” LCP 6(3):454-63, at 458 (Summer 1939).
74Proceedings of the First Constitutional Convention of the Congress of Industrial Organizations at 254-56. Another convention resolution covered the subject matter of a resolution submitted by the UOPWA to the effect that unemployment among clerical, professional, and technical employees had increased sharply within the past year and that adequate consideration be given to this fact in allocating WPA projects. Id. at 283-4.
Abortive Statutory Amendments to Exclude Even More White-Collar Workers

work is taken up by longer hours rather than spreading the work, I do not believe that Congress will fail to meet the challenge." He did not rule out the possibility that the ultimate congressional reaction would be enactment of a 30-hour law.75

On March 30, the day after Norton had introduced H.R. 5435, Utah Democrat Elbert Thomas, chairman of the Senate Education and Labor Committee, introduced a bill with identical wording.76 Then on March 31 the WHA endorsed the $200 figure, writing Norton that it would "greatly improve" the law’s administration. However, at the same time he advised against a lower threshold on the grounds that it would affect a considerable number of workers "to whom the overtime provisions should be extended."77

The new industrial unions’ umbrella organization, the CIO, immediately protested the pro-employer bias of the bill as a whole. The elimination of overtime protection for salaried workers was, in its view, objectionable both because the FLSA already excluded so many of these employees and because even those earning more than $200 monthly needed and deserved legal protection.78 CIO leaders also criticized the Norton-Andrews amendments for the danger to which they exposed the FLSA "of more serious amendments being tacked on to the bill by representatives of the sweat-shoppers."79

In spite of the House Labor Committee’s approval of the Norton bill, the chief white-collar unions affiliated with the CIO, the American Newspaper Guild, the Federation of Architects, Engineers, Chemists and Technicians, and the United Office and Professional Workers of America,80 sought to retain and extend benefits to white-collar workers under the FLSA. A representative of each of these three unions held a special conference with Norton and Andrews to recommend reinforcement of the CIO position on the FLSA amendments. Although the House

75 "The Fair Labor Standards Act of 1938": Address by Earle W. Dahlberg, Acting Director, Area No. II, Wage-Hour Division, United States Department of Labor, Sixth Annual Meeting, Southern States Industrial Council, Atlanta, Georgia, November 29, 1938, at 7, 8, 9.


80 The FAECT was the first white-collar union to affiliate with the CIO, which a few days later chartered the UOPWA, with which the FAECT merged after World War II. "Technicians Join C.I.O.,” NYT, May 28, 1937 (10:5-6); "FAECT-UOPWA Merger Completed New Technical Division Set Up," OPN, 13(4):2:1-5 (Apr 1946).
Abortive Statutory Amendments to Exclude Even More White-Collar Workers

Labor Committee did defeat a number of other proposals, including the Cox and Thomas bills, strongly opposed by the UOPWA and CIO, which would have eliminated all white-collar workers, according to the UOPWA: “One of the factors preventing elimination of the ‘white-collar’ amendment was the contention of the AFL that they were ‘reasonable.’” The Norton bill had the Roosevelt administration’s support, but it contained “many objectionable features which outweigh its advantages,” the provision entirely excluding employees on a guaranteed $200 monthly salary having been “particularly objectionable” to the UOPWA.81

Nevertheless, Andrews, in an address to the Council for Social Progress in Philadelphia on April 5, insisted that the amendatory proposals worked out collaboratively between the WHD and the House Labor Committee would “not weaken the law in any essential particular, but on the contrary will...provide needed flexibility....” Specifically with regard to the exclusion of all employees with a guaranteed monthly salary of $200 or more Andrews explained that: “One of the major complaints of both employers and employees has resulted from the application of the overtime provisions to employees requiring flexibility in working time.”82 Similarly, President Roosevelt, asked about Norton’s amendments at his press conference on April 18, replied that he had not seen them, but that “the general line-up by Elmer Andrews seems to be all right. That is, the objective.”83

Norton’s Labor Committee reported out her bill (H. R. 5435) on April 27 with slightly revised language that appeared to detach the exclusion from white-collar status altogether. It now excluded “any employee employed in a bona fide executive, administrative, professional...capacity...or any employee employed at a guaranteed monthly salary of $200 or more.”84 The report then justified the amendment on the by now familiar grounds that non-supervisory administrative employees should also be excluded (without Norton’s concrete references to bookkeepers and private secretaries):

Section 13 (a) (1) exempts from both the wage-and-hour provisions any employee employed in an bona fide executive or administrative capacity. There are, however, many employees in the higher-salaried group, whose functions are not clearly managerial or supervisory, to whom this exemption is not applicable, and who, further, are not within the exemption applicable to employees engaged in a professional capacity. The inclusion under the act of this class of employee has given rise to many administrative problems and numerous protests from employers.

While the committee was of the opinion that the hour provisions of the act are as necessary and as beneficial to the ordinary clerical workers as to almost any other class of employees subject to the act, it also believed that they should not include those employees whose work generally requires flexibility in working time and whose salaries are comparatively high. A guaranteed monthly salary of $200 was believed to be a satisfactory basis of exemption from the act. A lower figure than $200 would undoubtedly exempt a considerable number of salaried workers to whom the overtime benefits of the act should extend.85

The Committee had, thus, adopted the arguments of the WHD memorandum without explaining what “flexibility in working time” entailed or even whether excluding those whose work required it was consistent or inconsistent with overtime regulation. To be sure, even the weekly salary level of $50, or four and half times the weekly minimum wage, would have been more protective of alleged executive workers than the $30 that Andrews had incorporated into the regulations.

Passage of the FLSA amendments at this juncture was becoming more complicated by the fact that some employers, led by the Chamber of Commerce of the United States, were making what The New York Times’s conservative columnist Arthur Krock called “the politically impossible (whether or not socially desirable)” proposal for repeal of the FLSA. Krock was constrained to point out that the FLSA had been enacted because some workers were unorganized, miserably paid, and “forced to toil beyond right or reason.” Yet it was also “full of absurdities” and “more protective of workers who did not need it than those who did.” The remedy was modification and change, whereas the Chamber’s demand for repeal merely “unite[s] the President’s general forces and divide[s] those who want a new deal of personnel and method in the government.”86 The Roosevelt administration’s rhetorical counterattack featured the declaration on the Senate floor by “arch-New Dealer” and Democratic whip Sherman Minton that the Chamber of Commerce’s demand for repeal of the FLSA and the NLRA87 showed that “big

86Arthur Krock, “In the Nation: Difficulties of Forming the President’s Opposition,” NYT, 5-5-39 (22:5).
87Turner Catledge, “Business and Government Renew Their Fight,” NYT, May 14,
business was on a sitdown strike to compel this Government to change its liberal policy...."88 Times columnist Turner Catledge suspected that business leaders seemed “quite willing to risk their chances” with what they perceived as an independent Congress and then with the 1940 general elections, thus leaving it unclear whether they “really plan any serious attempt at making New Deal laws” such as the FLSA “more workable...."89

Norton’s bill was recommitted to the Labor Committee on May 3,90 but on May 11, when she announced that on May 15 she would ask the Speaker to suspend the rules to debate H.R. 5435,91 she explained the proposed measure, detailing the expansiveness of the amendment excluding employees employed at a guaranteed monthly salary of $200 or more:

The necessity for this exemption has arisen because under the present act only employees engaged in executive or administrative or professional capacities are exempt by virtue of their positions. It has been found that there are many persons whose work is not clearly administrative or executive but who are high-salaried workers with necessarily flexible hours. Their inclusion has created some hard problems for the Administrator and caused real hardship in many cases. Of course you gentlemen realize there is nothing in this act which limits the application of this exemption to clerical or so-called “white collar” workers. If a ditch digger receives $200 a month he would be similarly exempt under this provision.92

This extension of the exclusion to blue-collar workers was still conditioned on a monthly salary guarantee.

Some Republicans expressed dissatisfaction that the Labor Committee had considered the bill “in closed executive session, and no opportunity was afforded those of us interested in this phase to present testimony or argue our case. And now, we are informed, the bill is to be brought before the House for action under suspension of the rules, which precludes the offering of amendments...."93

1939 (E3:3-6).

88 CR 84:5492 (May 12, 1939).
89 Catledge, “Business and Government Renew Their Fight.”
90 In this version § 5 reverted back to “or on a monthly basis at a guaranteed salary of $200 or more.” H.R. 5435 (76th Cong., 1st Sess., May 3, 1939).
91 CR 84:5458 (May 11, 1939).
92 CR 84:5459 (May 11, 1939). Norton delivered exactly the same explanation the following year. CR 86:5122 (1940).
93 CR 84:5475-76 (May 11, 1939) (George Darrow, Rep. PA, who wanted to exempt wholesale employers from paying overtime for hours 40-44 when the overtime trigger was lowered to 42 and 40 hours). Rep. Ramspeck asserted that Darrow must have
Abortive Statutory Amendments to Exclude Even More White-Collar Workers

On Saturday May 13, five national farm organizations, including the American Farm Bureau Federation, sent letters to all House members demanding both defeat of the Norton bill’s FLSA amendments on the (wholly bogus) grounds that they “nullify[ ] most of the agricultural exemptions in existing law”94 and that her bill be opened to amendments.95 On May 15, Cox stated on the House floor that he had understood that Norton had stated that if her motion to suspend the rules and pass her committee’s bill was voted down, “she will pocket the resolution and...the House would have no opportunity of taking action on the measure this session.” He then reminded the body that if Norton’s motion were defeated, the Rules Committee had the right to grant a rule for consideration of any bill that had been presented to the House, and if any House member offered a resolution, “the probabilities are that the Rules Committee would grant a rule on the bill which would provide for...the offering of amendments of the bill.”96 In response to this threat to “invoke a seldom-used parliamentary move,”97 Norton declared that “because of the...extraordinary misstatements” issued over the weekend and “due to the vicious and unreliable propaganda spread by those who in the first place were opposed to the law, and who would now repeal it if they dared to do so, it has been decided not to call the bill up at this time under suspension of the rules.”98 Despite the fact that once she reported the bill she lost control of it—the bill, in Cox’s words, was “‘now the property of the House’”—she also told the House that “only ‘over my dead body’ would the bill be brought to the floor unless it could be protected against its enemies,” but the anti-FLSA bloc “decided...to let matters go for a few days and then ask the Rules Committee for an ‘open rule’....”99

Then on May 16, when Norton sought unanimous consent to recommit the bill to the Labor Committee for further consideration, Michigan Republican Roy Woodruff objected on the grounds that he was not satisfied that the House would see the bill again if it went back to the committee.100 Two days later Norton introduced H.R. 6406, a new vehicle for amending the FLSA, which once again

misunderstood Norton because some members of Congress had appeared at the committee sessions. CR 84:5476. See also CR 84:6550 (June 2, 1939) (Robert Rich, Rep. PA, asked whether a closed debate rule was “the proper way to have good, sound legislation”).

96CR 84:5529-30 (May 15, 1939).
97Dorris, “Map Rules Appeal in Wage Act Fight.”
98CR 84:5537 (May 15, 1939).
99Dorris, “Map Rules Appeal in Wage Act Fight.” The Congressional Record lacks such statements attributed to Norton.
100CR 84:5625 (May 16, 1939).
Abortive Statutory Amendments to Exclude Even More White-Collar Workers

included the exclusionary language transcending white-collar workers: “or any employee employed at a guaranteed monthly salary of $200 or more.”

However, that vehicle had not traveled far before Norton on June 5 moved to suspend the House rules and pass H.R. 5435—whose § 5(a) would have amended § 13(a)(1) of the FLSA to read: “any employee employed in a bona fide executive, administrative, professional...capacity...or any employee employed at a guaranteed monthly salary of $200 or more”—but the House defeated it 167 to 110, thus refusing for the second time to permit the kind of limited debate that could not generate amendments that would have threatened to dilute the FLSA in ways unacceptable to Norton. Cox, whose principal concern was excluding from the FLSA as many agricultural processing workers as possible, called the bill “a decoy purely” that “ought to fool no Member of this House.” Cox, who both advocated “drastic amendment” of the FLSA and was also a powerful member of the Rules Committee, insisted that the proposal to open the bill to floor amendments was not dead: “It is to be hoped that in time the Committee on Labor will realize that it is the servant and not the master of the House.” He was sure that the Rules Committee would grant an open rule for debate of the bill, which the Labor Committee could not take back, and that “the House would write the legislation.” Although Norton said that “she would fight ‘to the last ditch’ to prevent the big farm groups writing into the act what she considers too broad exemptions for agricultural [processing] labor,” she apparently did not make such a vow on behalf of clerical workers. She denied that she was “grieving,” but admitted now for the first time that she “felt that we went too far even in these amendments.” Waxing histrionic, Norton declared: “My right eye is no dearer to me than this Act,” which had “brought greater relief to the underprivileged than any other law on the books. President Roosevelt will veto any bill that emasculates the law.”

What Norton wished the public to perceive as her attitude toward the exclusion of even more white-collar workers was presumably captured adequately in a column by the widely syndicated and respected political correspondent Raymond Clapper, which she herself had included in the Congressional Record of June 7, and which resembled very closely her own remarks in March:

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102CR 84:6620 (June 5, 1939).
103CR 84:6621.
104CR 84:6622.
105CR 84:6620.
106House Curbs Move to Rush Bill,” NYT, June 6, 1939 (8:6).
107Receding Prospect of FLSA Change,” WHR 2:283 (June 12, 1939).

463
Abortive Statutory Amendments to Exclude Even More White-Collar Workers

High-paid specialized employees, professional brain workers who are judged by results, not by the number of hours worked, were being required to turn in overtime schedules. Employers are required to pay such workers time and a half for overtime. A highly paid advertising writer, for instance, or a writer like myself, has to work without much regard for the clock. Some produce their best copy at night. Some are stale one day and hot the next, when they can produce a prodigious amount of copy.

The employer doesn’t care how little or how much such an employee works. He wants results. It is much the same with the employee. Sometimes he sits at his paper for hours or stares through the window. Again he grinds out his work almost off-hand. There is no way for these men to measure their working time because their work is pretty much their life. Anyway, they are paid far above the scales which the Wage and Hour Act was intended to protect.

So the Wage and Hour Administration sought to wipe off this layer of impossible administration by proposing an amendment to eliminate from the scope of the act employees receiving $200 or more a month.108

Two days later Andrews launched his own broadside. In a press release designed to absolve himself of any responsibility for the direction that the congressional process had taken, he noted that in February he had informed the House Labor Committee that he “would be glad to support certain clarifying amendments” that were “all of a noncontroversial character and were generally agreed to and believed to be a desirable improvement of the Act.” Without specifying that these noncontroversial improvements included his proposal to exclude from overtime regulation all workers with monthly salaries in excess of $200, Andrews complained that “[p]owerful lobby groups, who have always been unfriendly to labor have transformed the original Bill into an attempted emasculation” of the FLSA. By this point it had become clear to him that no FLSA bill could be passed in Congress “without opening up the Act generally for revision,” which was inappropriate since seven months of operation had hardly made a conclusive evaluation possible. Denouncing H.R. 5435 with the committee’s proposed amendments as “‘A Bill to Lower Wages and Establish Longer Hours of Work,’” the WHA added that he had been advised that labor’s opponents now intended to permit floor amendments that would, inter alia, exempt all clerical workers. Andrews also expressed the fear that if agricultural packing and canning employers could establish the precedent of excluding large numbers of workers from the FLSA by sheer lobbying pressure “without a factual basis...no worker covered by this Act can long expect to receive its benefits. Such a legislative reward is an invitation to other employer pressure groups to secure a similar exemption for their

Abortive Statutory Amendments to Exclude Even More White-Collar Workers

workers.” Finally, the Wage and Hour Administrator argued that codifying “intolerably long hours...would handicap labor unions in securing reasonable hours in their collective bargaining agreements.” Andrews concluded by exhorting “[e]very workingman in America” to be concerned that the revisions were “being supported by well-financed lobby groups who are hell-bent on taking from clerical and industrial workers the social gains which have been made during the last year.”

