"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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Fānpihuà Press
Iowa City
2004
Employers Switch Strategies: From Relying on an Anti-Labor Congress to Capturing a Pro-Labor Wage and Hour Division

Amendments to the Wage-Hour Act which were before Congress this spring were understood to have been dropped on the understanding that administration of the act would be modified.¹

Strict definition of what an executive is should, and probably will, be relaxed by the Wage and Hour Division.²

Employers' failure to secure by legislative amendment from the 76th Congress in 1939-40 any, let alone a significant, expansion of the universe of white-collar employees excluded from overtime regulation³ prompted numerous firms and employer associations to seek to achieve a similar, if not equivalent, exemption from liability from the Wage and Hour Division, the regulatory agency entrusted with administering the FLSA in general and defining the excluded categories of executive, administrative, and professional employees in particular. If some employers' highest priority was elimination of overtime regulation for all but minimum-wage workers and their second-best approach was a Bardenesque low ($150) monthly salary ceiling for overtime eligibility, then regulatory revision was a third-best strategy. In creating the Department of Labor in 1913, Congress may have declared that its purpose "shall be to foster, promote, and develop the welfare of the wage earners of the United States,"⁴ but once employers realized by July 1939 that amending the FLSA was, despite the growing power of the southern Democrat-Republican conservative coalition, by no means a foregone conclusion, they began turning their attention to persuading the WHD to accommodate their

¹"Professional Employees [sic] Status to Be Studied," ENR 125:73 (July 18, 1940).
³See above ch. 10.
⁴An Act to Create a Department of Labor, ch. 141, § 1, 37 Stat. 736 (1913) (codified at 29 USC § 551 (2000)).
Employers Switch Strategies

demands for broader white-collar exemptions by expanding the scope of the components of the trinitarian formula.

This chapter first analyzes the background behind the WHD’s decision in 1940 to hold hearings on the white-collar overtime regulations and then provides a biographical account of the heretofore obscure but crucial decisionmaker, Harold Stein, who presided over them, while the Chapter 12 scrutinizes the voluminous hearing testimony and Chapter 13 examines Stein’s report and the new set of regulations that adopted it.

The Road to Regulatory Revision

Mr. [Harry] SHEPPARD [Dem. CA]. ...Colonel: Isn’t it consistent, isn’t it easy, that whenever an administrator is confronted with a question in his mind as to what the intent of the Congress may be, to hold a hearing and invite Members of the Congress to attend and find out exactly what the situation was and what they may have had in mind at the time that the enactment was passed? ...

Colonel FLEMING. Would that mean inviting all of Congress down there, Congressman? Each one may have a different idea.

Mr. SHEPPARD. No. Not inviting all of them. They won’t all come. 

In spite of the fact that employer and labor representatives had discussed a draft of and expressed their approval of the original regulations of October 1938, during the following year and a half the WHD engaged in “much correspondence and many conferences” with employers, trade associations, unions, and workers about the regulations. Nevertheless, following publication of the regulations, the WHD received no petitions for changes for more than a year: “From time to time some dissatisfaction with the regulations was indicated by various groups, but none of them definitely requested amendments and hearing.” In the final days of 1939,


6See above ch. 9.

7U.S. DOL, WHD, “Executive, Administrative, Professional...Outside Salesman” Redefined: Effective October 24, 1940: Report and Recommendations of the Presiding Officer at Hearings Preliminary to Redefinition 1(Oct. 10, 1940) (Stein Report).

8US DOL, WHD, “Wage-Hour Public Hearings Called to Consider Definitions of Executive and Administrative Employees of Wholesalers” at 3-4 (R-689, Mar. 18, 1940)
Employers Switch Strategies

WHA Philip Fleming announced at a news conference that, because the American Retail Federation, newspaper publishers, and wholesalers had asked for a re-definition of the white-collar categories, the exemption might be dealt with at new public hearings. The Council of National Wholesale Associations encompassed all the wholesale distributive trades, while the ARF was "particularly concerned with the problem of assistant buyers who buy for wholesale chain stores." In addition, the Southern States Industrial Council was "interested in various types of employees in many different industries...."

After these employer organizations, making use of the regulatory mechanism for requesting amendments, had formally applied for hearings, Fleming scheduled them. In mid-March 1940 he announced the first such hearing, to take place April 10, with respect to the wholesale distributive trades. The hearings, of which he appointed Harold Stein the presiding officer, were to deal with the question of what amendments, if any, should be made to §§ 541.1, 541.2, and 541.4, which encompassed the definitions of executive, administrative, and professional employees and outside salesmen. These first hearings were confined to the wholesale distributive trades because only they had filed petitions, but even if other "business groups" did in the future apply, Fleming decided to hold separate hearings for different industries in order to focus on each one's special problems.

The fear that revisions based on the testimony at this first round of hearings would establish a precedent that would "have a tremendous weight in other industries" prompted Abraham Isserman, counsel for the American Newspaper Guild, to write to Fleming on March 22 to complain that the scope and impact of the hearings would "necessarily...be much broader than the actual notice of hearing (copy furnished by the DOL Wirtz Labor Library).

10US DOL, WHD, "Wage-Hour Public Hearings Called to Consider Definitions of Executive and Administrative Employees of Wholesalers" at 1-2.
11§ 541.5: "Any person wishing a revision of the terms of the foregoing regulations may submit in writing to the Administrator a petition setting forth the changes desired and the reasons for proposing them. If, upon inspection of the petition, the Administrator believes that reasonable cause for amendment of the regulation is set forth, the Administrator will either schedule a hearing with due notice to interested parties, or will make other provisions for affording interested parties an opportunity to present their views...."
13Apparently, publishers failed to file a formal application for a hearing, since in mid-March the WHD stated that it had promptly granted hearings to "all pending petitions." US DOL, WHD, "Wage-Hour Public Hearings Called to Consider Definitions of Executive and Administrative Employees of Wholesalers" at 1, 2, 4.
Employers Switch Strategies

indicates by its express terms.” Because many trade unionists “interested in maintaining the status quo” had “erroneously” concluded that the wholesale distributive trades hearings would not affect them, they were not planning to attend the hearings and might therefore later “be faced with a fait accompli....” Subsequent hearings would not remedy this situation since “the precedent of newly established definitions would carry great weight.” In addition, the Guild was especially concerned because it had indirectly heard that “the question of linking up one or more of these definitions with monthly earnings of employees will be on the agenda,” a linkage to which the Guild and other unions objected in principle. Isserman therefore requested that Fleming open the hearing to all interested parties to submit evidence.14

