“Time and a Half’s the American Way”

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

Marc Linder

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[T]he power to define is the power to exclude.¹

We must recognize the fact that it would have been impossible at that time [October 1938] for a regulation or definition to be issued which was in conflict with the actual intent of the legislators.

Passage of time, however, renders a certain plausibility to arguments which would not have been effective if raised at that time.²

The hearings on the regulation of white-collar overtime that the Wage and Hour Division held in Washington, D.C. on 14 separate days between April 10 and July 29, 1940, remain the single most enlightening extant source of information on the underlying policies and debates concerning the exclusions. Overlapping chronologically and intertwined substantively and politically with the House floor debates on the FLSA amendments at the end of April and beginning of May,³ the regulatory hearings were understood by participants, once the FLSA bills had been definitively defeated, to be employers’ best chance to achieve what a majority in the House would have been willing to grant them had insuperable political-economic and party-political splits not doomed the amendment process altogether.

The Wage and Hour Administrator was not able to bestow all the advantages that Congress could have conferred on employers because the legislature had not empowered him to exclude white-collar workers other than executive, adminis-

¹Twenty-Eighth Annual Report of the Secretary of Labor for the Fiscal Year Ended June 30 1940, at 236 (1940) (WHA Philip Fleming discussing the definition of executive employees under the FLSA).


³See above ch. 10.
trative, and professional employees, let alone blue-collar workers; moreover, the WHA, by general understanding, also lacked the authority to issue a blanket exclusion even of these three categories based on salary level alone. Finally, employers’ recourse to regulatory revision in the form of redefinitions of the three statutorily specified occupations was a less than optimal strategy because managers’ perception of industry- or perhaps even firm-specific needs with regard to proposals for reformulating the duties tests virtually precluded the formation of a united front, which was much more easily achievable in terms of a legislatively enacted flat wage or salary level triggering an across-the-board exclusion.

Because they took place at a time when the regulations were both rudimentary and largely untested by experience, yet close enough in time to the enactment of the FLSA that witnesses could not easily bluff about the purposes of the overtime provision that had been ‘in the air,’ the hearings permitted a textual and contextual openness that would never again be possible. The unique richness of the testimony and dialog makes it possible to scrutinize in great detail employers’ arguments in favor of shrinking the universe of covered workers. Contrasting the relative volume of conceivably plausible reasons, on the one hand, and incoherence or sheer unwillingness to pay additional compensation, on the other, provides a basis for evaluating the solidity of the hearing officer’s report and recommendations, which the WHA adopted virtually intact. Secondarily, exploring labor unions’ arguments sheds light on the extent to which they adopted, from the beginning, a critical, oppositional stance on Congress’s and the WHD’s creation of a potentially huge wedge of exceptions to a national hours standard or merely acquiesced in the 1938 law and regulations in the (false) hopes of warding off revisions embodying even worse conditions.

Setting the Stage

“We aren’t going to hire a convention hall so as to have a lot of crackpots sound off,” the Administrator said. “What we are going to do is get sound, constructive advice from those familiar with problems of the industry.”

4Not coincidentally, where employers came closest to such unity—namely, with respect to the expansion of the category of administrative employees to encompass non-bosses—they also achieved their most significant success in terms of the ultimate revised regulation.

5“Wage Hearings Set Next Week on Scope of Textile Industry,” JC, Aug. 27, 1938 (1:6, at 5:2).
The 2,216-page transcript of the crucial white-collar regulatory hearings held by the WHD in the spring and summer of 1940 has, contrary to erroneous scholarly opinion, been preserved—in multiple copies—at the National Archives, although officials there could not locate the approximately 180 briefs, written statements, memoranda, and exhibits submitted to supplement the oral testimony. The latter itself represented 127 appearances on behalf of employers and employer associations, 34 by labor groups, three by deans of journalism schools (on behalf of newspaper publishers), and one by the League of Women Shoppers. Hearings were held separately for industrial sectors and publicly announced seriatim:

6“1940 WHD Hearings Transcript” at 353 (April 11) (Harold Stein).
7“The briefs and hearing transcripts [of the Stein hearings] seem no longer to exist: neither the relevant collections in the National Archives or [sic] the Department of Labor has them, nor do the majority [sic] business and labor archives I contacted.” Deborah Malamud, “Engineering the Middle Classes: Class Line-Drawing in the New Deal Hours Legislation.” Michigan LR 96(8):2212-2321, at 2304 n.363 (Aug. 1998).
10a“Thank you for your message of July 1 concerning the exhibits and written statements to the hearings you previously ordered (RG 155).... The records do not include the exhibits or submitted comments of witnesses or others.” Email from Tab Lewis, Archivist, Civilian Records, NA, to Marc Linder (July 23, 2003).
11U.S. DOL, WHD, “Executive, Administrative, Professional...Outside Salesman” Redefined at 2 n.4. A complete witness list was compiled at id at 55-59.
12The DOL’s section 541 regulations authorized the WHA in holding hearings for determining future regulations to give consideration to “separate treatment for different industries and for different classes of employees....” § 541.5. For the dates, see U.S. DOL, WHD, “Executive, Administrative, Professional...Outside Salesman” Redefined at 1. According to the ANG, Fleming had considered the possibility of a broad hearing on the definitions as applied to all industries, but decided to confine each hearing to a certain industry for which specific request for redefinition had been made. “Fleming Bids Guild to Hearing.” GR, Apr 1, 1940 (3:5).
Wholesale distributive trades (April 10-16);\textsuperscript{13} manufacturing and extractive industries (June 3-5);\textsuperscript{14} banking, brokerage, insurance, financial, and related institutions (July 9-10);\textsuperscript{15} and publication, communication, public utility, and transportation, and miscellaneous industries (July 25-29).\textsuperscript{16} It was not until May 11 that Fleming declared, in connection with the announcement of the hearings on manufacturing, that there would be a total of four separate hearings. He also stated that no changes were planned in the existing regulation until the whole series of hearings had been completed. This procedure was “in accord with the recommendations made by many representatives of industry and all labor representatives” who had appeared at the wholesale distributive hearings.\textsuperscript{17} Since those hearings had made it clear that definitional problems cut across industries, his final decision on proposed changes was withheld until after all the hearings had taken place.\textsuperscript{18}

Almost as a prelude to the hearings that Stein opened that very day, his boss, WHA Fleming, told the New York Board of Trade on April 10 that the administration of the FLSA was “not going to be on a hard and fast rule basis but rather through a policy which permits elasticity.” More specifically, he added that if the law’s definitions could be made “more elastic without...working an injustice upon poorly-paid workers,” he would “like to see it done.”\textsuperscript{19} The \textit{Wall Street Journal} editorially lauded him for this approach,\textsuperscript{20} which did not augur well for non-poorly-paid white-collar workers.

In addition to the presiding officer, Harold Stein, the assistant director of the WHD’s Hearings Branch, five other WHD officials were also present at the first hearing on April 10,\textsuperscript{21} including the director of the WHD Research and Statistics Branch.

\textsuperscript{13} \textit{FR} 5:1296 (Apr. 3, 1940).
\textsuperscript{14} \textit{FR} 5:1685 (May 11, 1940).
\textsuperscript{15} \textit{FR} 5:2325 (June 21, 1940) (application by the American Bankers Association).
\textsuperscript{16} \textit{FR} 5:2326 (June 21, 1940) (application by the United States Independent Telephone Association and SSIC). The WHA appended the same request for additional information as for the banking hearings. See also US DOL, WHD, Press Release: Final Hearing to Redefine Executive, Administrative, Professional Employees, Outside Salesman, to Start Thursday, July 25 (R-929, July 25, 1940), in NA, RG 155.
\textsuperscript{17} US DOL, WHD, Press Release: Wage-Hour Hearing on Redefinition of “Executive”, Etc. in Manufacturing and Extractive Industries June 3 (R-770, May 11, 1940) (copy furnished by Wirtz Labor Library, US DOL).
\textsuperscript{18} 1940 WHD Hearings Transcript” at 4-5 (June 3) (Harold Stein).
\textsuperscript{21} For a very brief account, which mentioned the suggestion of universal exemption for all employees earning $1,500 or more, see “Urge Wage-Hour Change,” \textit{Nyt}, Apr. 11,
Branch, Harry Weiss, who in 1947-48 would preside over similar white-collar regulatory hearings and issue his own report, which would prompt further revisions. Stein announced at the outset that in 1938 the Part 541 regulations had been “issued after conferences with various representatives of industry and labor and represented, what seemed at that time, at least, to be the most satisfactory definitions that could be worked out. That did not mean, of course, that they might not be...improved...after we had some experience with it.” Having received during the previous year and a half both favorable and adverse comments, the WHA wanted to crystallize “all this somewhat inchoate mass of statements,” but it was inadvisable to hold one meeting for all of U.S. industry and since wholesalers had actually come forward with certain concrete proposals and labor representatives had said that they were ready to speak in behalf of their own feelings, this hearing had been announced and the WHA had also announced his willingness to hold others if and when representatives of other industries came forward with concrete proposals.

Procedurally, Stein explained that: “I expect to ask quite a number of questions. I have a fairly inquisitive nature and I will give myself full play in that.” He then added—fully confirming his son’s remark that Stein was very self-confident and did not suffer fools gladly—that after he had finished asking questions, it was “conceivable, although not highly probable, that there will still be some questions which should have been asked to illuminate the record”; if so, he would entertain questions from anybody who was interested. Ironically, Stein managed, in exemplary fashion, to conduct the hearings on white-collar workers’ hours within the scope of bankers’ hours: the five-day hearings on the wholesale trades, which began at 10 a.m., consumed 27 hours and 55 minutes, the longest workday lasting 7 hours and 5 minutes, the shortest—a Friday—a mere 3 hours

1940 (48:6). “Seek Pay Definition in Wholesale Lines,” JC, Apr. 11, 1940 (4:6), stated that the WHD had announced that any decisions based on the wholesale hearings would be confined to the wholesale trade—an approach that the WHD abandoned.

22“1940 WHD Hearings Transcript” at 1, 8 (Apr. 10).
23“1940 WHD Hearings Transcript” at 3-5 (Apr. 10).
24“1940 WHD Hearings Transcript” at 7.
25Telephone interview with John Stein.
26“1940 WHD Hearings Transcript” at 7. It is unclear whether these character traits fell within the range that WHA Andrews had had in mind when he wrote that a special hearings section had been established “so that these specialized functions might be concentrated in the hands of officers especially qualified by experience and temperament for this exacting type of work.” Interim Report of the Administrator of the Wage and Hour Division for the Period August 15 to December 31, 1938, at II-27 (Jan. 1939).
and 15 minutes. These times were exclusive of lunch breaks, which ranged from one hour to two hours and 15 minutes.27 Similarly, the three days devoted to manufacturing industries took a total of 14 hours and 30 minutes, the longest day lasting only 5 hours and 35 minutes,28 while the two-day hearings on banking and brokerage lasted only 8 hours and 40 minutes.29

Wholesale Distributive Trades

This watering down process was accepted in good part by the unions at first on the theory that such modification was necessary to forestall complete mutilation of the wage-hour law by Congress.30

The proceedings then began with the original petitioners—the Council of National Wholesale Associations, Southern States Industrial Council, and American Retail Federation.31 The wholesale employers, who testified at the first set of hearings, had, as already noted, done considerable advance work lobbying both Congress and the WHA for special exemptions.32 Stein himself observed that a bill was pending before Congress that would, inter alia, exempt wholesalers from the FLSA.33

The first witness on April 10—the day after Nazi Germany’s occupation of

27"1940 WHD Hearings Transcript" at 1, 90-91, 189 (Apr. 10); "1940 WHD Hearings Transcript" at 190, 288-89, 380 (Apr. 11); "1940 WHD Hearings Transcript" at 381, 421-22, 465 (Apr. 12); "1940 WHD Hearings Transcript" at 466, 549-50, 630 (Apr. 15); "1940 WHD Hearings Transcript" at 631, 694-95, 830 (Apr. 16).

28"1940 WHD Hearings Transcript" at 1, 58-59, 134 (June 3); "1940 WHD Hearings Transcript" at 135, 238-39, 331 (June 4); "1940 WHD Hearings Transcript" at 332, 434, 478 (June 5).

29"1940 WHD Hearings Transcript" at 3, 174 (July 9), 177, 243 (July 10). Because the recess times were not always recorded for the hearings on the communications industries, it is not possible to specify their length, but the times that were recorded suggest that they were comparable to the others.


31"1940 WHD Hearings Transcript" at 6 (Apr. 10).

32See above this chapter.

33"1940 WHD Hearings Transcript" at 9 (Apr. 10)
Denmark and invasion of Norway—was M. L. Toulme, chairman of the Council of National Wholesale Associations, who also appeared on behalf of the National Wholesale Grocers Association. He disclosed that for a sample payroll week ending March 19, 1938, the typical office worker in the wholesale grocery trade was on duty 45 hours and the median employee for the whole industry worked 48 hours, while 68 percent worked 45 hours or more. He also pointed out that overtime premiums had not been widely prevalent before October 1938: 50 percent of reporting plants made no additional payment and 25 percent more than the usual hourly rate. Toulme then launched into an ideological assault on the FLSA, which “was not enacted solely to ‘put a floor under unconscionably low wages and a ceiling over unconscionably long hours’ as it has been so many times described. As currently interpreted, the law, by fiat, automatically raises all wages except those paid specifically exempted employees and at the same time exacts a time and a half penalty for all hours worked over the maxima” of 42 and 40 after October 24, 1940. This interpretation, he charged, would either be very costly to wholesaling or prevent it from “operating the proper number of hours prescribed by custom as well as competitive necessities.”

Joe Timberlake, the president of the National Wholesale Grocers Association complained that the prohibition on performing any substantial amount of non-exempt work and the $30 salary requirement prevented many employees from qualifying for the exemption. He therefore proposed a $25 threshold, although he admitted that he did not know how many employees would gain exemption as a result. In response to Stein’s question as to whether the association was opposed to the five-day week on general social grounds, Toulme inadvertently explained why universal coverage was needed to avoid a race to the bottom: “Everybody, of course, would like to work a five-day week, but we think it is a bad business policy, inasmuch as our customers are all exempt. Many of them work seven days a week. We are simply shackled under the five-day week from giving those customers the normal service they desire.” Ironically, however, Toulme asserted that the elaborate service that competition forced them into giving “might represent a waste, inefficiency, perhaps, but it does what the Wage & Hour law wants—it gives jobs, creates jobs.”

The Cooperative Food Distributors of America, represented by its executive

34“1940 WHD Hearings Transcript” at 10 (Apr. 10).
35“1940 WHD Hearings Transcript” at 13-14 (Apr. 10).
36“1940 WHD Hearings Transcript” at 16-17.
37“1940 WHD Hearings Transcript” at 29-31, 37-38.
38“1940 WHD Hearings Transcript” at 48.
vice president Hector Lazo, told a familiar tale of "decidedly liberal employers" who were "rather proud that we were among the first large business groups to actively favor" FLSA when it was introduced, but then "[t]o our astonishment, we discovered that what had been intended merely as a floor to wages in industries where deplorable wages were the general rule—which assuredly was not the case in our branch of the industry—had become a distinct burden upon independent businesses...." In other words, these employers had supported the FLSA until they realized that they would have to pay time and a half to non-minimum wage employees.

In conformity with this position, Lazo welcomed a minimum wage level of $1,500 a year as the line dividing exempt and nonexempt workers. He then wanted to go "even...one step further and give substance and expression to the ultimate aim of such social legislation" by proposing a 44- or 48-hour week for white-collar and commercial establishments as opposed to 40 for industry. As if he were engaged in a negotiation, he offered as his final concession that the WHD could "leave the time and a half overtime even for these people if you must for real overtime above those hours...."

The influential and reactionary Southern States Industrial Council presented the most important employer testimony on the first day of the hearings. Its representative, J.H. Ballew, had been the Tennessee Adjutant General from 1933 to 1937 and was a partner in a Nashville law firm one of whose clients was the SSIC. The SSIC's petition, which Ballew admitted had been filed primarily on

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39"1940 WHD Hearings Transcript" at 70.
40"1940 WHD Hearings Transcript" at 69.
41"1940 WHD Hearings Transcript" at 71.
43"1940 WHD Hearings Transcript" at 73-74. It is unclear what Lazo meant when he said to Stein that "[i]n the official invitation to the hearings, it would appear that you are at least considering" that $1,500 dividing line.
44"1940 WHD Hearings Transcript" at 77. Lazo appended this confused and confusing statement: "Of course, this still does not disturb the exemption for executives, who can and should be restricted in working hours."
45"1940 WHD Hearings Transcript" at 79.
46Martindale-Hubbell Law Directory 1: 1543 (biographical section) (72d ed. 1940). Ballew, born in 1886, had studied law privately. Martindale-Hubbell Law Directory 1:2008 (85th ed. 1953) mentioned him for the first time as (apparently) employed by the SSIC. He was last mentioned in Martindale-Hubbell Law Directory 3:2951 (94th ed. 1962), still (apparently) employed by the SSIC. Ballew was a Tennessee delegate to the
behalf of manufacturing industries, was based on the theory that Congress had never meant to give the Wage and Hour Administrator the power to issue a regulation coupling executives and administrators. The SSIC’s proposal was an exact copy of the 1939 Cox amendment. Ballew agreed with Stein that the SSIC’s proposal would exempt all or practically all nonmanual workers, but added that it did not touch the definition of “executive,” but only that of “administrative”: Ballew had no particular complaint regarding the former “except that we cannot see what salary has to do with it. We think that an executive is an executive, whether he gets one dollar a year or $10,000 a year.” In reply to Stein’s question as to whether, if adopted, his “executive” definition would be purely of academic interest, Ballew offered contradictory responses and then shifted to administrative employees, conceding that the SSIC had suggested no salary, but that $25 or $30 might be worked out.

Democratic national convention in 1948 who attended the Birmingham segregationist rump convention at which speakers denounced Truman and his civil rights program as “‘threats to make Southerners into a mongrel, inferior race by forced intermingling with Negroes.’” Strom Thurmond’s running mate, Mississippi Governor Fielding Wright, had started the states rights revolt and on May 8 had delivered a statewide address to blacks in which he told them that “if they envisioned social equality with whites in schools and restaurants it would be better for them to leave the state.” John Popham, “Southerners Name Thurmond to Lead Anti-Truman Fight,” *NYT* July 18, 1948 (1:1, 3:1-4).

Presumably Ballew was referring to H.R. 4363, which would have excluded all office workers on straight salary who received a paid vacation. See above ch. 10. The text of the SSIC’s proposal was not read into the hearing testimony, but was reprinted in a memorandum submitted by another witness: “The term ‘employee employed in a bona fide...administrative...capacity...shall mean any employee whose duties are connected solely with the administration of an industry, and shall embrace clerical employees, such as bookkeepers, stenographers, payroll clerks, auditors, cost accountants, purchasing agents, statisticians, and/or other office help regularly employed on a straight salary basis and given vacations and sick leave with pay.’” Lewis Merrill, “Wage-Hour Legislation and the White Collar Worker: Memorandum submitted to the Wage and Hour Division United States Department of Labor in Opposition to Proposed Amendments to Part 541, Title 29, Chapter V, Code of Federal Regulations pursuant to Section 13(a)(1) of the Fair Labor Standards Act of 1938, at a Special Hearing Held April 10, 1940” at 15 n.*. Two days later, when AFL economist Boris Shishkin pointed out that the price of a one-week vacation was working “unlimited hours the rest of the year,” Stein, uncharacteristically, chimed in that one day’s vacation would also comply with the wording. “1940 WHD Hearings Transcript” at 431 (Apr. 12). The National Wholesale Hardware Association testified that the SSIC definition would “most acceptable” to it. “1940 WHD Hearings Transcript” at 20 (Apr. 10).

"1940 WHD Hearings Transcript" at 93-94.
At this point, Dr. Lazare Teper of the ILGWU intervened to ask Ballew how a file clerk could be employed in a bona fide “administrative or executive” capacity. Ballew then used the opportunity to point out that the fact that Congress had not inserted an “and” or “or” between those two terms “clearly show[ed] that Congress meant two very distinct types and classes of employees.” Stein, who at first thought that he had caught Ballew misreading the text and then seemed to believe that Ballew was trying to evade Teper’s question by playing word games, apparently did not grasp that in fact Ballew was raising the vital question as to the justification for the WHD’s having combined the two categories. Having thus shut off this discussion, Stein suggested that Teper rephrase his question to ask only about administrative employees, prompting this potentially illuminating but ultimately inconclusive exchange:

Mr. Ballew: Our idea with reference to that is by the use of the term administrative, Congress clearly meant that the employees engaged in the administration of the business, not manual employees but employees - in other words, the so-called white collar workers. ... That is our theory upon which the petition was filed. And upon that theory I say that file clerk is well within that scope.

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

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

Presiding Officer Stein: I think we would agree on that.

Dr. Teper: That is all.

Teper’s initial question, which could have become a vehicle to ferret out what Congress might have meant by the oblique term “administrative,” was dropped by him and Stein. Even the subsidiary question as to the scope of the meaning of “bona fide” could and should have been explored further to achieve the same end as the principal question, but the interrogators cut off the discussion as soon as they had elicited a narrow and crude hypothetical response that described a gross misclassification of a manual production worker as white-collar office worker, but failed to deal with the much more subtle issue of the distinctions between excluded administrative employees and protected clerical workers. Although it is possible that Stein may have wanted to avoid discussion of the legitimacy of the WHD’s fusion of the executive and administrative categories, Teper’s reason for abandoning this fundamental question is unclear.

Henry Matter, the executive secretary of the Wholesale Dry Goods Institute,

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49"1940 WHD Hearings Transcript” at 94-95.
50"1940 WHD Hearings Transcript” at 95-96.
raised the more general and far-reaching point on which even many factory employers had been focused since the FLSA's enactment—namely, the contention that it could not have been Congress's intent in enacting the FLSA "to penalize a concern already liberal in the treatment of its employees. Yet, by requiring the payment of time and one-half for hours in excess of the established workweek, the liberal employer is subjected to drastic penalties." From the competitive perspective, the Institute found it difficult to believe that Congress had intended to create a situation in which firms paying higher salaries would also have to pay more in overtime. Coming to the specifics of the wholesale industry, Matter rehearsed the widespread but implausible empirical claims that the FLSA could not increase employment because wholesaling was seasonal and during increased-demand periods experienced help was needed and it was not practical to engage additional help since experienced help was not available and the seasons were not long enough to train new workers. The dry goods wholesalers suggested a $35 salary test for executives and $25 for administrative employees, who would be defined by reference to the same criteria as executives but who did not need to have management as a primary duty or the power to hire or fire. Just how expansively the Institute meant the exclusion can be gleaned from Matter's response to Stein's question as to whether the term "administrative employee" had been used before the FLSA's passage: "You might call them office workers. It is a matter of personal preference. It wasn't a common term at all."

The American Retail Federation, one of the original petitioners, scored a major coup by retaining Charles Wyzanski, Jr.—the former Solicitor of Labor himself, who, after having worked at the Justice Department, engaged in private corporate practice until he became a federal judge in 1941—to represent it. Wyzanski put in a cameo appearance to alert Stein to the one particular case in which the ARF was interested—that of an assistant buyer of a purchasing office—before introducing the ARF's real witnesses. In this regard, Wyzanski seemed almost pre-

51"1940 WHD Hearings Transcript" at 97.
52"1940 WHD Hearings Transcript" at 98.
53"1940 WHD Hearings Transcript" at 101.
54"1940 WHD Hearings Transcript" at 108.
55Eric Pace, "Charles E. Wyzanski, 80, Is Dead," NYT, Sept. 5, 1986 (A20:1-3). Wyzanski in 1940 was a partner in the Boston corporate law firm Ropes, Gray. Another name that would one day be famous was Jacob Javits, the future liberal New York Republican senator, who submitted a statement for the National Paper Trade Association without appear in person. "1940 WHD Hearings Transcript" at 143-44.
56"1940 WHD Hearings Transcript" at 109-10. The ARF took the position that as retailers its members were generally exempt under § 13(a)(2). Wyzanski did interrupt
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destined to represent this employer since at the end of 1938 he had criticized the model state wage and hour statute for not exempting employees in higher salaries who were not in executive or administrative posts such as an $8,000-a-year steel purchaser whose only assistant was a secretary whom only the personnel office could hire and fire; and more generally, he had opined that the overtime provision should apply only to the those with lower salaries.57

David Craig, the president of the ARF, whose members accounted for 200,000 stores, explained that the organization was interested in the executive-administrative exempt status of assistant buyers employed in physically separate units, who: exercised much discretion and individual initiative; were not closely supervised; were judged by their results and not by their methods; had very little control of the managing of other persons; “really” did not have the right to hire or fire; whose pay varied from $1,800 to $7,500 a year with a median at $2,200-2,300; were not unionized; and, finally, had steady year-round employment and paid vacations and sick leave. As to their numbers nationally, he could do no better than guess that there were between 1,000 and 10,000 of them.58 “None of them,” Craig concluded, seemed to be “within the purposes” of the FLSA. It was, moreover, impractical to keep records of their time, since they had no regular office hours; in addition, while they worked considerable overtime during the peak

several times during the questioning of his clients to object to disclosure of information. E.g., id. at 133, 139.

57Malamud, “Engineering the Middle Classes” at 2290-91. On Wyzanski’s rather conservative advice to Perkins before the FLSA was drafted, see above ch. 9. More than four decades later, Judge Wyzanski, sitting by designation, was a member of a circuit court panel that issued a decision that had an enduring impact in expanding the universe of low-level supervisors from whom employers could lawfully extract unlimited unpaid overtime as bona fide executives. Donovan v. Burger King Corp., 672 F.2d 221 (1st Cir., Feb. 22, 1982).

58“1940 WHD Hearings Transcript” at 111-12, 142. Later in the hearings, Solomon Lischinsky of the Amalgamated Clothing Workers, characterized the ARF’s proposal as “obviously designed to exploit a natural doubt as to coverage in the case of a $4500 a year assistant buyer in order to clothe with reasonableness a definition admittedly designed to exempt employees earning as little as $1800 and averaging $2300 and which will in effect exempt any employee who has acquired any familiarity with the trade. The duties of a $4500 a year assistant buyer may be such as to exempt him from the protection of the law which apparently he does not need, but obviously a description of his duties does not throw much light on the case of a $2000 a year employee, who is in the vast majority.” Id. at 771 (Apr. 16). Interestingly, Lischinsky, despite his critical dissection of the subterfuge, was even quicker than the employers to stamp the higher-paid assistant buyer as unworthy of state protection—without any explanation.

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buying season, at other times they were encouraged to take a day off to go to a ball game. The current executive-administrative definitions were unsatisfactory "because they insist that the individual have managerial functions, and insist that they have the authority to hire and fire. Our proposal is simply that their executive or administrative capacity definition should be revived." Whereas the SSIC's proposal went further than was necessary for the ARF's purpose, the Council of National Wholesale Association's proposal did not go far enough because of its stress on managerial functions and the power to hire and fire.59

Specifics about assistant buyers' job were furnished by H. C. Hangen, the assistant merchandise manager for J. C. Penney Company, which employed a total of 60 assistant buyers (0.2 percent of the company's total workforce), who were all nonunion. An assistant buyer's principal duty was to build the line of merchandise he handled, select materials, develop styling, make purchase commitments, go to manufacturers to see samples, and travel to conventions of Penney managers. The assistant buyer was an important part of the organization who was able to commit the company for large sums of money. Showing signs of thorough coaching, Hangen conclusorily allowed as how their work was, for the most part, more important than that of many clerical or operating department heads "who definitely are exempt according to the regulations." Pointing up the inadequacy of the executive-administrative definitions for Penney, Hangen observed that assistant buyers did not hire any employees; they did direct the work of three or four clerical assistants, but lacked managerial supervision over them.60

Although Hangen considered it doubtful whether they came under the regulations, "we want any doubt removed." It was important for the regulation to be changed because an assistant buyer's performance of his duties could not be viewed in terms of "the number of hours they sat at a desk, in fact every part of their whole time may be devoted to their work. They have to do such things as

591940 WHD Hearings Transcript" at 112-13. The ARF's expansive proposed definition was not included in the hearing testimony transcript, but was reprinted in a memorandum submitted by another witness: "The term 'employee...employed in a bona fide executive...capacity...shall mean any employee who is entrusted with responsibility as to the method by which and the time during which he executes his work, and who determines important policy questions, or who requires special financial, merchandising or other technical and non-manual skill to execute his work and who receives compensation at a rate not less than $30 a week." Lewis Merrill, "Wage-Hour Legislation and the White Collar Worker" at 16 n.***. The CNWA's proposed definition of executive employee was like that in the October 1938 regulation except that it deleted the requirement that the employee do no substantial amount of non-exempt work and raised the salary threshold to $35. Id. at 16 n.**.