Then on June 19 Andrews warned the public in a radio broadcast that the wage-hour law was “in peril” because if opponents succeeded in defeating the closed debate rule, they would try to amend the H.R. 5435 to exempt all clerical workers and warehouse employees. At this point in the legislative process, the momentum in favor of excluding a broad swath of white-collar workers from the overtime provision was halted by the complex forces shaping the 1939 amendments, which focused primarily on vastly expanding the scope of agricultural processing exemptions and were driven by southern congressmen. The FLSA amendments proposed by them were too radical for Norton, Andrews, and the Roosevelt administration.

Employers injected a new quality into their attack on the FLSA on June 22, when Virginia Congressman Howard Smith submitted a resolution asserting that the law had been enacted on behalf of “those groups of laborers who are unorganized,” that “many enterprises have found it uneconomical and unprofitable to continue their operations under its [FLSA’s] provisions and numerous enterprises...have closed up, causing additional unemployment,” and that those charged with administering the act had construed “interstate commerce” to cover minor and local matters not intended by Congress, and proposing a five-member committee to investigate whether the WHD had been “fair and impartial” and had increased or decreased employer-employee disputes or employment, and what amendments were desirable to effectuate Congress’s intent. Although the House ultimately did not adopt the resolution—it did establish a committee to investigate the NLRB, which created the momentum for the eventual enactment of the Taft-

109US DOL, WHD, Press Release (R-328, June 7, 1939) (copy furnished by Wirtz Labor Library, US DOL). The text of Andrews’ statement was also published in “Receding Prospect of FLSA Change,” WHR 2:283, 284 (June 12, 1939). To be sure, Andrews’ apprehensions concerning exclusions driven by effective employer lobbying appeared rather late in the day given the extensive list of such exclusions that employers had lobbied directly into the original FLSA. FLSA, § 13, 52 Stat. at 1067.


111Paulsen, A Living Wage for the Forgotten Man at 139-43.

Abortive Statutory Amendments to Exclude Even More White-Collar Workers

Hartley amendments—it signaled an intensification of the struggle over the FLSA.

This conflict was heightened still further on July 11, when Graham Barden, an extreme anti-labor North Carolina Democrat (who had, however, voted with the 16 to 2 Labor Committee majority to report out H.R. 5435 because it was better than no bill at all), introduced H.R. 7133, which would have excluded from the Act "any employee employed in a bona fide executive, administrative, professional...capacity..., or at a guaranteed monthly salary of $150 or more, or at a guaranteed yearly salary of $1,800 or more, if such employee is not required by his employer to work any specific minimum number of hours in any workday, workweek, or other period and has been notified by his employer in writing to that effect." This notification requirement would have been met "by the posting of a simple notice to that effect...." (If, as Barden stated on the House floor in 1940, the condition concerning no minimum number of hours meant that such workers "work when they please and keep their own time," the universe of affected workers would presumably have been radically reduced.) Since it had been known for weeks that the House Labor Committee had been trying to reach a compromise, the Times reported, Barden's move meant that "the 'broad exemption' bloc—admittedly powerful—had decided to attempt to force through a bill at this session." While Barden declined to explain how he hoped to get his bill, which was still in the Labor Committee, to the House floor, privately his friends revealed that he intended to "get the measure spread upon the Congressional Record as notice to all the membership, and then to offer it as a substitute for the Norton bill, which, assertedly, will obtain a 'wide-open' rule upon the motion of some member of the Labor Committee."
In early July, even before Barden introduced his bill, a coalition of unions and church and women's groups had formed the Emergency Committee for Preserving the Fair Labor Standards Act. In a statement to Congress it charged that the same powerful lobbyists who had fought the FLSA before it was enacted were now trying to "'make new alliances...under the guise of "clarifying" amendments, to exclude members of the sweated industries and to destroy the very foundations of the Act.'"\(^\text{119}\)

As early as July 14, according to an Associated Press report, "House leaders" had "agreed to take up compromise wage-hour amendments designed to remove certain farm and white collar workers from operation of the law." The unnamed leadership's decision meant that "unless the Labor Committee approves the revisions in a day or two, the Rules Committee would be asked to send them to the floor for debate anyway."\(^\text{120}\)

In a wide-ranging and trenchant report to Norton on July 15, WHA Andrews opposed the exclusion in Barden's bill of all employees with a guaranteed monthly salary of $150 or annual salary of $1,800 because:

Our studies indicate that employees in the salary classification from $150 to $200 a month have as much need for protection against long hours as any other class of workers. Furthermore, if this class of workers may be worked an unlimited number of hours without overtime compensation, the purposes of the bill to spread employment in this group will be defeated.

In addition to the hundreds of thousands of clerical workers who would be deprived of their right to overtime compensation, this provision would exempt all craft and skilled workers paid on a piece-rate or hourly scale where it would be to the employer's advantage to guarantee the employees $150 a month.\(^\text{121}\)

The only flaw in Andrews' critique was that it was almost as applicable to his own regulations and the FLSA exclusions themselves.\(^\text{122}\)

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\(^{121}\) *CR* 84:A3270, A3273 (July 17, 1939). See also "Status of FLSA Amendments," *WHR* 2:343, 344 (July 24, 1939); "Wage Act Endangered, Andrews Says," *CIO News*, 2(30), July 24, 1939 (5:1). The WHD was unable to furnish precise estimates on the number of workers who would be excluded from the FLSA depending on which of the various bills was enacted because it had abandoned a study to work up such data after discovering that they were unavailable. "Action on FLSA Changes," *WHR* 2:351, 352 (July 31, 1939).

\(^{122}\)Malamud, "Engineering the Middle Classes" at 2300, criticizes Andrews for having
Abortive Statutory Amendments to Exclude Even More White-Collar Workers

Cox, "the leader of a powerful group whose aim is to revise" the FLSA and the NLRA, sought to ratchet up the attack on July 18 by threatening to tie up further business in the House unless the Rules Committee granted a rule permitting floor consideration of Barden's bill. With much bravado, Cox made the threat to committee chairman Adolph Sabath in the presence of news reporters: "I'd be willing to sidetrack everything.... The Barden bill is of first importance. A terrible thing has been done this country by the administration of that (Wages-Hours) law. It is ruining some of the industries down my way [sic: must be way]." As ranking member of the Rules Committee, he claimed to have "almost solid backing of its members for the Barden rule, and for an investigation of the Labor Board"—an assessment that other members of the committee privately confirmed. 123

Despite his theatrical efforts, Cox was forced to backtrack later that same day after Roosevelt at a press conference had described the Barden bill in such terms as to suggest the possibility of a veto if it passed. Replying to a question, the president said that the Barden amendment "would, in effect, pick out the two million lowest and poorest paid employees of industries who are the principal beneficiaries of the Act, and would lift them out from the Act, and, in effect, would give Congressional sanction to unconscionably low wages for them." 124 The Washington Post regarded the president's response as having "apparently killed" the Barden bill, since Cox, as soon as he had heard of Roosevelt's statement, told the newspaper that "he would no longer press for passage" of Barden's amendments: "I would counsel those pressing for amendments to consult with the President, find out what amendments he will agree to, adopt these and stop the controversy for the time being." The threat of a veto, however, did not mean that the FLSA's opponents had abandoned their struggle. On the contrary: "a bitter fight over less drastic changes" was "still in the offing" since: "Even though the Barden proposals in their entirety may be lost, it is almost certain that the conservative Southern Democrats, allied with the Republicans, will endeavor to obtain more extensive modifications of the present law than the Administration failed to provide a basis on which to conclude that the work of white-collar employees whose monthly salaries exceeded $200 was not susceptible to work-spreading: "None appears, in his speech or in the relevant archives." Although this critique is generally justified, it overlooks the aforementioned WHD memorandum on "High Salaried Employees," which assumed that work-spreading was not applicable insofar as their long and short workweeks cancelled each other out over the course of a year.

Abortive Statutory Amendments to Exclude Even More White-Collar Workers

desires." Since Norton and Andrews had already advocated a large expansion of the number of excluded white-collar workers and Roosevelt had approved of their position, the would-be excluded owed their reprieve to the tenacity with which the more radical pro-employer legislators pursued their goal and short-sightedly forfeited the opportunity to enact somewhat less far-reaching coverage restrictions.

Prospects for passage of the less drastically exclusionary Norton bill appeared dimmer after the Wall Street Journal disclosed that even "Administration Democrats are inclined to blame the Wage and Hour Administration for the difficulties now confronting this law in Congress. These members say that the Administration, in interpreting the act, clearly has gone beyond the intent of Congress and that complaints against the law are really complaints against its administration." One such alleged ruling by the WHD legal division pointed out by an unnamed "outstanding House member" held that "if an employer took his employees on an outing or a picnic at which time a representative of the management made remarks designed to improve labor relations, the employees would be entitled to overtime wages for the time of the outing." Apart from the atypicality of the scenario, the hypothetical ("if") character of the ruling suggests that FLSA opponents were grasping for pretexts.

The editors of The New York Times, though fully aware that the Barden amendments' main object was to "make a very large number of exemptions," especially in agricultural processing, could not refrain from meting out harsh criticism to the Roosevelt administration as well, which had both been "so unwise as to name a definite minimum wage in the law" and, through administrative rulings, given the FLSA "a range of application far greater than even most of those who voted for it suspected at the time of its passage." Recurring to its hobbyhorse, the paper editorialized that: "Designed to help submarginal labor, it has been extended, principally through the so-called hours provision, to apply to the great bulk of labor in the country." Faulting the law for creating wage inflexibility and "endangering sound recovery," the Times, without specifying any details—presumably it wanted, like many employers, at the very least a limitation of overtime liability to time and a half on the minimum wage regardless of

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128See Marc Linder, "Moments Are the Elements of Profit": Overtime and the Deregulation of Working Hours under the Fair Labor Standards Act 41, 42, 57 (2000).
Abortive Statutory Amendments to Exclude Even More White-Collar Workers

workers' regular rate—called for a “thorough-going revision.”129

The entire political constellation of forces was disrupted on July 20 when WHA Andrews announced at a news conference that he now opposed exempting white-collar workers earning more than $200 a month. He had originally favored the measure because he had believed that it would make administration of the FLSA easier, but “changed his mind because ‘organized labor’ opposed the exemption” and since it had “‘done such a swell job of fighting my battle for me...I think it would be very unethical for me to press that amendment if they are opposed to it.’” Not bereft of a sense of humor, Andrews added that because the American Newspaper Guild was one of the chief objectors to Norton’s amendment, “‘now he had changed his mind he felt he could accept the Guild’s invitation to address its San Francisco convention on July 31.’”130

Andrews’ special mention of the Guild was noteworthy since the Employer Relations Committee of its International Executive Board had stated at a meeting from May 27 to 29 that the fact that the FLSA amendment exempting workers receiving more than $200 a month had been proposed and backed by the WHA

129“A New Dispute in Congress.” Ironically, whereas the Times viewed the FLSA as applying to “submarginal labor,” the Chamber of the Commerce of the United States complained that the act was unfair to the marginal worker (such as the handicapped), who was not worth the minimum wage. Edward Cowdrick, “The Plight of the Marginal Worker,” NB, 27(2):20-22, 70-71 (Feb. 1939). From 1923 to the late 1930s Cowdrick had been the secretary of the influential Special Conference Committee, a clearinghouse on personnel management and labor relations of a dozen of the biggest corporations. Violations of Free Speech and Rights of Labor: Hearings Before a Subcommittee of the Committee on Education and Labor United States Senate, Part 45: Supplementary Exhibits: The Goodyear Tire & Rubber Co.—The Special Conference Committee 16785 (76th Cong., 1st Sess., Jan. 16, 1939). See above ch. 9.

130Andrews Shifts on ‘White Collar,’’ NYT, July 21, 1939 (5:1). See also Paulsen, A Living Wage at 142. In an article free of editorializing, the Guild took note of Andrews’ new position. “Andrews Bars Change of Hours Act,” GR, Aug. 1, 1939 (1:3, 2:4). Despite Andrews’ change of mind, when he resigned three months later the Times speculated that his administration had not greatly pleased some unions. “Andrews Out, Fleming In,” NYT, Oct. 19, 1939 (22:2). The press reported that Andrews had been replaced because both unions and employers that wanted to comply with the law regarded him as “too gentle.” “Elmer Out,” Time, Oct. 30, 1939, at 11. Although unions opposed his successor, Fleming, because he was an army officer, they did not express their views before he was appointed because they disliked Andrews even more. “Wage-Hour Tightening Due as Army Officer Takes Over, BW, June 10, 1939, at 48, 49. On his death a quarter-century later, AFL-CIO President George Meany lauded him as a “sincere, loyal and devoted friend of all the working people of this country.” “Elmer Andrews, Labor Aide, Dies,” NYT, Jan. 18, 1964 (23:1).
"was a good reason for lessening the emphasis on the Fair Labor Standards Act in relation to Guild contracts, and made it particularly important that Guild contracts contain no reference in their language to the provisions of the act." ... "It is of particular interest that the position of the Wage and Hour Administration is already being used by certain publishers as an argument against hour limitations for newspaper employees. Exemptions for higher paid men were asked for by the Scripps-Howard management in the Washington Daily News negotiations recently. While we can probably afford to laugh off this particular maneuver it does emphasize the need of establishing the principle of hour limitations—the five-day, forty-hour week—without exemptions of any kind."  

At his press conference, Andrews, who was to meet the next day with Barden and a special subcommittee of the House Labor Committee, declared that the former's amendments were "merely a renewal of the "dime-an-hour" bloc's proposal for wholesale exclusion of needy workers from the act," which was its answer to the "carefully drafted amendments..., which included many concessions," which the WHA had attempted to propose five months earlier. In light of the positions adopted by Barden and "the interests he represents," Andrews could see only "impassable differences...."

As far as Arthur Krock was concerned, Andrews' withdrawal of support for the white-collar amendment without "any alteration in the merits of the case," simply to restore a political front by rejoining organized labor in its opposition to the change, was a "naive example...typical of the administrative attitude which has helped to bring about the new and temporary Congress majority" consisting of nearly all Republicans and upward of one-third of Democrats.

That the anti-FLSA congressmen had nevertheless not given up their fight became clear on July 21, when the House Rules Committee, after an executive session had revealed that the Labor Committee had been unable to work out a compromise between Barden and Andrews concerning the agricultural and white-collar overtime exclusions, finally granted a hearing for July 25 on the Barden bill—at which Andrews would probably be a witness—under circumstances indicating both that the House would act on it before the end of the session and that there was "[l]ittle doubt...that the House would pass overwhelmingly the amendments...." On the other hand, the immediate purpose of this exercise was unclear since, given the late stage of the session, legislators considered it doubtful that the bill could get through the Senate and probable that Roosevelt would veto it.