In his reply a week later Fleming pointed out that after having considered the issue of holding a general hearing for all industries or separate hearings for major industries, he had concluded that there was “such a wide variation in the work and functions performed by executive, administrative and professional employees in different industries, especially in the administrative and professional classes, that it appeared more practicable to hold separate industry hearings.” He therefore rejected Isserman’s contention that a definition in one industry was “necessarily to be treated as a precedent in others.” Although Fleming recognized that “certain standards of definition” might be applicable to other industries, he nevertheless feared that the record of a general hearing “would contain a confusion of testimony....” Thus while adhering to his plan for industry-by-industry hearings, he saw no reason why representatives of other industries should not attend as observers and file legal briefs. Fleming also specifically invited the Guild to be “heard” on behalf of its own views if oral argument was heard. In any event, he advised Isserman that definitions would not necessarily be issued immediately after the first hearing because further hearings might be desirable.15

Shortly after this exchange the WHD announced on April 2 that representatives of groups that might be affected would be permitted to participate in the hearing on April 10.16


Employers Switch Strategies

The Council of National Wholesale Associations had early on taken an aggressive stance on revision of the white-collar regulations. Organized in 1937, it had a twofold purpose of refuting "propaganda based on the 'elimination of the middleman'" and developing uniform policies concerning legislation. In March 1939 wholesalers prevailed on Pennsylvania Republican George Darrow to introduce a bill in the House that would have permitted them to continue to employ all of their employees 44 hours a week without being required to pay overtime even after the statutory overtime trigger was lowered to 42 and 40 hours. Darrow, a former wholesaler himself, used many of the same tropes to justify this special treatment that wholesalers afterwards deployed in 1940 in their regulatory campaign.

Under the CNWA’s auspices, 24 national wholesalers associations held a special meeting on December 6, 1939, to appeal to government officials to "exempt them from the hours provision" of the FLSA on the grounds that operating costs had risen so rapidly since its enactment that "hardship had been worked on all types of wholesaling...." The nub of their complaint was the claim that they were "essentially a service industry" whose customers (retailers, charitable institutions, hospitals, railroads, and steamship lines) were "exempted from the regulation on hours, with which wholesalers must comply." To accommodate these customers, the wholesalers themselves were "compelled to keep open for long hours...." The exact nature of the alleged hardship was difficult to discern because their argument was apparently not that their profits were being narrowed since they passed these increased costs on to the retailers, thus "materially increasing distribution costs." It was presumably in this sense that the wholesalers adopted a resolution appointing a committee "to wait on the officials of the Wage and Hour Division" to state their conviction that it was "in the best public interest, that the wholesale trades be exempted from the maximum-hours provisions of the act." In a subsidiary argument that ignored those provisions' purpose, they contended that because the wholesale sector’s wages were "well above" the statutory minimum and those of their customers, "the burden of overtime

18 "Plan Bibliography to Defend Jobbers,” NYT, Jan. 30, 1938 (54:5).
19 CR 84:6633-34 (June 5, 1939).
20 H.R. 4631 (76th Cong., 1st Sess., Mar. 1, 1939); CR 84:5474-75 (May 11, 1939). In 1940 Massachusetts Democratic Representative Joseph Casey advocated that wholesalers be relieved of overtime pay liability with the understanding that they had to continue to pay already high hourly wage scales for each hour worked so that there would always be a check on them to avoid unnecessary long hours. CR 86:2672-73 (App.) (May 3, 1940).
payments necessitated by the law is excessive.”21

In mid-January 1940 the committee then met with WHD officials to discuss “the prospects for action on their drive for changes in the Wages and Hours Law substituting straight hourly wages for time-and-half for overtime work in the wholesale trades.” Fleming reportedly told the committee that “any action would have to come through Congressional legislation.”22 In January and February at least four bills were introduced in both houses of Congress, by Democrats and Republicans, excluding all wholesale employees from the overtime (but not the minimum wage) provision of the FLSA.23

That WHA Fleming was considering regulatory action to preempt more radical congressional measures was known, at least in well-informed circles, as early as January 16, 1940, when Leo Cheme, the executive secretary of the Research Institute of America, delivered an address to the annual convention of the Wholesale Dry Goods Institute24 in which he stated:

The possibility is...that rather than risk emasculation of the Act, rather than risk controversy, the Wage & Hour Administrator may, within the next thirty or sixty days, change the definition of administrative, executive and professional employees, so that an employee in an office capacity earning more than, let us say, $150 a month, will, by virtue of these earnings, prima facie be an executive or administrative employee.

The administrator can not create exemptions not now in the Act, but he can...say what the exemptions...mean, so if he can square this change with his conscience, there is a good chance that the Wage & Hour Act will not be up before this session of Congress.25

21cWholesalers Ask Exemption from Hours Rules of Wage Act, Declaring They Are Hardship,” NYT, Dec. 7, 1939 (42:4-5).
22cWholesalers in Capital,” NYT, Jan. 17, 1940 (34:2).
24On the Wholesale Dry Goods Institute’s radical proposal for excluding white-collar workers from overtime regulation, see below ch. 12.
Employers Switch Strategies

That agency intercession might confer on employers benefits that a politically paralyzed Congress could not soon became a possibility. On March 4, 1940, two weeks after the Senate had officially confirmed him as WHA, Philip Fleming declared that with regard to the administrator’s discretionary determinations, it was his “'clear duty' to 'make such interpretations and definitions within the normal channels of trade and interstate commerce as will create the least uncertainty within the industry....'” In accordance with his duty to “grant a hearing and the right of appeal to ‘every employe and employer whose interests are affected,’” Fleming also announced his plans to hold two hearings within a month on applications for reviews of administrative rulings. One of them sought a “redefinition, separately of administrative and executive employees,” and although The New York Times failed to identify the requester, it added, portentously, that the change “would serve to exempt large groups of white collar workers”—without commenting on the dissonant juxtaposition of this outcome to the headline, “Fleming Pledges Wage Act Justice.” Alluding to the third category of the trinitarian formula, Fleming also mentioned that “he had an ‘old brief’ by the American Newspaper Publishers Association urging changes in the definition of ‘professional’ employees and a memorandum by the American Newspaper Guild opposing them, but no plans for a hearing were indicated.” The ANPA was presumably dissatisfied with administrative rulings that some reporters and editorial writers were professional employees and others not—a classification that would remain unchanged even if there were no regulatory requirement that their work be “based upon educational training in a specially organized body of knowledge....”