601940 WHD Hearings Transcript" at 113-16 (quote at 115).
read ads in newspapers, read trade publications, style magazines, see what competition is doing in store windows, and so forth. They can’t very well keep a record of the hours they work. For example, they might spend several hours with an out of town salesman or manufacturer at his hotel, or at lunch, at which time part of their discussion might be social and part of it might be on business affairs.” Building up to an artistic analogy he was about to make, Hangen insisted that it was “difficult satisfactorily to employ additional assistant buyers on some lines as one man should know an entire line.”

Hangen’s concluding remarks then culminated in an absurd analogy between assistant buyers and creative artists or learned professionals that failed to provoke a challenge or even a question from Stein: “The results of their work cannot be measured by the hours they work or on any kind of a piece-work basis but they are judged by...what they accomplish, by the exercise of discretion, judgment, and good taste, much like a portrait painter or a lawyer.” Without offering any data, Hangen asserted that assistant buyers probably did not average during a year more than 40 hours a week, but that it was important for them to work long hours during peak weeks, whereas during the hollows their hours were unimportant.

One of the Penney assistant buyers, R. B. Fox, then testified in behalf of the Penney assistant buyers. The purpose of his testimony was to demonstrate the infeasability of recording their working hours. For example, when meeting with manufacturers at a hotel or lunch: “Part of the time we are discussing business and part of the time we might not be discussing business, it might be pleasure.... Naturally, we can’t pull out a book and show one hour for business and one hour for monkey business....” What Fox in fact demonstrated was that he had so fully internalized his employer’s profit-driven demands that he was willing to subordinate his life outside to them, to merge them, or even to abandon his independent judgment as to where working time ended and his own free time began: “I might consider that all of the time I am away from home that I am doing work whether I am riding the cushions, going through the factory, nevertheless I...”

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61“1940 WHD Hearings Transcript” at 116-17.
62“1940 WHD Hearings Transcript” at 117.
63“1940 WHD Hearings Transcript” at 117. In spite of Fox’s own self-description, later, when a union representative asked Fox whether he was basing his opinions (especially that he would rather not be subject to the FLSA) on his own personal opinions or whether they were common among the assistant buyers, Wyzanski objected that “[w]e didn’t offer Mr. Fox as a representative of anybody but himself and the J. C. Penney Company” and added that “there were no unions in this association....” Stein himself prompted Fox to state that he would not know whether others agreed with him. Id. at 139.
64“1940 WHD Hearings Transcript” at 119.
am working for the J. C. Penney Company and I am spending my time. I wouldn’t
know where to draw that line. I might be sitting on the train and instead of reading
Life magazine, I may be reading some ads so I would charge that up to the office.
It is difficult to say whether it is business again or the other thing.” That J. C.
Penney had selected a picture-perfect self-abnegating and/or corporate hierarchy-
climbing white-collar employee to testify was clear from Fox’s admission that:

[T]here are certain times when you just can’t hang up your hat or drop the hammer and run
home. If you do you have a guilty conscience. And that is our part of the job.
We have enough feeling of the responsibility to want to stay there on the job until the
thing is done. I am just selfish enough to think that that might be a feather in my cap,
too.66

65“1940 WHD Hearings Transcript” at 120 (Apr. 11). An example of an employer’s
praising employees for similar behavior was furnished later in the hearings when a repre­
sentative of Kraft Cheese Company testified that its union contracts, which did not limit
daily or weekly hours, provided that routes were to be laid out so that outside salesmen
could complete them by 5 p.m.; nevertheless, on 90 percent of the routes they did not
return by then “[b]ecause they are salesmen and they do have that fire burning inside of
them which we are looking for when we hire them.” Id. at 523 (Apr. 15) (testimony of
John Wolf). Self-contradictorily, the same company opposed time and a half because “if
the salesman who, after all is human, knew that he was to draw time and a half for over­
time,...he would always linger over lunch; he would always have his hair cut and a shave
on the employer’s time, probably making money by doing it.” Id. at 487 (statement of
Richard Keck). Kraft’s representative, asked by Stein whether a 60-hour week was
“socially desirable,” replied that it was “all right for a salesman.” Id. at 494. That the
demand for excluding outside salesmen rested on employers’ preference that employees
waste their time on their own time was revealed by a firm: “[W]e all know that a lot of
time is wasted in selling merchandise. We all know that it requires a certain amount of
visiting and conversation that is absolutely outside of business. ... If you and I were work­
ing under the Wage and Hour setup, we naturally would have to chalk up the hours while
we were visiting at his [a customer’s] home.” Id. at 106-107 (June 3) (statement of E.
Heaton, Institute of American Poultry Industries, quoting member’s letter). Even where
a firm conceded that outside salesmen could be depended on to perform their duties with­
out constant personal supervision, it felt constrained to concoct a metaphysical claim to
justify non-payment of overtime: Because they represented to many customers the only
contact between the company and the dealer, “salesmen assume a sort of supervisory
capacity or managerial position, in that they are responsible for the activities of the com­
pany they represent....” Id. at 62 (June 3) (statement of Frank Will, vice president
Consolidated Cigar Corp.).

66“1940 WHD Hearings Transcript” at 121.
Stein sought to puncture this picture by asking Fox whether he would “feel the same keen sense of responsibility...if you got $25 a week”—a figure proposed by some employers as the salary threshold for administrative employees—but Fox parried swiftly: “Yes. I think I would. I will take the ‘think’ out. I would.”

Fox closed by alleging that he could not “always delegate [his] duties to somebody else” on account of their “exacting nature” and especially during rush periods. But when such peaks were over, he could be “missing from the office at the beginning of the World Series some afternoon and there wouldn’t be an awful lot said about it because they know that the job would be taken care of any way [sic].” Why he could sometimes delegate his duties Fox did not explain, nor did Stein ask him, although this question went directly to the fundamental matter of the feasibility of work-sharing and -spreading. As to his total weekly hours, Fox was not forthcoming. At one point he remarked that sometimes “we might work possibly 60 hours in one week. However, I believe over the long pull, it wouldn’t average over 40 or 45 hours a week.” Later, when Stein asked him directly how the problem of his hours had been handled since the FLSA went into effect, Wyzanski interrupted, and they had a discussion off the record. When Stein then accommodatingly instructed Wyzanski: “Tell him not to answer if you think he shouldn’t,” Wyzanski, whom Harvard Law School Professor Felix Frankfurter had lauded as “one of the most brilliant students I ever had” and The New York Times later celebrated as “a profound legal thinker,” humbly replied: “I am not the corporation counsel and I don’t know. Refuse to answer on the basis of — Stein, taking command, but also turning extraordinarily deferential to Penney’s interests, peremptorily declared: “Mr. Wyzanski advises that the witness not answer the question. I would certainly not press it over such learned advice.”

It is not clear what line of questioning Stein had wanted to develop, but one reason that the failure to pursue Fox’s hours was unfortunate is that the opportunity was forfeited to discover whether in fact he worked long hours over the whole year and/or only seasonally. (Stein took one last sly stab at this issue by asking Fox whether he had in fact gone to the last (1939) World Series, but Fox’s response that he had gone in 1938 ended the foray.) If his hours in fact were extended only

67* 1940 WHD Hearings Transcript” at 125.
68* 1940 WHD Hearings Transcript” at 123.
69* 1940 WHD Hearings Transcript” at 121.
70Pace, “Charles E. Wyzanski.”
71* 1940 WHD Hearings Transcript” at 132. The dashes marked the end Wyzanski’s statement; perhaps Stein cut him off.
72* 1940 WHD Hearings Transcript” at 125. Stein was shrewd enough to ask whether Fox had been an assistant buyer at the time, but did not ask whether he had gone on a
seasonally, then it might have been possible to propose dealing with this specific problem by means of a seasonality or hours-averaging exception rather than permitting such an occupation to compel a radical expansion of the category of excluded administrative employees. If, on the other hand, the assistant buyers’ hours were long virtually throughout the year, the need for ‘flexible’ hours that employers stressed as the basis for the exemption would have been severely undermined.73

Wyzanski was much more interested in insuring that the record reflected that the assistant buyers did not meet the managerial criteria of the joint executive-administrative definition by putting into Fox’s mouth that he was merely a “straw boss” who did not manage a department.74

The United States Wholesale Grocers Association, represented by its executive vice president, R. H. Rowe, solemnly declared at the outset that “the minimum wage act, maximum hour act...is here to stay and I hope it will.”75 To be sure, Rowe may have meant this hope in the literal sense that the organization never wanted the minimum wage increased: in any event, eight years later, when Congress was considering an increase made long overdue by wartime inflation, he announced that one of the Wholesale Grocers Association’s highest political priorities was opposing any increase.76 Rowe opened his testimony on the executive-administrative issue on a promising note by suggesting that the first order of business was “some dictionary home work,” after which it would be necessary to determine whether that definition “fits the actual employee in practice or if it doesn’t fit and if it fits on him so bad that it makes him look ridiculous.”77 Unfortunately, however, he never did his homework, and proceeded to offer his personal, arbitrary linguistic preferences without any dictionary or empirical support. Conceding that “we didn’t use...administrative employee” in the NRA wholesale grocery code, he pointed out that it was necessary to “carry out the will of Congress,” although he offered no explanation as to what that will might be. Rowe’s principal point was that: “[E]xecutive and administrative are different.

weekend.

73None of the three union representatives who questioned Fox asked these or any other fundamental questions, although Leo Bernstein of the United Wholesale and Warehouse Employees’ Union did tell Stein that since the WHA was being asked to create definitions that would have a wide scope, the questioning should have wide latitude. “1940 WHD Hearings Transcript” at 141. On the questioning by Lazare Teper, ILGWU, and Leonard Geiger, United Retail and Wholesale Employees of America, see id. at 134-40.

74“1940 WHD Hearings Transcript” at 124.

75“1940 WHD Hearings Transcript” at 145.


77“1940 WHD Hearings Transcript” at 145.
Though the administrative does project somewhat of the nature of the executive, yet it is of a less [sic] degree. And my suggestion is on the idea that one is the higher degree and the other the lesser degree.87 Apart from the prohibition on doing any substantial amount of non-exempt work, he was satisfied with the existing executive definition and was even willing to increase the salary level to $3579—exactly where the NRA Wholesale Food and Grocery Trade Code of Fair Competition had set it seven years earlier.80

Rowe’s proposed new separate exempt administrative employee had as his primary duty management of a customarily recognized department whose employees’ work he customarily directed regardless of how many it had or whether it had any at all. In addition, he initially proposed a mere $20 as the salary level, but then on second thought allowed as $25 would also be “suitable to me....”81 How such a petty salary, which would work out to less than the minimum wage once this departmental manager worked more than 66 hours a week, could possibly provide the protection against “abuse” that he attributed to the $35 executive salary,82 he did not bother to explain. Thus despite this minuscule salary, the Wholesale Grocers Association did propose a relatively narrow duties test, adoption of which would presumably have frustrated the vast expansion of the category of excluded administrative employees, most of whose amorphous activities could not have been pressed into this confined definition. In essence, Rowe viewed administrative employees as belonging in the loftier category of administrators—a conclusion corroborated by his express analogy to the Wage and Hour Administrator himself.83

The second day of the wholesale and distributive industries hearings brought to the witness stand a much more heterogeneous group of entities espousing a broader array of proposals. Stein heard first from Joseph Klamon, a professor of marketing at Washington University in St. Louis, who purported to be appearing in a “dual capacity” as economic adviser to four St. Louis lumber companies and to “offer expert testimony for the record....”84 Klamon immediately proclaimed that “we are strongly in favor of” the FLSA and that he personally had “always

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87"1940 WHD Hearings Transcript" at 146.
88"1940 WHD Hearings Transcript" at 146-49.
89"1940 WHD Hearings Transcript" at 146-49.
81"1940 WHD Hearings Transcript" at 149.
82"1940 WHD Hearings Transcript" at 148.
83"1940 WHD Hearings Transcript" at 149-51.
84"1940 WHD Hearings Transcript" at 192-93 (Apr. 11).
been for maximum hour and minimum wage legislation designed to eliminate unconscionably long hours of work and sweatshop wages."85

Klamon was hardly an unknown quantity at the WHD and it is not clear what sort of credibility his assurance could generate since he had spent the past few months testifying before the Division on behalf of the St. Louis Manufacturing Association threatening to challenge the validity of a 35-cent minimum wage for the shoe industry that New England manufacturers and the Shoe Industry Committee had recommended.86 In any event, Klamon argued that

It is one thing...to believe sincerely in a floor for wages and a ceiling for hours, and perhaps quite another to attempt to have the Government, through an administrative agency, perform the bargaining function for labor....

It was my impression that this Act was and is the Fair Labor Standards Act, designed to eliminate as much as possible sweatshop conditions, not primarily the time and a half Act for administrative or executive employees, or perhaps even white-collar employees, receiving, let us say, $125 per month or considerably more. ... I think it well to keep in mind that this hearing is not the place for policy determination which is, of course, a legislative function; nor, perhaps, is this the place for upper bracket or even middle bracket wage and hour negotiation.87

Klamon proposed exempting white-collar employees receiving $125 per month—or any other reasonable sum that the WHA felt was appropriate—and paid annual and sick leave. He also suggested monthly hours-averaging by making the time period the month instead of the week “in order to allow them to work at certain short, peak periods, that most firms have during any month, and then provide, in the strongest way, of course, that employees who are not exempt because of the $30 a week provision, shall be given compensatory time off during that month for peak load overtime....”88

After tentatively defining exempt administrative employees as being paid $30 per week (or other sum) with the authority either to hire or fire or with the responsibility for employees’ work,89 Klamon went on to reveal a broader agenda focused on the belief that Congress never intended to include “many administrative..."
employees receiving well over $30 per week" because they did not work under socially harmful or deleterious sweatshop conditions. Covering such workers might “simply create inequitable competitive advantages and possibly make certain phases of the Act unworkable.” In spite of the unspecific definition that he had just offered and that described a supervisor rather than an administrative employee, Klamon objected to the adoption of a “forced or far-fetched or unreal interpretation of administrative employees,” urging instead selection of “a clear, generally accepted, operating concept....” Instead of offering or citing one, Klamon insisted that many members of Congress would be surprised if told that in enacting the FLSA they had had in mind that they were covering administrative employees earning $90 a week.90 He felt that such interpretations were tantamount, “[u]nder the guise of having the Government act against such socially harmful conditions” to “asking the Government to perform the bargaining function for labor, and to serve as an arbitrator whose decision is binding, and an arbitrator, possibly, who has already made up his mind.” Then in a completely unmediated fashion and contradicting his earlier definition, he declared that assistant buyers, finance men, accountants, and similar office employees, as well as other white-collar employees with salaries above the named level should clearly be exempt, adding that it was neither his intention nor that of his principals “to use the term ‘white-collar’ simply as an effort to avoid the purposes of the Act”—as made evident by their acceptance of the salary limitation. Since the $30 salary threshold had been in the regulations since 1938, it was unclear what Klamon was actually proposing other than the blanket exclusion of all white-collar workers without the benefit of any definition whatsoever—his assertion to the contrary notwithstanding that he was not asking that the current definition be “thrown aside or thrown overboard entirely,” but merely that it be “amended to make it very clear and workable....”91

Klamon’s responses to questions—concerning his view of a legislated 40-hour week, on whether the regulation should be a flat prohibition or penalty overtime pay, and even whether the firms he represented had experienced any inequities as a result of the regulation—were as confused and ambiguous as his statements.92 After Stein had elicited from him that he was not opposed to functional descriptions in the definitions, but that “in order to make the thing workable, I would suggest that you copy the words of the Act itself, with an amount,”93 thus confirming the impression of his testimony that he advocated a blanket exclusion, Leo

90“1940 WHD Hearings Transcript” at 199 (Apr. 11).
91“1940 WHD Hearings Transcript” at 200 (Apr. 11).
92“1940 WHD Hearings Transcript” at 204-208 (Apr. 11).
93“1940 WHD Hearings Transcript” at 209 (Apr. 11).
Bernstein of the 7,000-member\textsuperscript{94} left-wing United Wholesale and Warehouse Employees\textsuperscript{95} asked Klamon whether it was not true that the current definitions were "very clear, but in your opinion...too inclusive...." Evading a straightforward answer, Klamon in effect agreed by asserting that "the inclusive character" of the executive-administrative regulation "indicates that whoever prepared it, was trying to make the act cover a lot of territory which Congress, I think, never intended...." Bernstein tried to pin Klamon down by asking him whether the problem was not lack of clarity but that the definitions did not exclude certain categories he wanted excluded, but Stein prevented further interrogation on this issue by suggesting to Bernstein that instead "later on we expect to have the benefit of your views on this subject."\textsuperscript{96} How Bernstein could possibly shed light on unexpressed opinions that were exclusively in the possession of employers or their representatives, Stein did not reveal. Since the scope of the administrative exclusion was the central factual controversy surrounding the regulations, Stein did not promote enlightenment on the roots of this eminently political-economic struggle by cutting off debate.\textsuperscript{97} In fact, Bernstein’s and his union’s position was “that the purpose of the Act is not completely served, even by the present definitions, but we are content to observe the further working-out in life of these definitions and reserve requests for changes for a later date.”\textsuperscript{98}

Another large corporation to testify was the Pittsburgh Plate Glass Company, represented by its assistant counsel Joseph Owens, who, like many other big business agents, felt that "the present law covers a lot of employees that Congress never intended to cover, and which it is economically and socially undesirable to cover...."\textsuperscript{99} PPG submitted two proposals. One would have raised to 50 percent the amount of non-exempt work that bona fide executive and administrative employees were permitted to perform (instead of "no substantial" amount). PPG’s alternative definition of an exempt executive or administrative employee as any employee who did no manual, mechanical or physical labor was, in effect, a blanket white-collar exclusion subject to a $34.69 a week salary requirement. This

\textsuperscript{94}1940 WHD Hearings Transcript” at 803 (Apr. 16).
\textsuperscript{95}Three weeks after the hearing this CIO affiliate marched in the May Day parade in New York. “Thousands March on May Day Here,” \textit{NYT}, May 2, 1940 (16:3).
\textsuperscript{96}1940 WHD Hearings Transcript” at 210-11 (Apr. 11).
\textsuperscript{97}Stein did not adduce lack of time as the reason for his interruption since he both permitted Bernstein to ask a different question and told him that if necessary he would be given a week to rebut all the inaccuracies that he claimed were being presented. “1940 WHD Hearings Transcript” at 211 (Apr. 11).
\textsuperscript{98}1940 WHD Hearings Transcript” at 809 (Apr. 16).
\textsuperscript{99}1940 WHD Hearings Transcript” at 231 (Apr. 11).
equivalent of $140 a month could, Owens testified, also be as high as $150, but that sum would be higher than possible or practicable for many other organizations.\textsuperscript{100}

Owens focused on the issue of performing nonexempt work, especially in small warehouses, purportedly because, if the executive-administrative definition meant that the medium-size and small warehouse or department manager was subject to the law and thus effectively restricted from working more than 42 or 40 hours a week, it would have had the very serious detrimental effect of preventing his development, in particular his promotability. Keying PPG’s objection to a statutory purpose, Owens also argued that in small warehouses there was not enough work to justify hiring another employee; consequently, the manager had to do the nonexempt work and therefore the practical reality was that no work-spreading would result because it was not possible to hire one-fourth of an employee, although he failed to explain why part-time employment or payment of the overtime premium was impossible (even if it no longer functioned as a deterrent).\textsuperscript{101} If, however, the manager could work beyond the overtime trigger of 40 or 42 hours, he would, according to Owens, be able to create business that would result in additional hiring: “It is our belief that the driving force of business, the initiative and energy which makes the American business system go, is found in the activity of these comparatively young and unimportant executive and administrative employees, and that if you do put this brake upon their activities, you definitely retard the ability of the business system to absorb the unemployment...and you are really defeating one of the asserted purposes of the” the FLSA.\textsuperscript{102}

PPG’s warehouses had to remain open long hours because they did a considerable business volume with the construction industry, which was not subject to the FLSA. The company conceded that it could stagger hours with nonexempt employees, but claimed that this practice was not “feasible” with “real executive and administrative employees” because it was “self-evident” that there had to be “continuity in the personnel of the people who are making executive decisions. A man can’t be an executive in charge of a department or in charge of the warehouse on the late shift and know what the executive in charge of the warehouse on the earlier shift has done.” Instead of explaining how, according to his description, three-shift industrial operations of any kind could possibly exist without shift managers, Owens chose to challenge the suggestion that PPG could lower their salaries to the level at which they could work overtime and be paid time and a half.

\textsuperscript{100}“1940 WHD Hearings Transcript” at 214-15 (Apr. 11).
\textsuperscript{101}“1940 WHD Hearings Transcript” at 220-23 (Apr. 11).
\textsuperscript{102}“1940 WHD Hearings Transcript” at 224 (Apr. 11).
the equivalent of an hourly employee “does much to destroy his usefulness and to lower his efficiency....” 103

PPG’s intense interest in a 50-percent limit on the amount of non-exempt work that it could require its executive-administrative employees to perform without jeopardizing its exemption from overtime regulation seemed oddly out of all proportion to the extent of the problem that it alleged: after all, the issue arose only in its relatively few “very small” warehouses/wholesale branches, even there the non-exempt work formed only “a minor portion” of the employee’s duties, and even before the FLSA had gone into effect the workweek had typically been 48 hours and often only 44 or 46 hours. 104

Brilliant light was inadvertently shed on the whole question of excluding executives altogether by one of Stein’s questions that provoked Owens to respond that

only the pure executive, the man that has a couple of private secretaries and a lot of buzzers, can function without doing some amount of non-exempt work. The people that supervise the work of others have to do some amount of non-exempt work, or they lost [sic] their contact with that work, and they are not able to do a proper job of supervision. 105

Neither Stein nor the labor union representatives pursued this matter, 106 but Owens had manifestly, albeit unintentionally, raised the question of how anyone could know that Congress had not meant the exclusion to be confined to “the top-ranking, pure executive,” 107 rather than encompassing huge numbers of lower-level, hands-on supervisors, whose work, working conditions, power, and privileges have never entitled them to what in common parlance is the lofty title of “executive.”

The testimony of Montgomery Ward’s attorney, Marie Manderscheid, 108 provoked an important exploration of the exclusion of administrative employees. Montgomery Ward’s appearance was significant in its own right since its chairman

103 “1940 WHD Hearings Transcript” at 225-26 (Apr. 11).
104 “1940 WHD Hearings Transcript” at 216-19, 220 (quote), 243 (Apr. 11).
105 “1940 WHD Hearings Transcript” at 248-49 (Apr. 11).
106 Later, Stein did pick up on Owens’s terminology, but the context shows that he did not mean it in the same strict sense: he suggested that the duties test be overhauled, if necessary, “to make sure it is aimed at the pure executive, and/or administrative employee, not the comptometer operator or a whole group I could name....” “1940 WHD Hearings Transcript” at 251 (Apr. 11).
107 “1940 WHD Hearings Transcript” at 249 (Apr. 11).
108 Her name was spelled “Mary” in the hearing transcript, but according to her listing in Martindale-Hubbell it was “Marie.”
of the board, Sewell Avery, was an “arch foe of the New Deal,” especially of its labor regulation. In 1935 he had declared the NRA’s retail code illegal, and then welcomed the NIRA’s judicial demise with the words: “These efforts to manage immutable economic laws, as the NRA tried, are always futile.” On the grounds that the WHA lacked reasonable grounds to believe that Montgomery Ward had violated the FLSA, in August 1939 his firm resisted the WHA’s subpoena to produce the wage and hour records that the Act required it to keep. When WHA Andrews took the company to court, a federal district judge also rejected Montgomery Ward’s defense that the FLSA was unconstitutional. This litigation was pending during the hearings, the appeals court affirming the lower court’s decision in July 1940 and the Supreme Court refusing to take the case.

Manderscheid testified that Montgomery Ward’s mail order houses employed 13,700 employees, 900 of whom it considered to be executive or administrative employees. In addition to echoing PPG’s proposal of a 50-percent ceiling on non-exempt work for executives and proposing the elimination of the $30 salary level, Manderscheid proposed that an administrative employee be defined as any employee

“1. upon whom responsibility is placed to perform his work without detailed supervision, and who is required to exercise discretion in its performance; and
2. who has the right directly or indirectly to supervise the work of other employees or the operation of some function of the business of the employer, or who has the right to require other employees or departments to do such work as he may deem necessary to assist him in the performance of his work, or who has the right to prescribe the procedure to be followed or the work to be performed by other employees or by a department of the employer’s business.”

110 “Mail Order House Accepts NRA Ban,” NYT, Apr. 9, 1935 (10:5).
111 Avery Hails NIRA Decision,” NYT, May 28, 1935 (18:5).
113 Andrews v. Montgomery Ward & C., 30 F. Supp. 380 (N.D. Ill., Nov. 22, 1939). In upholding Congress’s exercise of the police power, the judge cited Adam Smith’s Wealth of Nations for the proposition that wages, especially of unskilled labor, tended toward the lowest point at which the laborer can subsist. Id. at 384.
114 Fleming v. Montgomery Ward & C., 114 F.2d 384 (7th Cir., July 18, 1940), cert. denied, 311 US 690 (Oct. 28, 1940).
115 “1940 WHD Hearings Transcript” at 262 (Apr. 11).
116 “1940 WHD Hearings Transcript” at 263-64 (Apr. 11).
117 “1940 WHD Hearings Transcript” at 264-65 (Apr. 11) (quoting from letter of Apr. 2 to the WHA).
Montgomery Ward argued that the existing regulation did not make the congressionally intended distinction between executive and administrative employees and applied only to the former. Whatever plausibility this claim possessed was jeopardized by its attachment to the baseless claim that Congress did not contemplate the use of a minimum salary-level test, which was "not inherent" in "executive" or "administrative" employee. Arguing circularly, Manderscheid contended that this position was supported by the fact that the firm had employees who met the other criteria, but whose pay fell below $30. To buttress its proposed definition, Montgomery Ward noted that it was necessary for it to delegate to many employees "considerable responsibilities" for making decisions and indirect control over business operations, although they were not executive employees and did not manage a department or have anything to do with hiring, firing, or promoting; nevertheless, they were often given more responsibility than employees who did manage a department and were clearly within the scope of the definition of "administrative" employee as intended by Congress. As an example Manderscheid mentioned certain buying department employees who had "no management responsibility over any other employees except the right to call upon clerical and stenographic employees for assistance," were often paid as much as $375 a month, and were "important cogs in the administrative machinery of the company...."

An incredulous Stein was not sure that he had heard correctly: "Does Montgomery Ward & Company, with over 13,000 employees, seriously contend that it has executives who get $30 a week?" Manderscheid admitted that there were a very few, but dismissed Stein's concern on the grounds that their salary was irrelevant. She was, moreover, unable to answer Stein's follow-up question as to what their "$27 a week executive" did. Having revealed his suspicions, Stein proceeded to lay a trap for the unwary lawyer: "I got the impression that anybody who could qualify for the executive redefinition would inevitably and invariably also qualify under the redefinition of administrative?" Manderscheid's admission that it was true of Montgomery Ward's and others' submissions prompted him to engage her in the following colloquy:

Q In other words, you could throw the executive redefinition out of the window and it wouldn't affect one single employee if you had your proposed redefinition of administrative?