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132"Andrews Shifts on 'White Collar.'"
Abortive Statutory Amendments to Exclude Even More White-Collar Workers

Barden, in the meantime, stated that he had written the white-collar amendment "after talking with various employes and employers, and declared he felt that it was 'a very reasonable amendment' that would exempt only persons who 'obviously ought to be exempt.'"\(^{134}\)

After Representative Ramspeck, who had weighed in on the controversy in November 1938 with a suggestion of excluding all higher-paid employees, introduced a compromise bill on July 24 excluding "any employee employed at a guaranteed monthly salary of $200 or more,"\(^{135}\) the Rules Committee held a "boisterous hearing" the next day at which Andrews, Barden, and Norton all put in appearances. In response to "a rapid fire of questions from Cox, Andrews denied that he had adopted a policy of permitting "'pressure groups’ to govern his administration” of the FLSA, but noted that workers of the Westinghouse Electric and Manufacturing Company had convinced him that basing exemptions to [sic] white collar workers on a monthly salary limit would work to the disadvantage of the older workers." When asked whether he had been correctly quoted as to his change of view regarding the white-collar exemptions, Andrews replied that he had gone further: "'I said if the decision was going to be left to the pressure groups I was sorry the pressure groups did not get behind the Norton bill when the time was ripe.'" After having questioned Andrews, Cox allowed as the FLSA was "'meaner'" than "'but not so meanly administered as'" the NLRA. Norton, who announced that she had called a House Labor Committee meeting for July 27 to discuss a wage-hour compromise, told the Rules committee that she had done everything she could to "compromise her differences with Mr. Barden. With much heat, she declared that Mr. Barden would talk with her and seem agreeable on some matters, and 'then he would go out and meet the lobbyists of powerful concerns who want to wreck this act.'"\(^{136}\) Although there was little prospect of success, adoption of the Rules Committee’s suggestion that Andrews meet with Norton and Barden to work out a compromise prompted the committee to meet again the next day (July 26) with a presumed agenda of discussing whether to grant rules for floor debate on the FLSA amendments bills.

The Rules Committee did meet on July 26, but a confused and complex political constellation produced only arrangements for a conference of the AFL and CIO with the NAM and Chamber of Commerce of the United States to try to reach compromise on the FLSA amendments. To be sure, the members of the Rules Committee “did not even try to hide their smiles” as they suggested this meeting to Norton, who then summoned the labor and business representatives to appear

\(^{135}\)H.R. 7349, § 5(a) (76th Cong., 1st Sess., July 24, 1939).
\(^{136}\)Andrews Opposes Wage Act Changes,” *NYT*, July 26, 1939 (5:1).
before the Labor Committee on July 27. The call for the conference was a by-product of the efforts by House Majority Leader Sam Rayburn "to clear the decks" to consider the housing expansion and lending bills, which were key to adjournment, by enlisting Cox's influence to secure a rule to bring them to the floor. However, Cox's chief interest lay in floor debate on the Barden bill, which the Republican members of the Rules Committee, who were Cox's allies in a conservative coalition, threatened to block if Cox aided Rayburn in bringing the administration's bills to the House floor. Consequently, the Rules Committee took no other action than proposing the conference, which was viewed as merely an attempt to "play for time..." Cox promptly denounced the conference as "just a stall," and initially sought to force an immediate vote, but was prevailed upon to agree to the delay. Without identifying its nature, Cox justified his move by reference to his desire to avoid a "tactical blunder," but he continued to insist that "we have the votes to do what we want at any time."

Abortive Statutory Amendments to Exclude Even More White-Collar Workers

The Labor Committee special meeting on July 27 proved to be tumultuous. Overshadowing all substantive discussion of the proposed FLSA amendments at the special meeting was the electrifying attack by CIO leader John L. Lewis on Vice President John Garner. Lewis opened his remarks by criticizing Andrews for having appeared before the House Labor Committee to "suggest amendments to the act before he had undertaken the job of administering and enforcing the act."


138 "Calls Conference a 'Stall,'" NYT, July 27, 1939 (5:3-4).

139 There appears to be no extant transcript of the meeting. At the very end of a House Labor Committee hearing on the NLRA the previous day (July 26), Rep. Wood stated: "I understand that a call has been issued for an executive meeting of the committee tomorrow morning." Proposed Amendment to the National Labor Relations Act: Hearings Before the Committee on Labor of the House of Representatives 2140-41 (76th Cong., 1st Sess., July 26, 1939). According to the condensation of testimony published in the Wage and Hour Reporter, the witnesses were W. T. Ham (U.S. Department of Agriculture), W. D. Johnson (Railway Labor Executives Association), W. C. Hushing (AFL), George McNulty (General Counsel, WHD), John L. Lewis, Francis Kelly (American Road Builders Association), Mary Dublin (National Consumers League), and Nina Collier (League of Women Shoppers). "Testimony on Wage-hour Amendments," WHR 2:352-53 (July 31, 1939). McNulty opposed the Barden amendments for removing from the protection of the hours provision "nearly two million of the most sweated industrial workers in the country." Curiously, the condensation included no testimony by representatives of the NAM or Chamber of Commerce. Because news accounts were distracted by Lewis's fulminations, the other witnesses received scant attention. "Lewis Lashes Garner," CIO News, 2(31), July 31, 1939 (3:5, 6:1-2).
Although Norton herself had, from the outset, been acutely aware of the dangers of exposing the FLSA to the amendatory process, Lewis underscored the recklessness of enabling "the chiselers...who believe that 25 cents an hour is too much for an American...to cripple this act with amendments...." It was in connection with his castigation of "the Republican minority, aided by a band of 100 or more renegade Democrats" for having "conducted a war dance around the bounden prostate form of labor in the well of that House," that Lewis then directed his attention to Garner, the "labor-baiting, poker-playing, whisky-drinking, evil old man," as the genesis of the House campaign against organized labor. He justified what he himself conceded was a personal attack on the grounds that "Gamer's knife is searching for the quivering, pulsating heart of labor." The diatribe culminated in the accusation that the vice president was "putting his foot upon the neck of millions of Americans by conducting this intrigue in recent weeks in this Congress on every proposal that protected the rights of labor or sought to give labor increased or additional privilege."140

Since even Norton's FLSA bill would have reduced rather than expanded coverage (especially for white-collar workers), it is not clear what proposals Lewis had in mind. His acknowledgment that labor had had "no opportunity to become familiar with the application of the vast crop of amendments" in connection with his correct charge that "this is the first public hearing that the committee has had,"141 suggests that Lewis may have been misinformed, although he did claim at the end of his talk that he "could take up these amendments one by one in great detail...."142 Regardless of the reality-content of his accusations that the vice president was the ring-leader of the congressional anti-laborites, it was true that Garner had been infuriated by the sit-down strikes of the 1930s and had adamantly opposed enactment of the FLSA.143 In any event, at the close of his remarks, chairman Norton thanked Lewis for his "very fine contribution to this meeting," though she later termed his remarks as in "very bad taste" and regretted that he had chosen the forum provided by her committee hearing to make them.144 Lewis's ad hominem attack did not prevent W.C. Hushing, the AFL's legislative agent, and W. D. Johnson of the Association of Railway Labor Executives from echoing his plea to the committee to give the FLSA an opportunity to show its strengths and weaknesses before amending it.145

142“Lewis Speech Naming Garner As Labor ‘Baiter’” (3:5).
143Patterson, Congressional Conservatives and the New Deal at 135-37, 154.
144Stark, “Ovation to Gamer in House Follows Attack by Lewis” (3:4).
145Louis Stark, “Ovation to Gamer in House Follows Attack by Lewis,” NYT, July 28,
Following this "extraordinary hearing," the House Labor Committee in executive session that same day, reported out H.R. 6406 with a committee amendment, which deleted the $200 guaranteed monthly salary, instead excluding "any employee employed at a guaranteed monthly salary in excess of that required by this Act who does not work more than one hundred and sixty hours per month." This blanket exclusion, which was not confined to white-collar workers, was a compromise, sponsored by Representative Ramspeck, presumably designed to offer employers the hours-averaging (over a period of one month) that so many had been demanding. Interestingly, the committee report characterized all of the bill’s provisions as “noncontroversial”; because the proposals for additional exclusions of agricultural processing workers were “highly controversial,” they were omitted from the reported bill. If the committee’s description was accurate, it strongly suggests that employers and their congressional advocates could, at the very least, have passed an amendment expelling large numbers of additional white-collar workers from the regime of overtime regulation if they had refrained from committing the kind of parliamentary “tactical blunder” against which Cox had warned.

1939 (1:1).


H.R. 6406, § 4(a) (76th Cong., 1st Sess., July 27, 1939). The committee report failed to explain the change, stating merely: “White-Collar Exemption. In lieu of the exemption from wages and hours of employees at a guaranteed monthly salary of $200 or more, a committee amendment proposes to exempt from both wages and hours any employee employed at a guaranteed monthly salary in excess of that required by the act who does not work more than 160 hours per month.” Amendments to the Fair Labor Standards Act of 1938, at 5 (H. Rep. No. 1376, 76th Cong., 1st Sess., July 27, 1939).

Action on FLSA Changes,” WHR 2:351 (July 31, 1939).

A few months later Ramspeck told the annual meeting of the SSIC that the FLSA was too inflexible and would have the tendency to speed up installation of labor saving machinery. He argued that it should be amended to permit “averaging hours over a monthly period.” Robert Ramspeck, “Federal Legislation: Address” at 7 (Seventh Annual Meeting, Southern States Industrial Council, Atlanta, Georgia, Jan. 23, 1940).

E.g., Kelty, “Fair Labor Standards in Name Only” at 95-96 (house organ of the Chamber of Commerce).

Abortive Statutory Amendments to Exclude Even More White-Collar Workers

The CIO may have lauded Lewis's diatribe, but otherwise it had the consequence of "stiffen[ing] the backs" of the members of the Rules Committee coalition, "who straightaway made up their minds to let the House vote upon legislation which the C.I.O. leader had just denounced...." The Rules Committee rule provided that the House had to vote yes or no on the Norton bill without amendments, although the House was permitted to supplant hers with the Barden or Ramspeck bill. The Rules Committee late on July 27 decided to send the wage-hour issue to the House floor "over the protests" of the Labor Committee and the CIO. The rule was forced out of the committee by the same group of southern Democrats headed by Cox who the previous week had combined with Republicans to bring before the House the Smith resolution for an investigation of the NLRB, marking the first time that session that the committee had "turned on Administration labor policies." Although it was, according to the Wall Street Journal, "generally conceded that chances for final enactment of wage and hour amendments are non-existent, insofar as this session is concerned, the decision of the rules committee, which is believed to reflect general sentiment in the House, comes as a rather definite indication that some House action will be taken next year." Whereas debate on the Barden and Ramspeck bills would be limited to four hours and scheduled for the first week in August, it had still not been determined whether the House leadership would permit the Labor Committee to carry out its plan to bring up the modified Norton bill on July 31 under the procedure of suspending the rules, which prohibited amendments but required a two-thirds majority. But even if the Labor Committee had its way, it was "highly unlikely" that the revised Norton bill would be accepted by the House; rather, it was more likely that the Barden bill would be substituted for it.

Presumably because Lewis's attack on Garner had intensified the determination of western and southern representatives to force a vote on the Barden bill,

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154"House Rules Group Speeds Wage-Hour Amendments," WP, July 28, 1939 (1:1). The Rules Committee ignored the bill that the Labor Committee had reported out earlier that day, instead issuing the rule for Ramspeck's Norton's earlier bills. Id.

Abortive Statutory Amendments to Exclude Even More White-Collar Workers

Alabama Democrat William Bankhead, the Speaker of the House, while stating on July 28 that the FLSA amendments would be considered before adjournment, had made no agreement with Norton to consider her non-controversial bill on July 31 under suspension of the rules.\textsuperscript{156} As Roosevelt administration leaders began to reconfigure their end-of-session legislative plans “in the hope of stemming the revolt they fear may wreck the program,” Bankhead announced that he would not permit the Labor Committee to bring up its latest FLSA bill under the suspension of rules device that had already failed twice. Indeed, the leadership “obviously” did not want to allow the FLSA bill to be voted on at all before the aforementioned lending and housing bills were considered lest “a majority, having obtained their major aim in passing the Wages and Hours Bill, would want to ‘fold up’ and adjourn.”\textsuperscript{157}

On Sunday, July 30, Norton—who, according to Barden, had told the Labor Committee in the wake of Andrews’ blast of H.R. 5435 that she would take no further steps to bring the bill to the House floor\textsuperscript{158}—gave a radio address defending her original bill. She maintained that all of its amendments had been necessary for proper administration of the FLSA and alleviating unnecessary hardship.\textsuperscript{159}

On July 31, as the House seemed to be finally on the verge of voting on the FLSA amendments, Andrews was at the Guild’s annual convention in San Francisco inveighing in a nationally broadcast speech against the “dime-an-hour bloc” in Congress that was trying to “wreck the act.” Addressing “all Americans,” Andrews stressed that: “The Wage and Hour Law is on the statute books because you willed it there. The United States Chamber of Commerce didn’t want it. No clamor for its enactment floated down to Congress from the citadels of big business and high finance.”\textsuperscript{160} The country’s premier labor standards enforcer (who had also been Labor Secretary Perkins’ successor as New York State Industrial Commissioner)\textsuperscript{161} had good reason for imparting this vital lesson: “You cannot drowse now...in any confident assumption that industrial justice has been made secure for all time to come by the scratching of a pen on paper. Whether the law stays on the books or not, it will soon cease to have meaning unless you are

\begin{itemize}
  \item \textsuperscript{156}Turner Catledge, “House Caucus Backs Roosevelt, But Avoids Commitments on Bills,” \textit{NYT} July 29, 1939 (1:6-7, 2:3).
  \item \textsuperscript{157}Henry Dorris, “Roosevelt Chiefs Seek Way to Avert Lending Bill Rout,” \textit{NYT}, July 31, 1939 (1:8, 2:3).
  \item \textsuperscript{158}\textit{CR} 84:11113 (Aug. 4, 1939).
  \item \textsuperscript{159}\textit{CR} 84:3649-50 (July 31, 1939).
  \item \textsuperscript{160}“Andrews Attacks Foes of Wages Act,” \textit{NYT}, Aug. 1, 1939 (3:5).
\end{itemize}
Abortive Statutory Amendments to Exclude Even More White-Collar Workers

prepared to fight for it.”"162 The chasm between this blunt admonition to the working class to come to the rescue of their statute and the DOL’s indiscriminate transmogrification at the end of the twentieth and beginning of the twenty-first century of both the protected class of workers and the suspect class of violators into “customers”163 is unbridgeable.