Events, however, quickly overtook Fleming’s hesitation, and soon the ANPA would have its hearing too. The ANPA and other publisher groups had filed a

quotation marks; Bernstein did not indicate the source.

26“The Day in Washington,” NYT, Feb. 20, 1940 (11:2). Although Elmer Andrews, the first WHA, had resigned in October 1939 and Roosevelt had named Fleming as his successor, official confirmation was delayed as a result of a legal dispute over whether an army officer—Fleming was a colonel in the Army Corps of Engineers—could serve in a civilian post. “Shifts in Chiefs Seen in Wage-Hour Post,” NYT, Sept. 16, 1939 (16:2); “Andrews Resigns, Col. Fleming Gets His Post, with No Explanation of Wages-Hours Shift,” NYT, Oct. 18, 1939 (1:2-3).

27“Fleming Pledges Wage Act Justice,” NYT, Mar. 5, 1940 (12:6). The article did identify the National Retail Federation as having filed the other request dealing with reclassification of purchasing agents as engaged in wholesale rather than retails occupations.


29See below.
memorandum arguing both that the newspaper industry should be exempted entirely from coverage on the grounds that it was a service establishment engaged in intrastate commerce and that virtually all workers in departments represented by the Guild should be excluded as professional or administrative employees. To meet publishers' attempt to apply pressure on Congress and the WHA, the Guild filed its own hundred-page counter-memorandum. In refutation of the publishers' assertion that the union's members did not need and were not entitled to FLSA protection, the Guild's counsel, A. J. Isserman, emphasized that "'[t]oday newspaper men do not come and go as they please.... Hours are regulated, some times [sic] by time clocks....'" Despite the fact that the Guild's contracts established working conditions superior to those required by the FLSA, the union advanced several reasons for defending the statute. In addition to the fact that some of its members did not yet work under collective bargaining agreements, the wording in some contracts tied hours and overtime to the FLSA. Excluding newspaper workers from the act would therefore create another hurdle to be overcome in negotiations. Moreover, the Guild viewed the attack on the wage-hour law as "part of a general campaign against social legislation, more important to us, such as the Wagner Act, that is coming to a head in Washington." Finally, in the context of an economy still deeply mired in depression, the ANG argued that: "The act helps to spread employment. This is important not only because more jobs are needed for our unemployed but unemployment is an ever-present menace to the salary and hour standards of the employed."52

That the WHA was considering expanding the exclusions must have been percolating through business circles: already at the end of February the leading construction industry trade magazine hopefully reported that although there would probably be no change in the definition of "professional," the definitions of "administrative" and "executive" "may be so broadened—perhaps by including all above a certain wage level—as to exempt most engineering employees." Because of such "persistent reports in Congressional circles that the national administration had worked out a plan of peace with opponents of the Fair Labor Standards Act, under which the Wage and Hour Division would issue a series of revised rulings drastically reducing the application of the act, and proposed amendments to that effect by Congress would be dropped," the Guild had sought assurances from Fleming—which he gave the union—that if any changes in rulings or definitions

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30a "Wage-Hour Act Hearings Pledged," GR, Mar. 15, 1940 (5:4-5); "Guild Meets Attack on Wage-Hour Law," GR, Mar. 1, 1940 (5:1-5).
31a "Guild Meets Attack on Wage-Hour Law" (5:3-4).
33a "Congress May Change Wage-Hour Law," ENR 124(9):295 (Feb. 29, 1940).
Employers Switch Strategies

were contemplated, public hearings would be held.34

By March, the WHD’s preliminary arrangements had alarmed the UOPWA, the left-wing white-collar union:

An enveloping movement planned in Congressional and Administrative halls of
government to cut off several categories of workers, including white collar employees,
from the provisions of the Wage Hour Law has evoked a mighty wave of protest from
organized labor. ... A rearguard action by none other than Administrator Fleming is
scheduled to take place on April 10, at which time hearings have been announced on
possible reinterpretations of the definition now covering administrative, executive, and
professional employees, and consideration of exclusion of employees earning more than
$135-$150 monthly. [A]ny relaxation in enforcement or change in interpretation...are [sic]
merely a prelude to the destruction of the entire act....35

The union announced that it would present a brief at the hearings identifying the
motives of those who wanted to amend the FLSA.36

Some sense of the grudging treatment that the WHD had been according
alleged exempt administrative employees can be gleaned from the pertinent opin­
ions of its general counsel:

Purchasing agents with a staff of only one person cannot be entitled to an exemption
from provisions of Act under terms of Section 541.1...unless he takes part in the manage­
ment of establishment as a whole.

It is also doubtful whether a purchasing agent with two clerks or stenographers
satisfies another requirement of the definition—“whose primary duty is management of
establishment, or a customarily recognized department thereof.”37

Confidential secretaries to executives are not exempt merely because the persons they
are secretaries for are exempt executives.38

Secretaries to executives who, because of the nature of their duties, must delegate
certain of their duties to secretaries might be held to be exempt...if secretaries satisfy all

34"Wage-Hour Act Hearings Pledged."
35"Fight Barring of Salaried Worker from Wage Law,” OPN, 6(3):1:2, 3:3 (Mar-Apr
1940).
36"Fight Barring of Salaried Worker from Wage Law” (3:3).
Counsel Wage and Hour Division Department of Labor, 1:27 (1940).
Counsel Wage and Hour Division Department of Labor, 1:28

521
requirements of Regulations.39

Vice president of bank who is member of board of directors and of loan and discount committee, but who also performs any other work around bank that needs to be done, cannot claim exemption from benefits of Act as an executive, if extra work may be said to be of a "substantial amount."40

The regulations that Fleming issued in October 1940 revamped such rulings, resolving all of these classification disputes in employers' favor.