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118 "1940 WHD Hearings Transcript" at 266-67 (Apr. 11).
119 "1940 WHD Hearings Transcript" at 267 (Apr. 11).
120 "1940 WHD Hearings Transcript" at 268-69 (Apr. 11).
121 "1940 WHD Hearings Transcript" at 269 (Apr. 11).
A That is right.
Q And...Montgomery Ward & Company urge that that carries out what it claims to be the congressional intent, that two separate definitions are necessary if one of them is simply words on a piece of paper?
A You can combine your executive and administrative and make them the same, if you wish.
Q I thought Montgomery Ward & Company said you couldn’t combine them?
A I think it was the congressional intent that they not be combined. The comma between executive and administrative in the law, as I recall it, indicates that.
Q Then, if that’s true, I am afraid we cannot accept Montgomery Ward & Company’s proposal.\(^{122}\)

In spite of the lethal blow that Stein had administered to Montgomery Ward’s proposal, Leo Bernstein, the left-wing unionist, pursued the matter further, asking Manderscheid what exactly she meant by administrative work. Her response—that it involved “a person who has responsibility of accomplishing a certain result without detailed supervision” and “is able to exercise discretion in how he is going to carry out that job”—led him to ask whether a dictaphone operator did not have “discretion as to manner” in which she will turn out records and whether even most merchandising department employees who performed such tasks as picking orders or even checking that the correct number of cartons were received did not have discretion and responsibility. Manderscheid rejected this surmise both because their discretion and responsibility was “very small” and “we have tied it up with these other qualifications.”\(^{123}\) Yet these latter were in the disjunctive and could be satisfied so long as any of the people mentioned by Bernstein had—to repeat the company’s proposed test—“the right to require other employees or departments to do such work as he may deem necessary to assist him in the performance of his work.” Thus if they had the right to require as few as two other people to give them supplies (even pencils), they would literally meet the duties test, although Manderscheid insisted in response to a question by a UOPWA official that “all stenographers, all purely clerical help, your comptometer operators, probably, secretaries, except those that are considered executive secretaries...to one of the highest officials in the company who carr[y] out executive duties without necessarily being subject to detailed supervision” would not be administrative employees.\(^{124}\)

Demonstrating the diversity of employers’ approaches to extricating themselves from national hours regulation, John Harrington, associate counsel of the

\(^{122}\)“1940 WHD Hearings Transcript” at 270-71 (Apr. 11).
^{123}“1940 WHD Hearings Transcript” at 276-77 (Apr. 11).
^{124}“1940 WHD Hearings Transcript” at 286 (Apr. 11).
Illinois Manufacturers Association, proposed a “pure salary test” for executives ($40 a week): “We feel that whether it is $40, $45, or $50, it is exempting people who were not intended to come under the Act.”\textsuperscript{125} And if that suggestion was not accepted, then he and his client wanted “to join the general clamor against ‘substantial amount’ of time devoted to” non-exempt work and for 40 or 50 percent. They were satisfied with the executive employee definition, but could not meet the five requirements for administrative employees—such as those in one-man departments—whose definitional merger with executives “was not contemplated by Congress” and worked “a severe hardship on industry,”\textsuperscript{126} although Harrington was constrained to admit under questioning by Leo Bernstein that he did not know of a single one of his association’s 3,000 members that had stated to him that the regulations had worked undue hardship on it.\textsuperscript{127} Since the manufacturers’ proposed “administrative” definition was also based on a “straight salary qualification $40 or $50 or whatever is wanted,” if that proposal was not accepted, the “administrative” definition would have to be revised to exclude the employees covered under the old “executive” definition. The Illinois Manufacturers also wanted to broaden the professional exclusion by adding that training could be acquired by experience as well as by school.\textsuperscript{128}

Prodded by Stein, Harrington admitted that if the $40 or $50 salary test—which he regarded as a simplification for workers, employers, and the WHD “so that you didn’t have to bother above a certain point beyond which the Act wasn’t, in our opinion, intended to apply”—were adopted for executives, there would probably not be people who would not qualify under the administrative definition, but as the salary went down, they should meet certain tests.\textsuperscript{129} Then in a rare moment of epistemological humility, of which employers quickly repented and against the recrudescence of which they immunized themselves, Harrington conceded:

I realize that the problems of employees that we consider to be in administrative capacity who don’t have departments, as supervisors, under them, it is easier for us to point out that your definition is wrong than it is for us to draft one that will cover what we want and not open the doors.\textsuperscript{130}
One of the categories of workers that the Illinois Manufacturers proposed excluding encompassed administrative employees performing "work requiring the regular exercise of discretionary powers." Without accusing Harrington of intending to exclude all such workers, Solomon Lischinsky (representing the Amalgamated Clothing Workers and the Textile Workers Union), asked whether using exercise of discretion as a definition, when almost all operations outside "purely manual labor" involved it to some extent, would permit the argument that all these workers were excluded. Harrington called it a "rather forced argument," but Stein, having apparently dealt with more than enough lawyers, admonished him: "[I]n our work I am afraid we do have to meet a great many forced arguments, and it would be enormously advantageous...to have a definition which was as little susceptible as possible of even forced arguments."

At this point Lischinsky—who, like most union representatives, opposed any changes in the regulations—and Harrington entered into one of the hearings' least ideological and most cooperative dialogs between labor and capital in which they really seemed to be groping for an answer to the question as to what "administrative employee" meant. This turn of events was especially surprising since Harrington, in testifying on behalf of the Illinois Manufacturers' Association at the FLSA congressional hearings in 1937, had argued in the manner of a thoroughly unreconstructed knee-jerk reactionary.

Mr. Lischinsky: What do we usually mean by the terms "administrative", "administrator"? We usually think of a person as administrator who allots work to other people to be done, do we not?

Mr. Harrington: No, I don't think that that is—I think that administrative is part of the

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131 "1940 WHD Hearings Transcript" at 293 (Apr. 11). Because the National Archives was unable to locate the written submissions for the hearings, this proposal is known only from references in the testimony. It appears that the administrative exclusion was tripartite, with the first part excluding all those who supervised employees and earned over $30 a week. Id. at 295. The second part was not sufficiently described.

132 Later Lischinsky was accused, together with economists Victor Perlo and Harry Magdoff, of being a Communist spy. "Fitzgerald Loses Contempt Appeal," NYT, July 7, 1956 (7:1).

133 "1940 WHD Hearings Transcript" at 300 (Apr. 11).

134 "1940 WHD Hearings Transcript" at 785 (Apr. 16) and 473 (June 5). See also id. at 789 (statement of Elinor Kahn, American Communications Association); "Wage Redefinition Backed by Labor," JC, Apr. 16, 1940 (3:4).

management of a business. The executive is the head and gives the orders; administrative, they carry out the orders, and those who are not administrative are those who actually perform the work. They go between the executive and the ones who actually do the work.

Mr. Lischinsky: Well, such a person would direct the people under him, would he not?

Mr. Harrington: There are also people that we consider administrative who don’t have anyone under them.

Mr. Lischinsky: That is just what we are after.

Mr. Harrington: Yes.

Mr. Lischinsky: Would you ordinarily think of that person as an administrative person if it wasn’t a question of getting him exempted?

Mr. Harrington: Yes, I think you undoubtedly would. I think there are a lot of people that I think are in administrative capacity that I can’t think up a definition to cover them. I think that administration is very possibly a much broader term than any of these definitions. I don’t think I would go as far as some of the suggestions here, that it covers everyone outside of production, but I do think there are a lot of employees engaged in the administrative functions of the business who don’t necessarily have anyone operating under them. They may be a full one-man department in themselves. ...

Mr. Lischinsky: You can’t have an administrator without an administratee, can you?

Mr. Harrington: I think you could very easily.

Bizarrely, Stein peremptorily cut off the richest discussion of the subject that he had yet heard: “I don’t feel that this is very profitable. After all the term, it would seem to me, would be extremely vague; it overlaps executive....” However, Harrington was not willing to let it go just yet and replied: “Yes, they overlap; but I think administrative goes as far as executive.” Thwarted in his effort to get to the bottom of the mystery of the administrative employee—in fact, he contended that “these two terms...reinforce and explain each other in the description of a single group”—Lischinsky apparently tried to undermine the legitimacy of the white-collar exclusions by scrutinizing the FLSA’s purposes. But when he posed the question, Harrington—seconded by Stein—referred him to the statute’s preamble, and when he then asked whether the Act aimed to raise wages and increase employment, Harrington replied that he could not remember anything about the latter in the preamble and Stein lauded his memory. Stymied again, Lischinsky then posed the same question about the overtime provision, but Harrington demurred at going beyond what Congress had said that it intended, and

136“1940 WHD Hearings Transcript” at 303-304 (Apr. 11).
137“1940 WHD Hearings Transcript” at 304-305 (Apr. 11).
138“1940 WHD Hearings Transcript” at 770 (Apr. 16). This substantively plausible argument has to overcome the syntactical problem that Congress placed a comma and not a hyphen between the terms.
Stein intervened to convey his feeling that Harrington had exhausted his knowledge. Lischinsky then undertook one last attempt to focus on the congressional intent to spread work, but Stein instructed him to save that subject for his own statement later, thus, once again, obstructing exploration of a vital question, resolution of which was absolutely essential to the articulation of rational regulations.\footnote{1940 WHD Hearings Transcript" at 305-306 (Apr. 11). Later, Lischinsky expressly mentioned increasing substandard wages and reducing unemployment by the spread of work as the broad purposes of the FLSA, thus implying that shorter hours was merely an instrumental objective and not a goal in its own right. \textit{Id.} at 768 (Apr. 16).
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The Associated Industries of Missouri, including a number of large national firms such as Brown Shoe Company, International Shoe Company, Falstaff Brewing Corporation, Anheuser Busch, Inc., and Ralston Purina Company, was represented by Cleveland Newton, who in addition to pointing out what he regarded as the anomaly that a $30-a-week foreman might properly be classified as executive-administrative, whereas a $500-a-month purchasing agent with no one under him except a stenographer might not be, was the first witness to assert that the existing regulation "is not appreciated by the employees themselves. They have always been free to exercise discretion as to the manner in which their duties shall be performed. They do not like to be bound to a rigid schedule of hours. They like to be free to work when the occasion demands and have always been granted many compensating privileges when their work schedules are light."\footnote{1940 WHD Hearings Transcript" at 313 (Apr. 11).} The kinds of employees who were allegedly joining their employers in urging revision included purchasing agents, welfare employees, claim agents, assistant department heads, statisticians, auditors, and credit men.\footnote{1940 WHD Hearings Transcript" at 314 (Apr. 11).} The Missouri firms did not request bifurcation of the executive-administrative definition; instead, they proposed an amended joint definition containing an additional exclusion of employees who had a duty of exercising discretionary powers although they were not in charge of a department or other employees. While retaining the $30 salary threshold, it deleted the limitation on performance of non-exempt work.\footnote{1940 WHD Hearings Transcript" at 317-18 (Apr. 11).}

Significant political testimony was given by Lewis Merrill\footnote{Consider Change in Wage Definition," \textit{JC}, Apr. 12, 1940 (2:6), recounted Merrill's testimony.} of UOPWA and Marcel Scherer of FAECT, two white-collar unions that merged after World War
II. In September 1939, at a House Special Committee to Investigate Un-American Activities hearing, Benjamin Gitlow, a founder, two-time vice-presidential candidate, and former general secretary of the Communist Party, accused both Scherer and Merrill of being Party members—an accusation that persisted into the post-World War II years. Reputedly Scherer in 1939 recruited Julius Rosenberg to become a member of FAECT, of whose Civil Service Commission he soon became chairman. In any event, Merrill and Scherer were feisty witnesses, who did not shy away from pointing out the class-political interconnections between the hearings and the congressional proceedings. Indeed, Merrill opened his remarks by stating expressly that the employers’ petitions for revising the regulations could not be “separated from the controversy over the Barden Bill...and like amendments” and mentioning predictions of the probable concessions...the Administrator...might make to the point of view incorporated in the various amendments and proposals. The impression has been indelibly created that the Barden Bill, the Cox Bill, and the present proceedings itself are part of a carefully conceived procedure whereby the operation of the Act would be limited either by amendment to law or by administrative ruling. It is being held that these proceedings are an effort to achieve through the Administrator what could not be secured from Congress.

It cannot but be held that the current proposals for redefinition originate in the drive to change the Act itself or repeal it in its entirety. It is viewed as an effort to water down by administration social legislation which has the emphatic approval of the American people. Change along the lines currently advocated will not be construed as a constructive redefinition to improve the administration of the Act along the lines approved by Congress, but will be construed as a victory over the Act.

Following this political analysis, Merrill gave Stein a brief sociological over-

145See below ch. 14.
147E.g., “House Unit Speeds Test on Contempt,” NYT, June 22, 1950 (5:4).
148Harvey Klehr, The Heyday of American Communism: The Depression Decade 235-36 (1984). The FAECT’s Marxist bona fides was well displayed in its monthly magazine, the May 1938 issue of which, for example, included a long extract from and a precis of articles published in Science & Society: A Marxian Quarterly, for which there was an advertisement in the same issue. TA, 5(5):3-4, 17 (May 1938).
149"1940 WHD Hearings Transcript" at 325 (Apr. 11).
150"1940 WHD Hearings Transcript" at 325-26, 328 (Apr. 11).
view of white-collar working conditions. Having “called into a being a new army of clerical and professional workers engaged in a multitude of tasks in connection with the administration and servicing of American industry and commerce,” business by the 1930s was “developing its own solution for the reduction of administrative costs with all of its accustomed energy, ingenuity, and decisiveness” and thus “rapidly changing the economic and social status of all white collar workers.” From data showing that clerical and professional employees accounted for a substantial proportion of the unemployed in urban areas and that prior to the FLSA most companies paid their office employees either nothing or only supper money for overtime work, as well as from the fact that mechanization accompanied by monotony, speed-up, specialization, and mental and nervous strain had “conquered office as well as factory” Merrill concluded that employers’ proposed redefinitions “would run rough shod over any of the considerations pertaining to the changing status of white collar employees, or the present high incidence of unemployment, long hours, and so forth.” Indeed, he went so far as to suggest that the FLSA should protect all white-collar employees: “What Congress did not provide against, if it could, is the fact that the present trend among white collar labor makes all of the provisions of the law a matter of pressing necessity for every category of clerical and professional endeavor.”

In contrast, Merrill argued that the October 1938 regulatory definitions were “entirely within the intent and spirit and the declared policy of the Act.” Although he was referring to all the definitions, he was focused on the de facto merger of the executive and administrative categories, which was of particular significance to UOPWA members. Merrill was able to embed his preference for the existing definition in a robust sociological framework and, unlike any of the other witnesses or anyone else in the years since the hearings, to give tangible (albeit speculative) meaning to a widely overlooked statutory term:

The insertion of the word “bona fide” is not accidental. It was inserted consciously and should be read in its natural meaning.

The whole of white collar labor can be said to be engaged primarily in an administrative function in the production and distribution of goods. In order to distinguish between the officers of an enterprise and their direct agents, the word “bona fide” was

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151 "1940 WHD Hearings Transcript” at 337-38 (Apr. 11).
152 "1940 WHD Hearings Transcript” at 338-40 (Apr. 11).
153 "1940 WHD Hearings Transcript” at 342 (Apr. 11).
154 "1940 WHD Hearings Transcript” at 343 (Apr. 11).
155 "1940 WHD Hearings Transcript” at 338 (Apr. 11).
156 "1940 WHD Hearings Transcript” at 344 (Apr. 11).
inserted. At one time before the emergence of corporate enterprise, business was administered directly by the owner. Today...we have developed a group of especially trained executives who are the direct representatives of the owner, employed because of the special qualifications and paid at a rate commensurate with their identification with responsibility for the outcome of policies for which they are primarily responsible. Minor executives in this category are also responsible for some essential phases of policy and are paid at a rate commensurate with their identification with the owners of the enterprise and the initiation of its policy.

If a monetary standard alone were to be substituted for any actual definition describing the role of the employee in a particular enterprise, for the purpose of distinguishing between bona fide executives, administrators and professionals, and those who can be considered as executive and so forth, only in a limited sense, then the amount of that monetary level would have to be set at a rate not less than $5,000 per year, and even if this were done there is no likelihood that a clear, scientific separation would be achieved.157

Merrill concluded by lauding the impact of the FLSA on white-collar workers in terms of job creation and labor market regularization, advocating an expansion of coverage, and warning that employers’ proposals to restrict coverage were dictated by their belief that what the state did not give white-collar workers—“humane, sane, fair and equitable conditions of work”—the latter would be incapable of obtaining through collective bargaining. But employers had, in the UOPWA’s view, “misjudged the situation. Business change itself has made it impossible for the white collar employee to remain supine.” Outdistancing reality for dramatic effect, Merrill declared that white-collar workers had “put forward their champions and taken their place squarely with the labor movement.” Consequently, if the Wage and Hour Administrator decided to deprive them of their statutory gains and thus “to throw the current dispute into the customary arena” of industrial struggle, “these champions will not be found failing.”158

Waiting until the end of Merrill’s prepared statement, Stein reprimanded him for the implication that the WHA, the employer-petitioners, and possibly Stein himself were are all acting in bad faith; without explaining why, Stein insisted that such an implication would be inappropriate to introduce at a hearing and was better left for the press. Merrill, in turn, took umbrage at Stein’s instructing him in “proper politeness....”159

Interrupting this contretemps, Harry Weiss, the director of the WHD’s Re-

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157a "1940 WHD Hearings Transcript" at 344-45 (Apr. 11). Lazare Teper referred very briefly to the narrowing effect of the term “bona fide.” “1940 WHD Hearings Transcript” at 389 (Apr. 12).

158a "1940 WHD Hearings Transcript" at 349-51 (Apr. 11).

159a "1940 WHD Hearings Transcript" at 351-52 (Apr. 11).
search Statistics Branch, asked Merrill whether a $7,500-a-year assistant to a corporation president met the definition, but the high salary failed to cause the UOPWA president to modify his principled position that "the clerical employees are in a sense assistants to the administrator." Thus in a modern corporation "the end of all clerical labor" is to provide its head with the basis for "analyzing information so he can make a correct decision which will add to the profitability of that enterprise." Rather than engaging this unorthodox argument, Stein closed the colloquy with Merrill by expressing his assumption that, like all the other witnesses, Merrill, too, felt that certain employees should be exempt: "The question is, how many and which."[160]

Marcel Scherer was a chemist who had already in the 1920s organized engineers and architects in the Union of Technical Men, whose militancy caused it to be expelled from the International Federation of Technical Engineers, Architects, and Draftsmen's Union. The immediate predecessor of the FAECT was the United Committee of Architects, Engineers and Technicians, which was organized in March 1932 and became FAECT in the latter half of 1933 when the NRA codes of fair competition were being considered. Scherer's brother Paul, a wine chemist, filed a brief on behalf of the FAECT in connection with the hearings on the construction code, proposing for technicians a six-hour day, five-day 30-hour week and a ban on overtime "except in cases of extreme emergency," when it would be compensated at double time. Marcel Scherer, who was elected secretary of the FAECT when it was founded in 1933,[161] endorsed Merrill's presentation and then discussed the professional and technical workers whom the UOPWA did not represent. Taking as his point of departure that any changes that excluded clerical or professional employees would be "unfair and discriminatory, and in effect, a negation of the law,"[162] Scherer sought to fashion a dichotomy that ultimately proved untenable. Technical-professional employees did highly skilled technical, chemical, and engineering work under supervision, but they were, nevertheless, "not, what is commonly called 'professionals,' by which is meant independent agents, who receive fees for their services, maintain their own establishments, or are retained for work on the premises of clients, or who are called in, in a consultant capacity, to solve special problems or perform special research." He agreed that these latter professionals would be engaged in a bona

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[162] "1940 WHD Hearings Transcript" at 357 (Apr. 11).
fide professional capacity. It appears not to have occurred to Scherer that, on the contrary, his dichotomous conceptualization would have made a nullity of the category of exempt professionals because the WHD and the courts would probably have classified the independent consultants he was describing as non-employee, self-employed, independent contractors, who were totally excluded from the FLSA anyway.

Intuiting the same predicament, Stein asked Scherer to describe an engineer, architect, or chemist who was a corporate employee but still exempt. Deviating from his rigid framework, Scherer spontaneously conceded that in almost every drafting room the chief draftsman and in a laboratory the chief chemist would either be an exempt professional "because of his use of independent work, creative work," or an executive or administrative employee, whom the FAECT did not try to organize. He was also willing to deem exempt at Westinghouse Manufacturing Company in East Pittsburgh: "a few men working on atom-smashing, a very specialized, advanced research work, not subject to supervision...." In conclusion he accepted Stein’s view that his primary criterion was whether the employee was "on his own responsibility for the whole planning as well as the immediate execution of his work"—or, in Scherer’s own formulation—creative or independent work. It is noteworthy that Scherer instinctively acquiesced in Stein’s categorization without any explanation as to why workers performing such work should have to forfeit all protection against long hours or why work-spreading did not apply to them. Perhaps the alacrity with which he abandoned them was linked to his aforementioned suspicion that they were supervisors whom the union would not represent in any event.

Among the professional employees whom the FAECT represented even those whose work required “independent thinking” were generally engaged in “detailed work as part of a general policy dictated by the supervisory and administrative.

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163 "1940 WHD Hearings Transcript" at 359 (Apr. 11).

164 At the opposite end of the spectrum, the most irrationally capacious “professional” redefinition was submitted by the American Trucking Associations, which proposed that a professional employee be one who by reason of special educational qualification and training was enabled to do work of a kind that “he would be unable to perform without” them, or who “[b]y reason of natural aptitude, continued practice, natural talent, inherent ability, or especial finesse, is enabled to do work of a type...he would be unable to perform but for such special qualification.” “1940 WHD Hearings Transcript” at 456 (July 27) (John Lawrence, general manager).

165 "1940 WHD Hearings Transcript" at 367-69 (Apr. 11).

166 "1940 WHD Hearings Transcript" at 370 (Apr. 11).
apparatus of the employer."\textsuperscript{167} For example, most engineering work was routinized group work in large organizations, and more generally: "In every respect, the technical-professional employee is subject to the same employment conditions, insecurity, supervision, and employment policies as are countless other categories of highly skilled workers." The technical-professional employees' work and conditions were in no way different than those of the highly skilled tool and die maker, while in many cases their pay rates were lower than those of machinists and pattern-makers. Cost accounting in most drafting and engineering offices was "based on production on an hourly basis where time clocks are punched and time sheets filled out with drafting and engineering time allocated to each drawing, plan, design, and so forth." Before the FLSA, they "were required to work unlimited overtime at the same weekly or monthly rate, thus reducing their hourly rate considerably. It was common practice in engineering and drafting offices to employ these technical men many long hours of overtime without any remuneration or at best, paying for the employee's supper."\textsuperscript{168} (Three months later Scherer announced a settlement of the first complaint filed to protect engineers and draftsmen in New York under the FLSA: following a WHD investigation, Lummus Company paid $15,000 in back overtime wages to 150 drafting room employees for as many as 400 hours of overtime.)\textsuperscript{169} Indeed, under these circumstances, the distinction between manual and mental work was itself "arbitrary," while proposals, like the SSIC's, to exempt white-collar workers as administrative employees merely because they received salaries and paid vacations and sick leave was unrealistic since many production workers did too.\textsuperscript{170}

The third day of hearings was given over almost entirely to labor union witnesses,\textsuperscript{171} the first of whom, Lazare Teper, the founder and director of the research

\textsuperscript{167}"1940 WHD Hearings Transcript" at 359 (Apr. 11).
\textsuperscript{168}"1940 WHD Hearings Transcript" at 360-61 (Apr. 11).
\textsuperscript{169}"Technicians Hit Move of Pay-Hour Administrator," \textit{DW}, July 25, 1940 (3:4-5). See also "Professionals' Paid for Overtime Work," \textit{NYT}, July 24, 1940 (22:3).
\textsuperscript{170}"1940 WHD Hearings Transcript" at 363-64 (Apr. 12). L. Vansciver, General Executive Board, the FAECT, appearing on behalf of Chapter 27 at Westinghouse, which represented 200 technical, unrelated clerical employees who until the FLSA had had to work overtime without compensation and then were paid time and a half, opposed any changes that would exempt them. "1940 WHD Hearings Transcript" at 801-802 (Apr. 16). See also "Applicability of Wage-Hour Law to Engineering Employees Studied," \textit{ENR} 124:549 (Apr. 18, 1940), which pointed out that many definitions proposed by industry witnesses, "though not aimed at engineers, are so broadly drawn that if accepted they would exempt nearly all technical employees." The FAECT was the only witness specifically concerned with technical employees and opposed to any changes.
\textsuperscript{171}The one major exception was William Peake, secretary of the Association of Stock
department of the ILGWU, did not even seek to establish his expertise by mentioning that he had written his doctoral dissertation on hours of labor. In an effort to defend the WHD’s joint executive-administrative definition, he immediately resorted to Webster's International, reading aloud to Stein that an administrator was defined as one who administers, or a manager, especially one who administers affairs, directs, manages, executes, while an executive was defined as a person charged with administrative or executive work. Because the dictionary’s demarcation line was “very very narrow”—probably only a matter of degree of responsibility—Teper concluded that “to attempt to provide a departmentalized definition which would be mutually exclusive for the terms ‘executive’ and ‘administrative’ employees, would be virtually impossible.” By arguing that administering necessarily entailed managing subordinates (although it might not involve direct hiring and firing), Teper concluded that the existing regulation adequately interpreted the meaning of “administrative” and “executive,” while the testimony had amply confirmed that it was impossible to create a definition of the one that would not also encompass the other.

Unlike other witnesses, Teper took a laudable but not very plausible stab at identifying the policy underlying the exclusion of white-collar workers: “It may be assumed that the reason Congress provided these special exemptions is primarily because certain employees in certain responsible jobs of executive or administrative nature, may not be able to keep track of their hours, and in order not [sic] to prevent hardship, such an exemption was made.” The hardship that Congress

Exchange Firms, who “simply ask[ed] for clarification” so that for example the second bookkeeper could be excluded in addition to the head bookkeeper despite the fact that no overtime was involved. The purpose, instead, was to “help[ ] dignify the jobs of some of these chaps.” “1940 WHD Hearings Transcript” at 411-12 (Apr. 12). When the union official Leo Bernstein sarcastically asked Peake whether he had considered that his aim of spreading dignity among two positions “might have the actual effect...of excluding tens of thousands of employees who should be covered,” Stein grew impatient with what he viewed as a statement masquerading as a question, but lauded Peake, who claimed that he was “not particularly interested in the saving of money on the overtime,” for his “very liberal attitude toward these matters.” Id. at 417-18.


173“1940 WHD Hearings Transcript” at 389 (Apr. 12).

174“1940 WHD Hearings Transcript” at 391-92 (Apr. 12).

175“1940 WHD Hearings Transcript” at 390 (Apr. 12). At least one employer’s representative disagreed: “[C]ertainly, Congress was not exempting an executive because
meant to prevent—on the assumption that "not" was a typographical error—was presumably one on the employer of making it liable for hours that were never worked, but such a reason, which might have made more sense in relation to an outside salesman working far from his employer's premises, seems like a very thin reed to support a massive exclusion of executive-administrative employees who might work long but regular hours on the employer's premises, but whose hours might be easily recorded.

While arguing that a salary standard was one indicator, Teper rejected it—for example in the version advocated by the Illinois Manufacturers Association—as a stand-alone conclusive criterion since some ILGWU factory-worker members were paid more than $40 a week for 35 hours and were entitled to time and a half pay. This contention prompted Stein to open a line of questioning that could have led to a thorough exploration of the policy foundations of the FLSA's overtime regulation and the possible bases for excluding certain white-collar workers if Stein (and Teper) had pursued it:

Q I suppose you would agree that a figure could be fixed, possibly $100 a week or $125 a week, above which it wouldn't be very practical to be concerned about the employees. I wonder if you think that such a figure could be fixed which would be low enough so as to have any substantial effect on any large group of employees without opening loopholes which would be improper?

A Offhand I know of certain industrial occupations of non-executive character, where compensation probably would be around $100 or so for a full week..., where these workers would be paid time and a half. I am sure that certain experienced tool and die workers are making that particular amount of weekly wage.

Q And do you feel that they are entitled to the benefits of the Act in spite of the fact that they get up to $100 a week?

A They are entitled to time and a half. While the Act specifically doesn't state so, there is no question in my mind that Congress intended to foster the spreading of employment. I think this is our paramount economic problem today; when we have nine million persons unemployed, the major social policy should be directed toward the spreading of employment. While I recognize that there will be certain instances where it is difficult to spread employment, to hire two persons to do the job, or one full-time and one part-time person, nevertheless in a great mass of occupations a requirement of time and a half for overtime means the employment of additional personnel.
Stein’s supposition that Teper would agree that it would not be “very practical to be concerned” with (the overtime work and pay of) employees with weekly salaries ten times greater than the minimum wage (of 30 cents for 42 hours) was never directly confirmed by Teper and its meaning is not entirely clear, but perhaps Stein meant that at that salary level—the equivalent of more than $88,000 in 2004—and differential the terms and conditions of employment were not a significant societal concern or, alternatively, that employers, if required to pay time and a half, would simply adjust base salaries downward.  