In remarks to the ANG convention after completing his nationally broadcast speech, Andrews went on to discuss the specific application of the white-collar regulations to newspaper workers: “If Congress had thought that these reporters, copy readers and other editorial employees were professionals it could very easily have excluded them. It did not do that.” He believed that “many, if not most, of the employees engaged in reporting and editorial work” would fail to satisfy at least one or two of the five regulatory criteria constituting the definition of a professional employee, in part because the WHD’s search of the journalism literature did not reveal “much agreement, even among publishers and editors, on the value of training in a specially organized body of knowledge.” As for the argument that even if they were not professionals, the many types of editors could nevertheless be excluded as executives, Andrews observed that the Guild, in negotiating collective bargaining agreements, had “jealously and wisely...sought to restrict the number of its members to be classified as executives and on that ground excluded from the benefits of the contract. Apparently Guildsmen suspect a tendency on the part of some newspaper proprietors to pay off in the form of titles, as well as in by-lines, in lieu of cash.”164

As late as August 1, Congress still regarded the FLSA amendments as one of three pieces of “‘must’ legislation awaiting action” before adjournment. A large majority of the House, according to the Times, wanted to debate the Barden bill, which was “said to be favored by a large number of the House members.”165 Nevertheless, prospects for a vote dimmed as the House leadership, “stunned” by the defeat that day of the lending bill, now focused its attention on a drive to adjourn, “hoping to get the rebellious Congress out of Washington by Saturday night.”166 By August 2, Speaker Bankhead and Majority Leader Rayburn unsuc-

163“The Department of Labor is committed to providing its customers, America’s employers, workers, job seekers and retirees, with clear and easy-to-access information on how to comply with federal employment laws.” http://www.dol.gov/esa/regs/compliance/whd/ca_main.htm.
cessfully sought to negotiate an agreement to shelve the housing and FLSA bills, on which the conservative Democratic-Republican coalition was poised to hand the administration yet another defeat. Bankhead and Rayburn's plan to adjourn the session before Roosevelt's legislative program suffered further damage failed because the "ardent New Dealers," echoing the president, insisted on making a record of the opponents of the housing bill, while the supporters of the Barden amendments persisted in "following up an advantage which they believed they had" to pass the bill. Rayburn refrained from announcing for the time being his plans for calling up the FLSA amendments, but he was "considered somewhat bound to help get them" to the floor to reciprocate for their supporters' having relented in their opposition to a rule for the housing and lending bills. Yet Rayburn did go so far as literally to take Rules Committee chairman Sabath—an "arch-enemy" of the Barden bill who had declined to follow his committee's instructions to report a rule for it—by the arm, lead him to "the committee room where the rule was resting in a pigeonhole," and bring both back to the House floor, where Sabath finally filed the rule, although under parliamentary rules he could have continued to block it for another seven legislative days.167 On August 3, when the anti-New Deal coalition completed its wrecking of the administration's lending recovery program by voting to kill the housing bill, House leaders "took drastic steps to shut off further controversial measures and end the session quickly." The denouement came that day when Rayburn finally announced that he would not allow the Barden bill to be debated before adjournment.168

Thus legislative efforts to reach a compromise on amending the FLSA in 1939 broke down and House leaders removed a "remote chance of emasculating changes." Congress adjourned on August 5 without having resolved the question, and in a post-mortem the Times opined that congressional criticism did not seem to have been directed "to any large extent" against the FLSA's fundamental objectives, but against "specific and sometimes unforeseen results of its application"—for example, to "well-paid workers employed on a generally permanent basis who receive vacations with pay and similar benefits and still do not come under the exempted classes of executives and professionals."169

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168"Housing Bill Killed, 191-170, by House Economy Group," NYT, Aug. 4, 1939 (1:8). Patterson, Congressional Conservatives and the New Deal at 315, completely misconceived the controversy in asserting that "southern Democrats led by Cox forced the House leadership to drop consideration of a bill to extend coverage under" the FLSA.
Adjournment of the first session of the Seventy-Sixth Congress hardly meant that employers had abandoned their efforts to expand the exclusions of white-collar workers. W. Gibson Carey, Jr., the president of the Chamber of Commerce of the United States, stated on national radio that with machinery, we will “not have to work abnormally long hours,” but there will definitely “have to be a relaxation of the control of hours.” He added that working 48 hours in certain groups did not necessarily reduce employment.\(^{170}\) As the first anniversary of the FLSA’s effective date approached (October 24), at which time the overtime trigger dropped to 42 hours and the minimum wage rose to 30 cents, the Chamber of Commerce reaffirmed that it “is opposed to continuance of the law....”\(^{171}\) A month later the *Times* reported that the NAM Employment Relations Committee had taken the position that:

“The law is being used as a mechanism for controlling wages and salaries far above the statutory minimum. This extends to inclusion of high-salaried employes by narrow definition of exempted classes and is being construed in an effort to fix and freeze wage rates far in excess of any minimum standards which the law was designed to establish.

By fixing an inflexible limitation on hours of employment, without the penalty of overtime compensation, the law has ignored many instances in which flexibility is essential and desirable from the standpoint of employes. The law makes no provision for the averaging of hours except where pursuant to collective bargaining agreement.... The law is equally defective in failing to provide exemption from maximum hours standards during periods of emergency affecting an entire community or section.”\(^{172}\)

Little wonder that in an address on December 8 to a celebration of the fortieth anniversary of the National Consumers’ League,\(^{173}\) Norton named the Chamber of Commerce and the NAM as foes of the FLSA together with the Associated Farmers of California and their allies, the packers and canners.\(^{174}\) Pointing out that

\(^{170}\)“The Road to Recovery? Try the 48-Hour Week, Advises Big-Shot Tory,” *CIO News*, 2(41) Oct. 9, 1939 (5:3).


\(^{172}\)“Employers Urge Wage Law Change,” *NYT*, Nov. 29 1939 (12:6).

\(^{173}\)In light of Norton’s acquiescence in the amendment to reduce white-collar coverage during the 1939 session of Congress, it is odd that the NCL regarded Norton’s talk as the first step in the organization’s opposition to any amendment of the FLSA. Anne Petersen, “Drive Forming to Bar Altering Hour Pay Act,” *NYT*, Dec. 3, 1939 (sect. 2, 4:1).

\(^{174}\)“Miss Perkins Sees Gains for Labor,” *NYT*, Dec. 9, 1939 (10:6); “Hillman, Mrs. Norton Ask Consumers’ Support for Wage-Hour Law,” *CIO News*, 2(51), Dec. 18, 1939 (3:4-5). Norton did not attend the celebratory dinner, but someone else read her address to those who did.
Abortive Statutory Amendments to Exclude Even More White-Collar Workers

de the Barden bill would endanger the hours standards of 250,000 to 400,000 higher-paid clerical and skilled wage earners, Norton added: "The exemptions provided for in the Barden Bill have no economic or social justification." After underscoring that the overtime penalty was expected to put more people to work, she countered the NAM's criticism that the FLSA fixed inflexible limits on hours and did not permit hours-averaging: "Many state and foreign laws impose an absolute limitation on hours. In the interest of flexibility, the Act sets no absolute limit on the number of hours that may be worked.... If the standard number of hours must be exceeded to meet some particular situation, in all probability the employer will be sufficiently recompensed therefor to enable him to pay overtime."175

In light of the Republican House leadership's confirmation in December that the FLSA amendments were still high on its legislative list for the 1940 session,176 the labor movement remained acutely aware of the need to resist employers' efforts to dismantle the national regime of overtime regulation. In particular the UOPWA took the initiative, with the transition to the 42-hour overtime trigger, "to make the law work by informing white collar employees of their rights" by undertaking a national leafletting campaign in major cities. On Wall Street alone members distributed 6,000 leaflets in less than two hours.177 Spreading from the East Coast to Chicago, Milwaukee, Denver, Los Angeles, and San Francisco, the UOPWA leafletting campaign called attention to the union's dual aim of preventing evasion of the FLSA and eliminating its inadequacies. The UOPWA also sought to link its organizing to these overtime informational operations.178

The CIO's year-end call on Congress not to pass any pending FLSA amendments, which were sponsored by large agricultural commodity processors "merely using the guise of farmers to exclude from the Act industrial workers who are subject to the most severe exploitation," but then later, after the law had had a chance to operate, to extend its benefits to the millions still deprived of its protection, lacked the resonance to halt the amendatory juggernaut.179

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179"CIO's 1940 Legislative Program for Jobs, Security and Peace," CIO News, 2(52)
Abortive Statutory Amendments to Exclude Even More White-Collar Workers

Seventy-Sixth Congress Third Session: 1940

With half the world in the agony of war, and many pressing questions before the Congress, we have taken 5 days to decide whether or not the American worker is worth 30 cents an hour for his labor.180

Nor was it surprising that the new year witnessed the Chamber of Commerce’s committee on manufacture reporting that 15 months’ operation of the FLSA “had proved that the chamber’s opposition at the time of enactment was right and that the chamber should continue to advocate repeal.” The organization therefore asserted that the only valid public regulation of minimum wages and maximum hours could be undertaken by state governments “‘for the special classes of workers for which legislative protection may be necessary to prevent their oppression and safeguard their health and well-being.”181 In particular, the committee inveighed against the application of the overtime provision to “office employees and other salaried workers, who customarily are granted vacations with pay, are compensated during absence because of illness, and are accorded other privileges....” The Chamber’s members regarded the requirement of overtime compensation to such employees as “inequitable to the employer and as tending to restrict the opportunities of the worker to improve his status.” Indeed, the editorial staff of the Wage and Hour Reporter characterized this criticism as being “[a]t the heart of the Committee’s objections to the Act....”182 To be sure, many employers, perhaps too impatient to await the fruits of the Chamber’s agitation for repeal, took the law into their own hands: a survey conducted by the Women’s Bureau of the DOL throughout 1940 in Houston, Kansas City, Los Angeles, Philadelphia, and Richmond revealed that only 46 percent of office employers paid their employees


180CR 86:5430 (May 2, 1940) (statement of Mary Norton, chairman of the House Labor Committee).

181“Scores Wage-Hour Law,” NYT, Jan. 28, 1940 (29:4). A few days later Senator Taft, in a speech he gave at Swarthmore College in his unsuccessful campaign for the Republican presidential nomination, presented the same view, urging the country to: “Abandon hour regulation, except where it involves injury to health or lack of time for recreation.” “Taft Calls Party to Help Business,” NYT, Feb. 19, 1940 (1:2).

time and a half for overtime work.\textsuperscript{183}

A more concrete sense of the typical complaints expressed by employers that were, unlike the Chamber of Commerce, willing to engage mandatory labor standards, can be gleaned from a December 1939 memorandum with recommendations for amending the FLSA that was drafted by a group of businessmen from Duluth, St. Paul, and Minneapolis, organized as a state committee to study the wage and hour law. These employers complained that the FLSA was being used as a mechanism to control wages and salaries far above the statutory minimum and had been extended to include high-salaried employees by a narrow definition of exempted classes, whereas Congress’s declared purpose was “to protect the under privileged [sic].” They therefore recommended either amending the law to exempt from the maximum hours provision all employees paid 40 cents or more an hour or $16.80 week or “exempt[ing] from the hours provisions of the Law all office, clerical, supervisory, technical and other employees being paid on a full time salary basis of $30.00 a week or more.” In any event, the group preferred that the statute itself definitely define the excluded white-collar groups in order to avoid confusion and uncertainty. Finally, the Minnesota employers criticized the FLSA for its inflexibility in failing to provide for hours-averaging outside of collective bargaining agreements and recommended that it be amended to permit hours-averaging in nonunion firms.\textsuperscript{184}

\textsuperscript{183}In addition, 14 percent paid the regular rate, 18 percent provided compensatory time off, 9 percent gave supper money, and 13 percent paid nothing. Calculated according to data in US Women’s Bureau, \textit{Office Work in Houston: 1940}, at 40 (Bull. No. 188-1, 1942); US Women’s Bureau, \textit{Office Work in Los Angeles: 1940}, at 36 (Bull. No. 188-2, 1942); US Women’s Bureau, \textit{Office Work in Kansas City: 1940}, at 48 (Bull. No. 188-3, 1942); US Women’s Bureau, \textit{Office Work in Richmond: 1940}, at 40-41 (Bull. No. 188-4, 1942); US Women’s Bureau, \textit{Office Work in Philadelphia: 1940}, at 74-75 (Bull. No. 188-5, 1942). The data refer only to those (446) offices in which employees actually worked overtime. In many of the larger offices in Los Angeles, peaks work loads were handled by employing temporary or extra employees.

\textsuperscript{184}“Recommendations as to Needed Amendments to the Wage and Hour Law” (Dec. 12, 1939), enclosed with letter from Jack Schroeder, General Manager, Associated Industries of Minneapolis, to George McKinnon [sic] (Oct. 31, 1947), in George E. MacKinnon Papers, Location 144.J.19.2F, Box 6: Labor: Fair Labor Standards Act: Correspondence, 1947-1948, Folder 2 (MHS). The original FLSA exempted employers from overtime pay liability if they employed workers beyond the weekly overtime trigger pursuant to a collective bargaining agreement with employee representatives certified as bona fide by the NLRB that provided that no employee shall be employed more than 1,000 hours during any 26 consecutive weeks or 2,000 hours during any 52 consecutive weeks. Fair Labor Standards Act of 1938, ch. 676, Pub. L. No. 718, § 7(b)(1)-(2) 52 Stat. 1060,
If some employers were disgruntled about the scope of their exemptions from overtime pay liability, by January 1940 the left-wing CIO-affiliated UOPWA was profoundly fearful of the consequences for its members and potential members of looming legislative developments. With rumors circulating that crippling amendments to the FLSA would soon be called up by a member of the House Rules Committee and powerful lobbies of the NAM, Chamber of Commerce, and Associated Farmers once again actively campaigning for passage of the Barden and Ramspeck bills: “Over one million white collar workers are today unemployed and those employed are notoriously underpaid. Passage of these amendments, which would permit unlimited overtime, would increase the ranks of the unemployed white collar workers by an estimated 400,000.” The union therefore mandated that national and local campaigns be organized against the Barden, Ramspeck, and Norton amendments.\(^{185}\) A month later the union warned that: “Reports from Washington leave no doubt that a determined attack to destroy the Wage-Hour Law will be made this session of Congress.” Having observed that the exclusion of office and clerical workers was a chief point of many of the amendments already introduced, the UOPWA pointed out that: “Large employers of office and clerical workers such as the utilities have already opened lobbies in Washington to get their

\(^{1063}\) (June 25, 1938). With modifications the provision is codified at 29 USC § 207(b)(1)-(2) (2000). Because the NLRB was required to certify that the workers representative was bona fide, certification had to be requested by a union rather than an employer, and doubts had been expressed, even before the law went into effect, as to unions’ willingness “to ask for a plan to average working hours over a period of weeks since employees would lose time and a half payment for overtime,” and thus the extent to which the provision would be “invoked may be smaller than has been thought.” “Wage Law Difficulties Discounted,” \textit{JC}, Oct. 4, 1938 (1:4). From January to mid-August 1939 about 160 certifications were issued by the NLRB of unions entering into agreement exempting employers from overtime pay. \textit{Report of Proceedings of the Fifty-Ninth Annual Convention of the American Federation of Labor} 177 (Oct. 2-13, 1939) (Report of the Executive Council). In recent years such “1040/2080 plans are rarely used because of the requirement for employee consent through the collective bargaining process. Where such plans are implemented, however, they afford some scheduling flexibility to deal with seasonal manpower peaks and valleys without running up overtime costs.” Gilbert Ginsburg, Daniel Abrahams, and Sandra Boyd, \textit{Fair Labor Standards Handbook for States, Local Governments and Schools} ¶ 550 (1998).

\(^{185}\) “National Legislative Program of the United Office and Professional Workers of America CIO: National Legislative Committee Report” at 1-3 (Jan. 1940), in #6046 Box 281 Folder 7: Office and Professional Workers of America, United. Legislative Dept., Kheel Center, Cornell University.
Abortive Statutory Amendments to Exclude Even More White-Collar Workers

employees exempted.\footnote{Wage-Hour Law Fights for Life,} OPN, 6(2):4-3-5 (Feb. 1940).