In the meantime, even more aggressive employers organizations took precedence: although the March 19 hearing notice in the Federal Register failed to identify the wholesale organizations other than the CNWA requesting a hearing, the Times reported that they were the "National [sic] Retail Federation" and the Southern States Industrial Council on behalf of its wholesale distributor members. The newspaper also added that discussion of the "exemptions" of administrative, executive, and professional employees had "led to demands in Congress for exemption of 'white collar' workers within certain wage limits from the effects of the statute."41 (Triggered by a separate application filed by the SSIC with respect to the manufacturing and extractive industries, Fleming scheduled another hearing on this sector for June 3.)42

The SSIC, which had filed a petition for revision of the regulations on February 26, 1940,43 had nurtured and propagandized on behalf of an especially antagonistic position toward the FLSA. Founded as "a child of the N.R.A."44 in 1933 to demand wage differentials in codes of fair competition favoring the South,45 the organization, whose members at the time operated 10,000 plants,46 testified at the original FLSA congressional hearings in June 1937 through its

42 FR 5:1685 (May 11, 1940).
43 "1940 WHD Hearings Transcript" at 11 (June 3) (J. Ballew).
44 Investigation of the National Recovery Administration: Hearings Before the Committee on Finance United States Senate, Part 5, at 1592 (74th Cong., 1st Sess. Apr. 5-12, 1935) (testimony of John Edgerton, president, SSIC).
45 "Wage Differentials Urged for the South," NYT, Dec. 20, 1933 (8:2).
Employers Switch Strategies

president, John Edgerton, that regional wage differentials, were, in the favored racist code of the period, “established by the natural operation of natural laws.”

Edgerton, a Tennessee textile manufacturer who had been president of the National Association of Manufacturers from 1921 to 1931 and had a preference for “‘racial purity,’” proudly confirmed that he was “one of the leaders in the South speaking against any and all State or national laws that would provide a minimum wage or maximum hours in industry....” Three months later the SSIC’s directors adopted a resolution denouncing the FLSA bill as “‘economically unsound’” and designed to “‘throttle industry’”—a rejectionist position to which the organization still adhered in 1970, when it testified before Congress that it opposed “the entire concept” of a federal establishment of a minimum wage. In a pamphlet published while the Senate FLSA bill was being held up in the House Rules Committee, the SSIC insisted that “the South cannot willingly submit to any law whose administration is placed in the hands of a Board in Washington that inevitably would be dominated by majority interests of other sections.” Unable to separate itself from its deepest commitment, the SSIC declared that among the factors contributing to lower wage rates in South was “the presence of a large percentage of sub-normal workers as represented by the southern negro....”

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47 Fair Labor Standards Act of 1937: Joint Hearings Before the Committee on Education and Labor United States Senate and the Committee on Labor House of Representatives at 794.

48 George Tindall, The Emergence of the New South 1913-1945, at 71, 444 (quote) (1967).

49 Fair Labor Standards Act of 1937: Joint Hearings Before the Committee on Education and Labor United States Senate and the Committee on Labor House of Representatives at 802.


52 Southern States Industrial Council, Chief Dangers to the South of Uniform Wage and Hour Legislation: Analysis of Black Labor Standards Bill (n.p. [1]) (n.d. [1938]).

53 Southern States Industrial Council, Chief Dangers to the South of Uniform Wage and Hour Legislation (n.p. [6]).
Employers Switch Strategies

The Presiding Officer: Harold Stein

[We], in administering this law [FLSA], have taken some cognizance of what we conceive to be the successes and failures of the N. R. A which in some way resembled the Act...and according to the information we have received, there was a considerable question in some industries about the abuse of the exemption for executive and administrative, using the words in their broad sense.

It has been reported to us that under the N. R. A. in some industries, a good many people who should not have been so described, were so described and were given titles on paper which bore no relation to their actual duties and were worked for very long hours without adequate compensation.54

Harold Stein...was a part of Franklin D. Roosevelt's New Deal from its inception, served at one time or another in a dozen of its agencies and brought to each of them a combination of patient pragmatism and unquenchable idealism. Quiet, modest, indefatigable, he understood better, perhaps, than any of his contemporaries the arcane pathways through the jungle of bureaucracy. He was a specialist in getting things done.55

Before examining the substance of the white-collar hearings, it is necessary to devote some attention to the presiding officer to whom WHA Fleming had entrusted their conduct. Harold Stein was manifestly responsible for the roads taken and not taken by the testimony he developed by his questioning; but, since Fleming adopted his recommendations as the new regulations and a decade later another WHA adopted much of his report (still known today as the Stein Report in preference to its long-winded full title)56 as the basis for the WHD’s non-binding interpretive regulations,57 more than any other single person, Stein in large part also bears responsibility for having determined from 1940 to the present which of the tens of millions of white-collar workers have and have not been entitled to overtime pay.

Stein, who ultimately held an astonishingly diversified variety of important civilian governmental positions during the New Deal and World War II and was eulogized as “a foremost civilian administrator of his generation,”58 was, by back-

54"1940 WHD Hearings Transcript” at 344 (June 5) (Harold Stein).
56E.g., In Re Farmers Insurance Exchange Claims Representatives’ Overtime Pay Litigation, 300 F.Supp.2d 1020 at *20 (D. Or. 2003) (Lexis).
57See below ch. 14.
58Rowland Egger, in “Harold Stein In Memoriam” 13 (n.d. [1966]) (copy furnished
Employers Switch Strategies

ground and education, a most improbable candidate for enduringly revamping the white-collar overtime regulations. Born into a wealthy business family\(^59\) in New York City in 1902, he received a bachelor’s degree from Yale in 1922, taught, inter alia, Greek and Latin\(^60\) at a private school in Connecticut for two years, was an English instructor from 1928 to 1932 at the University of Wisconsin\(^61\)—where he was a “teacher...of legendary proportions”\(^62\)—obtaining a doctorate in English from Yale in 1932 upon submitting his dissertation on the sixteenth-century poet Edmund Spenser.\(^63\) Yale’s failure, despite Stein’s having been “the most brilliant of an outstanding group of graduate students during his years in the English Department at Yale,” to have given him a faculty appointment was “a cause célèbre of those days”\(^64\) and has been ascribed to anti-semitism.\(^65\) Nevertheless, Yale did award him a prestigious Sterling Fellowship to do research at the Bodleian Library at Oxford at the nadir of the Depression in 1933-34,\(^66\) and Oxford University Press published a revised version of his dissertation in 1934\(^67\)—a work to which one of his children many years later heard him refer as “turgid crap.”\(^68\)

Stein himself reportedly said that he had been unable to get an academic job in America because of the Depression\(^69\); in any event, at the exact mid-point of his life, at age 32, he entered into the vortex of New Deal agencies, irrevocably altering the course of his life. In 1934-35 he worked for the Federal Emergency Relief Administration, where one of his most significant assignments was supervision of federally sponsored self-help cooperatives, which were, in his words, “one of the more ingenious though ultimately unsuccessful of the devices to avoid the full impact of depression.”\(^70\)

by Lucia Stein Hatch).