Teper neither answered Stein’s question as to a salary cut-off that would be low enough to exert a “substantial” impact on a large number of workers without depriving deserving workers of overtime protection nor questioned its political assumptions. He could, for example, have asked Stein why he was assuming that Congress intended to exclude large numbers of workers and why he was not seeking to identify a salary threshold high enough to effectuate the purposes of the overtime provision without encompassing employees whose inclusion would provoke counterproductive or dysfunctional results.

Even without articulating these critical perspectives, Teper could have sustained a discussion of first principles if he had simply specified a dollar amount that he knew exceeded any wage that any production worker was paid. Instead, however, Teper merely mentioned an occupation at the $100 level, prompting Stein to ask whether its incumbents were nevertheless “entitled to the benefits of the Act....” Stein’s use of “entitled” embedded the purposes of the FLSA in an individualistic perspective, implying that those (unnamed) benefits would inure to them alone. This personalized logic strongly suggested that the primary benefit was the 50-percent premium pay on an already far above-average hourly wage: after all, since the only other individual benefit to an employed worker was the indirect protection from being overworked by an employer who had been deterred by the 50-percent penalty, it is difficult to discern why highly paid production workers should be less entitled to that protection than their lower-paid co-workers. Interestingly—and presumably inadvertently—Teper, while confirming those workers’ entitlement to time and a half, immediately launched into an eloquent defense of the collective purposes and benefits of the overtime provision in terms of spreading work and reducing unemployment. These considerations marked the

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178 Even before the FLSA had gone into effect employers had detected a “possible loophole in the maximum hours provisions...to avoid time and a half payment for overtime...in the lack of restraint over wage reductions so that long hours could be worked at the same weekly wage as at present.” “Loophole Provides Escape,” JC, Oct. 21, 1938 (1:3). Judges ultimately legalized the loophole. See Linder, Autocratically Flexible Workplace at 267-78.
point at which Teper should have explicitly led the discussion back to the applicability of these statutory purposes to white-collar workers and confronted Stein with the argument that “bona fide” executive, administrative, and professional employees were those not exposed to significant unemployment. And in fact, Teper came very close to making this connection, although he did so only indirectly by conceding that concrete job or workplace configurations made it difficult to split and share certain jobs. But he failed to turn this concession against continued and expanded exclusions by neglecting to propose a revised definition that would have incorporated any kind of empirical indicator of impediments to job sharing or employment spreading such as a catalog of jobs (including, for example, CEO’s) that would be prima facie exempt.

Although Stein failed to pursue this logic either, Teper—again, presumably inadvertently—objectively introduced yet another statutory purpose into the discussion by observing that after the ILGWU had succeeded in reducing weekly hours in the needle trades from 60 to 35, the same manufacturers who had opposed the reduction wound up saying: “‘We didn’t realize that we also gained additional leisure and that we also can enjoy life a little bit more now, as well as our workers can.’”179 Teper thus demonstrated that the other statutory purpose of shorter hours could be as beneficial to executives as to manual workers.

This vantage point did not excite the curiosity or interest of Stein, who instead channeled the questioning back to the distinction between administrative and executive employees, asking Teper about such occupations as credit and traffic manager or purchasing agent, who were heads of departments with no other employees except possibly a single stenographer.180 As to these “one-horse departments,” Teper argued that where that employee “performs all the routine tasks, to elevate that person to the executive class, I think is mere subterfuge. Usually he can perform his duties within the hours during which the establishment is normally operated and when the greatest majority of employees...are there.”181

Harry Weiss, hoping to explore the administrative employee category further,

179“1940 WHD Hearings Transcript” at 404 (Apr. 12).
180“1940 WHD Hearings Transcript” at 404-405 (Apr. 12).
181“1940 WHD Hearings Transcript” at 405-406 (Apr. 12). Leo Bernstein later observed that it was not possible to “have a one-man department without the employee in that department being the poobah of it. Besides exercising supervision and discretion of everything else he is also spending his time carrying out his own instructions and his own orders. The actual effect of that would be that if we recognize the number of departments and the fact that the average wholesale establishment has eight employees, would be to exclude the wholesale distributive trades from the operations of the Act.” “1940 WHD Hearings Transcript” at 821 (Apr. 16)
conceded that “[m]aybe the word ‘executive’ is unfortunate,” but suggested that Teper had to know of “jobs where a president or large executive has a personal assistant who carries out specialized things for him,” but had no line or supervisory authority at all. Teper, apparently insisting on the indivisibility of the executive-administrative category, was willing to discuss the question of whether some particular employee was an “executive,” but insisted on a concrete job description, because the business witnesses had failed to furnish the specifics of “what qualifies them to be called executives, instead of a glorified clerk.”

Struggling for an example, Weiss finally related an “illustration” he had “heard of” involving a man at a large corporation “getting $7500 [who] definitely felt—and I think he was right—that the present regulations did not exempt him; but their cheap [sic; should be “chief’?], who supervised 50 or 100 low grade people, getting $2,000, was exempt. Do you think the concept of indirect control over employees should be recognized?” Without even stating the obvious fact that Weiss had failed to disclose anything whatsoever about this person’s work, Teper, declining to take Weiss up on his bizarre request to discuss “a hypothetical individual” stripped of all job duties, replied: “No, I wouldn’t go that far.”

Thus this surprising lack of such basic information (or even imagination) on the part of the director of the WHD’s Research and Statistics Branch frustrated one of the hearings’ few well-intentioned joint efforts to come to grips with the meaning, scope, and purpose of the exclusion of administrative employees. Consequently, Teper was, in good conscience, able to conclude the colloquy by asserting cooperatively that, if offered job descriptions, the WHA “could intelligently say, ‘Well, my straitjacket may or may not fit this particular definition, there may be some amendments necessary,’ but in their absence, “I don’t see that he can do anything else but leave the present regulations intact.”

Although AFL economist Boris Shishkin conceded that the white-collar definitions might be “far from perfect,” he testified against the employers’ proposed revisions and emphasized that it was “indefensible” that such a large and growing occupational group had been singled out for special treatment without any

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182“1940 WHD Hearings Transcript” at 406 (Apr. 12).
183“1940 WHD Hearings Transcript” at 407 (Apr. 12).
184“1940 WHD Hearings Transcript” at 408 (Apr. 12).
185Less than a year earlier Shishkin had written a whole journal article on the FLSA without having even alluded to the exclusion of white-collar workers. He mentioned as the most criticized substantive provisions: the excessively long 44-hour week; the lack of a limit on daily hours; and the lack of an enforcible ban on lowering wages when hours were reduced. Boris Shishkin, “Wage-Hour Law Administration from Labor’s Viewpoint,” ALLR 29(2):63-72, at 65-66 (June 1939).
explanation as to the special problem it represented for the wholesale industry.\(^{186}\) Rather, “the definitions are petitioned for because the petitioners want them, there is no further substantiation, there are no facts, there are no facts comprehensive enough which should change an iota of any definition....”\(^{187}\) Indeed, the AFL was “deeply disturbed” that the WHA had even entertained such petitions unsupported by any such evidence.\(^{188}\) Shishkin argued that regarding the existence of FLSA-covered establishments whose entire labor force consisted of office employees: “Just how...the employees of the whole establishment could be determined to be in a bona fide administrative capacity, is a question which itself shows plainly how far the proponents of the definition have gone to torture the plain meaning of the language to achieve their ends.”\(^{189}\)

Victor Pasche, the secretary-treasurer of the American Newspaper Guild,\(^{190}\) conceptualizing “white collar, office workers...[as] people who deal in abstractions, paper and pencil or typewriter, rather than the actual merchandise,” pointed out that just seven years earlier, before the NRA, it had been generally argued that they were not subject to wage and hour regulations, except at the employer’s will, while union regulation was opposed; in the interim, both the NRA and NLRA proved that regulation and collective bargaining were in fact applicable to them.\(^{191}\) Although Pasche was not a lawyer and therefore did not “feel competent to go into the question of congressional intent,” he nevertheless believed that the existing regulatory definitions “seem to carry out what the language of the act meant.” Specifically, he meant that “we know perfectly well that ‘executive’ and ‘administrative’ explain each other rather than being different terms.” For example, the executive branch of government was called “the administration,” and in a corporation, union, or chamber of commerce, “the people at the head are called administrative officers or executives....” Consequently, he could “see no point whatever in the attempt to split the definition, except for providing just another method for removing some people from the protection of the Act.”\(^{192}\) Furthermore, the SSIC’s proposal to exclude all clerical workers as administrative “contradicts Noah Webster” because these clerks and other “office help” were in fact in greater

\(^{186}\)“1940 WHD Hearings Transcript” at 423, 425 (Apr. 12).
\(^{187}\)“1940 WHD Hearings Transcript” at 427 (Apr. 12).
\(^{188}\)“1940 WHD Hearings Transcript” at 436 (Apr. 12).
\(^{189}\)“1940 WHD Hearings Transcript” at 432 (Apr. 12).
\(^{190}\)On the Guild’s view of his testimony, see “Pasche Warns Against New Hour Law Interpretations,” *GR*, May 1, 1940 (5:3-4).
\(^{191}\)“1940 WHD Hearings Transcript” at 451 (Apr. 12).
\(^{192}\)“1940 WHD Hearings Transcript” at 454-55 (Apr. 12).
need of protection since most of them were not organized like factory workers.\textsuperscript{193}

In an interim prognosis after the first three days of testimony on the wholesale industry, the usually well-informed \textit{Journal of Commerce} predicted that efforts to "ease" white-collar wage-hour requirements were "likely to prove successful." The main change was expected to be a broader definition of executive or administrative employees resulting from eliminating the requirement of the power to hire/fire, thus extending exemptions to a wider group. Astonishingly at variance with the aforementioned testimony was the newspaper's contention that, "[l]abor organizations seem satisfied,"\textsuperscript{194} which also contradicted its own earlier report of unions' opposition to any broadening of the scope of exclusions.\textsuperscript{195}

On the fifth and final day of the wholesale hearings,\textsuperscript{196} Joseph Kovner, assistant general counsel of the CIO, put the hearings into context by declaring that they represented "a movement that organized labor is determined to resist. After years of bitter struggle on the picket line, in the legislature and in the courts, labor, in recent times, has been able to secure legislation protecting [sic] its hard won standards. The employers, finding their freedom to lower these standards limited by law, have instituted a counter attack [sic] upon even basic labor legislation...." And since "our greatest contemporary problem" was that millions were unemployed, "[t]he worst possible thing to do for the national economy and the public welfare is to increase the hours of the work week."\textsuperscript{197} Specifically he emphasized that employers' petitions to expand the scope of exclusions was part and parcel of their efforts to persuade that the FLSA "is only intended to protect that group of workers who are subject to severe exploitation in the form of long hours and low wages, but that workers who receive wages above the statutory minimum...do not need the protection of this law" and that therefore overtime pay for all workers should be based on the statutory minimum wage. Because the FLSA's purpose was not solely to protect workers in "sub-marginal groups against conditions of outrageous exploitation," the courts had been right in rejecting the claim that the law was not intended to protect workers who were paid what employers "are pleased to call good wages."\textsuperscript{198} Consequently, the CIO, apparently rejecting the principle of means-tested entitlements, objected to proposed exclusions based on

\textsuperscript{193}\textit{1940 WHD Hearings Transcript} at 456-57 (Apr. 12).
\textsuperscript{194}"Broadening White Collar Wage and Hour Exemptions," \textit{JC}, Apr. 15, 1940 (1:4).
\textsuperscript{195}"Opposes Changes in Wage Definitions," \textit{JC}, Apr. 13, 1940 (5:6).
\textsuperscript{196}The fourth day was largely devoted to the subject of outside salesmen, which is not dealt with in depth here; some references to this day's testimony have been included throughout this and other chapters.
\textsuperscript{197}\textit{1940 WHD Hearings Transcript} at 761-62 (Apr. 16).
\textsuperscript{198}\textit{1940 WHD Hearings Transcript} at 751-53 (Apr. 16).
a salary level because their justification was that the FLSA not intended to protect workers receiving more than the statutory minimum, "even though the workers who receive these wages themselves think that they need this protection, who don't know why it is any more desirable for a person earning $25.00 a week to work more than forty-two hours a week than it is for a person receiving less than that."199

Turning to the existing regulatory definition of executive and administrative employees, Kovner characterized it as encompassing only "employees who are directly and intimately connected with management." In defense of the WHA's regulation, he approved of the tests as common-sense rules that have been applied by workers and employers alike to distinguish between workers who depend for a livelihood upon their wages and need the protection of standards in their hours and their working conditions on the one hand and workers who are part of the administrative and executive staffs who fix the working conditions of others and who do not need the protection of this law.200

Although this conceptualization, at first sight, appeared robust in etching a bright line marking off autonomous power-holders to whom the application of compulsory state-enforced labor standards would be superfluous, it assumed that every manager-boss who met the rather minimal regulatory requirements fixed their subordinates' working conditions and for that very reason also fixed their own. Neither assumption was empirically plausible. Neither the six individual sub-tests nor the definition as a whole created any certainty or even likelihood that bona fide executive employees fixed any employee's working conditions. Instead, they merely identified those managers who primarily and with the use of discretion bossed statutorily covered subordinates without doing the kind of work the latter performed; the definition in no way, however, situated these managers on the much higher hierarchical level where executives fixed working conditions—a criterion that was nowhere mentioned in the regulations, although specifying such a function would surely have made for a more stringent and narrow definition.

If most "executives" did not fix anyone else's working conditions, it seems even more implausible that they fixed their own. To be sure, the only working conditions at stake here were their working hours and, perhaps, salary (which, at a $30 regulatory minimum, was less than many skilled production workers' wages and thus scarcely so lofty as to indicate the inapplicability of the CIO's "basic principle that even so-called high-paid workers need the protection of this law"),201

199 "1940 WHD Hearings Transcript" at 760 (Apr. 16).
200 "1940 WHD Hearings Transcript" at 755 (Apr. 16).
201 "1940 WHD Hearings Transcript" at 756 (Apr. 16).
but the regulations neither required nor implied that executive discretion extended to self-determination of the length of the workweek (as contradistinguished from flexibility in scheduling long working hours). And even if some executives did set their own hours, the CIO furnished no support for its implicit assumption that they could be relied on to do so without injuring their own long-term health and welfare, let alone without exacerbating the unemployment of other managers. Thus, whether for propagandistic reasons or on account of inattention, the CIO imputed too much stringency to the joint executive-administrative definition.

Manufacturing

[T]he petitioners do not want to pay overtime to a group of employees who, up until now, they have been paying with the pap that they are practically or about to become members of the firm.

All through these hearings we have been regaled with Horatio Alger stories of from messenger to president. Constant doses of this pap have, up until very recently, been quite efficacious in preventing the organization of white collar workers so that at the present time they, as a class of workers, are those less able to protect themselves and doubly in need of the protection conferred by the Act.

Sixty-four years later, one of Kovner's successors as associate general counsel of the AFL-CIO asserted that “[t]he salary basis requirement embodied the empirical finding that bona fide executive, administrative and professional employees did not punch a clock, but rather had a degree of control over their own working hours. This autonomy compensated for the loss of overtime pay because long hours were less oppressive to an employee who was free to take a break during the day to attend to personal business or for other purposes.” Final Rule on Overtime Pay: Hearing Before the Subcommittee on Labor, Health and Human Services, Education, and Related Agencies of the Committee on Appropriations United States Senate 19 (S. Hrg. 108-542, 108th Cong., 2d Sess., May 4, 2004) (statement of Craig Becker). It is difficult to discern why having the flexibility to stretch out a 60-hour workweek to 70 hours to permit mid-afternoon shopping should suffice to preclude the justification of hours regulation. For an example of a bank permitting a bookkeeper to shop for two hours during a non-busy week “as long as she completes her work at the end of the day,” see “1940 WHD Hearings Transcript” at 67 (July 9) (Johnson). Moreover, such flexibility in no way negates the applicability of employment spreading.

1940 WHD Hearings Transcript” at 769 (Apr. 16) (Sol Lischinsky, Amalgamated Clothing Workers of America).
By the time the hearings on manufacturing industries began on June 3, with the definitive defeat of the FLSA amendments in the House of Representatives already a month old, success in the regulatory forum assumed greater urgency for employers. But labor, too, was well aware of the heightened stakes. Literally on the eve of the resumption of the hearings, the FAECT, on the last day of its national convention, discussed the wage and hour law and the hearings called for the following day: “Danger to technical employees stressed with exemptions sought by manufacturers to exclude practically all technical employees.” A motion then carried for the convention to “protest to Washington.”204

The first witness to provide oral testimony on the opening day of the hearings was counsel for the Southern States Industrial Council, J. H. Ballew, the only person to testify at all four hearings.205 The SSIC’s central purpose in petitioning the WHA for revision of the regulations was to separate the administrative from the executive employee category based on the argument that the comma in section 13 clearly indicated that Congress had in mind two distinct classes of employees, which were not synonymous.206 Unlike other groups, the SSIC at least devoted a section of its brief to the question: “Why the Exemption of Salaried Employees?” As meritorious as raising the issue was, its speculative and sociologically anachronistic answer shed no light on Congress’s intent. Despite dealing with a profoundly heterogeneous group, Ballew maintained that it was well defined because its members received “on an average, a much higher rate of pay than any minimum that could be enforced” under the FLSA in addition to paid vacations and sick leave and “permission to retain their positions and to draw their salaries during the entire year. [S]lack periods do not affect this type of worker.”207 This office workers’ story-book golden age, if it ever existed, had disappeared during the Depression, which brought on widespread white-collar unemployment; at the same time, the gap between salaried and wage workers in terms of paid vacations and sick leave was quickly being effaced.208 Finally, although it was true, then as now, that many high-ranking executives and professionals received outsized salaries, the

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204 Federation of Architects-Engineers-Chemists & Technicians-CIO, Proceedings 5th National Convention 21 (May 31-June 2, 1940).

205 On Ballew’s testimony urging elimination of all white-collar workers from regulation, see “Seek to Exempt ‘White Collar’ Class,” JC, June 4, 1940 (3:2).


207 1940 WHD Hearings Transcript” at 19-20 (June 3).

208 See above “Terminological Prolegomena” and below ch. 13.
wages of significant numbers of blue-collar workers, as a considerable volume of testimony at the hearings demonstrated, far exceeded the WHD's white-collar salary threshold (which was, in turn, higher than any amount that the SSIC found acceptable). Ironically, then, if employers in the twenty-first century attacked the FLSA's overtime provision as outdated because it was predicated on a need to spread employment during a historic depression that has never recurred, the SSIC's empirical justification for excluding white-collar workers from overtime regulation had become outmoded even before it was formulated.

In addition to such tangible (but refutable) bases, Ballew also adduced "the opportunity given this class of employee to familiarize himself with the business of his employer, and thereby to become fitted for advancement when the opportunity is presented." Asserting that the meteoric careers of "probably 90% or more of the 'executive' class...began in minor office positions" before they "worked their way to the top," the SSIC charged that the existing regulations, by "requir[ing]" such an "employee to limit the hours which he may apply to the business of his employer will...cut off this field of opportunity, and will result in gradual disappearance of trained personnel for advancement." The FLSA manifestly required no (adult) employees to limit their working hours; Ballew's accusation simply rested on employers' unspoken right to force would-be bosses to 'learn the ropes' off the clock. Finally, the SSIC was not embarrassed to issue a direct threat: "employers can not be expected to continue gratuities...customarily extended to this class" if they also had to pay for overtime. "This means that these people will be deprived of their summer vacations with pay...[and] of sick leave with pay."

Impressed with the breadth of the SSIC's proposal, Stein asked Ballew whether it encompassed "almost anybody who normally wears a white collar and does not have anything to do with the physical handling of the goods." Ballew agreed that what they "really had in mind was principally the office employee regardless of whether he might be a stenographer, bookkeeper, cost accountant, who is on a regular salary, is not affected by vacation, sick leave, and things of that kind," adding that the latter component was the only amendment that the SSIC had sponsored to the FLSA in the form of the Cox amendment because the organization had "clearly expressed the attitude...that they were in favor and sympathy with the Act."

Instead of challenging this preposterous fabrication, Stein reminded Ballew

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209 See below chs. 16-17.
209a '1940 WHD Hearings Transcript' at 20 (June 3).
210 '1940 WHD Hearings Transcript' at 24-25 (June 3).
212 On the SSIC's frequently and publicly expressed hostility to the FLSA, see above ch. 11.
that the Civil Service Commission classification system “lump[ed]” both clerical and administrative employees in one category, and asked whether he felt that there was any general understanding outside of the government that clerical and administrative employees were not necessarily identical. Ballew conceded the existence of such a “well defined idea,” but insisted that the SSIC’s approach was “based largely on the theory that they may be considered one group” apparently because “they all belong to the channel or chain through which the executive carries on the managing of the details of the business.”

Unenlightened by this assertion, Stein asked whether under the SSIC’s redefinition the WHD inspector’s whole job would consist in going to the plant office, checking the office force, seeing that they got vacation and sick leave pay, and then saying: “‘Very well, they are exempt.’” Grasping the sarcastic point, Ballew replied that while the SSIC had not fixed a salary, it would not argue against a “reasonable salary limitation”—meaning not the $200 of the Norton amendment, which was “certainly carrying the thing entirely too far”—but $20 to 30 a week.

Professor Klamon put in his second appearance, this time characterizing his proposal to exclude any employee compensated on a straight-time salary basis of at least $35 a week with two weeks of paid vacation and two weeks of paid sick leave as “a middle-of-the-road position” between, on the one hand, exempting all white-collar employees doing clerical or ministerial work regardless of pay, which would deprive many of the benefit of the law that Congress had intended to give them, and, on the other, a blanket salary threshold of $200 a month or $2,400 a year, which would make the WHD into a bargaining agent for workers. The fluidity of the public debate and the extent to which it was fraught with risk for maintaining labor standards was evident in the fact that Klamon could praise as a centrist “‘friend of the court’” proposal an approach that was even more exclusionary than the Norton amendment, which labor had already decried as “emasculatory.” Indeed, the latter had become so anathematized that Klamon would have strongly preferred leaving in place the existing regulations, “unfortunate as that might be....” Klamon touted his proposal as avoiding the “exceedingly difficult, if not impossible” problem of writing a general description of the duties of an administrative-executive employee that would fit an almost infinite

213“1940 WHD Hearings Transcript” at 26 (June 3).
214“1940 WHD Hearings Transcript” at 26-27 (June 3).
215“1940 WHD Hearings Transcript” at 33 (quote), 36-37, 38 (June 3).
216“1940 WHD Hearings Transcript” at 41 (June 3).
217See above ch. 10.
218“1940 WHD Hearings Transcript” at 41 (June 3).
variety of positions and situations. Although the purely monetary criterion had simplicity to commend it, Klamon’s setting the threshold at so low a level was dictated by his failure to understand that the overtime provision was designed to limit hours (whether for the ultimate purpose of spreading employment or increasing leisure)—and not to generate higher incomes for workers through time-and-a-half payments. Consequently, there was nothing unfair or unreasonable about Congress’s protecting workers whose monthly compensation exceeded $150 or $200.

The 27 member companies of the Chicago-based National Door Manufacturers Association may have employed only 10,000 workers, of whom about 1,100 were salaried clerical employees, but its secretary-manager, S. O. Hall, provided unconditional support for the SSIC’s proposal to exclude as an administrative employee any employee whose duties were solely connected with the administration of an industry and embraced clerical employees such as bookkeepers, stenographers, payroll clerks, auditors, cost accountants, purchasing agents, statisticians, and “other office help regularly employed on a straight salary basis and given vacations and sick leave with pay.” The novel reason that Hall offered for this exclusion was that the duties of such employees cannot be regulated to produce a regular flow of work such as is possible in the planning of actual production processes. The work of order clerks, estimators, detailers and billers, and their assistants fluctuates widely according to the inflow of customers’ inquiries and orders. The requirements for service are such that their duties must be performed promptly. It is therefore common for such employees to have before them during one or two weeks of a month more work than they can handle within the number of hours to which they are now restricted by the Act. Whereas in the balance of the weeks in the same month their volume of work may be such as to permit its completion in somewhat less than that number of hours. The same irregularity of work volume affects the other clerical employees. ... It is impossible for any employer to anticipate such fluctuations and 'spread out' the work so as to permit its accomplishment in a standard number of hours each week. Furthermore, there is not an available supply of experienced clerical employees for short-time employment during such periods. It is uneconomic and costly for an employer to provide sufficient employees to handle the peak volume period without overtime..., as doing so he burdens his business with a tremendous excess of clerical capacity during the more normal periods.

219"1940 WHD Hearings Transcript" at 35 (June 3).
220"1940 WHD Hearings Transcript" at 37, 39 (June 3).
221"1940 WHD Hearings Transcript" at 49, 54 (June 3).
222"1940 WHD Hearings Transcript" at 50 (June 3).
223"1940 WHD Hearings Transcript" at 50-51 (June 3).
Continuing in this innovative vein, Hall alleged that “the complete absence of flexibility in the handling of their duties by clerical workers” since the advent of the FLSA had prompted firms to hire new clerical workers on an hourly basis with overtime pay but to lay them off when work was slack. Because they were paid “only for the actual number of hours their duties require[,]” the door manufacturers charged that the act’s effect was to “reduce employment of so-called white-collar workers.” Despite the fact that Hall could not even say with certainty that all the industry’s clerical employees received even $16 a week, he insisted that they had been “accustomed to greater liberties than can be granted to any” hourly employee, a freedom that he described as their having “understood that the duties of their particular positions were their own responsibilities. Except for such as has been necessary to maintain an efficient and coordinated office operation, they have usually been free to exercise their own initiative in the performance of their duties.” Skipping over any description of the actual kinds of initiative that self-managed bookkeepers, stenographers, and clerks exercised in these apparently uniquely libertarian offices that spared them the fate of wage workers, who were “paid only for their productive hours” and whose “superiors...determine what work is to be performed,” Hall revealed that he was in reality merely repeating the SSIC’s claim that the FLSA was putting a damper on the tradition of promoting into managerial ranks those who had shown themselves worthy of such careers by putting in long hours without pay: “Those clerical employees who have availed themselves of these opportunities for the development of initiative have become the administrative directors of our businesses. Such ‘extra hours’ as employees of this type have devoted to their responsibilities have contributed more largely to the development of their own knowledge of the business and their executive abilities than to the negation of any of the purposes” of the FLSA. Identifying those statutory purposes was, to be sure, made rather difficult by Hall’s claim that his proposal to deprive all clerical workers, regardless of salary level, of all protection from employer overreaching regarding hours would “simplify...and clarify administration and enforcement” of the FLSA “without detracting from the accomplishment of its fundamental purposes.”

Without confirming that the woodwork manufacturers were really seeking hours-averaging, Hall promised that: “If all clerical employees are exempted, it is

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224 E. Tinker, the executive secretary of the American Paper and Pulp Association, whose members employed 138,000 wage earners in mills and 14,000 salaried employees, was unique in conceding that “the problems” of his industry were “not particularly unique.” “1940 WHD Hearings Transcript” at 299, 301 (quote) (June 4).

225 1940 WHD Hearings Transcript” at 55 (June 3).

226 1940 WHD Hearings Transcript” at 52-53 (June 3).
extremely improbable that any appreciable number...will be required by their duties to work more than the maximum number of hours provided by the Act when averaged over a period of six months or a year.” Without disclosing what proportion of clerical workers ever rose into managerial ranks or how they could distinguish themselves from their slothful time-serving colleagues if, averaged over a year, they worked no more than 40 hours a week, Hall pledged that the “[f]lexibility provided by their exemption” would “permit orderly, efficient and expeditious discharge of their duties in an atmosphere conducive to the development of executive ability and administrative talent....”

Perhaps because the fantastic character of his testimony had deprived him of all credibility, none of labor’s advocates responded to Stein’s call for questions of Hall.228

Unsurprisingly, the Southern Pine Industry Committee, representing manufacturers, expressed strong support for the SSIC’s proposal.229 Appearing on its behalf, Phillip Walker argued that the proposed redefinition of “administrative employee” would not militate against the achievement of the FLSA’s objectives of putting a floor under wages and spreading employment because the one was irrelevant and the other inapplicable to the industry: almost all of the employees proposed to be exempted were paid well in excess of the minimum wage and performed work that “cannot be duplicated by persons brought in on a moment’s notice” during peak periods, for example, to file tax returns or prepare payroll. Walker, while admitting that as a lawyer he was “not thoroughly familiar with the conditions in the industry,” nevertheless dogmatically-implausibly insisted that: “It is almost a necessity that those same individuals do the work during those peak periods. It would be almost a physical impossibility to bring somebody in from the outside who is not [sic] familiar with the particular work going forward, so that in those cases the employer has the option of not having the work done, or of working those same individuals longer hours, and of course paying them overtime if they come within the...Act, but our proposition is simply this, that by no stretch of the imagination could that give employment to additional persons....”