Before the House\footnote{The Senate, once again, did not debate any bill, but Senator Taft did express the view that there should be more exemptions from the overtime provision. Patterson, Mr. Republican at 235 (citing Taft’s papers). Senator David Worth (Dem. ID) did introduce a bill in April with the same language as the Barden bill, but no action was ever taken on it. S. 3725 (76th Cong., 2d Sess., Apr. 8, 1940).} resumed deliberations at the end of April 1940 on the three bills pending from the first session that excluded, inter alia, higher-paid workers from the FLSA’s premium overtime provision,\footnote{House to Consider Wage Act Changes Early Next Week,} NYT, Apr. 9, 1940 (1:1). other bills were introduced early in the third session\footnote{Following Germany’s invasion of Poland and the beginning of World War II, Roosevelt called Congress into a special second session, which was devoted to revising the Neutrality Act and ran from September to November 1939. Half a year later it was reported that “in the closing days of the special session an attempt...was made to pave the way for consideration of changes [in the FLSA], but was abandoned.” “House Recommits Norton Wage Bill by 205 to 175 Vote,” JC, May 4, 1940 (1:3, at 6:6). The index to the Congressional Record for the second session of the 76th Congress includes no references to any such attempt.} that were even more radically exclusionary; although Congress took no further action on them, they suggested the range of interest in constricting overtime pay for white-collar workers. Identical bills were introduced on January 8 in the Senate and February 9 in the House that would have excluded from overtime regulation “any employee employed in a clerical capacity.”\footnote{S. 3047, § 3 (76th Cong., 3d Sess., Jan. 8, 1940) (Alexander Wiley, Rep. WI); H.R. 8393, § 3 (76th Cong., 3d Sess., Feb. 9, 1940) (Vincent Harrington, Dem. IA).}

Although ultimately nothing came of this initiative to exclude clerical workers, the WHD was sufficiently concerned about Senator Wiley’s bill, S. 3047, that it prepared a report detailing the lack of justification for and ramifications of the exclusion.\footnote{US DOL, WHD, “Report on Proposal to Exempt Clerical Employees from the Hours Provisions of the Fair Labor Standards Act” (Mar. 1, 1940). The only extant library copy of this 17-page typescript appears to be held by the DOL’s own Wirtz Labor Library.} The report’s starting point was that the FLSA’s overtime provision applied to “clerical employees just as much as to other workers unless such employees are employed in an executive, administrative, or professional capacity....” The reason for this implicit overlap lay in the fact that, according to the dictionary definition, “clerk” was “an indefinite term of wide application, and may include employees clothed with authority to act in various weighty matters for their employers, such as the teller of a bank or the secretary of a corporation.”\footnote{US DOL, WHD, “Report on Proposal to Exempt Clerical Employees from the Hours Provisions of the Fair Labor Standards Act” (Mar. 1, 1940). The only extant library copy of this 17-page typescript appears to be held by the DOL’s own Wirtz Labor Library.} Indeed,
since the Census of Occupations listed several clerical occupations that were carried on in factories rather than offices, the WHD concluded that Wiley’s bill would exclude such factory workers as shipping and stock clerks and timekeepers, as well as telephone and telegraph operators, newspaper editorial employees, and inside sales people. All told, the number of newly excluded might reach as high as 1.75 million workers—or about one-seventh of all those then covered—including 350,000 clerks, 225,000 bookkeepers and cashiers, and 200,000 stenographers and typists.\(^\text{193}\)

Uncharacteristically, the WHD also emphasized that the existence of as many as one and a half million unemployed clerical workers was an important factor “in considering the limitation of hours of those employed at present.” Contrary to claims that clerical duties were such that reduced hours neither were necessary nor would create additional employment, the WHD noted that the routine nature of many clerical occupations made “the problem of taking on additional employees...little different from that of adding factory employees.” To be sure, the Division itself asserted without evidence that: “Exemption of workers whose duties are not routine...and therefore cannot be subdivided” and who “need greater flexibility in working time” was already provided by the white-collar exclusions.\(^\text{194}\) The WHD then elaborated on the multidimensional convergence and fusion of white- and blue-collar workers:

The difference between clerical and factory work has been decreasing with the increasing mechanization of office work and the amount of energy involved in operating many office machines is probably little different from that used in operating many factory machines. Partly because of the use of machines in offices, the work of many clerical employees is as routine as that of many factory employees. Because of the physical energy required, the routine nature of much of the work, the noise of office machines, and because of the eye strain involved, office work results in physical and nervous strains just as does factory employment. From the standpoint of health, as well as from the standpoint of reducing unemployment..., it is as necessary to cover clerical employees by hour legislation as it is to cover factory employment.\(^\text{195}\)

The WHD therefore easily concluded that if they were not covered by the FLSA,

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"the clerical workers most in need of protection will be required to work overtime without adequate compensation." How time-and-a-half pay would protect clerical workers' health the WHD did not explain.

Of especial interest was the bill introduced in late February by Representative Charles Kramer, a California Democrat. H.R. 8624 would have added three new subsections to the FLSA's definitions section defining an employee employed in a bona fide executive, administrative, and professional capacity. Kramer adopted verbatim most of the DOL's original regulations from 1938, but also inserted new provisions that, intriguingly, anticipated some of the most important and contentious revisions that the DOL made eight months later. In addition to raising the executive salary-level test to $50 a week, the bill would have accorded bona fide executive status to any employee "whose primary duty was to assist" an executive. Kramer also advocated the separation of the executive and administrative categories. He then defined the latter to encompass an employee whose primary duty was: (1) to "manage, direct, or superintend any group of employees," which presumably represented a lower managerial status than the management of an establishment or department required of executives; (2) to assist any employee who satisfied the definition under (1); and (3) (the vaguest and most expansive subgroup) to "execute the instructions of his superiors as to results to be accomplished by the exercise of discretionary powers as to the means by which such results are accomplished." The administrative employees' threshold salary Kramer kept at $30. Kramer also anticipated the WHD's addition of an artistic subgroup of excluded professional employees "customarily or regularly engaged in work which is largely original and creative in character and of which the result depends upon the conception, invention, imagination or genius of the employee." Like the original regulations, H.R. 8624 imposed no salary-level test for this professional subgroup. For good measure, Kramer also excluded from the FLSA any employee paid at least $200 a month, $50 a week, or even $1.25 an hour who was guaranteed at least 40 hours' employment a week. If further evidence were necessary, the bill's tell-tale final section, which—in stereotypical pro-employer fashion for the times—would have rolled back the statute of limitations for filing FLSA claims to only six months, underscored that Kramer's amendments were not designed to inure to workers' benefit. Kramer confirmed this speculation on the House floor.


197 H.R. 8624 (76th Cong., 3d Sess., Feb. 23, 1940). On the debate over the statute of limitations, see Linder, "Moments Are the Elements of Profit" at 339-48. The discussion of Kramer's bill in Malamud, "Engineering the Middle Classes" at 2301 n.353, is distorted by its mistaken assertion that the Roosevelt administration's $200-a-month proposal would...
Abortive Statutory Amendments to Exclude Even More White-Collar Workers

in May 1940 when he (unsuccessfully) offered this "short period of limitation" as an amendment to the FLSA bill on the grounds that it was "manifestly unfair for employees who have continued in their employment without objection over a period of years to sue for large amounts of overtime which are alleged to have accumulated."198

Although it is not clear why Kramer undertook this initiative, the attention it paid to the exclusion of artistic professional employees strongly suggests, in combination with the limited range of Kramer's interest in the FLSA, that he was engaged in constituent service on behalf of the movie industry in his Los Angeles district. This surmise is consistent with the fact that in 1937-38 Kramer had been responsible for the last minute amendment of the bill to make an exception from the prohibition of child labor for children employed as actors in motion pictures.199

Then in May 1940, on the last day of debate on the FLSA bills, Kramer, in (unsuccessfully) offering as an amendment the aforementioned compensation thresholds, justified weekly and hourly measures on the grounds that in the motion-picture industry even executives receiving some of the highest salaries paid in the United States were paid weekly, while other highly compensated employees were paid on an hourly basis.200

One reason that the House took no action on Kramer's proposal to write the definitions of the excluded white-collar workers directly into the FLSA was that the very next day House supporters of amending the FLSA agreed to give WHA Fleming "an opportunity to modify existing regulations before acting on pending amendments." In this context Cox disclosed that Fleming planned conferences the following week "with industrial leaders to discuss proposed changes in his interpretation of the exemptions in the act." To be sure, Cox appeared to hold out little prospect of a successful regulatory process: "If Colonel Fleming were given a free hand I think he would make a good job of administering a bad law.... But I don't believe he will be permitted to exercise any freedom." Since a rule was at that moment pending on Speaker Bankhead's desk to consider the three FLSA bills from the first session, and Cox as a member of the Rules Committee was "entitled to act at any time the House is momentarily clear of other business,"201 priority for

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198CR 86:5486 (May 3, 1940).
200CR 86:5481 (May 3, 1940). See also below ch. 12.
201"Give Time to Modify the Wage-Hour Rules," NYT, Feb. 25, 1940 (9:6-7). For an express statement that Kramer's bill had been preempted, see "Congress May Change
the legislative route seemed probable if not assured.

Of the three principal bills before the House during the second session, both Norton’s administration bill (H.R. 5435)—viewed by labor as “the ‘least obnoxious’”202—and Ramspeck’s compromise bill (H.R. 7349) would have excluded all employees employed at a guaranteed monthly salary of at least $200, while Barden’s blatantly pro-employer bill (H.R. 7133) would have excluded all employees with salaries of at least $150 monthly or $1,800 a year. The WHD conservatively estimated that alone the salary provision of the Norton and Ramspeck bills would exclude an additional 125,000 workers from the hours provision, while 325,000 would be excluded under Barden’s bill.203 Acting WHA Fleming told Congress in February that he had had a chance to read only the Barden amendments, which he believed went “too far.”204

As discriminatory as Barden’s amendment was, ironically, his paltry salary threshold nevertheless exceeded by 15 percent the $30-a-week executive salary level that remained in the WHD’s regulation until 1950. And as blatantly restrictive and antilabor as Barden’s white-collar provision was, in the perverse speculation of The New York Times, it might have expanded the law’s scope. Since the newspaper asserted an “almost universal agreement” that the FLSA “should not apply to highly paid workers,” it feared that by “‘[r]estricting’” the FLSA to workers earning less than $150 monthly, Barden’s bill had “the incidental effect of extending the application to all persons getting up to that amount. Instead of applying merely to the lowest paid workers, the act would then definitely cover much the greater part of our whole working population.”205 “The most important needed amendment,” according to the Times, was “removal...of the mandatory blanket ‘maximum hour’ provisions” because then, from the unique perspective of its exquisite editorial logic, Barden’s exemptions would become superfluous.206

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203The WHA’s useful section-by-section comparison of the bills was published by Representative Norton in CR 86:2260-64 (App.). The estimates are explained at id., 2264 n.g. Without mentioning a source or methodology, a news magazine stated that the Ramspeck and Norton bills would exclude 212,000 and 464,000 additional workers, respectively, from the overtime provision. “Hurdle for Labor Law Change,” USN, May 3, 1940, at 28.
205“Wage-Hour Amendments,” NYT, Apr. 25, 1940 (22:3) (editorial).
206“Wage-Hour Amendments,” NYT, Apr. 29, 1940 (14:2) (editorial).
Abortive Statutory Amendments to Exclude Even More White-Collar Workers

Barden himself had been swept into a complex political dynamic that was tightly interwoven with competing amendatory processes. The well-informed Journal of Commerce, which covered the congressional debates and WHD hearings more thoroughly than any other business publication, reported in early March that “[i]mportant concessions to the employer viewpoint in the administration” of the FLSA might be made early in 1940 by the WHD “to head off a drive for drastic amendment of the act by Congress....” The newspaper observed that although the Roosevelt administration controlled the labor committees in both houses, “official circles would dislike having amendments come up because of the hostility of Western agricultural interests and Southern industrial groups. These could effect drastic changes if given the opportunity.” Such “an understanding between administrative leaders and anti-New Deal forces” that involved pro-employer concessions by the WHD making congressional intervention unnecessary would, according to the American Newspaper Guild, in addition “take some of the anti-New Dealers off of a difficult spot on to which they maneuvered themselves through over-enthusiasm for their attack on the law.” In particular Barden, who had felt himself safe from attack by the AFL because he had sponsored amendments to the Wagner Act that it had favored in opposition to the CIO, “must have received a severe shock” when the North Carolina State Federation of Labor adopted a resolution at its 1939 convention to prevent his reelection because he had led the fight to wreck the wage-hour law by excluding two million low-paid workers. However, according to the Guild: “If the Administration meets enough of Barden’s proposals to pacify his employer backers, he will at least be spared the necessity of again placing himself on record in the eyes of his AFL constituents.”

Considerable publicity attended the run-up to the House debates. For example, in a radio address Barden misleadingly declared that in the FLSA there was “no such thing as a white-collar workers’ exemption, except” § 13(a)(1). He began by focusing on atypical cases presumably involving highly paid non-supervisory “administrative” employees: “As absurd as it may sound, it is nevertheless true that the Administrator is now confronted with men drawing as much as $7,000 per year and more who are under this act, and apparently there is no way to take them out without an amendment.” Then, without warning, Barden switched categories to complain that under the FLSA “columnists, newspaper reporters, and others who have responsible jobs, and sometimes like to go to a baseball game, play golf, or take an afternoon out for fishing, either must forego [sic] this pleasure or violate

207"Business Outlook," JC, Mar. 4, 1940 (1:6).
the act." After calling his listeners' attention to these trivial and/or misrepresented matters—employees cannot violate the overtime or minimum wage provisions of the FLSA—Barden finally focused on his most important point, an unveiled threat of *Realpolitik*, which, oddly, he never reiterated on the House floor in the course of his numerous speeches during the seven days of debate. Praising Fleming and his assistants as "high-type intelligent gentlemen," he acknowledged that they were striving as best as they can to administer a law full of ambiguities and terms almost impossible of interpretation, construction, or application, and I am firmly of the opinion that unless the amendments included in the Barden bill or amendments of similar purport are adopted the act will pull its own house down, and industrial labor will lose the protection and benefits which it has heretofore and is now receiving.210

Although Barden also found these ambiguities in the area of the agricultural processing exclusions,211 he included the quoted passage in the section on "White-collar exemptions."212 His complaint about administrative agencies' promulgation of regulations at odds with congressional intent was, in the abstract, common among opponents of the New Deal and became Representative Cox's special province during the debates:

[Is Congress to further tolerate administrative agents nullifying what Congress does through the substitution of what they think Congress ought to have done? [D]o you wish to prostate the people of America and Congress at the feet of these administrative tyrants who, through the substitution of their judgment for that of the Congress, set up regulations having the force and effect of law?213

Barden, a member in good standing of the antilabor coalition dubbed "Cox's army,"214 was part of this larger movement,215 but the particular substantive point

209 "Radio Address by Hon. Graham A. Barden, of North Carolina," CR 86:2101 (App.) (Apr. 15, 1940). Barden merely stated that he had "recently" delivered this radio address without dating it. This part of the address he included in remarks he made on the House floor several days before the debate on his bill began. CR 86:4925 (Apr. 23, 1940).
210 CR 86:2102 (App.).
211 CR 86:2102 (App.).
212 CR 86:2101 (App.).
213 CR 86:5202 (Apr. 29, 1940).
215 It found expression in the Walter-Logan bill, which Congress passed in 1940 but Roosevelt's veto of which it was unable to override. "The Walter-Logan Bill Dies," NYT,
he was making about the ambiguities of the FLSA’s white-collar provision was both distinct from his pro-employer ideology and as irrefutable then as it has remained ever since, although no participant in the early-twenty-first-century debates acknowledges or, perhaps, has even reflected on those ambiguities. As a member of the House Labor Committee in 1937-38 that helped enact the FLSA, Barden must have been aware that the entire responsibility for the ambiguity—which no WHA, confronted with what Barden accurately described as the “almost impossible” task of penetrating, ever publicly admitted—lay with the Seventy-Fifth Congress, because it had furnished absolutely no legislative intent as to what it meant by the “bona fide” “executive,” “administrative,” and “professional” employees it excluded from the wage and hour provisions. Nevertheless, the only after-the-fact light that he or chairman Norton ever shed on that intent by way of proposing their exclusive salary-level criterion for exclusion was indirect and unfocused: instead of explaining that the purpose of the overtime-pay provision was, for example, to spread employment and that because no appreciable number of workers with salaries in excess of $150 or $200 a month performed jobs that could be shared with the unemployed by eliminating overtime work, it would have been irrational to penalize their employers for working them long hours, they (and WHA Andrews), in effect, merely transmitted employers’ expressions of displeasure over being required to pay overtime to non-bosses paid far higher salaries.