\(^{59}\)Telephone interview with Stein’s daughter Lucia S. Hatch, Belfast, ME (Mar. 18, 2004).
\(^{60}\)Email from Adam Stein (Stein’s son) to Marc Linder (Mar. 30, 2004).
\(^{62}\)Eugene Rostow, in “Harold Stein In Memoriam” at 18.
\(^{64}\)Eugene Rostow, in “Harold Stein In Memoriam” at 18.
\(^{65}\)Dan Oren, Joining the Club: A History of Jews at Yale 358 n.35 (1985) (without a source); telephone interview with Lucia S. Hatch.
\(^{66}\)“Graduate Awards Are Given at Yale,” NYT, May 1, 1933 (13:6-8).
\(^{67}\)Harold Stein, Studies in Spenser’s “Complaints” (1934). The book was reprinted in 1969 by Foxcroft Press.
\(^{68}\)Telephone interview with John H. Stein, Newberg, OR (Mar. 18, 2004).
\(^{69}\)Oren, Joining the Club at 358 n.35 (no source).
\(^{70}\)Harold Stein’s resume (undated [ca. 1946]) (copy furnished by Lucia S. Hatch).
Employers Switch Strategies

His prominence or notoriety as a New Deal bureaucrat began during his tenure at the Works Progress Administration from 1935 to 1938. Most of his WPA activity related to the art, theater, writers, music, and historical records survey projects. In the field and then in Washington, D.C., he was Assistant Director of the Division of Professional and Service Projects, playing, again in his own words, "a major role in the general planning, organization and supervision of these activities." Much of his time was devoted to "bridging the gap and curing the recurrent disturbances between the professional personnel and the regular WPA staff, particularly the State WPA Administrators. Effective artistic production within the legal, administrative and political restrictions of a large government agency was made possible only by a continuous series of adjustments and resolutions of problems which in general the artists did not understand and for which the harassed State Administrators had little sympathy." Toward the end of his time at the WPA he took active charge of the New York arts, writers, music and historical records project—the largest in the country—and "led them through and out of a period of reduction in force, strikes and reorganization necessitated by long years of confusion and uncertain control."71

This self-description, taken from his 1946 resume, scarcely does justice to his tumultuous tenure at the WPA in New York City in the summer of 1937, which brought him front-page headlines in The New York Times. While his children observed that his interest and background in literature, theater, and art made him believe "himself perfectly well qualified to handle the Artists and Writers Project for the WPA"72 and, in turn, induced the agency to regard him as bringing qualifications to the job,73 it is also conceivable that his WPA experience with proletarian artists, writers, and musicians helped shape his decision three years later to classify them as professional employees and thus deprive them of overtime protection. Stein's relegation to the sensitive and onerous mission of head of the largest local WPA arts project was, according to his older son, a bureaucratic intrigue:

71Stein's resume. On the arts program (Federal Program No. 1), see Barbara Blumberg, The New Deal and the Unemployed: The View from New York City 183-220 (1979).

72Email from Lucia S. Hatch to Marc Linder (Mar. 22, 2004). Stein's parents' apartment was "filled with French and American impressionist paintings, and the children were practically raised in art museums." His mother also sponsored a once well-known French painter, with whom his sister studied. His daughter noted that his interest in music and theater was "high and well-informed, but probably not at the level of expert," and that he "always kept up his interest in literature and poetry." Id. Stein's mother also supported Ralph Ellison for a year and Stein himself was for a time engaged to Robert Frost's daughter. Email from Adam Stein to Marc Linder (Mar. 30, 2004).

73Email from John H. Stein to Marc Linder (Mar. 22, 2004).
Employers Switch Strategies

What was most important in family history about...the assignment to New York to close down the arts project was that it was punishment. His good friend Marquis Childs wrote a column in the Washington Post about these "cynical New Dealers" describing Father who, in fact, was a committed New Dealer, but enjoyed pointing out things he found ludicrous and people he found stupid. Eleanor Roosevelt was furious and demanded that the person be found and fired. He was found. His bosses did not want to fire him, so this was the compromise, send him to a career ending job. His friends always thought that he never rose above being a career Deputy Director in one agency or another because of this. Childs had no animus towards him nor did he think Father was really cynical. It just seemed like a good column.74

Stein’s travails began at the end of May 1937,75 when, in the face of a sit-down strike at the offices of the writers' project in Manhattan, he, the administrative officer of the music, art and writers’ projects, assured strikers that reductions in personnel were unlikely before the end of June and promised to give workers as much notice as possible. The left-wing or Communist unions sponsoring the stoppage included several that would testify before him three years later at the white-collar hearings: the New York Newspaper Guild, the Federation of Architects, Engineers, Chemists and Technicians, and the Bookkeepers, Accountants, and Stenographers Union.76 Two weeks later, on June 12, Stein announced that he had received the order that cuts had to be made by July 15 terminating 25 percent of the 4,500 workers then employed on the projects. Organized relief workers in the

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74Email from Adam Stein to Marc Linder (Mar. 30, 2004). Adam Stein may have misremembered at least one aspect of the intrigue: Childs, who was the Washington correspondent of the St. Louis Post-Dispatch, appears not to have been syndicated in the Washington Post at the time in question.