Rather than explore Walker’s presumably inadvertent disclosure that his clients’ regulatory revision program was driven by their preference to work existing employees overtime without pay, Stein asked him hypothetically whether, if a firm at the time the FLSA went into effect employed 10 bookkeepers who consistently worked 54 hours a week, the law could have an employment-spreading effect. Evasively, Walker replied that it might be possible to arrange a system to hire new employees

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227“1940 WHD Hearings Transcript” at 53-54 (June 3).
228“1940 WHD Hearings Transcript” at 57 (June 3).
229“1940 WHD Hearings Transcript” at 95 (June 3).
230“1940 WHD Hearings Transcript” at 96-97 (June 3).
permanently, but the “proposition, of course, would be that during a large part of that time you wouldn’t need that additional assistance” and it “would be foolish to build up a large staff just on the theory that during a few small periods...extra help” would be required.\(^{231}\) Since Stein’s question presupposed that the firm required 540 hours of bookkeeping per week all year round, the 140 hours of overtime beyond 40 were available to be redistributed to hire an additional three full-time and one half-time bookkeeper.

That some employers seemed to believe that their desire to save money was the cause rather than the effect of creating legal categories of excluded workers was revealed by Institute of American Poultry Industries, whose representative, E. B. Heaton, asserted that professional employees “require freedom from time restrictions,”\(^ {232}\) when he really meant that their employers required freedom from restrictions on not paying them for all their working hours. Offering an illustration by way of taking exceptional semantic liberties, he instanced the head feeder at a poultry feeding station with many years of practical knowledge enabling him to know when chickens were healthy and how to feed them: “it is important that he have unlimited hours because the chickens can take sick in the middle of the night. He has to observe them 24 hours a day, if possible, because he can’t leave it to any of the employees.”\(^ {233}\) Apart from the question of why two or three employees could not share this aspect of head-feeder professionalism—after all, even the rationale for requiring physician-residents to observe human patients for 24 hours was to enable them to understand the course of a disease, not to prepare them individually to observe sick humans 24 hours a day for the rest of their professional careers—it never occurred to Heaton that paying him for all these hours would in no way constrict his freedom to work unlimited hours. This same mechanism was impressively on display when Heaton blamed the FLSA for the egg plant foreman’s having more physical work to perform because “the employees leave right on the dot and somebody has got to see that things are ready for opening the next morning and it is generally up to him to do it. ... It takes considerable overtime work....”\(^ {234}\) This account must mean that prior to the FLSA, non-supervisory workers had been required to stay late to perform such work gratis; by permitting employers to remove certain employees from the protection of the law, Congress and the WHA undermined the employment-spreading impact of the overtime regulation regime, since instead of being deterred by the penalty from working existing overtime, employers simply reassigned that work to foremen, who could still be

\(^{231}\) 1940 WHD Hearings Transcript” at 98 (June 3).
\(^{232}\) 1940 WHD Hearings Transcript” at 103 (June 3).
\(^{233}\) 1940 WHD Hearings Transcript” at 108-109 (June 3).
\(^{234}\) 1940 WHD Hearings Transcript” at 110-11 (June 3).
legally required to perform it gratis.\textsuperscript{235}

The second day of hearings on manufacturing, June 4, featured the increasingly hard-line testimony of witnesses from the oil and gas, clothing, and lumber, pulp, and paper industries as well from several state manufacturers associations, who demonstrated deep-seated antipathy to overtime regulation at all and/or to that of any white-collar employees.

The Mid-Continent Oil and Gas Association, through its representative Clarel Mapes, took the unusual position that because of the industry’s above-average blue-collar wages,\textsuperscript{236} the FLSA “was not aimed at” it.\textsuperscript{237} Nevertheless, given its coverage, the Association argued that administrative employees were “entitled to be exempt...because within their respective spheres they carry out the policies and orders of the executives and in so doing are permitted wide discretion. They exercise extensive authority and shoulder great responsibility.” Why the exercise of discretion, authority, and responsibility should serve to deprive employees of all protection against long hours, Mapes failed to explain, but he added that their personal assistants had to be sacrificed as well because they were “necessary to the exempt employees in carrying out their proper functions.”\textsuperscript{238} Oil and gas employers were particularly concerned about applying the “maximum hours per week” to executive secretaries because they had to transmit executive instructions to subordinates and gather essential information from them; Mapes asserted that work spreading was irrelevant because “it would be impossible to substitute other employees for them,” but he no more explained why than he did why it would be impossible for the firms to pay time and a half.\textsuperscript{239}

That employers’ hostility to overtime regulation extended into the core of unionized manufacturing was impossible to overlook in the testimony of the Clothing Manufacturers Association, which accounted for 85 percent of men’s and boys’ clothing produced in the United States.\textsuperscript{240} In 1937 it entered into a three-year agreement covering 135,000 workers with the Amalgamated Clothing Workers of America, whose president, Sidney Hillman, remarked on that occasion that in the midst of industrial strife in the country, union and management had negotiated amicably on all issues. One of the latter’s negotiators was Frank Zurn of the Alco

\textsuperscript{235}This strategy is identical to fast-food restaurants’ practice of requiring assistant managers to work overtime gratis doing their supervisees’ regular work to avoid “blowing payroll.” See below ch. 15.

\textsuperscript{236}“1940 WHD Hearings Transcript” at 120-21 (June 3) (A. Nicholson).

\textsuperscript{237}“1940 WHD Hearings Transcript” at 137 (June 3).

\textsuperscript{238}“1940 WHD Hearings Transcript” at 144, 145 (June 3).

\textsuperscript{239}“1940 WHD Hearings Transcript” at 150-51 (June 4).

\textsuperscript{240}“1940 WHD Hearings Transcript” at 226 (June 4).
Zander Company in Philadelphia, who, as the Association’s executive director, appeared as its witness at the hearings.\textsuperscript{241} He began his testimony by asserting that the existing regulatory definitions of executive and administrative limited the number of exempt employees “much more narrowly than was the intent of Congress and too narrowly from the point of view of the set-up of industry.”\textsuperscript{242} The CMA’s aversion to paying overtime even to blue-collar machine maintenance workers provoked Stein at one point to inquire sarcastically: “By the way, Mr. Zum, does your, shall I say, disinclination to pay overtime extend to these temporary shipping employees?”\textsuperscript{243} When Zum described a comp-time system for maintenance workers, Stein felt obliged to ask: “Of course, you must realize...I am sure you do, that this Act doesn’t in any sense forbid overtime work.” Zum’s reply aligned him with the representatives of a number of other industries that purported to be intentionally organized in such a way that many of its employees much of the time did little or no work:\textsuperscript{244} “I appreciate that; but the point is we feel it is unfair to industry to penalize us by having to pay time and a half for overtime to a man who is a salaried worker by the year, during dull periods and peak periods, and we have to pay him when there is no work to do. We feel that is unfair to industry.”\textsuperscript{245}

Returning to the white-collar focus of the hearings, Zum proposed that an “administrative employee” be defined as “any employee who is employed in the administration of an establishment, including such employees as bookkeepers, stenographers, payroll clerks, auditors, cost accountants, purchasing agents, statisticians and other office employees, and who is compensated on a weekly or monthly salary basis...of not less than $25 per week and who receives vacation and sick leave with pay.”\textsuperscript{246} Perhaps because of the strong similarity to the proposal advanced by the virulently anti-union SSIC, Stein asked whether the industry’s

\textsuperscript{241}“12% Rise in Wages Is Won by 135,000 in Clothing Trade,” \textit{NYT}, Feb. 15, 1937 (1:5, 4:4).

\textsuperscript{242}“1940 WHD Hearings Transcript” at 226 (June 4).

\textsuperscript{243}“1940 WHD Hearings Transcript” at 232 (June 4).

\textsuperscript{244}Like their counterparts in other industries, clothing manufacturers also complained that non-production workers, no matter how unskilled, were quasi-non-fungible: “As it is impossible to obtain sufficient trained help for the relatively short shipping period, most manufacturers keep an average number of salaried workers employed steadily in their picking [sic] and shipping departments regardless of the amount of work to be done.” “1940 WHD Hearings Transcript” at 231 (June 4).

\textsuperscript{245}“1940 WHD Hearings Transcript” at 231 (June 4). Zum mentioned the possibility of extending the limited practice of permitting compensatory time off at the rate of 1.5 hours for every hour of overtime work. \textit{Id.} at 225-26. So long as the time off was within the same pay period, the FLSA did not and does not stand in the way.

\textsuperscript{246}“1940 WHD Hearings Transcript” at 223 (June 4).
unionization extended to the office workers; Zurn’s response that organization prevailed only in certain markets might have led to an interesting exploration, but Stein did not pursue it, instead eliciting from Zurn that he had arrived at the $25 salary limit by adopting “a little lower than the average...for general types of office workers in the administrative offices,” although weekly salaries ran from $16 “for the most menial employee” to $70 “for the top employee....”

Reciprocating for Zurn’s claim that the WHD had misunderstood Congress’s intent regarding administrative employees, Stein decided to be “equally frank.” His interrogation was tough-minded enough to make Zurn abandon, successively, all his claims, but stopped short of pressing him at the end to reveal how many employees satisfied the restrictive definitional criteria for exclusion that Stein had forced him to adopt:

Presiding Officer Stein: ... Do you seriously contend that Congress meant to exempt every single white collar worker in the country getting $25.00 a week?

Mr. Zurn: I don’t think so; but I think that Congress perhaps intended that where there were salaried workers who get vacations and sick leave and are employed throughout the year.

Presiding Officer Stein: Then, every white collar worker getting a vacation with pay and sick leave with pay and $25.00 a week should be exempt?

Mr Zurn: No, I don’t say that, because where a white collar worker, as you term it, has steady work, where his functions call for steady employment throughout the year, the same amount of work every day, I would say that that is a different proposition entirely from the white collar worker who perhaps has 10 hours of hard work one day and the next day has two or three, sometimes goes to the ball game in the afternoon and still is paid for it.

Solomon Lischinsky of the ACW, who had been so relentless in interrogating employers’ representatives at the wholesale distributive trades hearings, was mercifully brief with the CMA regarding white-collar workers—perhaps because of the amicability of relations that Hillman had hailed or of the relatively limited interest that the union had in organizing them. Restrained as the questioning was, it sufficed to uncover the incoherence of the clothing manufacturers’ justification for

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247 “1940 WHD Hearings Transcript” at 227-28 (June 4).
248 “1940 WHD Hearings Transcript” at 228-29 (June 4).
249 See above ch. 7. Lischinsky devoted most of his questioning to the use that employers could make of § 7(b) of the FLSA to enter into agreements for the maintenance and shipping department workers with the union permitting hours-averaging over 26 or 52 weeks excusing employers from the time and half requirement unless hours exceeded 12 in a day or 56 in week in exchange for a limitation of total hours to 1,000 over 26 or 2,000 over 52 weeks. “1940 WHD Hearings Transcript” at 234-36 (June 4).
excluding stenographers and clerks:

Mr. Zum: We consider the office force the administrative force of the business. They are, in a measure, assistants to the members of the firm or the top executives of that end of our business....

Mr. Lischinsky: Do you think it is proper to assume that such a clerk is a bona fide administrative employee?

Mr. Zum: It depends entirely on what you would call a clerk.

I would say that all employees in the office have specific functions, and they range from filing clerk on up through to secretary to the president, and so on.250

A committee of the National Lumber Manufacturers Association,251 whose members accounted for 70 percent of national lumber output, had met in February 1940 to discuss “the serious problems the industry was facing” under the FLSA and after “careful deliberation and temperate consideration of inequities and hardships resulting from the law and the present regs...recommended...the exemption of clerical workers paid on a straight salary basis and given vacations with pay, and foremen having the right to hire and fire or recommend hiring or firing.” This employer group proved to be yet another purporting to know what a Congress that had left no trace of the purpose or scope of the white-collar exclusions meant by them. The lumber manufacturers contended, according to their representative, Henry Bahr, that “Congress never intended” that the aforementioned clerical employees “should come within the coverage of the Act. Provision for their exemption was made in section 13(a)(1).” Moving from fiction to theatrical exaggeration, Bahr claimed that: “Unfortunately, the Administrator, in interpreting that provision, wished to be so certain that fullest possible coverage be maintained that he interpreted the exemption so restrictively that, if the regulations are construed literally, they are almost meaningless.” Despite the legislative setback that employers had suffered just one month earlier, the Association threatened to throw its political weight around: “If the exemption intended by Congress is not...made effective in the regulations, there can be little doubt that Congress will...make the exemption which was originally intended...so specific that it cannot be defeated by misinterpretation.” Combining sheer covert speculation with a description of an imaginary workplace, Bahr insisted that: “Congress was clearly attempting to

250 "1940 WHD Hearings Transcript" at 237 (June 4). Zum seemed to suggest that stenographers in non-administrative departments might be treated differently, but he failed to make this point clear and Lischinsky did not pursue it. Id at 237-38.

251 It was founded in 1902 and became the National Forest Products Association in 1965 as a result of the increasingly integrated nature of major forest industry firms. http://www.afandpa.org.
exempt employees who do not need the protection of its standards.” The exemption was, rather, “an effort to make the law workable and reasonable” in the sense that: “It is impossible for many employees in these categories to cease work at the end of 40 or 42 hours and for another employee to carry on....”252

Concurring in Ballew’s critique of the joint executive-administrative definition and characterizing executive employees as responsible for forming policies and to the owners,253 Bahr proposed defining an “administrative employee” as either (1) a supervisor or (2) clerical or office employee paid on a straight salary basis with paid vacations, “whose services are closely related to the first group and whose hours must necessarily, in most cases, be the same.”254 The lumber manufacturers also argued that the WHA had departed from congressional intent in introducing a salary threshold because Congress excluded all the workers mentioned in § 13(a) from the statutory minimum wage.255 This argument overlooked the fact that, for example, agricultural employees were subject to § 13(a) precisely because their abysmal wages were, especially in the South, far below the minimum and Congress did not want to disrupt the plantation system.256 In contrast, there is no evidence whatsoever that Congress intended to preserve office sweatshops exploiting low-paid clerical workers.

Stein, who by this time had become well aware that witnesses claiming to have divined congressional intent were merely bluffing, mild-manneredly asked Bahr whether he would “be able to give us any help by citing passages in congressional records which indicates that Congress didn’t mean to give any protection to white-collar workers in the manufacturing end....” But even Stein was not prepared for the primitiveness of Bahr’s response: “It isn’t necessary to cite passages, the Act itself manifests that intent.” After having failed to elicit a satisfactory reply to his request for an explanation of this conclusory assertion, Stein engaged him in the

252“1940 WHD Hearings Transcript” at 239-40 (June 4).
253“1940 WHD Hearings Transcript” at 241-42 (June 4).
254“1940 WHD Hearings Transcript” at 243 (June 4).
255“1940 WHD Hearings Transcript” at 244 (June 4).
256Marc Linder, Migrant Workers and Minimum Wages: Regulating the Exploitation of Agricultural Labor in the United States 125-75 (1992). It is noteworthy that when Congress was considering expanding agricultural processing exclusions in 1939-40, Representative John Hinshaw, a California Republican, declared on the House floor that “while in California we are not concerned for ourselves over the minimum-wage provisions of the act, as our workers—agricultural workers in particular—receive the highest wages paid anywhere in America, and for the most part substantially in excess of the minimum-wage provisions of the act; yet we are concerned over the low wages paid to workers who live elsewhere and are in competition with us.” CR 86:5484 (May 3, 1940).
following revelatory dialog:

Presiding Officer Stein: Do you think it would have been clearer if they had said clerical employees instead of executive and administrative?
Mr. Bahr: It probably would have.
Presiding Officer Stein: But you feel for all practical purposes executive and administrative means exactly the same as clerical?
Mr. Bahr: Clerical employees here are executive employees.
Presiding Officer Stein: You remember the Act doesn't say administrative employees or executive employees. It says employees employed in bona fide administrative capacity.
Mr. Bahr: I would say that such clerical employees are necessary for the particular operation and therefore they are in an administrative capacity.
Presiding Officer Stein: If I heard you correctly you said that these employees don't need the protection of the Act. Is that right?
Mr. Bahr: I think that's right.
Presiding Officer Stein: You don't think a girl who gets $14 a week who is sitting at a typewriter for 54 hours a week needs the protection of the Act? Such things exist.
Mr. Bahr: Such things exist but not as a rule.
Presiding Officer Stein: Do you think she would get higher wages if she had the protection of the Act?
Mr Bahr: Those employees would undoubtedly get higher wages.257

Stein’s incisive interrogation slackened only when he asked Bahr whether a regular 54-hour workweek for white-collar workers was “conducive to the greatest health and efficiency of these workers....” Bahr’s reply that where manufacturing production workers were on a 40-hour week, “you can’t make the clerical employees” work “a very much longer week” failed to prompt the follow-up question that the war mobilization was already in the process of raising as to what the consequences would be for excluded office workers when factory workers worked long and paid overtime hours.258

The Machinery and Allied Products Institute, while agreeing with many other employer organizations that Congress did not intend to apply the act to salaried, office, clerical, or other administrative and executive workers paid at rates substantially above the minimum and enjoying paid vacations and sick leave, and that $150 a month was an appropriate cut-off, was unique in “conced[ing] that the language of the Act may be read as giving the Administrator authority to define ‘executive’ and ‘administrative’ (and ‘professional’ and ‘outside salesman,’ for

257“1940 WHD Hearings Transcript” at 246-47 (June 4).
258“1940 WHD Hearings Transcript” at 247-48 (June 4).
that matter) within a single class under a sub-joined definition.” Nevertheless, the MAPI’s representative, Alexander Konkle, argued that the commas in the statutory text created a “stronger presumption” of congressional intent to create a separate definition of “administrative employees,” which was “imperatively needed” to “exempt beyond question” the aforementioned salaried office and clerical workers. The MAPI proposed that this group encompass general administrative employees and their assistants receiving at least $30 weekly, including clerks, stenographers, and secretaries as well as purchasing agents, draftsmen, foremen, cost accountants, comptrollers, and statisticians. The air of unreality that surrounded employers’ complaints manifested itself in this group too, a great many of whose members apparently felt totally defenseless against shirkers and incompetents or unable to promote the fastest workers:

“We have found that the rulings under the Fair Labor Standards Act have tied our accounting and clerical work in knots. The trouble is the injustice created when a fast and efficient cost man gets his work done in regular time and therefore draws no overtime, whereas the slower, less accurate cost man must work overtime and draws money for it. This creates a premium on inefficiency. Moreover, all parties feel the injustice. The slow man hates to take the money; the fast man feels he is rooked, or else we have to raise his pay; and we feel that the working of the Act is victimizing our company in an entirely unnecessary way.”

The Indiana Manufacturers Association took the tack of offering verbal support for the FLSA’s objectives of eliminating sweatshops and child labor for the benefit of production workers, but asserted, without the slightest anchor in the statute or legislative history, that “Congress did not...have in mind the typist, bookkeeper etc. of the small industrial organization.... It might well appear that such was a form of class legislation not socially desirable in this country, however Congress probably did not contemplate the office girl appearing for work in blue denim slacks and the bookkeeper in similar overhauls [sic] at her elbow....”

Unlike numerous other employer organizations, the Indiana association did not propose creating a separate administrative employee category; instead it argued for a joint definition with numerous sub-criteria, the meeting of only one of which would have triggered an employee’s exclusion. Thus an employee employed in a

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259 “1940 WHD Hearings Transcript” at 250-52 (quote at 252) (June 4).
260 “1940 WHD Hearings Transcript” at 252-53 (June 4).
261 “1940 WHD Hearings Transcript” at 255 (June 4).
262 “1940 WHD Hearings Transcript” at 256 (June 4). The reference was to cost estimators.
263 “1940 WHD Hearings Transcript” at 261-62 (June 4).
buna fide executive and administrative capacity would have meant "any so-called white collar employee who is paid on a straight salary basis, such employee typifying that class of employees who among other things may be found to have...sole responsibility of a separate clerical or administrative function..., or...limited discretionary powers, or...a straight salary of not less than $18.00 per week"; an excluded administrative employee would, moreover, also have included any assistant to anyone deemed exempt by meeting the foregoing qualifications in whole or in part (and would therefore have been excluded even with a salary of less than $18).264

Especially pregnant were a number of members’ letters from which the Association’s representative Hall Cochrane quoted. One firm boasted that it made no deductions from the salaries of its “so-called ‘white-collar’ workers” for absence caused by sickness, but complained that when they returned to work, they “naturally found that they are behind in executing the responsibilities entrusted to their care. It means that added time must be worked. For this the company is required to pay time and one-half,” which expense it claimed was impossible to bill to customers.265 Of interest here is that this employer, like many others before and since, regarded the paid sick leave in exactly the same way that employers regard the privilege bestowed on some white-collar workers to leave the office for limited periods during the day to run personal errands—namely, merely as an element of flexibility that did not dispense workers from the obligation of making up the time at no expense to the employer. (Indeed, the Connecticut Manufacturers Association suggested that “this problem of salaried employees could be better taken care of by an interpretative bulletin...to the effect that time off for overtime might be used to take up the vacation...or sick leave with pay....”)266 The manager of the Crawfordsville plant of the large and venerable R. R. Donnelly & Sons printing company, referring to paid vacations and sick leave, opined:

"[T]here is little doubt but that the authors and sponsors of the bill had no intention whatever of including office workers among those to whom the overtime provisions of the act would apply. It is not conceivable that any man, or group of men, would willingly endanger the desirable features now universally a part of the unwritten contract between the office worker and his employer. ... My prediction is that continuance of enforcing overtime pay to office workers will eventually cause the abandonment of the above

264	"1940 WHD Hearings Transcript" at 263-64, 271 (June 4). There were in all six disjunctive sub-criteria, but since they could be met in part in order to exclude the assistant, the others have not been mentioned here. On the DOL’s high-salaried test in 2004 that could also be passed by meeting a single criterion, see below chs. 16-17.

265	"1940 WHD Hearings Transcript" at 266 (June 4).

266	"1940 WHD Hearings Transcript" at 275 (June 4) (Paul Adams).
The same manager then continued in the same vein in a letter to Indiana's entire congressional delegation, arrogating to himself knowledge of the legislative history that even he knew he lacked:

"Although I represent an employer [m]y concern is entirely in the interest of the salaried person and his predicament.

Some congressman or senator is going to win renown with every worth-while flat-salaried office worker in the United States if and when he will introduce and secure passage of a bill which will cause the elimination of the salaried office worker from the provisions of the Act.

Opinion is general that authors and sponsors of the Fair Labor Standards Act never intended that salaried office workers would be affected by it. Due to haste only was the bill so drafted that it was not definitely restricted to time-workers." 268

That Cochrane literally had no idea what he was talking about was brought out under questioning by Lischinsky, who asked him what his authority was for the statement that Congress did not intend to include white-collar workers. Cochrane's reply—"I don't know that I could specifically lay my hand on any permanent record or authoritative source but it is a quite prevalent thought amongst everyone whom I represent"—prompted Lischinsky to ask why, if Congress did not intend to include white-collar workers, it specifically exempted professional and executive employees. Finally struck by a flash of epistemological humility, Cochrane conceded: "I don't think either of us know what was in the mind of Congress." 269

Numerous representatives of the paper and pulp industry testified, focusing on the high salaries and non-fungibility of white-collar employees who should have been but had not yet been declared outside of the FLSA. Charles Boyce, vice president of North-West Paper Company, complained that among those who turned out to be covered were heads of one-man departments with annual salaries as high as $7,500. In response, the company put them on the clock to keep track of their time and took them off the salary basis to calculate their overtime, with the ideological consequence of "the breaking down of that distinction which every one of these men has worked for to get, out of the hourly pay class into the supervisory class or the monthly salary class. It means...they are apt to lose, if we have got to follow through literally,...the advantages and benefits they are getting that they

267"1940 WHD Hearings Transcript" at 267 (June 4).
268"1940 WHD Hearings Transcript" at 268-69 (June 4).
269"1940 WHD Hearings Transcript" at 271-73 (June 4).
have worked for all these years."  

Another paper company official, E. Stoetzel of Marathon Paper Mills, sought to persuade Stein that work in the industry’s research and engineering departments was "comparable to work done in the medical profession"; suggesting that it was the "technically trained" employees themselves who desired unlimited hours was facilitated by dragging Einstein’s name in, though the reference to salaries ranging from $54,000 to $94,000 (in 2004 dollars) reduced the matter to its commercial core:

Their work isn’t regulated by the clock, but by the progress of the experiment, or design. Their work isn’t mechanical but of a high mental character that reaches the point of high efficiency some days creating a desire to continue that day to bring that particular portion of the problem to a conclusion. It is important that these men not by [sic; should be “be”] limited to a definite schedule of hours. ...  

Besides the points enumerated...comes the cost angle. These men are paid substantial salaries, from $4,000 to $7,000 a year, making the cost prohibitive if reduced to an hourly basis and multiplied by 150 percent for any time over a 40-hour week.

In conclusion, if Einstein and Edison and Steinmetz and other outstanding research men limited their work to hours instead of to actually performing the work itself, I don’t believe we would have progressed as fast as we have.  

Robert Canfield, counsel for the American Paper and Pulp Association, expressed the same thought even more starkly: “A man who...wants to do his job right and the job doesn’t consist of mechanical work but of head work primarily has got to know that he has got the right to work as much time as is necessary to do his job right. If he doesn’t he knows he isn’t earning what he is getting paid.”

In the absence of an overtime rule promoting this precept, Canfield appeared to be nearly overwrought because it was “absolutely impossible” for the member companies to know whether they were complying with the FLSA, while he found it “virtually impossible” to advise them how, especially since the guideline of “when in doubt comply, just doesn’t make sense if you are talking about people that are making up to $7500 a year.” Unlike many other witnesses, Canfield admitted that “[n]obody knows what” congressional intent was, though “everybody knows what it wasn’t.” In any event, Canfield knew that Congress “certainly didn’t intend to create a perfectly ridiculous situation, and that is what it amounted to when you are faced with the idea of paying overtime to salaried men whose

270.“1940 WHD Hearings Transcript” at 302-303, 309-10 (quote) (June 4).
271.“1940 WHD Hearings Transcript” at 316 (June 4).
272.“1940 WHD Hearings Transcript” at 328-29 (June 4).
273.“1940 WHD Hearings Transcript” at 323 (June 4).
salaries are in multiple thousands of dollars a year.” Having mistakenly identified the overtime premium as the purpose of the overtime provision, Canfield insisted that: “Certainly it isn’t necessary to the maintenance of a fair living standard that a man getting $4,000 or $5,000 or $6,000 or $7,000 a year be paid some time and a half....”

Canfield implicitly took the position that an employer could verbally manipulate its way into an exemption by defining a job as off the clock: the 10 percent of the paper industry whose jobs consisted of seeing to it that the machinery was available for the other 90 percent to earn their pay were “hired...to accomplish a job. And the company doesn’t give a damn whether it takes 20 hours [sic] week or 30 or 40 or 50 or 60, it is the job that is requisite. If the job is done they have earned their pay, if it isn’t done they haven’t.” The alternative of putting “one of those men on an hour basis” with time and a half meant either that the job (for reasons Canfield did not bother to explain) was not done right or, “where the job requires more than the usual number of hours per week, he is running up extra expense for the company...a very uncomfortable position to be in.”