This same attitude was shared even by that part of the press that in 1940 supported the FLSA in principle, such as the Washington Star, which editorialized that “the basic purpose of the act would not suffer if white-collar workers, earning $150 or $200 a month, were exempted....” Similarly, the St. Louis Post-Dispatch, which also opposed “emasculatory amendments,” agreed that the law unfairly penalized “employers who pay their employees well over the minimum scale, perhaps as much as several times the minimum” by requiring them to pay overtime to boot. ... [P]ersons earning approximately $2,000 a year are not those for whom Federal wage-hour legislation was intended. They may not be in the


216However, Barden voted to recommit the bill in 1937 and against the conference report in 1938. CR 81:1835 (Dec. 17, 1937); CR 83:9267 (June 14, 1938).

217New York Republican Bruce Barton, one of the world’s most celebrated advertising executives, continued this tradition by asserting on the House floor that “it was never intended under this act that the $5,000 or $10,000 or the $20,000 a year executive should be punching a time clock.” CR 86:5134 (Apr. 26, 1940).

Abortive Statutory Amendments to Exclude Even More White-Collar Workers

upper brackets, but they are not the bottom-rung workers in whose behalf the law was passed. Editorial opinion on this issue was, to be sure, almost always shaped by publishers' own struggles as employers vehemently opposed to paying overtime to reporters.220

In mid-April, Barden debated the FLSA amendments on the radio with New Deal Senator James Murray.221 A week before the House debate reopened, Lewis Merrill, the president of the Union of Office and Professional Workers of America, appeared before the congressional Temporary National Economic Committee investigating the concentration of economic power and testified that in 1937 143,766 professional employees were totally unemployed. Pointing out that a business magazine survey of 287 firms' overtime compensation policies found that only eight paid time and a half to office workers, Merrill declared, with a view to the pending resumption of debate, that: "The relatively poor bargaining position of the white-collar employee in the labor market is clear.... Yet, an act designed to improve that position, the Fair Labor Standards Act, is one whose applicability to white-collar employees is in hourly doubt, and only preserved because of the unremitting efforts of the white-collar unions and the Congress of Industrial Organizations."222

The renewed legislative wrangling in April 1940 augured success for the anti-labor southern congressional coalition, which "seemed able to dictate terms to the New Dealers...."223 If, as the Roosevelt administration admitted, its opponents

219"The Wage-Hour Battle," St. Louis Post-Dispatch, May 2, 1940, reprinted in CR 86:2721, 2722 (App.). The figure mentioned by the paper was the equivalent of about $27,000 in 2004—a salary that scarcely provoked such a reaction among employers in the latter year. See below chs. 16-17.

220See above ch. 9 and below ch. 12.

221Wage-Hour Revisions Demanded by Barden," NYT, Apr. 15, 1940 (8:4). Because this account focused on the agricultural processing exclusions and did not mention the white-collar exclusions, it is assumed that this debate differs from the radio address that Barden had printed in the Congressional Record.


Abortive Statutory Amendments to Exclude Even More White-Collar Workers

probably had the votes to pass the Barden bill, the question remained as to whether the majority was sufficiently large to constrain the Senate, whose Education and Labor Committee solidly supported the New Deal, to take up the bill too.\textsuperscript{224} Two weeks before the debate resumed, the \textit{Journal of Commerce} had reported that the Roosevelt administration was not likely to mount more than a "perfunctory fight" to defeat the Barden amendments because indications were that it could stop the bill in the Senate, although this strategy was complicated by discussions by several senators of broader FLSA amendments, to be accompanied by hearings, which would have delayed final action during the Seventy-Sixth Congress.\textsuperscript{225} The House offered solid evidence of where it stood on the FLSA amendments when, on April 18, it voted by an overwhelming 279 to 97 in favor of the Walter-Logan bill, which proposed to subject federal agencies' rulings and regulations to judicial review. Denounced by Roosevelt and regarded by New Dealers as "a vicious thing,"\textsuperscript{226} the bill applied to the WHD, whose rulings in particular had brought about widespread demands in the House for clarification of various sections of the FLSA, especially with regard to white-collar workers: "The demand for the Logan-Walter bill arose more out of alleged arbitrary rulings of the Labor Board and the Wages and Hours Administration than from any other reason."\textsuperscript{227}

Then several days before the House debate resumed, John L. Lewis renewed his attacks on the House bloc consisting of "Garner Democrats" and Republicans.\textsuperscript{228} On April 23, Morris Watson, the chairman of the legislative committee of the Guild's International Executive Board, sent a circular to all its locals pointing out that the $150 and $200 coverage cut-offs in the Barden and Norton bills would harm the union's members and urging each local and member to-telegraph their congressmen to oppose any amendments.\textsuperscript{229}

The House debate opened on April 25, just nine days after the conclusion of the first set of WHD white-collar regulatory hearings (on the wholesale distributive trades), of which Congress was well aware.\textsuperscript{230} President Roosevelt's flagging

\textsuperscript{224}Dorris, "Wage Law Revision Nears House Test" (9:4).
\textsuperscript{225}"The Washington Situation," \textit{JC}, Apr. 11, 1940 (1:2).
\textsuperscript{226}Henry Dorris, "House Votes 279-97 to Curb Agencies by Court Review," \textit{NYT}, Apr. 19, 1940 (1:1).
\textsuperscript{227}Henry Dorris, "House Vote on Agencies Signalizes a New Trend," \textit{NYT}, Apr. 21, 1940 (E7:1-2).
\textsuperscript{228}Henry Dorris, "Wage Law Revision Nears House Test," \textit{NYT}, Apr. 22, 1940 (1:5).
\textsuperscript{229}NLRB and Wage Hour Fights On," \textit{GR}, May 1, 1940 (5:1-3).
\textsuperscript{230}For example, New York Republican Representative Bruce Barton (founder of one
influence on Congress was impressively on display the very first day of debate, when, in spite of a letter from him stating that "it would be a great mistake to adopt the Barden amendments" that chairman Norton made public,\textsuperscript{231} the House voted 233 to 141 to permit floor debate on the Barden bill even though the Labor Committee had never considered, let alone reported it.\textsuperscript{232} This outcome, the result of "perhaps the bitterest debate of this session," was widely interpreted as signaling "the relative strength of the Cox-Barden and New Deal factions...."\textsuperscript{233}

The vast majority of the marathon debate—which took up about 200 double-columned pages in the \textit{Congressional Record} and the senselessness of which, in view of the certainty that the Senate would not follow suit and/or that Roosevelt would issue an unoverridable veto, numerous representatives repeatedly emphasized\textsuperscript{234}—was focused on the issue of which agricultural processing workers would be excluded from the FLSA\textsuperscript{235} and whether they would be deprived only of hours protection (as under Norton's bill) or also of the 30-cent hourly minimum wage.\textsuperscript{236} The fact that the House devoted so little attention to the proposed exclusion of all workers (but realistically, by and large, of white-collar workers) with a guaranteed salary above a certain amount, which even the Fleming-Norton administration bill embodied, strongly suggested that it was not controversial—or, at the very least, that labor realized that overtime pay for non-minimum wage workers was an issue on which employers were so insistently demanding a rollback that failure to acquiesce in the concession might trigger much more destructive amendments.

Hardly had the seven-day debate (lasting from April 25 to May 3) begun when

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\textsuperscript{231}Henry Dorris, "House Opens Way to Wide Changing of Wage-Hour Act," \textit{NYT}, Apr. 26, 1940 (1:3); "Roosevelt Protest on Pay Act Changes Rejected by House," \textit{JC}, Apr. 26, 1940 (1:7). Although both of these contemporaneous newspaper accounts have Norton reading the letter on April 25, according to the \textit{Congressional Record}, she did not do so until April 26. The letter, which was sent to Norton by Stephen Early, Roosevelt's secretary, was taken from a letter by Roosevelt to an unnamed friend. \textit{CR} 86:5122-23 (Apr. 26, 1940).

\textsuperscript{232}CR 86:5035-53 (Apr. 25, 1940).

\textsuperscript{233}Dorris, "House Opens Way to Wide Changing of Wage-Hour Act."

\textsuperscript{234}CR 86:5035-55, 5120-56, 5193-5229, 5255-81, 5342-70, 5430-61, 5479-5501.

\textsuperscript{235}New Bill to Amend Wage Act Forecast," \textit{JC}, Apr. 27, 1940 (1:2, 12:5).

\textsuperscript{236}CR 86:5199 (Apr. 29, 1940) (Rep. Ramspeck).
Abortive Statutory Amendments to Exclude Even More White-Collar Workers

A weary Labor Committee chairman Mary Norton was constrained to "come to the inescapable conclusion that my job to protect the working men and women of this country only began with the passage of the Fair Labor Standards Act. It is far more difficult to defend the law against attack than to secure its enactment." She found it consistent with this mission to advocate the exclusion of all employees paid a guaranteed monthly salary of at least $200 on the grounds—which she had already advanced a year earlier—that it had been found that there are many persons whose work is not clearly administrative or executive but who are high-salaried workers with necessarily flexible hours. Their inclusion has created some hard problems for the Administrator and caused real hardship in many cases. Of course, you realize that there is nothing in the act which limits the application of this exemption to clerical or so-called "white-collar" workers. If a ditch digger received $200 a month he would be similarly exempt....

Norton’s explanation was curious in the sense that apparently not even she believed that the work of the employees whom employers wanted excluded, although clearly not executive because they were not bosses—it was for this very reason that employers wanted the statutorily separate category of administrative employees that was ultimately vindicated in the WHD’s regulations later that year—was “administrative.” To be sure, achieving clarity on this point would have required Congress to divine what it had meant by that term. Although Norton’s bill overcame this interpretive obstacle by applying the salary threshold to salaried employees regardless of whether their work was encompassed by the trinitarian formula, the failure to enact her (or Barden’s) approach continued to leave the WHA without any guidance whatsoever as to the scope of the administrative workers whom Congress intended to exclude. In addition, Norton failed to explain whether by “flexible hours” she merely meant long hours or to identify the “real hardship” imposed on employers that had been compelled by the overtime provision to hire another worker to avoid the overtime penalty. The fact that virtually no member of the House asked these or any related questions or contested this expansion of the group of excluded workers strongly suggested that it was acceptable to virtually everyone who indignantly rejected Barden’s $150 threshold.

239 See below chs. 11-13.
240 AFL president William Green wrote a letter to Barden rejecting the $150 cut-off as “economically unsound because at the present time most thinking people agree that the
Abortive Statutory Amendments to Exclude Even More White-Collar Workers

The sole challenge on the floor came from Missouri Democrat, Reuben Wood, who had been president of the Missouri State Federation of Labor from 1912 until his election to Congress in 1932 and then resumed that post from 1941 to 1953 after losing his seat. In the midst of his attack on Barden’s agricultural processing exclusions, he was engaged by Massachusetts Democrat Arthur Healey—the eponymous sponsor of the 1936 Walsh-Healey Act, which created an overtime regime for workers under government contracts\(^{241}\)—in the following carefully scripted colloquy:

Mr. HEALEY. Does the gentleman think that white-collar workers receiving $150 a month ought to be exempted from the hour provisions of the act?

Mr. WOOD. I do not think the so-called white-collar workers, just because they are called white-collar workers, should be exempted, whether they receive $150 or $200 a month. The bank clerks and many other so-called white-collar workers are among the most sweated people in some instances. There is no industry that requires its employees to work longer hours than some bankers require their bank clerks to work. They should be privileged to be protected by this Fair Labor Standards Act.

Mr. HEALEY. And such an exemption would defeat one of the purposes of the act, namely, the spread of employment, would it not?

Mr. WOOD. Of course, it would. I am glad the gentleman contributed that. The main purpose of the Wage and Hour Act is to spread employment....\(^{242}\)

In the welter of hostile amendments adopted, Ramspeck soon disowned his own bill on the grounds that he did not want his name on a bill containing exemptions from the 30-cent-an-hour minimum wage.\(^{243}\) On April 29, Barden explained the famous “white collar” situation. As the situation is now, you have under the wage-hour law men drawing as high as $7,000 a year. If they go back to work after hours, to attend to their business or sign their mail, then the employer has to pay them overtime at the rate of $7,000 a year divided by the hours. This is perfectly absurd. The act was never intended to cover that type of employee. Therefore I wrote into this bill provisions for exemption of those drawing a guaranteed salary of $150 a month, or $1,800 a year, where the employee is not required to work any minimum number of hours; in other words, he number of hours worked per week must be lessened if we are to overcome widespread unemployment. We must distribute the amount of work available among a larger number of people.” CR 86:5135 (Apr. 26, 1940).

\(^{241}\)See above ch. 6.

\(^{242}\)CR 86:5136 (Apr. 26, 1940).