75Stein was appointed to the position of assistant administrator of the arts projects in New York City in March 1937. William McDonald, Federal Relief Administration and the Arts 517 (1969). Reductions in the WPA rolls and high-profile strikes and sit-ins to protest them in New York antedated Stein’s advent. E.g., “WPA Artists Fight Police,” NYT, Dec. 2, 1936 (1:2-3).

76"10,000 Stop Work on WPA Projects," NYT, May 28, 1937 (1:7, 12:2-3). At the time of the FAECT’s organization in 1933, industrial and medical and dental practice technicians, chemists, and construction draftsmen predominated among its members; it had 6,000 members by 1936, joined the CIO in 1937, was expelled for communist subversion after World War II, and merged in 1946 with the UOPWA, which was also expelled for the same reason in 1949 and disappeared. Jürgen Kocka, Angestellte zwischen Faschismus und Demokratie: Zur politischen Sozialgeschichte der Angestellten: USA 1890-1940 im internationalen Vergleich 254-66 (1977). According to Herbert Northrup, Unionization of Professional Engineers and Chemists 10-11 (1946), probably not more than 10 percent of FAECT’s 10,000 claimed members were professional engineers.
Employers Switch Strategies

Workers Alliance of Greater New York immediately countered that they would "fight like hell" against the cuts and were already planning sit-in strikes to pressure Congress to appropriate more funds. (The number of relief workers to be cut on construction and white-collar projects in New York numbering 170,000 had not yet been announced.)

Then, on June 25—the same day on which the WPA announced that 34,000 of those 170,000 workers would be dismissed, white-collar educational, health, and recreation projects being especially hard hit, and Leon Henderson, the WPA’s economic adviser, declared that the maximum hours provisions in the FLSA bill, the joint congressional hearings on which had just concluded, afforded the first real opportunity to adjust the workweek to compensate for greater productivity—Stein was catapulted into national consciousness when, in the words of the headline of the front-page, above-the-fold article in the Times: "WPA Official Held Captive in Strike." The Communist Party did not deem the event worthy of the front page of the Daily Worker, but Stein did merit a sub-headline in an inside-page article accusing him of having "turned a deaf ear to all appeals that the pink dismissal slips" of 17 dancers who were in a sitdown hunger strike" be rescinded. With two weeks’ lag, a weary-looking Stein appeared in a Life photograph sitting, “chin on hand,” at the head of a large table: “Held captive for 15 hours in his Manhattan office by 600 protesters, WPA Business Administrator Harold Stein...won freedom by granting captors’ demands.”

According to the Times account: “Six hundred WPA artists, writers and musicians imprisoned the executive head of their projects...after they had taken full control of central offices of the Federal Arts Projects....” The sit-down strikers warned Stein “that he would be forcibly restrained if he attempted to leave before the strikers had won their demand that an appeals board be set up to review the dismissal slips given to 2,848 workers....” Even after two of Stein’s superiors in Washington had dismissed this demand on the phone, “the strikers remained obdurate in their determination to hold the project official captive.” Despite the “stifling” air, by which two women were “overcome,” Stein was apparently able to retain his bureaucratic equanimity (unlike the regional chief of the historical records survey, who agreed to go to the office from his home in New Jersey only

77“WPA Art Projects to Drop 1,100 Here,” NYT, June 13, 1937 (sect. 2, 39:8).
78“WPA to Cut 34,000 from Rolls Oct. 15,” NYT, June 26, 1937 (3:5).
81“1,200 Arts Project Workers in Sit-ins,” DW, July 26, 1937 (5:5) (“700 Camp in Administration Offices While 500 Sit-in at Office of Stein Awaiting Word from Capital”).
82Life, 3(2):28 (July 12, 1937)
on the condition that the strikers would permit him to leave again when he wished): “Informed by a WPA safety engineer that the floor of the building could support the weight of 600 persons only while there was no commotion, Mr. Stein declined a police offer to escort him to the street for fear that such a move on his part would provoke a riot.” The situation inched toward the surreal as “Mr. Stein’s position was little more than that of a puppet in the hands of his captors. At their direction he made calls to Washington, repeating the conversation for the information of those who crowded through the door of Mr. Stein’s private office and even sat on his desk. Every inch of the floor outside was covered with demonstrators....” Finally, just before midnight, the strikers were able to obtain from Stein both an agreement to call a conference of federal arts project regional directors to seek a more equitable basis for dismissals and a promise to rescind the severance notices of five WPA dancers pending an investigation. As if Stein did not have enough on his hands, 40 workers in the payroll division had already been sitting down there when the artists arrived. On “orders’ from the committee,” Stein also telephoned Ellen Woodward, the assistant administrator in charge of women’s and professionals’ projects in Washington, to relay the demand that no needy workers be dismissed, but her rejection, on the grounds of insufficient funds, merely prompted the chairman of the strike strategy committee to announce that they would hold Stein until they got “satisfaction”—if necessary, from President Roosevelt himself.83

Stein’s “imprisonment” did not end until eight o’clock the next morning when, as the *Times* again reported on its front page, he “purchased his freedom...from 600 sit-down strikers, who had held him captive in his own office for fifteen hours, by granting all of the strikers’ demands to the limit of his authority.” Included among the terms of the agreement that he signed to “win his release” was his immediately informing Washington that he did not wish to carry out dismissals according to the then prevailing methods, which he considered unsound; he also strongly recommended that a neutral review board be empowered to “order all needy employables to be retained” on the four arts projects. Although Deputy WPA Administrator Aubrey Williams stated that he would set up a review board with advisory powers, he also warned a delegation of WPA artists, that “a few more things like” Stein’s imprisonment and they “might as well kiss WPA out of a window....”84

Stein’s temporizing achieved the results that he and his superiors had pre-

83“WPA Official Held Captive in Strike” (1:2, 4:7).
84“WPA Captive Yields to Strike Demands,” *NYT*, June 27, 1937 (1:6, 4:2-4). The *Daily Worker* reported that Williams had refused to agree to the concessions that Stein had made because they had been obtained “under pressure.” “Ask WPA Head to Set Up Appeals Board in Firings,” *DW*, June 28, 1937 (3:1).
Employers Switch Strategies

sumably been seeking. Three days later, on June 29, Stein returned to New York
from Washington to inform the relief workers’ organizations that their plea for an
appeals board had been rejected. He added that “I have not used force and I have
no desire to use force...[b]ut my job is to see that the projects run efficiently. If
they cannot run efficiently they will have to close.” Workers may have made it
clear that Stein’s warnings “would not deter them from further protests,” but the
WPA’s use that very day of the police to arrest stand-up strikers from another
WPA office signaled that the agency “was determined to carry out its full dismissal
program” in New York and “would not temporize with ‘extreme’ expressions of
protests....” In fact, on June 30 Roosevelt signed the Relief Bill, which cut the
WPA’s funds by half a billion dollars, thus requiring it to dismiss thousands of
relief workers, and in mid-July, the WPA did proceed with the dismissal of
almost 2,500 workers in the five arts projects and without the deferrals that the
protesters had demanded.