Melodramatically and incorrectly, Canfield charged that under the existing “definition strictly construed you can eliminate from the exempt list virtually anybody in any company, if we strictly interpret it. When you string together a dozen requirements with ‘ands’ you have eliminated pretty nearly everyone.” Conjuring up a strict enforcement regime that the WHA in 66 years has yet to bring to bear, Canfield pleaded that: “No company faced with the alternative of criminal prosecution, fine and imprisonment and injunction against interstate shipments...and it therefore means shutting down the mill if one man has been employed in violation of the Act, no company can operate legally with this kind of uncertainty.” Nevertheless, in spite of this nightmarish prospect, paper industry managers, unlike virtually all their counterparts, possessed the epistemological humility to announce that they had tried to work out a redefinition, “but we felt we were quite unqualified...since this hearing has to do with all industry and we don’t any of us know about other industries.” Canfield offered to undertake another effort if the Administrator was willing to proceed on an industry by industry basis—otherwise they would collaborate with other industries. In the interim, and recognizing that it was “hard to draw the line exactly,” he had tentatively

274"1940 WHD Hearings Transcript” at 324 (June 4).
275"1940 WHD Hearings Transcript” at 324 (June 4).
276"1940 WHD Hearings Transcript” at 325 (June 4).
277"1940 WHD Hearings Transcript” at 325 (June 4).
278"1940 WHD Hearings Transcript” at 328 (June 4).
279"1940 WHD Hearings Transcript” at 326 (June 4).
concluded that "the proper approach seems to be this, that if a job is such that it makes no difference what particular man is doing it, if it is practical at any time during the performance of that job to substitute one worker for another, that is clearly under the Act. If on the other hand the job is such that it must be, to be done right, performed by one individual, when in the middle of the job you can't substitute practicably one man for another, then the job should be exempt."\textsuperscript{280} One of Canfield's colleagues had been willing to push this approach to the ad absurdum brink of metempsychosis. If, H. Noyes of the Oxford Paper Company testified, management were deemed covered and confined to a 40-hour week and wanted to avoid overtime, it would have to provide adequate replacement: "And then we would be up against a proposition of—I don't know exactly how to express it but the transfer of thought from one person's mind say to the mind of the person who replaces him, as to what has gone before."\textsuperscript{281}

Taking seriously Canfield's proposal to make a position's non-fungibility the crux of analysis for exclusion of white-collar workers, Stein cautioned him that when he said that "the true test should be the irreplaceability of [the] worker so to speak...I am sure that you don't mean that that thing in crude form should be placed as a tool in the hands of the inspector." Canfield acknowledged that he had not intended such an implementation of his approach, but insisted nevertheless that: "What constitutes a management employee, and that really is what is intended to be exempt, is a man who has peculiar qualifications to perform a necessary job. The performance of the job can't be measured by time. It is a job that has to be done regardless of time...." Though apparently oblivious of the fact that his description was so vague and ambiguous that it could fit millions of non-management employees including, ironically, research scientists, Canfield's only effort at illustration was an assistant secretary of a corporation, who might normally work 42 hours, but, if the corporation suddenly decided to undertake a major refinancing operation, might have to work 80 hours a week.\textsuperscript{282}

His job is to do what is necessary to be done at any given instance. His remuneration is worked out on that basis. It assumes overtime at some times. It is already compensated for. That is why he is paid $4,000 or $5,000 or $6,000 of $7,000 or $10,000 a year.

If you required a payment of time and a half for overtime, you are in effect paying overtime on overtime. The whole purpose of negotiated salaries is to cover a man for the performance of a job regardless of the time involved.\textsuperscript{283}

\textsuperscript{280}"1940 WHD Hearings Transcript" at 327 (June 4).
\textsuperscript{281}"1940 WHD Hearings Transcript" at 320 (June 4).
\textsuperscript{282}"1940 WHD Hearings Transcript" at 329-30 (June 4).
\textsuperscript{283}"1940 WHD Hearings Transcript" at 331 (June 4). A similar perspective was
If such overtime stints resulted from rare and unforeseeable extraordinary emergencies that only one person in the world could deal with, then they could perhaps be permitted on the same basis as the exceptional emergencies threatening life or property that authorize production workers to exceed the limit under a maximum-hours regime. However, it seems improbable that annual salaries would be upwardly adjusted by thousands of dollars to compensate already highly paid employees for such rare disruptive intrusions. If 80-hour weeks were not uncommon, then the issues of the affected worker’s mental and physical health and the appropriateness of work-sharing were manifestly implicated. Since the overlap between the kind of work Canfield appeared to have in mind and high salaries—$10,000 in 1940 was the equivalent of almost $135,000 in 2004—was significant, then perhaps he should have proposed a high salary cut-off as the sole exclusionary criterion, which would, to be sure, not have resolved the aforementioned working-hours issues, but could have been set at such a lofty level that not even labor unions would have protested.

The manufacturing hearings on June 5 reached a high point when Stein convened the morning session of the final day in the Bamboo Room of the

offered by coal mine owners regarding auditors, cashiers, civil engineers, fire bosses, purchasing agents, personnel managers, and weigh bosses, whose salaries ranged from $115 (weigh bosses) to $750 (purchasing agents): “It would seem that there can be, by that exemption, no hardship, no denying of the benefits of the Act to anybody and still by such exemption there would not be an opportunity to prevent the spread of employment” because “[i]n practically all of these instances, the man’s work is peculiar to he, himself. It is a job that he does. It may take him all day; it may take him longer hours than the statutory maximum, but considering the remuneration that they are paid, it is our suggestion that they be exempt as administrative employees.”  

284Linder, Autocratically Flexible Workplace at 464-66.

285Before the NAM testified, Claudius Murchison, president of the Cotton Textile Institute, appeared to propose the elimination of the salary limit because in small units of the cotton textile industry in isolated communities $30 would unduly restrict the size of the exempt group. “1940 WHD Hearings Transcript” at 334 (June 5). This plea replicated his request at the 1937 FLSA congressional hearings to preserve the wage differential in favor of southern textile capital. Fair Labor Standards Act of 1937: Joint Hearings Before the Committee on Education and Labor United States Senate and the Committee on Labor House of Representatives on S. 2475 and H. R. 7200, Part 2 at 813 (75th Cong., 1st Sess., June 7 to 15, 1937). Of the original FLSA bill Murchison said that it was difficult for him to believe that it was “indigenous to America. It does not accord with our theory of government. ... It does not match our traditional concept of the dignity and the rights of labor.” Id. at 808.

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Willard Hotel ("The Residence of Presidents") in Washington, D.C., to hear the proposals of the associate counsel and secretary of the National Association of Manufacturers, employers' "most prominent and vocal peak association during the interwar era." In terms of its impact on Stein and the revision of the regulations, the single most influential testimony of the entire hearings was arguably presented by the NAM, which appears to have offered the critical arguments that prompted Stein and the WHA to create a separate category of excluded administrative employees.

The NAM's associate counsel, Raymond Smethurst—who later became a law school lecturer and considered himself sufficiently expert to self-publish a casebook on the FLSA—after announcing that a large number of state, local, and industry associations also supported the NAM's recommendations, noted that the NAM had, after much more extensive study, revised the three general recommendations that it had submitted for the wholesale distributive trade hearing. The NAM's candid preference was for a regulation or statutory amendment that "would exempt all so-called white collar employees earning a definite minimum regular salary." But since it was well aware that Congress had authorized exemptions only for employees in certain defined classifications, the NAM had to make do with second best—"a moderate and practical definition." Smethurst conceded that the legislative history of the FLSA revealed "little of the intent of Congress to extend this law to employees receiving far more in compensation than is required by the minimum standards imposed," but nevertheless insisted that it

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286 NYT, May 31, 1940 (23:8) (advertisement).
289 Smethurst joined the NAM's law department in 1934, the year he was graduated from law school, and became its counsel in 1941, retaining that position until 1949, when he entered private practice. At the end of the 1940s he taught labor law at George Washington University Law School. Association of American Law Schools, Directory of Teachers in Member Schools 1948-1949, at 246; Association of American Law Schools, Directory of Teachers in Member Schools 1949-1950, at 270.
291 "1940 WHD Hearings Transcript" at 348-49 (June 5).
292 "1940 WHD Hearings Transcript" at 349-50 (June 5).
293 "1940 WHD Hearings Transcript" at 351 (June 5).
was "obvious from a mere reading of the statute that the law was drafted to cover employees working for a wage rather than a salary." He was also able to quote powerful passages from the Senate and House FLSA reports that clearly declared that it was "only those low-wage and long-working-hour industrial workers, who are the helpless victims of their own bargaining weakness, that this bill seeks to assist to obtain a minimum wage." Fairly refraining from pronouncing such sources as definitive standards for construing the actual enactment, Smethurst did insist that, as indicators of "the atmosphere" in which the FLSA was "conceived," they demonstrated that the law "was not intended to regulate wages and salaries far above the minimum established as a standard of decency." From this construction he derived the argument that the WHA "would be fully justified in giving liberal effect to exemptions which in no way affect the minimum wage standard...."

The NAM freely admitted "that it may be difficult to write a satisfactory definition of the term 'administrative,'" but urged the WHA to consider that Congress itself had distinguished between administrative on the one hand and clerical and executive employees on the other in the Clerical Administrative Fiscal Service of the Civil Service. These positions bled into or overlapped with one another so that an employee classified as a clerk might perform duties comparable to those performed in an administrative classification and administrative work also included a large part of clerical work. (To be sure, the classifications also revealed synonymous usage of "administrative" and "executive.") The NAM's definition of "administrative employee" included those whose primary duty was to manage, direct, or supervise a group of employees, a function found in a CAF junior administrative assistant, administrative assistant, or senior administrative assistant; the NAM's definition also included employees directly assisting an executive employee—a job description that also appeared in various administrative classifications in the CAF service. Finally, individual work of a responsible, specialized, or technical nature requiring special training and experience was also

294"1940 WHD Hearings Transcript" at 352 (June 5). Presumably he was referring to provisions such as the 25-cent hourly minimum wage, but if salaried employees were not covered, then as Nathan Weinberg of the ILGWU asked rhetorically, why did executive and administrative employees have to be expressly exempt? Id. at 450-51.


296"1940 WHD Hearings Transcript" at 352-53 (June 5).

297"1940 WHD Hearings Transcript" at 355-56 (June 5).

298"1940 WHD Hearings Transcript" at 391 (June 5).

299See above ch. 2.
a function of various CAF administrative classifications. The inclusion within the NAM’s definition of employees performing “special assignments or tasks” was designed to overlap with similar work performed by senior administrative assistants in the CAF service who were called on to help in administrative investigations to determine compliance with office policies or in perfecting or coordinating office organization. Such tasks corresponded to the NAM’s definition involving “assignments directly related to management polices or general business operations.”

Unlike the CAF, which lacked a clear demarcation line between clerical and administrative employees, the NAM’s proposal “purports to draw the line between employees who perform routine clerical functions and those whose work requires the exercise of discretion and independent judgment as well as special training or experience.” Consequently, because its schema was more rigid than the CAF classification, the NAM did “not foreclose the possibility of exemption for employees designated as clerks if the nature of their work meets the standards suggested. It may be that ‘administrative’ does have a broader significance than” it had suggested. In fact: “The term might be broad enough to include practically all clerical work connected with the management of a business. It may be, therefore, that our definition is too narrow.” By the same token, at the other end of the spectrum, Smethurst admitted “ordinarily, the executive would meet the requirements of an administrative officer, because he is higher up in the scale and presumably delegates most of the functions that the administrative officer performs.”

Noel Sargent, who had been the NAM’s chief economist since joining the organization in 1920, took over from Smethurst in order to illustrate in detail the organization’s objections to the existing regulations and to explain the types of employees who would be exempted under its proposals. The basis for employers’ intense interest in expanding the category of administrative employees became manifest in Sargent’s succinct declaration that “there are a relatively small number of true ‘executives’ in any concern but many truly ‘administrative’ employees.” Whereas “the ‘executive’ is concerned with the formulation of policies or with the direction of their application,” administrative employees were “usually directly

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300“1940 WHD Hearings Transcript” at 362-64 (June 5).
301“1940 WHD Hearings Transcript” at 364 (June 5).
302“1940 WHD Hearings Transcript” at 414 (June 5). Questioned by Harry Weiss, Noel Sargent responded that he would not object to having one definition if the executive were taken care of in it, but insisted that “you couldn’t really include the definitions that really make an executive” without “excluding all the administrative employees.” Id.
303“N.A.M. Secretary Retiring,” NYT, May 31, 1955 (37:3).
concerned with...carry[ing] into practice the policies” formulated by the executives.\textsuperscript{304} As suggested by this guideline, the NAM’s redefinition would have narrowed the scope of “executive employee” and expanded that of “administrative employee” so that, for example, the assistant manager of a fast food restaurant could not be classified as the former, but only as the latter, which would encompass supervisors.

Under the NAM’s proposed definition, an “executive” had to satisfy the following criteria: (1) his primary duties had to be managerial, meaning that he had (a) to make or assist in making or determining company policies or directing their application; (b) ordinarily to direct other employees’ work; and (c) to spend the greater portion of his time engaged in the activities specified in (a) or (b); (2) he had to (a) have authority to hire or fire other employees; or (b) be given particular weight in his recommendations for hiring or firing; and (3) he had to be paid $30 weekly in compensation.\textsuperscript{305} To be sure, despite proposing this salary threshold, the NAM did not believe that it was “strictly part of any definition of administrative or executive function”; rather, Smethurst included it “merely because it was deemed better policy to include or refrain from” recommending deletion, but he did not regard it as contributing anything to the definitions.\textsuperscript{306}

In contrast, an administrative employee had, in addition to receiving $30 weekly pay, to meet any one of three alternative requirements: (1) “primary duty to manage, direct or supervise any group of employees” (e.g., supervisory clerk, but not working foremen, gang leaders, straw bosses, or pushers), or “regularly and directly to assist” an executive employee “if such assistance normally requires the exercise of discretion and independent judgment” (e.g., confidential secretary in answering correspondence); (2) primary duty to “perform, under general supervision, responsible office or technical work, requiring special training, experience, or knowledge of the business, and the exercise of discretion and independent judgment” (e.g., job analyst, rate setter, sales correspondent, auditor, sales research man, chief clerk, dispatch clerk, stockroom manager, purchasing agent, credit analyst, employment interviewer of technical applicants, cost estimator, and recrea-

\textsuperscript{304}1940 WHD Hearings Transcript” at 369 (June 5).
\textsuperscript{305}1940 WHD Hearings Transcript” at 370-73 (June 5).
\textsuperscript{306}1940 WHD Hearings Transcript” at 400-401 (June 5). When Stein asked him whether the salary level had some value “as a working test of bona fides, the good faith of the attribution by the employee” [sic; must be “employer”], Smethurst merely replied: “But as a test, it also creates certain hardships.” Stein’s laconic “Yes” prompted Smethurst to speculate that it might be “desirable to leave the way open for the administrator to relax that part of the regulation upon a showing that the employee in question did actually satisfy all the other requirements.” Id. at 401.
tion director); or (3) "work involv[ing] the execution of special assignments or tasks directly related to management policies or general business operations, involving the exercise of discretion and independent judgment, and...work is performed under circumstances in which direct supervision and control over time or manner of performance or hours of work are impracticable" (e.g., traveling auditor and accountant with special training, special representative making studies of organization operations for and reporting back to management, safety director, employee disability and compensation work, divisional credit man, whose delay in approving credit retarded work of manufacturing divisions, field engineer).^307

Under questioning by Stein as to who would not be encompassed within the NAM's proposed definition of "administrative employees" Smethurst and Sargent mentioned only pool stenographers and bookkeepers. Nevertheless, pressed by Stein—who failed to ask them what proportion of white-collar workers were excluded under the existing regulations—they offered a non-binding "guess" that of 100 office employees in a manufacturing plant perhaps 20 would be exempt under the proposal. In Sargent's slippery words: "I don't think we propose to exempt the bulk of office employees in these regulations."^308

Astonishingly, unions put hardly any questions at all to the NAM's representatives. Sol Lischinsky of the Clothing and Textile Workers Unions, who had vigorously interrogated employers at the wholesale distributive trades hearings, was the only unionist to seize the chance to challenge Smethurst or Sargent. In his own presentation at the close of the hearing, Lischinsky brashly asserted that the crux of employers' complaint was that paying overtime to certain workers was a "hardship," to which he replied that Congress intended that it be a hardship to employers that did not comply with the maximum hours provision.^309 Yet when he directly confronted Sargent, his sole question was at best of marginal impor­tance.^310

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307"1940 WHD Hearings Transcript" at 375-82, 396 (quotes at 375, 378, 380) (June 5).
308"1940 WHD Hearings Transcript" at 391-92 (June 5). Smethurst added that in a larger office where work could be more routine, a smaller percentage would probably be exempt. Id. at 393.
309"1940 WHD Hearings Transcript" at 473 (June 5).
310When Lischinsky asked whether a roofer sent out on a "special task" to fix a leaking roof away from the employer's premises and without supervision would qualify as an administrative employee, Sargent replied that "there might well be very grave doubt as to whether it could properly be interpreted" "as directly related to management policies or general business operation...." Lischinsky advocated a modification to the effect that the result of that employee's work determined plant policy, to which Sargent counter-proposed that the result assisted in determining the policy. The exchange ended without a resolution,
Overall, the NAM’s presentation was arguably the most technically proficient of all employers’ pleas for separation and expansion of the exclusion of administrative employees. Its most telling defect was the absence of any socio-economic justification for the exclusion. Not only with the aid of hindsight was labor’s failure to engage Smethurst and Sargent a colossal error: both the NAM’s prominence and its carefully thought-out program to broaden significantly the universe of excluded administrative workers should have prompted unions at the very least to develop through questioning strong arguments undermining these recommendations.

Nathan Weinberg, a research assistant in the ILGWU research department—who admitted that shipping clerks were the only white-collar workers it represented whom the proposed redefinitions might exclude from overtime regulation—did not question Smethurst or Sargent, but did provide a detailed refutation of much of their testimony, starting with the claim that office and clerical workers had not suffered as much from low standards as factory workers: “As a matter of fact,” he observed, in the garment industry it was “precisely these workers that have suffered the most. You could walk through the garment district in New York City before the Fair Labor Standards Act went into effect, late at night, and all the factory windows were dark but you would find lights in the office windows and girls working until ten or eleven o’clock at the books kept by the employers”—in large part because they lacked union protection. In this sense, sweatshop conditions, which, according to the NAM, Congress had perceived and sought to eliminate only among industrial wage workers, applied to office workers as much as to factory workers; indeed, they applied to wages as well since it had been “a very common thing” for garment firms to “take girls just out of business

Stein did not adopt any such modification, and it is difficult to discern why Lischinsky believed that his alternative wording would have narrowed the scope of the exclusion. “1940 WHD Hearings Transcript” at 416-18 (June 5).

311ILGWU, Report of the General Executive Board to the 24th Convention 148 (May 27-June 8, 1940). Weinberg testified instead of his boss Teper presumably because the union’s annual convention was taking place in New York City during the hearings.

312“1940 WHD Hearings Transcript” at 446 (June 5). Garment industry shipping clerks in New York City began organizing in 1935, but not until February 1940 did the ILGWU charter the Ladies Garment Clerks’ Union Local 99, whose 1,000 members represented about one-seventh of the workforce. Employers had commonly failed to comply with the overtime provisions of the FLSA with regard to these clerks. ILGWU, Report of the General Executive Board to the 24th Convention at 126-27. Although a resolution at the 1940 ILGWU convention protested the exclusion of “huge occupational categories” from the FLSA, it expressly mentioned only farmers and agricultural workers and not office workers. Id. at 646 (Resolution No. 216).
Although not a lawyer, Weinberg next turned to a discussion of the wording of the white-collar exclusions. Unlike other unionists who had referred to the lexicographic overlap and interchangeability between “executive” and “administrative,” he drew the conciliatory conclusion—based on the notion that an executive was an administrator who also formulated policy—that, “as a practical matter,” it made little or no difference whether “you have two definitions or one, because if you have one relatively loose definition for administrative employees and one slightly tighter definition for executive employees, anyone who filters through the looser definition of administrative employees will never have the other test of executive employees applied to him. He is already exempt.” Thus although the WHA was “perfectly correct in defining these two as one,” the ILGWU would nevertheless “have no objection, of course, to giving the proponents of amendments their legalistic song and dance and set up a separate definition which would include all of the conditions now in the present definition and add one or two others such as determining policy and a high salary.” The union was willing to acquiesce in the bifurcation in order to thwart employers’ efforts to relax the “definition of ‘administrator’...to exempt a far larger group than would be exempted by the present definitions.” Specifically, the ILGWU insisted that “an administrative employee must have something to administer. You might say that a stenographer administers a typewriter or something of that sort, but I don’t think we can go very [far] along that line.” A bona fide administrative employee had to have the power to hire or fire or influence such actions because otherwise he would lack the power to “force” his subordinates “to follow his directions.”

Weinberg’s accommodating standpoint was in part a function of his insight that: “You will never get perfect definitions in the field of Social Sciences.” But

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313"1940 WHD Hearings Transcript” at 447-48 (June 5).
314"1940 WHD Hearings Transcript” at 448 (June 5).
315"1940 WHD Hearings Transcript” at 452 (June 5).
316"1940 WHD Hearings Transcript” at 452 (June 5).
317"1940 WHD Hearings Transcript” at 453, 455 (June 5).
318For example, conceding that the hearing had been fruitful in revealing a couple of places where improvement was possible, Weinberg stated that the union had no objection to substituting 20 to 25 percent for “no substantial amount” of non-exempt work and that it was “fairly reasonable” to classify as a professional employee someone who did not meet the educational requirement, provided that he was operating in the position. “1940 WHD Hearings Transcript” at 459-60 (June 5).
319"1940 WHD Hearings Transcript” at 457 (June 5).
by the same token, that very precept also meant that Weinberg cautioned the WHA against letting borderline cases prompt redefinitions, which would engender yet further redefinitions, “until eventually there will be nothing left of the regulations whatsoever.” This tactic, characteristic of the NAM and other employers, consisted in taking a few cases already exempt, taking a few borderline cases that might or might not be exempt, and then using them “as a crow bar to open the door so wide anybody can get in.” Similarly, the proposal to exempt as administrative employees those who assist executive or administrative employees could facilitate a snowball effect so that ultimately a “plant will consist of one executive and 499 administrative employees” who assist other administrative employees.

**Banking and Stock Brokerage**

It cannot be contended that there is any especial hardship placed upon employers by...the present definitions in the ordinary conduct of their business. It is true that it does place certain limits. ... For some employers, payment of their telephone bill also spells a hardship, but it is a hardship which they cannot avoid, and one that is necessary if the rights of the telephone company are to be observed and uninterrupted service secured.

[T]he bank employee who wants to go to a baseball game doesn’t have to wait until his grandmother dies; they are pretty liberal in an informal way.

I think bank tellers get about the worst break of any group in the entire labor movement. Working a bank teller more than 40 hours a week seems to me to be a crime...against the health and safety of the bank tellers.... The nervous strain that they are under, the terrific fear of paying out money improperly....

On July 9-10 Stein held the third set of hearings on the largely white-collar

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320“1940 WHD Hearings Transcript” at 458 (June 5).
321“1940 WHD Hearings Transcript” at 461 (June 5).
322“1940 WHD Hearings Transcript” at 463 (June 5).
323“1940 WHD Hearings Transcript” at 347 (Apr. 11) (statement of Lewis Merrill, UOPWA).
324“1940 WHD Hearings Transcript” at 33 (July 9) (testimony of Archibald Wiggins).
325“1940 WHD Hearings Transcript” at 524-25 (July 29) (testimony of Sidney Cohn, ACA).
industries of banking and stock brokerage. By a wide measure the banking industry presented the most elaborately and efficiently choreographed testimony at any of the hearings. This monolithic coordination of witnesses representing a judiciously balanced diverse cross-section of large and small and urban and rural banks was doubtless made possible by the centralizing role of the American Bankers Association, which accounted for 82 percent of all banks and 96 percent of all banking resources in the United States. The WHA, who had scheduled the hearing in response to the ABA’s application, stated in his hearing notice that testimony would have its usefulness increased if it included information on: the number of employees in the firms represented by the witnesses; the number or percentage of employees exempt under the regulations then in force or “whom it is desired to exempt by the proposed definition”; the duties and salaries of such persons; as well as “the reasons why they should properly be classified” as in an exempt category and “[d]iscussion of the ability of the proposed language to exempt only the employees” desired to be exempt.

The ABA meticulously complied with this suggestion, setting forth its redefinitions and then introducing a series of well-prepped bankers to spell out the number of before-and-after exemptions. At the center of this stellar performance stood Archibald Lee Manning Wiggins, chairman of the ABA’s Committee on Federal Legislation and president of the Bank of Hartsville in South Carolina. Wiggins (1891-1980) was not, however, merely some small-town southern banker; he had many business interests, and had already embarked on a steeply rising national career trajectory, which would make him ABA president in 1943, under-secretary of the Treasury during the Truman administration, and director of a number of large corporations, including the American Telephone and Telegraph Company.

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326Official Report of the Proceedings Before the Wage and Hour Division of the Department of Labor In the Matter of a Hearing on Proposed Amendments to Part 541 of Regulations with respect to the Definition of the Terms “Executive, Administrative, Professional...Outside Salesman” as They Affect Employees in Banking, Brokerage, Insurance, Financial and Related Institutions, Washington, D.C., July 9-10, 1940, Pages 1 to 243. The UOPWA charged that although Lewis Merrill had presented a brief at the first hearing on wholesale trades, “[d]ue to extremely short notice of the second [sic] hearing [on banking], the union was not given sufficient time to prepare the necessary information for this brief. The hearing was held in the face of the union’s request for postponement....” “Wage Act Changes Peril 800,000,” OPN, 6(5):4:3 (July-Aug. 1940).

327“1940 WHD Hearings Transcript” at 5 (July 9) (statement of Archibald Wiggins).

328FR 5:2325 (June 21, 1940).

329“1940 WHD Hearings Transcript” at 27 (July 9).

330http://www.lib.unc.edu/mss/inv/w/Wiggins, A.L.M.
Wiggins began his presentation disarmingly by stating that the ABA had asked for the hearing “for the very practical purpose of sitting around the table and discussing some of the problems arising out of” the FLSA and the regulations and their application to banks. Characterizing the ABA’s carefully organized testimony as “a more or less informal presentation,” Wiggins hoped to “reveal the problems in such a way that, without in any way changing the real objective of the law,...it can be made more workable and facilitate the operations of the banks rather than to slow up and make more difficult the actual detailed operation of banking functions.” In fact, the ABA—which had not “employed counsel to make any particular argument”—like many other employers’ organizations, was seeking to transform the FLSA into a mere minimum-wage workers’ law.

Wiggins frankly admitted that “in the minds of bankers” the FLSA “seems to have been designed for wage workers, particularly wage workers receiving compensation on an hourly basis, and to protect minimum standards of living.” In any event, bankers “get that very distinct impression” from the congressional preambular policy to eliminate “labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers.” Based on this congressional finding, bankers’ reaction was that the FLSA “was not designed for banks” because their employees were not paid hourly wages, they were “among the better paid employees,” and the problems of subminimum living standards were not “of any particular importance” in banks. Nevertheless, bankers did recognize that under the FLSA’s “wide coverage...it is possible that banks are under the Act.”

Curiously, the bankers’ denial of the existence of such conditions did not prompt Stein to ask Wiggins—as he had at the manufacturing hearings slyly asked Ballew, whose SSIC had not even pushed this point as vigorously as the bankers—whether he regarded working white-collar workers over 60 hours a week month after month, even with paid vacations and sick leave, as “properly describable” as such a detrimental labor condition. The query would have been crucial to demonstrating that employers’ claim that the FLSA overtime provision did not apply to non-minimum wage workers was baseless: after all, even Ballew, counsel to the arch-reactionary SSIC, had been constrained to concede the obvious.

Before taking Stein through the ABA’s proposed regulatory redefinitions,
Wiggins casually mentioned a few circumstances that he regarded as unique or peculiar to banks and that made the applicability of an “inflexible” FLSA inappropriate. First, banking operations could not be “controlled by a time clock”: often near the closing hour important banking matters arose requiring the presence of employees many hours beyond those contemplated earlier in the day. Consequently, “the fundamental problem confronting banks” regarding the FLSA was whether to reorganize whole system and method of compensation from “monthly salaries with all the attendant benefits” to a fixed hourly wage and time and a half for overtime. The ABA asserted that employees were far more interested in “a reasonable feeling of security” associated with getting guaranteed monthly compensation throughout the year on which they could rely than to have an hourly wage resulting in weekly fluctuating compensation. Wiggins acknowledged that some of the flexibility that bankers desired could come only through legislative amendments—which they had already requested of Congress—such as hours-averaging over several weeks up to three months to deal with peak days, periods, and seasons. Had a bank been willing to enter into a collective bargaining agreement with a union, it could, under certain conditions, also have lawfully engaged in hours-averaging over 26 or 52 weeks.