\(^{243}\)CR 86:5128 (Apr. 26, 1940).
That no one challenged Barden’s lapse in logic in using “Therefore” to generate a rule based on $1,800 from an example based on $7,000 may have been a function of the fact that by this time, as New Dealer Raymond McKeough put it, “the advocates of revision were so strong they were likely to go ‘hog wild’ and load the bill with numerous exemptions. ‘I hope they do.... It will give us more support for a move to recommit....’”245 By April 30, an “unexpected and entirely informal coalition” of “New Deal Democrats and a small group of Republicans...jockeyed Barden into repudiating his own bill by tentatively writing into it a series of revisions.”246 Barden announced that he expected to vote against his own bill because it was loaded down with amendments (offered largely by Republicans),247 and in fact it was promptly defeated 156 to 66.248 These Republicans “privately explained their votes” as a response to having been put “‘on the spot’” by the Democratic leadership, which conveyed Senate hints that the measure would receive “‘a proper burial’”; the Republicans’ votes on several amendments, according to the Times, “went further toward courting the friendship of labor than perhaps any proposals ever offered by the New Deal.” Other Republicans traded their votes against the Barden bill for the New Dealers’ openly offered votes for about $350 million for farm programs.249

With the Barden bill was also lost an amendment offered by Michigan Republican Clare Hoffman— noted for having “opposed all New Deal programs for city workers”250—and agreed to on a vote of 74 to 38 the previous day, which would have created hours-averaging for white-collar workers. Specifically, it would have permitted employers to work employees more than 42 hours a week without having to pay overtime during a period of 26 consecutive weeks if the employee was paid on a salary basis and had been in the employer’s employ at least six months and the average workweek over that period did not exceed 42 hours. Anticipating the kind of misleading advertising that employers and their

244 CR 86:5198 (Apr. 29, 1940).
245 “Wage Law Changes by House Expected,” NYT, Apr. 28, 1940 (9:4). McKeough was an Illinois Democrat.
246 “Barden Legislation to Ease Wage Law Rejected by House,” JC, May 1, 1940 (1:1, 3:7).
249 Henry Dorris, “Wage Bill Beaten; Republicans Join with New Dealers,” NYT, May 1, 1940 (1:1).
Abortive Statutory Amendments to Exclude Even More White-Collar Workers

congressional supporters would deploy half a century later in support of the FLSA amendments allegedly empowering workers to control their own flexible schedules, Hoffman touted his proposal as enabling a worker “who wants to get off 1 week to make up his time the next week.”251 The Roosevelt administration’s spokespeople did not oppose the amendment, Ramspeck, for example, arguing that its sweeping character “will help us defeat the Barden bill....”252

Lost, too, with the defeat of the Barden bill was an amendment offered by Iowa Democrat Vincent Harrington that would have exempted from minimum wage and overtime liability all banks and trust companies the greater part of whose selling or servicing was in intrastate commerce.253 In vain Barden pleaded with Harrington to withdraw the amendment. Harrington’s admission that “the ordinary bank teller or clerk gets between $75 and $110 a month” in Iowa prompted California Democrat Lee Geyer to accuse him of first exempting such low-paid workers and then working them “from daylight to dark.” The tone of the proceedings at this point was nicely captured by Geyer’s exasperation qua strategy: “Let us adopt it and maybe we will kill the whole thing.” And adopt it the House did, albeit by the minuscule vote of 37 to 33.254

Some opponents of the FLSA, such as Georgia Democrat Malcolm Tarver, were acutely aware that the result of “the adoption of drastic amendments” would be nothing, since “the Senate will not consider them, and if they are...passed by the Senate, they will not be signed by the President.” But his “half a loaf is better than no bread”255 admonition failed to carry the day. Since the yeas and nays were not recorded on these various amendments, it is unclear whether their adoption was driven by dizzy-with-success anti-FLSA forces or by Democrats whose strategy consisted in loading the Barden bill up with enough radical amendments to make

251 CR 5225-26 (Apr. 29, 1940). On similar proposals beginning in the 1990s, see Linder, *Autocratically Flexible Workplace* at 13-15. Hoffman was quite atypical for the time in holding the view that: “The purpose of this law was not to put more men to work. The purpose was to increase wages by paying time and a half for overtime.” CR 86:5478 (May 3, 1940). Hoffman was the only member of Congress who made an appearance (by proxy) at the 1940 WHD white-collar hearings in support of an employer. Official Report of the Proceedings Before the Wage and Hour Division of the Department of Labor In the Matter of: Definition of “Executive, Administrative, Professional” Employees and “Outside Salesman” at 383 (Washington, D.C., April 12, 1940), in RG 155--Wage & Hour/Pub. Contracts Div. Location: 530, 47:9:3-4/Boxes 10-14.


Abortive Statutory Amendments to Exclude Even More White-Collar Workers

it impassable.256

In spite of the Barden bill’s defeat, of the general belief on May 1 that the aforementioned log-rolling over farm program appropriations together with “the apparent Republican determination to make its bid for the labor vote on the record” had made legislation unlikely,257 and of word from CIO vice president Sidney Hillman that at a conference with him Roosevelt had “seemed sympathetic to labor’s opposition to any proposals tending to ‘emasculate’ the statute,”258 FLSA opponents resumed their temporarily successful amendatory assaults on May 2—the same day on which the Chamber of Commerce of the United States, also meeting in Washington, adopted a resolution at the closing session of its annual convention demanding repeal of the FLSA.259 Of special interest was the amendment that South Dakota Republican Francis Case offered seeking to initiate a race to the bottom with Barden by exempting employers who paid employees a guaranteed annual salary of only $1,500. To the applause of the House, Case explained that his amendment was designed to encourage employers to provide “security for a great many workers who get close to” that annual salary because “[y]early job security is distinctly a step forward in social progress.” Since the House agreed to the amendment without any discussion whatsoever, no one asked Case to describe the social progress associated with privileging employers to require $30-a-week employees to work overtime without any penalty or premium pay260 (although the following day Representative Healey did observe that Case’s amendment took 1,750,000 workers out of the act).261 Nevertheless, even this Congress had its limits. When, immediately after adoption of the Case amendment, Harrington offered yet another monthly hours-averaging amendment that would have excluded any worker paid a guaranteed monthly salary merely in excess of the minimum wage, provided that he did not work more than 175 hours

256Despite saying that Hoffman’s proposal was “‘an amendment to the Barden bill, and we don’t care what they do to the Barden bill,’” Norton voted against it. Henry Dorris, “House for ‘Leveling Off’ Overtime of the Worker Who Is on Salary,” NYT, Apr. 30, 1940 (1:2-3, at 15:1).

257Dorris, “Wage Bill Beaten.”

258“Pay Act Exemption for Farm Workers Expanded by House,” JC, May 2, 1940 (1:3, 19:4).


260CR 86:5455 (May 2, 1940).

261CR 86:5492 (May 3, 1940).
per month, it was voted down 29 to 11.\textsuperscript{262}

When the House agreed to amendments to the Norton bill excluding an additional two million workers from the FLSA, Norton joined Ramspeck and Barden in disowning her own bill. Norton herself conceded that the inclusion of so many amendments would probably lead to its passage because each would attract congressmen whose constituencies might benefit,\textsuperscript{263} but the Washington Post drew the opposite conclusion on the grounds that "[m]ost urban Representatives are now dead set against the measure; and the farm group has not forgotten that it needs city votes for parity payments next week."\textsuperscript{264}

By the seventh and last day of debate, May 3, with the knowledge that Congress would be unable to override a certain presidential veto of the drastic Barden amendments and that neither side would be able to muster a majority,\textsuperscript{265} the intensity of the rancor suggested that it had transcended orchestration. When Cox took the floor to express approval of an amendment to exempt wholesalers because they needed relaxation of the hours provision, only to be told by Representative Healey that it would exclude yet another 800,000 workers, Cox, finally revealing the real agenda, shot back: "As far as I am concerned, I would exempt them all. I would take off the people of America this kind of regimentation that you are undertaking to impose. I believe we have gone far enough in this direction, and I think we have reached the point where we should begin to turn back. [Applause.]"\textsuperscript{266}

For their part, the FLSA's supporters had largely lost their patience with the proceedings, which Majority Leader John McCormack called "the most disgraceful spectacle this Congress has engaged in during my 12 years.... It is not a Congress; it is simply a chaotic group of individuals."\textsuperscript{267} And Norton, for good measure,
added that the corresponding work product was a “monstrosity.”268 After the New
Dealers were able to defeat the substitute for H.R. 5435 by 211 to 171 and a
majority of 205 to 175 voted to recommit the original Norton bill,269 “[t]here was
a rush for the doors, many hastening to catch trains for Louisville to see the
Kentucky Derby.”270 The Roosevelt administration’s victory was attributed by the
Washington Post to “a strange coalition of New Dealers opposed to any change in
the law and conservatives who thought the pending bill...did not go far enough.”271
Norton—who voted against recommittal because her promise the previous day to
vote to recommittal had been conditioned on the House’s adoption of the amend­
ments—had the last word, defending to the end her original bill as containing “very
many fine exemptions.... None of the amendments in the original act would have
destroyed the principle of the act. On the contrary, they would have strengthened
it.”272 Even though the week of debate had ended in an “important victory for
labor,” the Daily Worker, in a front-page article directly above an announcement
of Karl Marx’s 122nd birthday, lambasted the proceedings as “one of the most
disgraceful exhibitions of rough-house and rowdyism ever put on by the
House....”273

Congress’s failure to act did not leave the editors of the Journal of Commerce
in despair, since the Roosevelt administration’s “willingness...to accept several
mild changes in the statute...does not by any means spell the end of efforts to
modify this revolutionary Federal statute.” One of at least three amendments in
which employers continued to be interested was, according to the editorial, the
exemption of white-collar workers receiving monthly salaries of at least $200, who
“were clearly not meant to be subject to the law by Congress.” The newspaper
ascribed the defeat of the amendments to the fact that “the more bitter opponents
of the act appended quite drastic revisions to the pending amendments.” However
with “even enthusiastic supporters of the law” recognizing “the need for at least

268 CR 86:5490.
269 CR 86:5499-5501 (May 3, 1940).
272 CR 86:5501. After the 211-171 vote to reject all previously adopted amendments, Norton’s bill, as it stood when the House voted to recommit, “was in exactly the same form in which the bill was introduced...on March 29, 1939.” “House Recommits Norton Wage Bill by 205 to 175 Vote,” JC, May 4, 1940 (1:3, 6:6).
273 “Jittery House Blocks Tory Wage Act Amendments,” DW, May 4, 1940 (1:1).
Abortive Statutory Amendments to Exclude Even More White-Collar Workers

mild changes,” the editors were hopeful that the latter would be “enacted as soon as possible, while more drastic revision is left for future debate.” The United States News also laid great stress on the fact that President Roosevelt, Wage and Hour Administrator Fleming, and House Labor Committee chairman Norton had all favored the exclusion of all workers with a guaranteed monthly income of at least $200. And the Journal of Commerce offered employers even greater hope by pointing out that: “In some quarters the House vote killing the bill was interpreted as a vote of confidence in the Administration [sic] of the law by Col. Phillip B. Fleming,” who, despite having expressed a “desire that Congress clarify the law on some points, has undertaken to ameliorate some of the protests against enforcement through revision of the rules, believing this can be done without legislation.” Fleming, at least with regard to white-collar workers, did not disappoint.

A few months later, at its annual convention, the UOPWA rather immodestly took much of the credit for the anti-labor congressional coalition’s failure to revise the FLSA: “The UOPWA has carried on an active campaign against the Barden, Cox and Thomas amendments to the Fair Labor Standards Act, which would have excluded salaried employees earning over $100 to $150 a month. Effective lobbying against these amendments by the CIO and by our union helped to defeat these amendments at least temporarily.”

The FLSA amendments failed in 1939 and 1940, but they underscored the importance that the House of Representatives attached to “comparatively high” market-generated salaries as the single most important criterion rendering legislated protection against (unpaid) long hours unnecessary. Unfortunately, the House Labor Committee was unable to explain why “the hours provisions of the act...should not include” white-collar workers receiving salaries in excess of such a threshold. To be sure, it mentioned as a second criterion work that “generally requires flexibility in working time,” but it never distinguished such flexibility from genuine long working hours.

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276 "House Recommits Norton Wage Bill by 205 to 175 Vote" (6:6).
277 See below ch. 11-13.
278 A Summary of the Proceedings of the Third Constitutional Convention of the United Office and Professional Workers of America 79 (Aug. 31-Sept. 6, 1940).
279 Amendments to the Fair Labor Standards Act of 1938, at 8-9 (H. Rep. No. 522, 76th Cong., 1st Sess., Apr. 27, 1939). The Minimum Wage Study Commission thus erred in asserting: “The current salary test as a basic criterion used to identify exempt workers implicitly introduces a minimum wage type concept in the administration of this provision which is counter to the original intent of the exemption.” The Commission immediately
from mere long hours. Nor, more importantly, did it even broach the fundamental question as to why such workers should be exposed to the multifarious pernicious consequences of systematic overtime work and why their work did not lend itself to spreading to their unemployed colleagues.

World War II

Senator [Elbert] THOMAS [Dem. Utah]. My point is simply this: There was tremendous agitation, the minute labor became scarce, for repeal of the Fair Labor Standards Act.

Mr. [William] DAVIS [chairman NWLB]. On the hours part of it.280

For Alfred P. Sloan, top man in General Motors, to call himself a white-collar man, just like that, may savor a bit of understatement.281

No sooner had the amendments to the FLSA been defeated in May 1940 and the new white-collar overtime regulations gone into effect in October 1940282 than the swift militarization of the U.S. economy in 1941—which brought in its wake sharply increased production, absorption of the unemployed,283 conversion of part of the workforce into soldiers, and the reappearance of the 48-hour week284—overshadowed disputes over the rules for determining which white-collar workers were

contradicted its own position by conceding that Congress excluded these workers because “they were believed to be typically earning salaries well above the minimum wage level” and that “[a] relatively low salary test...defeats the ‘good faith’ aspects of the test.” Conrad Fritsch & Kathy Vandell, “Exemptions from the Fair Labor Standards Act: Outside Salesworkers and Executive, Administrative, and Professional Employees,” in Report of the Minimum Wage Study Commission 4:235, 240, 244 (1981). See also below ch. 15.


282See below chs. 11-13.

283From July 1940 to December 1941 the number of unemployed fell from 9.3 million to 3.8 million. “Unemployment in May 1942,” MLR 54(6):1451 (June 1942).


504
not entitled to time and a half pay. At this point the center of attention shifted to employers' general demand for a 48-hour week with no overtime liability for any workers. Like employers, which had never dropped their hostility to hours regulation, the editors of The New York Times discovered, six weeks before the FLSA's 40-hour premium overtime-pay trigger went into effect on October 24, 1940, a new reason for taking up the cudgels for this cause again. The occasion for the newspaper's reinvigorated interest was President Roosevelt's talk to the Teamsters Union on September 12, in the course of which, after praising his administration's having set "decent maximum hours and days of labor...to bring about the objective of an American standard of living and recreation," he called attention to those "who would even repeal what has been enacted during the past seven years on the plea that an adequate national defense requires the repeal." In rebuttal, Roosevelt declared that "the employment of additional workers and provisions for overtime payments will insure adequate working hours at decent wages to do all that is now necessary in physical defense." In contrast, the Times, which took a jaundiced view of what it perceived as the president's "blanket approval of all existing laws and provisions" and "stubborn defense at all points of whatever our labor legislation happens to be," asserted that the "defense emergency...should very properly...cause a reconsideration of bargaining arrangements and of rigid laws which cause an undue restriction of hours either directly or by such onerous wage provisions that the restriction is made all but inevitable."

Coming to the defense of the president and the FLSA, Labor Secretary Perkins stressed that because the FLSA and Walsh-Healey Act permitted "unlimited hours of work...without special permission from anyone," provided that time and a half was paid, they were "flexible and seem to meet any emergency needs of industry." (To be sure, the Times editors purported to criticize the FLSA for being primarily directed at creating jobs rather than protecting workers against overwork: "So far as this law is concerned, employees could be worked 100 hours a week if they were only paid overtime.") Praising the United States for having "perhaps the best and most complete mechanization of industry that the world has ever known," she reminded the Times editors that in recommending a shorter workweek, the Roosevelt administration had attended to the untoward human consequences of the capitalist business cycle in a top-down manner circumventing working-class agency. In particular, the New Deal had adopted reduced hours

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285 Linder, Autocratically Flexible Workplace at 292-301.
286 "Text of President Roosevelt's Address on Labor," NYT, Sept. 12, 1940 (14:3-6).
288 Francis Perkins, Letter to Editor, NYT, Oct. 9, 1940 (24:6-7).
in a period of high productivity as a method of giving more general employment in the face of the natural decline in employment which tends to follow complete use of labor-saving machinery.