One of Stein’s sons, who, like the whole family, was familiar with the sit-ins,
speculated that Stein had known that the WPA had hired him to get rid of com­
munist artists and that after this episode he was probably known in the federal gov­
ernment as a can-do person. To be sure, in July, when Ralph Easley, chairman
of the executive council of the National Civic Federation made public a letter to
Roosevelt urging him to investigate Communist control of the theater and writers’

85“500 WPA Pickets Fight with Police,” NYT, June 30, 1937 (1:7, at 4:3-4).
86“500 WPA Pickets Fight with Police” at 1:7.
87“Relief Bill Is Signed,” NYT, July 1, 1937 (5:3). See also Robert Post, “Hopkins
Faces New WPA Task,” NYT, June 27, 1937 (sect. 4, 6:6-7); “Governmental Vandalism,”
88“WPA to Drop 2,487 in 5 Arts groups,” NYT, July 15, 1937 (8:4-5).
89Telephone interview with John H. Stein, Newberg, OR (Mar. 18, 2004). On alleged
Communist control of the arts programs, see John Millett, The Works Progress
Administration in New York City 217 (1938). When asked about the discrepancy between
this account and Adam Stein’s aforementioned account, the latter replied: “I think my view
is different from John’s. I think Father was not at all happy with the assignment. He did
the job to survive. The budget was cut and artists needed to be laid off. If he later
described his assignment as getting a bunch of commies off the rolls, I am quite sure that
was his characterization of his employer’s view. I can’t believe that he saw it that way.
Although he was later a fairly conventionally anti-communist liberal, he opposed
discrimination against communists except when there was a strong need to do so for
reasons of internal security. (This was a big well debated issue in the 50’s.) As I recall,
his position on that was nuanced. I know that he wrote about it. An indication of his view
was the fact that he resigned from the ACLU when it banned communists from holding
office.” Email from Adam Stein to Marc Linder (Mar. 31, 2004).
Employers Switch Strategies

projects, Stein stated that since the communication had been addressed to the president, he would not be commenting.90 That Stein’s superiors appreciated his services became clear exactly one month after his imprisonment when WPA assistant administrator Ellen Woodward announced the consolidation of the Federal Theater Project and the Four-Arts Project, of which Stein had been administrative assistant, and his assignment “to make a nation-wide survey of the Federal art project....”91

After leaving the WPA, Stein worked as an NLRB per diem trial examiner from January to July 1938; jobless for three months, he was rehired and detailed by the WPA to the Wage and Hour Division in November (becoming WHD’s employee in May 1939), remaining there until September 27, 1941. In his 1946 resume, Stein recorded that he had been Assistant Director of the Hearings Branch, which was “responsible for the administration of the discretionary features” of the FLSA, “including the issuance and revision of regulations, the issuance of certificates for learners and handicapped workers, and likewise the definitions of executive and administrative employees, of seasonal industries, and of ‘area of production’, excluding various classes of agricultural processing workers from the benefits of the Act.”92 Without singling out for special mention his best known and most enduring accomplishment at the WHD—his single-handed re-creation of the white-collar overtime regulations—Stein modestly summarized his work there:

As with any new law, the policies were hammered out in conferences and hearings, in memoranda, letters and reports. The final policy determinations were made with one eye on the practical effect on industry and labor, and the other on the Supreme Court where in fact some of the decisions were finally affirmed and in one case reversed on a split decision. In all of the foregoing I acted as one of the chief responsible officials. Both as a regular part of this work and on special assignment from the Administrator, I held the great bulk of the hearings conducted by the Wage and Hour Division (except for Wage

90“Easley Views Stir WPA Resentment,” NYT, July 20, 1937 (8:5).
91“Shake-Up Ordered on WPA Theatres,” NYT, July 26, 1937 (15:1).
92Stein’s personnel papers; Stein’s resume. Stein presided, for example, at the hearings for a seasonal exemption of the lumber industry in January 1939. BNA, Wage and Hour Manual 623-24 (1944-45 ed.). Stein’s direct supervisor as Chief of the Hearings and Exemptions Section was Merle Vincent, who had been Washington legislative representative of the ILGWU and was, at the time of his appointment to the WHD, president of the Washington chapter of the left-wing National Lawyers Guild. “Merle D. Vincent, Chief of Exemptions,” WHR 1:290 (Nov. 7, 1938). For Vincent’s testimony at the FLSA hearings in 1937 on behalf of the ILGWU, see Fair Labor Standards Act of 1937: Joint Hearings Before the Committee on Education and Labor United States Senate and the Committee on Labor House of Representatives 262-69 (75th Cong. 1st Sess., June 2-22, 1937).
Employers Switch Strategies

Order Hearings) during the first three years of its existence.93

Among his more prominent assignments was his role as the WHD’s examiner in its investigation of the question as to how to calculate hours worked in underground metal mines. Stein’s conclusion that the workday “starts when the miner reports for duty as required at or near the collar of the mine, and ends when he reaches the collar at the end of the shift” was approved by the WHA on March 23, 1941. To be sure, Stein’s other portal-to-portal recommendation—that the workday did not include fixed lunch periods of one-half hour or more “during which the miner is relieved of all duties, even though the lunch period is spent underground”94—closed one possibility that the WHA had left open in September 1940. At that time Fleming was not yet prepared to take a position on a problem rendered “very difficult” by the fact that the miner “is required to eat under very unfavorable conditions and is subject to many of the hazards of his job while eating,” although he did have the time off.95