Finally coming to the bankers’ proposed redefinitions, Wiggins, too, pleaded for severing the “administrative” from the “executive,” although he conceded that there were positions that combined both. In general “administrative” was of a quality inferior to “executive” and was to be used to identify employees given “a substantial degree of sole responsibility in the exercise of their individual duties as distinguished from the exercise of broad discretionary powers in the general management of a business or department.” First, the ABA proposed that any bank employee paid at least $250 a month be considered an executive and any bank employee paid $200 in cities of at least one million population and down to $80 in cities of under 10,000 be classified as an administrative employee—a curiously arbitrary nomenclature in the absence of even the barest job description, but one that was presumably forced on the bankers if they wished to circumvent congressional action.

Next, Wiggins set forth the duties tests for executive employees divorced from

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337"1940 WHD Hearings Transcript” at 9 (July 9).
338"1940 WHD Hearings Transcript” at 10-11 (July 9).
339FLSA § 7(b). By January 1, 1945, one such contract (not in banking) with the UOPWA had been filed with the WHD. BNA, Wage and Hour Manual 754-55 (1944-1945 ed., 1945).
340"1940 WHD Hearings Transcript” at 14-15 (July 9).
341“1940 WHD Hearings Transcript” at 15-16 (July 9).
any salary requirement. Here the bankers merely picked three of the existing regulatory requirements—primary duty of management, power to hire/fire, and exercise of discretion—while dropping that of directing other employees' work and the ban on the performance of any substantial amount of non-exempt work without any justification at all.342

The newly minted definition of “administrative” employees (illustrated by tellers, auditors, bookkeepers, accountants, and investment managers) was extraordinarily capacious since it required meeting only one of three duties tests. The first, taken from the existing joint definition, called for supervisory capacity and customarily and regularly directing the work of other employees.

The second required a primary duty performance of which required “direct contact” with customers of the bank. On the cold and old paper transcript of the hearings, at least, Wiggins did not seem to be embarrassed about seeking to justify this breathtakingly outlandish blanket exclusion on the preposterous (and undocumented) grounds that: “The man who represents the application of the policy of the banking institution in its relationship and in its dealing with the public is administering that institution within the generally accepted and we believe the sound and proper designation or definition of an administrative employee.”343 Under questioning, Wiggins admitted that “the reason, one of the reasons, that we break it down as between executive and administrative” was that the teller could not qualify as an executive because he did not exercise discretion in most of his duties. On the other hand: “We think very clearly he is an administrative officer....” Indeed, in a bank with 30 or 40 employees, the only ones who would not be exempt under the ABA’s functional definition were bookkeepers, general run of stenographers, maintenance workers, and mechanical machine operators, while teller and private secretaries would be the “principle [sic] additions to the exempt class....”344

A number of the bankers whom Wiggins introduced reveled in their descriptions of precisely these two groups of public-contact administrators. For example, Francis Addison, the president of Security Savings and Commercial Bank in Washington, D.C., which employed a total of 52 officers and employees, of whom nine were already considered exempt and a further 25 of whom he hoped to exclude by amending the regulations,345 boasted that the bank’s 18 tellers who were, “in most instances, in direct contact with the bank’s customers...are certainly justified as being considered administrative employees. Every transaction they

342“1940 WHD Hearings Transcript” at 18 (July 9).
343“1940 WHD Hearings Transcript” at 20 (July 9).
344“1940 WHD Hearings Transcript” at 34-35 (July 9).
345“1940 WHD Hearings Transcript” at 40-41 (July 9).
handle is a contact between a customer and administration of the bank’s policies. This is solely in the hands of the tellers. And, the average depositor thinks of the bank in the light of the opinion which he has of that contact man, the teller.”

Addison then threw in the secretaries, to boot, as public-contact administrators because “when a customer or a client desires to see a busy executive,...his first thought is to consult the secretary to determine whether or not the executive is available and, if not, when.” And the reason that these seven secretaries—whose annual salaries averaged $1,450 and ranged as low as $1,200 (or about $23 a week)—deserved to be removed from overtime regulation was that they saved the bank’s executives “much work” and gave the customer “much satisfaction...in satisfying him by writing the inquiry where it will be most intelligently served in my absence.”

An official of the very large First National Bank of Chicago found it self-explanatory that its 68 tellers “should be exempted” merely because they met 80 percent of the public coming in and often advised customers about features the bank offered or how to apply for a loan. Astonishingly, this kind of statutorily irrelevant justification apparently impressed Stein, whose recommendation to exempt secretaries performing precisely such work was ultimately enshrined in the regulations. Yet, even Stein’s credulity had its limits, and when Willard Jones, executive vice president of Farmers National Bank and Trust Company of Rocky Mount, North Carolina, hopefully put forward his $1,000-a-year custodian of the vault as exempt because she “deals with the public as much as anyone else,” having permitted 1,639 customers to enter their boxes in 1939, Stein lost his patience: “In several of the New York banks...there are doormen who in a sense meet every single person who ever goes into the bank. Would you consider that

346See 1940 WHD Hearings Transcript” at 50-51 (July 9). In 2004 the Bush administration WHD gave new life to such job duties as a basis for classification as an administrative employee. See below ch. 17.

347See below ch. 13.
contact with the public?" Jones was willing to concede that "[t]hat is stretching it very broadly," but insisted that "the vault custodian came more under the law than did the doorman."350

The representative of the largest bank to testify, the First National Bank of Chicago, made clear what was at stake for a large employer in being able to overcome the prohibition on exempting non-boss administrative employees from overtime regulation:351 whereas under the existing regulations only 170 of 2,202 "clerical" employees were exempt, under the proposed redefinition "we would be able to exempt 612 employees, or a total of 28% of our total personnel."352 Smaller banks might have benefited relatively even more from the administrative redefinition: the bank in Rocky Mount reported that of its 22 "clerks," none was exempt under the old regulations, while 12 would have been so classified under the proposal.353

The third option for administrative employees was the blanket small-bank exclusion:"in case of an institution, not having more than seven...employees whose duties are so varied that they involve a combination of work of the same character as that performed by all other employees in the institution[ ]."354 Wiggins, maintaining that the average employee in such small banks "is almost everything from the janitor on up to the president," admitted under Stein's questioning that this proposal would "exempt practically all employees" in such banks.355

Finally, the professional exclusion—which Wiggins conceded trying to broaden and was illustrated by office counsel, tax consultants, auditors, accountants, private secretaries356—also consisted of three alternative sub-parts. The

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350 "1940 WHD Hearings Transcript" at 89-90 (July 9).
351 "1940 WHD Hearings Transcript" at 69 (July 9) (Johnson).
352 "1940 WHD Hearings Transcript" at 59 (July 9) (C. Edgar Johnson, assistant vice president, First National Bank of Chicago). The importance to employers of the revamped administrative duties test is revealed by the fact that although the employees whom the Chicago bank would have been able to exempt consisted largely of specialists such as tax experts, investment advisers, real estate appraisers, statisticians, analysts, architects, nurses, accountants, bond salesmen, senior auditors, and insurance specialists, using the alternative $200 monthly salary (which the Roosevelt administration had advocated legislatively in 1939-40) as the sole criterion would have exempted only 325 employees Id. at 60, 64. The Provident Trust Company of Philadelphia reported similar figures. Id. at 96-99 (Howard Foster, secretary and trust officer).
353 "1940 WHD Hearings Transcript" at 79-80 (July 9) (Jones).
354 "1940 WHD Hearings Transcript" at 20 (July 9).
355 "1940 WHD Hearings Transcript" at 21, 30 (July 9).
356 "1940 WHD Hearings Transcript" at 21 (July 9).
first tracked the existing requirement that the employee performed duties requiring “special qualifications based on educational [sic] training or experience in a recognized field of knowledge as opposed to routine, [sic] mental, manual, mechanical or physical work.” Claiming that “many of the most important, most valuable, and most highly paid employees” in banks occupied “a technical position as a secretarial assistant,” Wiggins submitted as the second option a primary duty to act as secretarial assistant to an executive or administrative employee. And the third professional sub-specialty entailed a primary duty to act as consultant, advisor or even executive assistant. Once again, he offered no empirical support for this eccentric terminology, which he called “an interpretation of reason and common sense.”

Wiggins expressed the hope that no one would believe that bankers lacked sympathy for “wage earners who have worked or have had to work the long hours of employment”—as if bank employees never had to do so. Instead, he stressed that it was precisely “the very exemption” that the ABA was seeking that would give bank workers “an opportunity to use their time productively in preparing themselves for advancement....” By this locution Wiggins meant, as was shown by individual bankers’ testimony, that “if that little group or upper middle group of employees are required to operate on an hourly basis...they will be denied many of the opportunities to spend time...learning the operations in other departments of the bank, and that it will handicap their men, hold them down to the dead level of their existing employment....” The banks, in other words, wished to continue training their future executive, administrative, and professional employees, but without paying for overtime work involved.

With his accustomed bluntness, the SSIC’s counsel, J. Ballew, who followed the ABA witnesses with his own presentation on banking, anecdotally conceded this very point: A cashier had told him of “an unusually bright boy who was quite anxious to get forward in the banking business....” One day, “along about four o’clock in the afternoon, after the bank had closed and after this young fellow was supposed to be gone, the cashier went into the Discount Department...and lo and behold there he was working. He asked him, ‘What in the world are you doing here?’ ‘Well, he says, I am just learning something about the Discount Department.’ And he said, ‘It’s just too bad, but you can’t learn it at time and a half.’ So he had to send him home.” To be sure, Ballew undermined his client’s position by letting it slip out that the employee was not just learning, but also “working.”

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357“1940 WHD Hearings Transcript” at 22-23 (July 9).
358“1940 WHD Hearings Transcript” at 24 (July 9).
359“1940 WHD Hearings Transcript” at 24-26 (July 9). See also id. at 47 (Addison).
360“1940 WHD Hearings Transcript” at 200 (July 10).
An Ohio banker revealed that the employee’s preference for security was being held hostage to the bank’s demand for unpaid overtime, while any conversion to an hourly wage rate might possibly “redound to the disadvantage of the employee,” as much as the bank did not like to see it happen:

[T]he employee likes to know that his salary is set at so much per year and that he is definitely assured of that much compensation provided he behaves himself and does his work satisfactorily. If he does, it is our practice...to increase salaries in accordance with the employee’s willingness, his initiative, his ambition to get ahead.

One more thing...: I happen to be of the old school...and we always felt that we learned more about the banking business after the bank closed than we did while it was open. That being the time when we can learn the job ahead of us, feeling that some time when it was time for promotion, if we worked hard enough and put in enough hours to learn this job that we would have chance in the future. ... We have endeavored to shorten hours as a matter of giving people more time for advancement in other things. Nevertheless, ours is a business.... Unless that employee has the...time to learn that job, in all likelihood when the time for promotion comes, he may not be fitted for it...because of not having the opportunity to apply himself to learn that job.361

Stein was fully aware of the impact of the ABA’s strategy: he elicited an unembellished “Yes” from Wiggins when he asked whether the effect of his proposals was to exempt so many people under the new administrative definition that the definition of “executive” was “ornamental rather than practical.”362 The bankers’ argument, though not expressed as brutally as the newspaper publishers’,363 boiled down to the point that there was a limit to how much profit they were willing to yield to labor and that that limit had already been reached; consequently, if the state imposed additional wage costs in the form of time and a half, banks would eliminate such non-mandatory ‘benefits’ as paid vacations and sick leave, hospitalization and life insurance,364 and freedom to “leave early for a baseball game, or a football game, or hunting season, or things like that...without any deduction from pay.”365 As the president of a Ohio bank put it: “If this comes to the point where we have to pay too much overtime, it would add a charge against our

361“1940 WHD Hearings Transcript” at 137-38 (July 9) (Cook).
362“1940 WHD Hearings Transcript” at 31 (July 9).
363See below this chapter.
364“1940 WHD Hearings Transcript” at 8, 32-33 (July 9) (Wiggins). See also id. at 48 (Addison).
365“1940 WHD Hearings Transcript” at 132 (July 9) (H. E. Cook, president, Second National Bank of Bucyrus, OH).
earnings which is likely to become burdensome.” Moreover, bankers contended that when confronted with this alternative, their employees had opposed FLSA coverage. A banker testifying on behalf of the SSIC candidly expressed both the threat and the acquiescence: “The necessity of compliance with the provision of the law effective in October, limiting the hours of work to a maximum of 40, will make it impossible to continue the granting of extra days leave without deduction from annual vacation and the allowance of sick leave with pay. It is the unanimous preference of all bank employees to continue the present merit system under which salaries and bonuses are based upon the value of services rendered and annual earnings.”

Indeed, even in the absence of such threats, for example, a $4,500-a-year trust assistant, after the First National Bank of Chicago had told him that it had to pay him $21 in overtime for having worked until 11 p.m., “was almost insulted. He did not want to be classed as an hourly employee. We finally compromised...by sending him home early the next day.” Indeed, the same bank official testified that “our morale would be shattered” if it put everyone on an hourly basis, whereas employees who would be exempt under the ABA proposal “would be quite happy about it” because an employee earning $2,000 or over “has a little pride and he does not feel that he should be compelled to sign in and out...or use a time clock. He is thinking of his friends on the outside of the bank. He feels that he is just a little bit better than some of the others.” One banker—who started out all employees at a monthly salary of $50 (which was below the minimum wage)—went so far as to assert that his employees, who did not like working under the FLSA, had said to him: “Mr. Brown, you are going down to Washington to this hearing, and we hope to goodness that something can be done whereby...we will not have to continue working under the Wage and Hour Law.” Nor was Brown the only employer to claim to employ unalienated workers: “Quite a number of our so-called white-collar workers have objected very strenuously to the fact that if they have a job to do and it is going to take another 15 minutes to complete the job, they have to stop at five o’clock. They feel they are being put in the position

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3661940 WHD Hearings Transcript” at 133 (July 9) (H. E. Cook, president, Second National Bank of Bucyrus, OH).
3671940 WHD Hearings Transcript” at 169 (July 9) (written statement of E. Otey, director for SSIC and president, First National Bank of Bluefield, WVA).
3681940 WHD Hearings Transcript” at 62 (July 9) (C. Edgar Johnson, assistant vice president, First National Bank of Chicago).
3691940 WHD Hearings Transcript” at 66, 68 (July 9) (Johnson).
3701940 WHD Hearings Transcript” at 156, 157 (quote) (July 9) (H. Brown, executive vice president, Shenandoah Valley National Bank, Winchester VA).
of being clock punchers and they object to that very much. They have an interest in their work."  

Nevertheless, several bankers testified that it was not the time-and-a-half pay to which they objected, but more intangible if not incoherently explained consequences of the overtime law. In spite of such complaints, however, at least one ABA banker disclosed that his bank had been able to comply with the law and structure its business—and would not have returned to its pre-FLSA schedule even if the law were repealed—so that on an annual payroll of more than $100,000, it had to pay only $95.42 in overtime.

The SSIC presented its own position on banking, which while purporting to support the ABA’s position, was more radical because it both called for the exclusion of all bank employees receiving at least $1,800 a year, regardless of job duties, and openly rejected the ABA’s pretense of sympathy with the “general provisions of the Wage and Hour Law.” Nevertheless, addressing the FLSA’s

\[371\] “1940 WHD Hearings Transcript” at 88-89 (July 25) (A. Funke, secretary, Automatic Electric Co.). As a union official pointed out: “Certainly the employee will have no objection if he is permitted to work after five o’clock and be paid for it.” *Id.* at 94.

\[372\] E.g., “1940 WHD Hearings Transcript” at 116 (July 9) (H. Lee Huston, cashier, Columbus Junction State Bank, Iowa); *id.* at 99 (Foster), 136 (Cook).

\[373\] One banker testified that “we are glad to pay” overtime, but that the law was “somewhat of a detriment to us...insofar as the cooperative effort which we have heretofore had and the lack of that which gradually is necessitated under the present operation.” Yet all that he meant was that before the FLSA “each staff member felt free to call upon someone who might be slightly junior to himself to assist him in taking care of additional work and that employee was glad to do it in order to learn that work and be in a position to be recommended for advancement.... At the present time, it is very difficult to do that because the staff members know that they are asking them to do something that they are really not permitted to do, since it is already necessary to put in a considerable amount of overtime.” Since no change took place after the FLSA went into effect except the requirement that overtime be paid, the only sense this statement made was that the bank preferred the pre-FLSA system when after-hours cooperation was free. “1940 WHD Hearings Transcript” at 72-73 (July 9) (Clay Stafford, cashier, Ames Trust and Savings Bank, Ames, IA).

\[374\] “1940 WHD Hearings Transcript” at 41, 53-54 (July 9) (Addison). Ironically, the First National Bank of Chicago official conceded that on the whole the FLSA had served a useful purpose by “ma[king] us sit up and take notice of our operations and cut a lot of corners. It has enabled us to eliminate help and cut down on help. We have purchased a lot more machinery.” *Id.* at 68 (Johnson).

\[375\] “1940 WHD Hearings Transcript” at 177 (July 10) (Ballew).

\[376\] “1940 WHD Hearings Transcript” at 169, 171 (quote) (July 9) (Otey).
purposes, the SSIC asserted that: “Such a liberalization of the law with respect to banking institutions will not affect the number of employees, as additional personnel cannot be carried on a full time basis merely to meet unusual, infrequent and unpredictable peak periods.”

Claiming as facts that there was “no available supply of trained persons for employment during peak seasons” and that “[s]pecialized employees can not be relieved by shift workers,” Ballew asserted that the overtime provision was “unreasonable and wholly illogical” as applied to all banks. Generalizing from the complaints voiced by employers at the hearings, Ballew insisted that interpreting the FLSA to cover any salaried employees had imposed an “unauthorized burden” on employer and employee. He then added opaquely: “The more this question is investigated, the more apparent becomes the intent of Congress in exempting administrative employees.”

After the bankers had presented all their testimony, stock brokers had their turn. As was the case under the NRA, they generally tracked the banks’ demands, “subscribing quite thoroughly...to almost everything the A.B.A. said”; indeed, the Association of Stock Exchange Firms’ proposed regulations were virtually identical to the bankers’—including the administrative employee exemption for public contact. The one area in which the brokers pressed harder—as they had seven years earlier too—was hours-averaging. Albert Clear, the chairman of the board of the New York Curb Partners Association and executive partner in Hirsch, Lilienthal & Company insisted that the brokerage business was unlike any other in the extent to which it was subject to unforeseen and extreme fluctuations.

377"1940 WHD Hearings Transcript" at 166-67 (July 9) (Otey). In contrast, the First National Bank of Chicago had claimed that: “We maintain a force to take care of a peak. The other two or three weeks in a month most of our employees are not kept busy.” ld. at 66-67.

378"1940 WHD Hearings Transcript" at 185, 186 (July 10).

379"1940 WHD Hearings Transcript" at 187 (July 10).

380See above ch. 7.

381"1940 WHD Hearings Transcript" at 209 (July 10) (Albert Clear, chairman of the board of the New York Curb Partners Association).

382"1940 WHD Hearings Transcript" at 234-43 (July 10). One difference was limiting the third administrative employee sub-definition to firms with five or fewer employees. Clear also complained that he could not make use of the administrative employee exemption for statisticians who were paid $450 to $750 a month, but who did not have the right to hire and fire: “Obviously, the act never intended that those statisticians were to get time and a half for overtime.” When Stein asked him whether he had examined the possibility they were professional employees, Clear said that he thought that they definitely were, but then added opaquely: “we don’t like to take any broad interpretation.” ld. at 216.
in volume: because each day’s business had to be cleaned up entirely that day, it was necessary to maintain complete personnel at all times to cope with peak activity. Under these circumstances Clear deemed it not unreasonable to ask the WHD to consider the possibility of “leveling off the overtime work hours in any one month by allowing employees to take time off the succeeding month.” The stock brokers took solace from a newspaper article of April 29, 1940 stating that the House of Representatives had considered an amendment permitting “leveling off” during a 26-week period, although Clear was seemingly unaware of the bill’s definitive demise just a few days later. Complaining that they were unable to take advantage of “leveling off within the pay period” or even within the month because the rush might come in the last days of the month, Clear, who thought it “would be grand” if the House bill’s 26-week leveling-off period were acceptable, hoped that “the Board [sic] would consider...leveling off in the succeeding month”—a concession vis-à-vis the four-month hours-averaging that stock brokers had demanded and obtained under the NRA. 

Like the bankers, “the brokerage fraternity” reported that its employees insisted that “they did not want any overtime” pay. But the brokers went the bankers one better by claiming that if, during a peak period, “you did walk in at ten or eleven o’clock at night, you would marvel at the esprit de corps. They really enjoy working; they are kidding a little bit. We don’t object to that. They enjoy working. It is hot work; it is nervous, energetic work and they are keyed up to the top.”

Indeed, according to Clear, even their family members pitched in free of charge: “I have one statistician, believe it or not, who comes back to the office with his wife and she sits down and takes the dictation and types it. She is not in our employ, but she is doing it for him and they love it.”

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383-1940 WHD Hearings Transcript” at 203-204 (July 10).
384-1940 WHD Hearings Transcript” at 204-205 (July 10). On the testimony in support of hours-averaging, see “Brokers Propose Labor-Act Change,” NYT, July 12, 1940 (23:1).
385 See above ch. 10.
386-1940 WHD Hearings Transcript” at 211 (July 10).
387-1940 WHD Hearings Transcript” at 212 (July 10).
388 See above ch. 7.
389-1940 WHD Hearings Transcript” at 207, 217 (July 10) (Clear). W. Peake, the secretary, Associated of Stock Exchange Firms, recalled that: “I have had employees call me on the telephone and say, why do I have to take overtime when my boss is losing money?” Id. at 225.
390-1940 WHD Hearings Transcript” at 210 (July 10) (Clear).
391-1940 WHD Hearings Transcript” at 216 (July 10). Stein did not advise Clear that
Publication, Communication, Public Utility, and Transportation Industries

[M]any of the engineers bossed men, such as bricklayers and carpenters, who received double the salaries of the civil service men.

"The difference between a white collar and a flannel shirt does not make up for the difference in wages." 392

[T]he present definitions are entirely adequate to take care of Clark Gable or anyone like that.... I don’t think anyone contends that Clark Gable or any of those people are subject to the act.... After all, they themselves are in control of their bodily functions and that is one of the important things which an actor does. 393

I had the case in the movie industry where some of the movie stars thought that they ought to get time and a half for overtime. They were getting fantastic salaries. I was almost inclined to give it to them because I had some doubt in my mind as to whether they were professionals or not. It seems to me that every word they spoke and every movement they made was dictated by somebody who told them how to say it and how to move. 394

On July 25, J.H. Ballew of the SSIC, who had testified at the first three hearings as well, was the first witness in the last set of hearings, at the outset of which Stein announced that the WHA was "anxious to reach a determination on this somewhat complex problem at the earliest possible moment" and that it was

because his firm was obviously suffering and permitting the employee’s wife to work for its benefit, she was in its employ for purposes of the FLSA.


393 Official Report of the Proceedings Before the Wage and Hour Division of the Department of Labor In the Matter of a Hearing on Proposed Amendments to Part 541 of Regulations with respect to the Definition of the Terms “Executive, Administrative, Professional...Outside Salesman” Issued under Section 13(a)(1) of the Fair Labor Standards Act, as They Affect Employees in Publication, Communication, Public Utility, Transportation, and Miscellaneous Industries, Washington, D.C., July 29, 1940, at 618-19 (George Bodle, lawyer representing movie industry employees) (“1940 WHD Hearings Transcript”).

therefore “safe to assume” that such a final determination would be “published within a comparatively few weeks after the conclusion of this hearing.”

Ballew immediately returned to the demand for the separation of administrative from executive employees. He insisted that Congress’s use of the term “administrative” clearly intended to exempt salaried office personnel, who formed “the channel through which the ‘executive’ exercises management of a business.”

Here Ballew specifically mentioned that newspaper publishers had requested that employees doing non-production work “should collectively be classified as administrative and exempt....” He also disclosed that some employers, including book manufacturers and publishers, had proposed that if office and clerical workers were to be included, their hours should be averaged over 26 weeks or two six-month periods. Curiously, in spite of the SSIC’s long and documented history of intense hostility to the FLSA, Ballew added the organization’s voice to that of industry generally supporting the statute’s purpose of preventing “the chiseler and sweat-shop operator from further exploitation of their employees.”

At this point Stein intervened to ask Ballew whether professional employees were salaried “‘white collar’ persons. When Ballew said yes and mentioned draftsmen and freight experts as examples, Stein asked why, if he felt that executive and administrative employees covered the whole group of salaried white-collar workers, there was any advantage or necessity of having “professional” in section 13. The remarkable epistemological humility that the reactionary Ballew displayed would soon enough become unimaginable among triumphant employers who no longer had to fight for exemptions, the legitimacy of which had become so entrenched that no one questioned them:

Well, I don’t know. ... Now just what may have actuated the Congress in including all those terms I am unable to say. I can appreciate the fact that it probably places a greater burden on the Administrator in trying to find out what all of these varied terms may mean. Probably a simpler term would have embraced them all within one term.

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395 “1940 WHD Hearings Transcript” at 5 (July 25).
396 For a brief wire service account of the first day’s proceedings, see “Asked to Limit Executive,” NYT July 26, 1940 (20:3).
397 “1940 WHD Hearings Transcript” at 9 (July 25).
398 “1940 WHD Hearings Transcript” at 13 (July 25).
399 “1940 WHD Hearings Transcript” at 16 (July 25). See also “1940 WHD Hearings Transcript” at 252 (July 26) (statement of J. Raymond Tiffany, Book Manufacturers Institute).
400 “1940 WHD Hearings Transcript” at 17 (July 25).
401 “1940 WHD Hearings Transcript” at 19 (July 25).
Stein then proceeded to pose several pointed questions to Ballew on positions that he had taken on behalf of the SSIC. Since Ballew had stated that salaried white-collar workers should be excluded if they were paid well above the statutory minimum, Stein wanted to know whether he considered the $14 a week he had seen in advertisements for typists in *The New York Times* to constitute such a minimum. When Ballew said no, Stein was quick to point out that the SSIC’s proposal would nevertheless exempt typists. Trapped, Ballew had to backtrack, conceding that “while we had suggested no salary limit, I think in order to curb certain practices and certain activities which we are all bound to admit do obtain in some quarters, it might be necessary that a provision of that kind be enacted.”

To be sure, the sum that he then mentioned (“something around $100.00”) as “well above the minimum” was also well below the already existing regulatory salary level of $30 a week. Since Ballew had included paid vacations as an indicator of exempt white-collar status, Stein, mentioning that he had also recently read in the newspaper that General Motors Corporation had announced that it would soon give one week of paid vacation to all employees, including production workers, after one year and two weeks after five years (adding that other companies such as United States Rubber did too), asked whether that practice was “any adequate indication of the propriety of including them within the group of executive or administrative employees....” Again, having painted himself into a corner, Ballew was constrained to admit that such a criterion was insufficient as a distinguishing characteristic, thus undermining the integrity of the Cox-SSIC proposal.

Surprisingly, one of the hearings’ most productive discussions centered on the relatively high-paid Hollywood motion picture industry, in which—as Stein pointed out in teasing Ballew, who had proposed monthly salaries as an absolute criterion for white-collar exemptions—both Greta Garbo and the highest-paid producer were paid on a weekly basis. The Motion Picture Producers and Distributors of America, which had been founded in 1922 to deal with the threat of censorship, was represented by Homer Mitchell, an attorney with the oldest Los Angeles law firm of O’Melveny and Myers, who two years earlier had defended Mackay Radio & Telegraph Company in a U.S. Supreme Court case, from which derives the still crucially important labor relations rule that it is lawful for employers permanently to replace striking employees. The producers’ testimony

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402 "1940 WHD Hearings Transcript" at 20 (July 25).
403 "1940 WHD Hearings Transcript" at 24 (July 25).
404 "1940 WHD Hearings Transcript" at 23 (July 25).
405 "1940 WHD Hearings Transcript" at 24 (July 25).
406 Martindale-Hubbell Law Directory 1: Part II at 98 (72d annual ed. 1940).
was crucial because it was apparently instrumental in persuading Stein to revise the
definition of “professional” employee to provide for the exclusion of non-learned
artists.408

Mitchell reported that of the studios’ annual average of 18,541 employees,
13,153 were covered by the overtime provision of the FLSA, 832 were indisput­
ably exempt, and 4,556 were considered exempt by the employers, but their status
might be disputed. Among this huge number of employees whom the studios
wanted excluded were actors, directors, writers, camera men, chemists, make-up
artists, electrical, mechanical, and sound engineers, musicians, and interior decora­
tors.409 In seeking to ground Congress’s definitions, Mitchell thought it necessary
to “consider the purpose of the Act,” which, he agreed with the SSIC, was “to take
care of labor conditions” in the sense of “the maintenance of a minimum standard
of living....” Joining the widespread employer campaign to limit overtime pay to
minimum wage workers and the minimum wage, he reminded the audience that
“[t]hroughout” the congressional debates, “the emphasis was placed upon the
sweated workers or the little fellow who couldn’t take care of himself.” Against
this background, the movie studios wanted the statutory term “professional”
defined “in such a way that that purpose will be carried out.”410 In particular, they

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408The studios proposed adding a sub-category for those whose work was “largely
original or creative in character and of which the result depends upon the conception,
invention, imagination or genius of the employee....” “1940 WHD Hearings Transcript”
at 56-57 (July 25).