In other words, the forty-hour week was not introduced in American industry at the implacable demand of labor as a method of righting long-suffered wrongs in a period of declining productivity, but rather by a government seeking economic improvement and recovery as a method of increasing the opportunities for employment in a period of high technical perfection and productivity of machines.

The Times, which once the United States had entered World War II, took glee in pointing out that the government continued to enforce an overtime law designed to spread employment at a time when there was no longer any unemployment, lectured Perkins for ignoring the fact that the 50-percent overtime penalty “at the least must seriously discourage—as it was intended to—working hours of more than forty a week; and in many cases it has the practical effect of a flat prohibition.” The editors also noted that WHA Fleming was defending the overtime provision on precisely the opposite basis: whereas for Perkins the FLSA’s virtue lay in its alleged promotion of employment opportunities, Fleming argued for it on the grounds of production. But as far as the Times was concerned, the Roosevelt administration itself had demonstrated that it did not believe that 40 hours secured the maximum production of which U.S. industry was capable by permitting government arsenals to increase their hours from 40 to 48.

Fleming, who had told a national radio audience on the eve of the advent of the 40-hour overtime trigger in October 1940 that the FLSA was not impeding defense production, issued a New Year’s statement that the FLSA “is now functioning as it was intended.... The forty-hour overtime penalty is hastening employment. It is causing the training of new workers instead of exhaustion of the present work force. It is causing multiple shifts on production machines which otherwise would slow down or stop when fatigue overtakes the worker.” Nevertheless, although the labor movement also “preferred to have employers add extra shifts when they found themselves compelled to work their forces beyond the normal forty hours a week...so long as there are large numbers of men idle” to whom the work could be spread, “in defense industries labor spokesmen have been willing to have union

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290Perkins, Letter to Editor, NYT, Oct. 9, 1940 (24:6-7). Perkins rejected the Times’s comparison between the FLSA and the French 40-hour law, but her analysis of the latter was flawed; see Linder, Autocratically Flexible Workplace at 246.

291Linder, Autocratically Flexible Workplace at 295.

292“Administration Labor Policy,” NYT, Oct. 9, 1940 (24:3) (editorial).

293“Calls 40-Hr. Week No Bar to Defense,” NYT, Oct. 24, 1940 (7:2).

294“Calls It Man-Power Year,” NYT, Jan. 2, 1941 (11:2).

506
men work longer than the forty hours a week provided the overtime payments were made."\(^{295}\)

Surprisingly, a deviant administration view was voiced by Perkins' subordinate, Verne Zimmer, the director of the Division of Labor Standards of the DOL, who at a conference of the Society for the Advancement of Management in December was apparently willing to resolve the dispute empirically. Since in his view "the primary purpose" of the FLSA was "the greater distribution of jobs...the question now is whether there is sufficient unemployment to justify retention of the act." Since the four million workers whom defense production would absorb would in no way end unemployment, Zimmer supported the FLSA's retention without venturing a definitive statement in favor of repeal if unemployment were ever abolished.\(^{296}\)

The outset of 1941 also witnessed a brief controversy between Fleming and the chairman of General Motors, Alfred Sloan, Jr., who in 1933 had been centrally responsible for initiating the tradition of excluding administrative employees from federal hours regulation.\(^{297}\) On November 13, Sloan had addressed the sixtieth annual meeting of the Academy of Political Science in New York, calling for a six-day week as soon as the slack of unemployment had been taken up. In a part of his prepared manuscript that he did not deliver orally, Sloan also advocated cancelling the overtime penalty during the emergency to encourage a longer workweek.\(^{298}\) At its annual convention two weeks later, the AFL rejected Sloan's proposal,\(^{299}\) which had been widely reported.\(^{300}\) In another radio address on January 8, 1941, Fleming quoted from a letter from Sloan: "'[I]f we increase the work week and pay a penalty, the result is to increase wages about 8 per cent. We get nothing for this 8 per cent because efficiency, manifestly, is not increased, therefore the result is a step toward inflation. That, in part, is why I think the penalty should be waived during the emergency period. Frankly, I do not believe in "something for nothing"....'" Fleming pointed out to his national radio audience that GM's most recent annual statement showed a $183,000,000 profit against a payroll of $386,000,000: "'Which is the more inflationary, an 8 per cent increase for the workers or profits almost half as large as total payroll?'" Moreover, William

\(^{295}\)"OPM Expected Soon to Ask 6-Day Week," NYT, Jan. 12, 1941 (28:1).

\(^{296}\)"Wage-Hour Easing Urged and Opposed," NYT, Dec. 7, 1940 (27-4).

\(^{297}\)See above ch. 6.


\(^{299}\)A. H. Raskin, "A.F.L. Reaffirms 30-Hour Week Plan," NYT, Nov. 30, 1940 (1:3).

\(^{300}\)Arthur Krock, "A Disposition to Consider Mr. Sloan's Point," NYT, Nov. 15, 1940 (20:5); Louis Stark, "Longer Working Week for Defense Debated," Dec. 8, 1940, NYT (sect. 4, 10:1-2).
Knudsen, the director of the Office of Production Management for Defense, who had been president of General Motors until June 1940, had informed Fleming that what the National Defense Commission wanted was ""'more machine hours. Machines if properly cared for can work 168 hours a week. Man can't. I know from my own experience that ten hours a day is too much. The man who works at a machine ten hours a day is good for about eight and one-half hours normal production.'"" Fleming therefore concluded that what the government wanted was an additional workweek of machine performance, not an additional eight hours of workers' performance.

Yet two days later it was reported that Knudsen had decided to urge industry to overcome its reluctance to pay time and a half and go to a six-day week ""to enable the nation to speed up its defense program...."" Ironically, one of the chief obstacles to the introduction of three-shift schedules was employers' discovery that ""they would have to spread their supervisory forces thinly over their entire operations."" Then, in a bizarre ending to the dispute two weeks later, Fleming ""'publicly and ungrudgingly'"" apologized to Sloan for having misunderstood him to have favored lengthening the straight-time workweek. What in fact Sloan wanted, Fleming reported, was to ""'waive the overtime premium and expand the work hours per week, as part of the emergency, to forty-eight hours.'"" In a mystifying non-sequitur, Fleming concluded that he was ""'glad that Mr. Sloan is not one of those advocating repeal of the statute requiring time and a half for overtime at this point....'"

As 48-hour workweeks became customary in the wake of the shrinkage of the reserve army of the unemployed, the Times once again seized the opportunity to propagandize on behalf of finally doing away with mandatory time-and-a-half pay (especially for those whose wages exceeded the statutory minimum). Turning back to the congressional debates in 1937-38, the editors asserted in early 1942 that most congressmen who voted for the FLSA had thought that overtime provisions were ""'genuine restrictions on hours'"" that ""'prohibited' employment for more than"" 44, 42, and 40 hours. The underlying theory was to solve the problem of unemployment by forcing the employment of more men to do the same amount of work. When unemployment gave way to a shortage of labor, the Roosevelt administration devised the new theory that work beyond 40 hours would actually decrease production. The newspaper conceded that fatigue and a decline in hourly productivity set in at some point, but argued that total output did not begin to decline until even later and that therefore the 40-hour week restrained production.

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301""Fleming Defends Overtime Pay Rate,"" *NYT*, Jan. 9, 1941 (17:7).
302""OPM Expected Soon to Ask 6-Day Week."
303""Fleming Retracts Criticism of Sloan,"" *NYT*, Jan. 29, 1941 (9:6).
Finally, according to the *Times*, Perkins had adopted the "utterly unrealistic" defense that the FLSA did not really restrict hours because the employer could simply pay for additional hours; yet this view ignored the FLSA's "very purpose," which was to make it "prohibitively costly" for employers to work their employees more than 40 hours. To the *Times* it was an absurdity that the government was now urging employers to work their employees extended hours and to pay them 50 percent more for hours 40 to 48 "no matter how high the regular rate of pay of the particular worker concerned already happens to be." Consequently, the editors advocated passage of a "moderate bill" raising the overtime pay threshold to 48 hours—a measure that Congress never enacted.305

Even as the Bureau of Labor Statistics reported that office workers were only infrequently paid overtime premiums and longer hours were paid approximately at straight-time rates,306 the principal wartime overtime issue involving white-collar workers was driven by the narrowing compensation differentials between supervisors and supervisees, against the background of overall government-enforced compulsory salary stabilization, as the latter's wages were fortified by time and half for overtime, while the former were excluded from that regime. Although this problem had been "plaguing management since the beginning of the war,...surprisingly little" had been done about it until mid-1943. A National Industrial Conference Board survey earlier that year had revealed that only 40 percent of firms had instituted plans for dealing with it, whereas some believed that no solution existed.307 In July 1943, a manager who anticipated "growing dissatisfaction among the supervisory staff on that score" asked a management magazine what the prevailing practice was. According to a survey of automotive parts and equipment manufacturers from May of that year, 54 percent of salaried foremen were paid time and a half and 19 percent straight time after 40 hours.308

The federal government intervened in this area through the Commissioner of Internal Revenue, whose jurisdiction, under the Stabilization Act of 1942309 and

305Linder, *Autocratically Flexible Workplace* at 300.
309To Amend the Emergency Price Control Act of 1942, Pub. L. No. 729, ch. 578, 56 Stat. 765 (Oct. 2, 1942). The statute authorized the president to correct gross inequalities and permitted private employers to reduce their employees' salaries to below $5,000. *Id.* §§ 4, 5(b) at 766, 767.
Abortive Statutory Amendments to Exclude Even More White-Collar Workers

the Office of Economic Stabilization regulation\textsuperscript{310} and the executive order issued pursuant to it,\textsuperscript{311} extended to salaried employees with salaries in excess of $5,000 and bona fide executive, administrative, and professional employees whose salaries did not exceed $5,000 and who were not represented by a union. This latter group of white-collar workers were subject to the same salary and duties tests embodied in the October 1940 Stein-Fleming FLSA regulations.\textsuperscript{312} The commissioner’s starting point was that although employers were not required by the FLSA to pay supervisors on the same basis as wage earners, “it is customary for employers to maintain reasonable pay differentials between the wage earners and their supervisors and between the several levels of supervision.” As a result of overtime pay to wage earners, in many cases they were receiving greater total compensation not only than their immediate supervisors, but in some cases than second and third level supervisors during a given pay period. The Commissioner therefore instructed the Salary Stabilization Unit that the maximum amounts allowed were such as necessary to maintain the minimum differentials between interrelated job classifications “required for the maintenance of productive efficiency.” Those amounts were supposed to be “proportionately less in the higher levels.” The operating pay principle permitted compensation to all employees at the same overtime rates for actual scheduled hours beyond 40 as “paid to the highest hourly-paid employee” subject to the FLSA if the former’s pay for the 40-hour week did not exceed the latter’s. Because the amount allowable was to be “progressively reduced...in such a manner that each succeeding higher level receives a proportionately lesser amount,”\textsuperscript{313} it was clear that the Commissioner was not proposing “in many cases to permit payment to supervisors of the full amount they would receive on a regular time-and-one-half basis.”\textsuperscript{314}

Two months after the Commissioner of Internal Revenue had announced the new salary policy, the Controllers Institute of America, whose members included controllers of 2,000 of the country’s largest firms, released a study revealing that the introduction of the 48-hour workweek had created serious new problems regarding wage relationships between factory workers and “so-called white-collar workers.” Management found itself in a “quandary”: If it paid them time and a

\textsuperscript{310}Part 4001.4, in FR 7:8748, 8749 (Oct. 29, 1942) (issued Oct. 27, 1942).

\textsuperscript{311}EO No. 9328, in FR 8:4681 (Apr. 10, 1943).

\textsuperscript{312}Treasury Dept. Regulations Part 1002.3-.5, -.10 (Dec. 2, 1942), FR 7:10550, 10551 (Dec. 3, 1942); on the FLSA regulations, see below ch. 13.

\textsuperscript{313}Bureau of Internal Revenue, Release No. 3731 (July 1, 1943), in BNA, Wage and Hour Manual 624 (1943 ed.). For a brief account, see “Revises Overtime Ruling,” NYT, July 2, 1943 (24:7).

\textsuperscript{314}“Overtime for Supervisors.”
half, it was violating the law by increasing their compensation, but if it asked them to work 48 hours without paying them extra, it was violating the law by cutting their compensation. When office workers of one firm complained that the factory workers were getting more money, the firm offered them transfers to the factory, but: "'So far...not one office worker has accepted the invitation to don respiratory mask and overalls when they realize their rate is higher and that the only reason more money is made by the factory workers is because of the longer hours.'" Nevertheless, a number of the firms surveyed disclosed "a strong feeling that the salary group of workers were the 'forgotten men' in the present situation."³¹⁵ In this respect they agreed with the white-collar workers themselves who met in 1943 to set up a permanent committee to represent the interests of "the 'forgotten man' of the war" in the national economy.³¹⁶

The same wartime issue of maintaining differentials between hourly production workers entitled to premium overtime pay under the FLSA and salaried white-collar workers who were not played itself out in collective bargaining. Illustrative is a dispute involving professional employees. Salaried engineers, represented by chapter 13 of the Federation of Architects, Engineers, Chemists and Technicians (CIO), at the General Electric Company's Philadelphia and Darby plants, which produced switch gear equipment, had requested that all employees receiving $5,000 or less receive time and a half for all work in excess of 8 hours a day or 40 a week because this proposal would eliminate an inequity that had been created by the fact that engineers who might receive lower weekly salaries than some draftsmen in the bargaining unit were arbitrarily exempt from overtime pay, whereas the draftsmen received it. The FAECT also pointed to the practice in five firms, including General Motors, to pay overtime to "technically 'exempt' employees...."³¹⁷ To be sure, the union distinguished its request from a mere demand for more money by also pointing out that: "Normally overtime compensation serves as a brake for possible employer abuse and as a means for spreading employment."

In turn, General Electric argued that engineering department employees were an exempt classification under the FLSA and that awarding time and a half to 135 of the company's 16,000 exempt employees would create other inequalities. Before the war, this group's overtime work was "casual," and, as employers were and are wont to asset, "considered as covered by the salary for the job." Beginning in 1942, GE did initiate the practice of paying exempt employees straight time for

³¹⁵"Overtime Pay Stirs Dissatisfaction Among Those Who Cannot Get It," NYT, Sept. 8, 1943 (44:4-5).
planned overtime hours, which the Treasury Department approved and was still in effect in 1945. In addition, GE contended that it was "contrary to industry practice to pay time and one-half to exempt employees." FLSA-exempt employees at the Bell Telephone Company and E. I. du Pont de Nemours and Company did not receive overtime pay; GM did pay it, but that practice had been established before stabilization.318

The War Labor Board—which had jurisdiction over the adjustment of salaries up to $5,000 annually except for nonunion bona fide executive, administrative, and professional employees319—found that the union’s request affected 135 FLSA-exempt engineers who were also not subject to the overtime provisions under the Walsh-Healey Act by interpretation. Since the 345 draftsmen did receive overtime pay under the latter law, there was an inequity within the bargaining unit that had to be eliminated, especially since both groups did related work.320 The Board ordered that GE pay engineers with monthly salaries of $350 or less time and a half after 8 hours a day and 40 a week; with regard to those with salaries between $350 and $500, the WLB ordered the parties to negotiate a plan for overtime pay after eight and/or 40 hours at rates based on a formula similar to the aforementioned tapered plan used by the Salary Stabilization Unit of the Treasury Department.321

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318General Electric Co., WLR 28:89.