A remarkable snapshot of Stein in action early on at the WHD was provided by Joseph Rauh, who, between stints as Supreme Court Justice Benjamin Cardozo’s last law clerk in 1938 and Felix Frankfurter’s first in 1939, worked briefly at the WHD. One afternoon in late 1938

the question before a meeting of the Wage and Hour Staff was how to get around the exemption in the law for agricultural processing employees in the area of production. Some wanted to follow the literal language and intent of Congress and were prepared to acquiesce in the denial of the 25-cent minimum wage and overtime pay to the exploited workers in the factories in the field; others like myself were prepared to ride roughshod over the law in the interest of equity for those oppressed workers. Harold stood out above the group; feeling as deeply as anyone in the room for the needs of the exploited, he nevertheless saw the self-defeating folly of unreasoned efforts in their behalf. Giving only a very little here and even less there, he soon accomplished our ends without giving offense with our means. With his almost paradoxically modest self-assurance, Harold called up reason that afternoon to fortify his idealism; and so it was for his three years of service there. The more complex the problem, the more likely the response would be: “Ask Harold.”96

93Stein’s resume.
95“Overtime and Records for Miners,” WHR, 3:466, at 467 (Oct. 21, 1940) (address of Sept. 18, 1940, before the American Mining Congress at Colorado Springs).
96Joseph L. Rauh, Jr., in “Harold Stein in Memoriam” at 9.
Employers Switch Strategies

What is fascinating about this vignette is that Rauh, valedictorian of Harvard Law School, class of 1935, clerk to two Supreme Court justices, an attorney who had spent a year at the Securities and Exchange Commission defending the Holding Company Act, and, who, on his death in 1992, was dubbed “the foremost civil rights and civil liberties lawyer of our time,” portrayed himself as having deferred to the legal strategizing of Stein, who had had no legal or economic training and, despite his family background, no understanding of business.

Rauh’s deference to Stein—who described himself at the 1940 white-collar hearings as “an innocent layman” whose opinion on constitutional issues “wouldn’t be worth very much”—becomes especially ironic in light of contemporaneous congressional skepticism of Rauh on account of his inexperience. In February 1940, less than two months before Stein’s hearings began, the Subcommittee on Labor Department and Federal Security Appropriations of the House Appropriations Committee held a hearing on the appropriations bill for the Labor Department for 1941, at which the ranking Republican member, Albert Engel of Michigan, interrogated George McNulty, the general counsel of the WHD, about Rauh, who at the time was assistant general counsel in charge of the Opinion Section of the Legal Division. Engel, who knew Rauh and considered him “a bright and brilliant young man,” nevertheless adamantly insisted that a 29-year-old, who with only four years of legal experience had never tried a lawsuit, had “assume[d] a responsibility which is beyond his age and beyond his immature judgment” in being “put...

99 Telephone interview with John H. Stein (Newberg, OR, Mar. 18, 2004). The only anecdote that Stein’s son John (himself a lawyer) knew of his father’s tenure at the WHD was that after he had decided a portal-to-portal case in favor of workers, the rule was changed that had permitted non-lawyers to hand down decisions in such cases. Only at one point during the white-collar overtime hearings did Stein refer to his family business background. When a witness complained that the WHD had determined that an elected company officer was not exempt, Stein responded that being an elected officer was not a very good gauge of executive status: “Well my mind happened to think back of [sic] an executive officer of the company of which my father was one of the principal officers and I don’t know why he was elected but his job was fourth assistant bookkeeper.” “1940 WHD Hearings Transcript” at 313 (June 4).
Employers Switch Strategies

in charge of writing the legal opinions affecting every industry in America....”101 Easily imaginable are the epithets that Engel might have cast at Stein, who, totally bereft of legal training or experience, was responsible for writing not only the white-collar regulations, but also those governing exclusions of agricultural processing workers, which were of much more intense interest to Engel and scores of his colleagues.

Equally noteworthy is that whereas Rauh at Stein’s memorial service observed that “Harold’s life in Washington was devoted to getting things done on behalf of the impoverished and the oppressed,”102 one of Stein’s sons stressed that he would not have expected his father, who was “a liberal but not a knee-jerk liberal,” to have “leaned over backwards to help the underdogs” get all they could or should have gotten at the white-collar hearings.103 This latter judgment was consistent with the Stein Report.

Stein left the WHD in 1941 to support the war effort, holding a series of important posts with the Office of Production Management, the War Production Board, the Office of Civilian Supply, and the Lend-Lease and Foreign Economic Administration (including a stay in Algiers). Toward the end of the war he was Deputy Chief of United Nations Relief and Rehabilitation Administration’s Polish Mission and was loaned by that organization to the French government as a special consultant. After the war he was Planning Advisor to the Director of the Office of War Mobilization and Reconversion, who in May 1945 appointed him special


102 Rauh, in “Harold Stein in Memoriam” at 10.

103 Telephone interview with John Stein. Reinforcing this point, John Stein added that his father had been one of Adlai Stevenson brain-trusters in 1952, but by 1956 disagreed with Stevenson; John Stein also reported that he had heard speculation that one reason his father, who taught at the Woodrow Wilson School at Princeton University, had not been appointed to a position in the Politics Department was that he was not liberal enough politically. Ironically, although John Stein was very well informed about the debate over the white-collar overtime regulations in 2003-2004 (calling it yet another reason to get rid of President Bush), he had known nothing of his father’s role in creating the regulations. Nor had his sister, who speculated that as a New Dealer, his “tilt” would have been in favor of workers’ getting overtime. Telephone interview with Lucia S. Hatch. Prompted, Stein’s other son observed: “I do not know about ‘bent over backwards’, but [he] would work to help the underdog as best he could (and he was good at making things happen).” Email from Adam Stein to Marc Linder (Apr. 5, 2004).
Employers Switch Strategies

advisor regarding surplus property problems, in which capacity Stein played a part in the controversy over the question of whether any government-built aluminum plants should be disposed of to the monopolist Aluminum Company of America. At that point he left the employ of the federal government and worked for the Committee for the Marshall Plan during 1947-48, before becoming staff director of the Inter-University Case Program, joining the Twentieth Century Fund and ultimately becoming a professor of public and international affairs at the Woodrow Wilson School at Princeton University.104