409“1940 WHD Hearings Transcript” at 27-29 (July 25). While the hearings were in
progress the WHD had initiated a study of job classifications in the motion picture
industry, “one of the highest paying industries in America,” to determine which jobs fell
within the excluded white-collar categories. US DOL, WHD, Press Release: Wage-Hour
Study of Hollywood Jobs Announced (R-772, May 12, 1940) (copy furnished by Wirtz
Labor Library, US DOL). The survey began on May 8, 1940 and resulted in a report and
a classification: US DOL, WHD, “An Exemptions Survey of the Motion Picture Industry:
A Report of Eldred M. Cocking, Special Survey Analyst” (Jan. 30, 1941); US DOL,
WHD, Manual of Motion Picture Job Classifications (Feb. 1941). The WHD classified
545 occupations: “The classification scheme furnished the basis for a voluntary industry­
After the employers and unions had objected to 29 of them, the WHD held a hearing from
March 25 to 28, 1941 before the Director of Hearings Branch, Merle Vincent (who was
Stein’s direct supervisor), who issued findings and recommendations on them. US DOL,
WHD, “Findings and Recommendations of the Presiding Officer on the Objections Filed
to the Survey Analyst’s Recommendation of Job Classifications in the Motion Picture
Industry” (May 26, 1941).

410“1940 WHD Hearings Transcript” at 31 (July 25).
were dissatisfied with the existing definition's requirement that the professional employee's work be based on "educational training in a specially organized body of knowledge." Their dissatisfaction was triggered by potential overtime liability regarding such highly paid employees as actors, writers, directors, sketch artists, and film editors, who typically did not undergo formal school training and thus could not meet the definition, whose scope was, in Mitchell's view, arguably limited to theology, law, medicine, and perhaps engineering.411

The movie producers were equally insistent on undoing what they regarded as the WHA's having rendered either "executive" or "administrative" superfluous. Its preference was that the latter be defined to mean "the staff of an executive" and to include "all key people. The staff is a body of assistants who carry into effect the plans of a superintendent or management." Mitchell contended that there was "much basis" for this distinction, including the WHD itself, which he said was an administrative board within the executive department of the federal government. As applied to the movie industry, "administrative people" were under and "a lesser kind of person than the executive." Mitchell, arguing that it was "a well recognized use of the term, particularly under modern conditions," was serendipitously able to cite that morning's newspaper account of the Senate Military Affairs Committee's talking about exempting from the impending draft certain "key workers," including executive branch officers, who were "policy making officials and not those with purely administrative functions." Unimpressed by the lesson in current events—which Mitchell had garbled in the re-telling in the studios' favor—Stein deflated Mitchell's lexicographic balloon by slyly pointing to the messy interwovenness of the two statutory terms: "I rather assume that included in the group of executive officials is the person who bears the title of 'Administrator of the Wage and Hour Division'?" Apparently unprepared for this semantic riposte, the Stanford Law School graduate could summon only a temporizing "Perhaps so," following it up with the evasive: "There's a way of differentiating

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411 "1940 WHD Hearings Transcript" at 31-36 (July 25).
412 "1940 WHD Hearings Transcript" at 39-40 (July 25).
413 Mitchell was quoting from John Norris, "Draft to Skip Men with Dependents," WP, July 25, 1940 (1:5), which nowhere used the term "key workers" in the text but only as an editorially inserted sub-head. Moreover, the article did not attribute the sentence that Mitchell quoted to anyone, merely stating that "it was said." Finally, the Senate Military Affairs Committee had completed its hearings on the draft two weeks earlier and the newspaper quoted its chairman, Senator Sheppard, without indicating where or when he had made the comments. When the committee issued its report 10 days later, it contained no such discussion of the distinction between executive and administrative employees. Compulsory Military Training and Service (S. Rep. No. 2002, 76th Cong., 3d Sess., Aug. 5, 1940).
if you qualify executive officials as being policy making people, executives, and administrative people those lesser people, excluding the policy-making people.414

But since Congress had empowered the Wage and Hour Administrator to formulate the very definition and policy that Mitchell’s client was petitioning him to revise, Mitchell failed to deal with the problem for statutory construction of the undeniably considerable overlap between the two terms in everyday usage.

After vainly trying to compensate for this faux pas by administering an irrelevant mini-Latin lesson to Stein (the former Latin teacher), Mitchell proceeded to enumerate and illustrate the many non-boss employees whom the studios wanted classified as administrative. These “key people” were “not workers in the ordinary sense of the word at all, labor workers I mean or white-collar low-paid workers....”415 One sub-category consisted of “first lieutenants”—those whose primary duty was regularly and directly assisting an executive or administrative employee and customarily and regularly exercised discretion and independent judgment and whose weekly salaries ranged between $50 and $500.416 The other sub-category of non-managers executed “special assignments” requiring discretion and judgment, but their manner of performance was not supervised. This heterogeneous group, including location auditors and outside buyers, was paid $74 to $104 a week.417 However, “the most important” sub-category, the one that was peculiar to the movie industry and “exceedingly necessary for us to have exempted,” was the “key employees on the shooting group...that must stay with the troop from the time it starts in the morning until the time it stops at night.”418 These workers, who ranged from script girl at $58 to first camera man at $348, and also included hairdressers and make-up artists, worked six days a week and as many as 60 hours; it was allegedly impossible to interrupt the shooting troop’s work, which could not be stopped after eight or 40 hours, but had to be finished regardless of how long it took, inter alia, because space limitations required sets to be dismantled prompt-

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414“1940 WHD Hearings Transcript” at 40 (July 25).

415“1940 WHD Hearings Transcript” at 42-43 (July 25). Although the studios focused on getting excluded “key people, responsible people, who don’t direct other employees, unless you call direction of his secretary as being the direction of others,” ironically it also proposed as a subgroup of administrative employees those “whose primary duty is to manage, direct, or superintend any group of employees,” thus eliminating the requirement of management of an establishment or a customarily recognized department thereof. Id. at 42, 47.

416“1940 WHD Hearings Transcript” at 47-50 (July 25).

417“1940 WHD Hearings Transcript” at 50-52 (July 25). These sums were merely those mentioned by Mitchell and did not necessarily encompass the full range.

418“1940 WHD Hearings Transcript” at 52 (July 25).
ly. Mitchell claimed that it was “simply impractical” in the middle of a scene to replace any of these workers, who in any event knew that their job meant “long hours and pay commensurate with those long hours.” Interestingly, however, the employers did not ask to exempt non-key people in the shooting troop, whose much lower pay gave rise to much lower overtime liability.\textsuperscript{419}

The sense that only money was at stake, after all, was reinforced by Mitchell’s comments about $96-a-week executive secretaries: “When we pay people that kind of pay, we do it because they earn that pay; we don’t feel they are subject to the Act. They have really got to stay with the important people and perform their important duties. It would be a hardship to treat them as an ordinary worker. I don’t think Congress intended to require us to treat $96.00-a-week persons who exercise discretion as 40-hour-a-week people.”\textsuperscript{420} If not monetary, the “hardship” could apparently only have been ideological: Mitchell did not know why the more than 5,000 employees the studios wanted excluded from overtime pay were “an awfully large number” since the FLSA was intended to bargain for the non-organized little people who could not bargain for themselves. To be sure, he was constrained to admit that “the language used in the Act exceeds that scope, but that is the thought which Congress had in mind as evidenced by the debates and reports....”\textsuperscript{421} When Joseph Padway—who was representing the Teamsters, but had

\textsuperscript{419}“1940 WHD Hearings Transcript” at 53-59 (quotes at 55, 57) (July 25). At the end of his prepared remarks, Mitchell revealed that the studios were also eager to broaden the administrative shooting troop sub-category to encompass manual workers: “If that wage qualification could be sufficiently high so that these people who are obviously responsible people, carrying out the will of the executive in something more than the way of the ordinary worker, whether they be white-collar or not white-collar worker, these key responsible people could be exempt.” \textit{Id.} at 60. Mitchell appeared to be using the term “key-men” differently than the Motion Picture Industry Code of Fair Competition, where it was synonymous with “stand-by.” The code excluded from the 40-hour week “employees engaged directly in production work whose working time must necessarily follow that of a production unit, including art directors; assistant directors; cameramen and assistants; company wardrobe men (women) and assistants; costume designers; draftsmen; make-up artists and hairdressers; optical experts; positive cutters and assistants; process projectionists; script clerks; set dressers; ‘stand-by’ or ‘key-men’; sound mixers; sound recorders; wardrobe fitters....” Those among these employees who were employed on an hourly or daily basis with overtime pay “shall at the conclusion of any single production be given a full day off without pay for each...6...hours of work in excess of a...3 6...hour weekly average during the production.” Code No. 124: Motion Picture Industry (Nov. 27, 1933), Art. IV, § 1(d)(2) and (e)(1), in NRA, \textit{Codes of Fair Competition}, 3:215-257, at 224-25 (1934).

\textsuperscript{420}“1940 WHD Hearings Transcript” at 66 (July 25).

\textsuperscript{421}“1940 WHD Hearings Transcript” at 76-77 (July 25).
long been a nationally important figure in labor law and was the AFL’s chief legal counsel—followed up by asking Mitchell whether Congress intended to eliminate excessive hours by placing a limit on them and eliminate unemployment by making it worthwhile for employers to employ more people rather than paying overtime, Mitchell denied it with respect to professional employees (including make-up artists) and “parts of the management key people....” Whether he was a self-deluded advocate or merely bluffing, he declared in the teeth of a totally barren legislative history: “Congress didn’t intend, I am quite sure by reading the debates, ever to include those people under the Act at all.”

Unwilling to let Mitchell evade the fundamental question, Stein enveloped it in a long preamble and then put it to him bluntly:

Fairly consistently throughout these hearings it has been urged that maximum hours limitations are unsuitable for a large group of higher paid workers whose work is said to be of an administrative nature because they are supposed to do a job and not worry about hours, and the Company is anxious to have them work along when a job happens to open up before them and they happen to have creative ideas about their work and in thinking about the future of the employer, and at other times when the work is light they correspondingly are excused from putting in full time. It is urged that with these workers, the workers themselves in many instances prefer not to have to worry about whether 40 hours has been completed or not. It is urged that they do better work if they can forget that consideration entirely and that, as a matter of fact, payment of overtime tends to make them do worse work, not better. I wonder if the same consideration would apply...to such people as the [$123 a week] second cameraman. Do you think his work would fall off in quality if he were paid overtime for hours above 40?

Cornered, Mitchell had to admit that the only problem was the additional cost: “It is a question of whether Congress intended to put a penalty on us when we employ a key person like that. Of course, it is possible to pay everybody overtime, I suppose, but if you are going to draw a line somewhere, as you are and must under the Act, it seems to me a reasonable place to draw it would be as between workers and administrative or key people.”

422 The British-born Padway had been a Progressive and a Socialist in Wisconsin, where he had also served as a state senator; he was the AFL’s general counsel from 1938 until his death in 1947. http://www.uwm.edu/Library/arch/findaids/mss006.htm. On being informed that Hollywood writers’ average wage was over $500 a week, Padway joked that “I might take up writing.” “1940 WHD Hearings Transcript” at 79 (July 25).

423 “1940 WHD Hearings Transcript” at 79-80 (July 25).

424 “1940 WHD Hearings Transcript” at 83 (July 25).

425 “1940 WHD Hearings Transcript” at 83-84 (July 25).
being unable to explain to Stein what exactly “key” meant and eventually Stein dismissed the whole request for the incoherent key group exclusion, which boiled down to the studios’ demand to be entitled to buy their way out of hours regulation without having to pay for overtime: “[I]f we are willing to pay people big wages for work that we regard as warranting those big wages and being work of an essential nature. There are projects where we feel that a limitation on hours is impractical.”

Following this tour of the Hollywood movie industry, Stein was introduced to a wholly different world-view by the testimony of the Federation of Architects, Engineers, Chemists and Technicians, which at the time claimed a dues-paying membership of 8,000 in addition to 7,000 others who regarded the FAECT as its bargaining agency. This radical left-wing union, a forerunner of which had been expelled from the AFL, was formed in 1933 and affiliated in 1937 with the CIO, which enabled it to organize technical workers across industry in cooperation with the CIO’s industrial unions.

After reporting that the annual earnings of technical workers in the publication and other industries under study at this set of hearings ranged between $1,400 and $4,500, with 70 percent earning an average of $1,800, and that their job tenure was no more secure than that of other production workers, Morris Zeitlin, an architect and chairman of the FAECT legislative committee, bluntly expressed the union’s disapproval to the WHD for having called the hearings without sufficient cause. After all, employers, which had failed to show that the law had imposed any undue hardship on them, had proposed redefinitions in an effort “arbitrarily” to exclude hundreds of thousands of technical and other workers. This “convenient method of emasculating the Act...by mere administrative interpretation” was, the FAECT charged a tad melodramatically, “contrary to the principles of a democratic government.” Although it was employers’ “privilege” to lobby Congress to amend the law, they had already tried and failed to do so: even the 76th Congress, which was “predominantly conservative in its attitude to labor, had, in refusing to pass the

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427a 1940 WHD Hearings Transcript” at 86 (July 25).
428a 1940 WHD Hearings Transcript” at 141 (July 25) (Charles Duke, International Executive Board, FAECT).
430a 1940 WHD Hearings Transcript” at 144 (July 25).
Barden and Norton amendments, which would have excluded various categories of workers, "reaffirmed the original intent" of the FLSA. This clear political failure in the legislature had made it even more the case that employers had "no business" trying to change the spirit of the law administratively.431

Echoing the claim made by CIO president John L. Lewis on July 15 that the WHA's apparent intention was to grant exemptions to employers which Congress had recently defeated, thus depriving them of any justification,432 and adding the accusation of collusion, Zeitlin demanded an "unequivocal" explanation from the WHD as to whether the construction magazine *Engineering News-Record* had received information from the agency enabling it to state just a week earlier that the FLSA amendments had been understood to have been dropped on the understanding that the law's administration would be modified. Absent a denial, the WHD could not "avoid the charge of partiality and...of deliberately using a government agency for the purpose of devising legal means whereby employers may secure evasion of those specific legislative enactments which" the WHD was "pledged to uphold and enforce...."433 Apparently more amused (or mellow) than he had been in April, when he had sharply rebuked Lewis Merritt of the UOPWA for having launched a related attack, Stein waited until Zeitlin had completed his testimony before engaging in an act of Christian humility by loving his enemy: "Not for the first time today I shall refrain from commenting on the alleged crimes and misdemeanors of the Wage and Hour Division. I merely turn my left cheek."434

Turning to the substance of his thesis, Zeitlin called attention to the disparate dictionary definitions of "professional," running the gamut from a lawyer, physician, architect, engineer, or dentist in private practice, to the antonym of "amateur," to any vocation including street-cleaning and juggling. He was, therefore, not meting out special criticism to employers by observing that their proposed definitions "cannot be but arbitrary one-sided, and totally devoid of any virtues of absolute definition." It was not any nefarious political goals that generated this characteristic. On the contrary: "any definition of the term "professional"...must

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431"1940 WHD Hearings Transcript" at 145-46 (July 25). The Communist Party newspaper reported FAECT vice president Marcel Scherer as having made exactly the same charges in a letter to WHA Fleming the previous day. "Technicians Hit Move of Pay-Hour Administrator," *DW*, July 25, 1940 (3:4-5).

432"1940 WHD Hearings Transcript" at 154 (July 25). For the text of Lewis's letter calling on all CIO unions to fight the regulatory revisions, see "Guard Against Moves to Scuttle Wage Act--Lewis," *DW*, July 27, 1940 (5:6-8).

433"1940 WHD Hearings Transcript" at 147 (July 25).

434"1940 WHD Hearings Transcript" at 155 (July 25).
be necessarily arbitrary, for there is no absolute definition of this term.” Moreover, the union acknowledged that the WHD itself “was and had to be arbitrary when it defined the term ‘bona fide professional’ in the absence of such definition by the Congress in the Act itself.” The only limitation on such interpretive arbitrariness that the FAECT could discern was the necessity of being “guided by the spirit of the Law itself in order not to be abstract or academic.”

Oddly, however, instead of illuminating the FLSA’s spirit—a difficult task in the light of the barren legislative history—the FAECT had recourse to a totally different statute that Congress had happened to enact a month before the hearing. Taking its cue from this Act to Expedite Naval Shipbuilding, the union contended that the WHD “must be guided by the distinction made by Congress recently between the term ‘professional’ and the term ‘bona fide professional’” in the FLSA. In particular, Zeitlin pointed out that the new law conditioned the employment of “professional and sub-professional employees” beyond eight hours a day or 40 a week on the payment of time and a half. Those terms, in turn, were taken from the Classification Act of 1923 (governing federal civil service employees), under which Congress designated as engaged in the professional and scientific service those classes, with salaries extending from $1,860 to $6,000, whose duties ranged from “the routine application of scientific principles to supervision of large technical projects.” The sub-professional group was yet “another example of arbitrary definition” lacking a “clear line of demarcation” because the duties and salaries of its upper grades overlapped with those of professionals’ lower grades. Regardless of this definitional arbitrariness, the FAECT drew the conclusion that if government employees were entitled to overtime pay, so should workers in private industry, “where the working conditions, security, wages and hours of the so-called ‘professionals’ are a great deal below the government’s standards.” Conveniently, Zeitlin suppressed the crucial fact—of which he could not have been unaware since unions were vigorously lobbying against it and he himself had just attended the FAECT national convention in June, which adopted a resolution on the matter—that Congress had granted govern-

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435"1940 WHD Hearings Transcript” at 148-49 (July 25).
436See above ch. 9.
437For a full discussion of the law, see below ch. 19.
438"1940 WHD Hearings Transcript” at 149-51 (July 25). Zeitlin erroneously used the salaries from the 1923 act, which had been superseded by amended enactments in 1928 and 1930, raising the lowest professional-grade salary to $2,000; similarly, the salary of the highest grade amounted to $9,000.
439The resolution demanded that all overtime work in government service be paid at “one and one half times the actual annual wage (which for annual employees is defined to
ment workers an inferior overtime regulation by calculating their time and a half on the basis of a daily wage depressed by the fiction that they worked 360 days a year.440

The union’s use of the naval shipbuilding law as a model for the FLSA was ironic since the former’s chief sponsor and House floor manager had identified it as patterned after the FLSA.441 Undeterred by this circularity, Zeitlin made the empirically unfounded and incoherent argument that in using the term “bona fide professional,” Congress had gone “out of its way to demonstrate that...it did not mean to use it as it is commonly and variously accepted.” If Zeitlin meant the 75th Congress that enacted the FLSA in 1937-38, the legislative history definitively revealed that if Congress went out of its way to do anything, it was to leave not the slightest trace of what it intended; if he meant the then sitting 76th Congress that passed the naval shipbuilding act, the legislative history at best suggested that Congress thought it was emulating, not surpassing, the FLSA. Untroubled by these facts, Zeitlin asserted that Congress had “definitely made a distinction between the two terms in that what it called ‘professional employees’ in the Classification Act of 1923 it granted an 8-hour day, 40-hour week and overtime pay...,” but it exempted ‘bona fide professional’ employees....” From this entirely contrived point of departure, the FAECT concluded that the WHD should interpret “bona fide professional” employees “as professionals other than those listed in the categories of ‘professional and scientific service’ in the Classification Act...when Congress chose to grant benefits similar” to those under the FLSA.442

Curiously, when Zeitlin finally proposed an interpretation of the scope of Congress’s exempt “bona fide professional employees,” he chose a definition more suitable to self-employeds rather than employees, virtually all of whom would therefore have been entitled to overtime coverage. It included anyone employed: (1) in a consulting capacity on fee as opposed to a wage or salary basis; (2) as “a

be the annual wage divided by 52x40 hours)...” Federation of Architects-Engineers-Chemists & Technicians-CIO, Proceedings 5th National Convention: Appendix ‘D’: Complete Resolutions Adopted at Fifth National Convention FAECT, Resolution #13 (May 31-June 2, 1940)

440See below ch. 19.

441See below ch. 19. Zeitlin also introduced a resolution adopted on July 21 by the FAECT’s National Conference of Civil Service Division declaring that since the naval law provided time-and-a-half pay for professional and sub-professional employees, “thus recognizing the principle of maximum hours and overtime pay for technical workers,” the WHA should maintain the existing FLSA interpretation so as to include already covered technical employees. “1940 WHD Hearings Transcript” at 165 (July 25).

442“1940 WHD Hearings Transcript” at 152-53 (July 25).
specialist engaged on a contract basis for the execution of a specific technical project...as distinguished from one...hired as one of a regular staff to carry on day to day technical work; (3) [[under no supervision by the employer or client as opposed to general supervision or instruction by employer or his agent.]]

Surprisingly, despite this radical proposal, the torrent of political criticism that Zeitlin had directed at the WHD, and the lengthy discussion of the problems associated with even politically neutral, but inevitably and inherently arbitrary definitions, he disclosed that the existing definition of "professional" did not exclude any member of or anyone eligible for membership in the FAECT. Consequently, because the definition "lives up to the spirit" of the FLSA by not "discriminat[ing] against the overwhelming majority of wage earners in our occupations," the union supported and opposed any "tinkering" with it.

Zeitlin then closed his remarks with what was perhaps the hearings' most far-reaching plea for extension of coverage—apart from his aforementioned definition excluding only the self-employed—although even he implicitly drew the limit at wages above those of skilled workers:

"If amendments are to be made they should be directed toward inclusion of more skilled and higher salaried employees. For they too are wage earners and subject to all the abuses, insecurity, long hours and unemployment as are all other wage earners, and although their hourly or weekly rates may be higher and their talents, knowledge and skill place them in supervisory positions, under general administrative instruction, their annual earnings do not exceed that of the average skilled worker. We maintain that talent, ingenuity and skill of the workers in the technical fields must not be penalized by the arbitrary wishes of the employers and their organizations to whom the expense of technical and professional labor is a mere drop in the bucket compared with their general production costs, especially since the profits derived from the labor of these men far exceeds the compensation and treatment employees themselves receive."

In terms of intellectual integrity, the hearings arguably descended to their lowest point the following day, July 26, when Carl Ackerman, the dean of the

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443"1940 WHD Hearings Transcript" at 152 (July 25). Unfortunately, Zeitlin neglected to indicate whether the three sub-parts were disjunctive or conjunctive.

444"1940 WHD Hearings Transcript" at 153 (July 25).

445"1940 WHD Hearings Transcript" at 153 (July 25).

446Unsurprisingly, the press covered this hearing more extensively than the others; the following pieces were typical in their uncritical reporting of publishers' outlandish testimony: "Publishers Seek Wage Act Test," *JC*, July 27, 1940 (5:2); "Rate Journalism as a Profession," *NYT*, July 27, 1940 (7:5); "Ackerman Warns of Control," *NYT*, July 27, 1940 (7:5); "Profession' Class Urged for Press," *WP*, July 27, 1940 (3:1). But see "Wage Hour
Columbia Journalism School, secretary of the advisory board administering the Pulitzer Prize, former public relations business owner, former assistant to the president of General Motors, the foremost journalism educator of his day, and a leading opponent of the subjection of the newspaper industry to the NIRA, \(^{447}\) testified that a narrow interpretation of the regulatory definition of "professional" employee might endanger the development and advancement of the profession of journalism—which he characterized as "the chief agency of our present civilization for the advancement of human relations"—and thereby affect the independent public service of the press. \(^{448}\) Indeed, he went so far as to assert that administration of the FLSA might even "possibly destroy the profession of journalism as an intellectual pursuit of free men and women. By a narrow and rigid interpretation and administration the federal government may bring such pressure to bear upon publishers and editors as to prevent the press from performing one of its most essential public services, namely, the exposing of corruption in government." \(^{449}\)

Because, according to Ackerman, the federal government had had "nothing whatsoever to do with the development of the profession of journalism" since the ratification of the first ten amendments to the constitution, the WHD's regulation governing the status of professional employees under the FLSA marked "the intrusion of the government in the field of liberty inasmuch as the government...seeks to define the status of journalists in such a way as to deny them professional standing." \(^{450}\) Instead of explaining the basis for this curious claim of unprecedentedness despite the fact that precisely the same struggle had raged under the NRA, \(^{451}\) the former vice president of the Institute of American Business \(^{452}\) proceeded to disembodied the profession of journalism of its subordination to profit-making firms and to reduce it to "community service." Having shorn reporters of their capitalist employers, Ackerman set out to preserve them from state serfdom and communities from being "enslaved by corrupt officials" \(^{453}\):

Law Meaning Debated," *GR*, Aug. 1, 1940 (3:1-5). As part of a broad legal strategy, the next day a newspaper publisher filed suit to test the application of the FLSA to newspaper employees, alleging that regulation of wages and hours was not within Congress's power. "Newspaper Starts Test of Wages, Hours Measure," *JC*, July 28, 1940 (5:7):  

\(^{447}\) "1940 WHD Hearings Transcript" at 168-70 (July 26); Albin Krebs, "Carl W. Ackerman, Columbia Dean, Dies at 80," *NYT*, Oct. 19, 1971 (25:1-3).  
\(^{448}\) "1940 WHD Hearings Transcript" at 169, 170 (July 26).  
\(^{449}\) "1940 WHD Hearings Transcript" at 172-73 (July 26).  
\(^{450}\) "1940 WHD Hearings Transcript" at 179 (July 26).  
\(^{451}\) See above ch. 7.  
\(^{453}\) "1940 WHD Hearings Transcript" at 181 (July 26).  

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In order to safeguard the community services of journalism the Wage and Hour Act must recognize community conditions, otherwise the journalist will become, in effect, an agent of the federal government, subject to control or possible intimidation. For example, there are many communities in the United States where reporters and editors are literally employed at all hours. They may actually work in an office 8 hours each day but as they walk or ride home they meet citizens with news or they become observers of news events. Like the local physician they are always on the job and their work is essential to the community public service.454

After having listened to much more of these fanciful encomia and panegyrics, even Stein lost his patience, if not his civility, and finally asked Ackerman whether “you could spell out a little more precisely the way in which you feel that an improper definition in Section 541.2 of our regulations might affect that very necessary activity [“exposing corruption in government”] on the part of the press.”455 Ackerman—who had earlier shed some indirect light on his poorly hidden agenda of saving publishers from being required to pay time and a half by asserting that “[i]n journalism, as in medicine, the public service must be superior to the economic rewards accompanying such a service”456—had an answer ready to hand: “[I]f the newspapers are, in any way, restricted at the time of an expose in the utilization of their men on assignments, it seems to me that it may interfere with their gathering of evidence.”457

Without informing Ackerman that the Supreme Court had recently decided in an NLRA case that newspaper publishers enjoyed “no special immunity from the application of general laws” and were, like others, required to “pay equitable and nondiscriminatory taxes” on their businesses,458 Stein asked the dean to “take it for a moment from the standpoint of the man himself. Do you feel that it interferes with his efficiency or his zeal in uncovering corruption to be paid for all the hours

454 “1940 WHD Hearings Transcript” at 180 (July 26).
455 “1940 WHD Hearings Transcript” at 185 (July 26). The phrase quoted in square brackets appeared on the previous page.
456 “1940 WHD Hearings Transcript” at 181 (July 26).
457 “1940 WHD Hearings Transcript” at 185-86 (July 26).
458 Associated Press v NLRB, 301 US 103, 132-33 (Apr. 12, 1937). The Supreme Court there rejected the claim that the NLRB’s interference with firing a Guild activist interfered with freedom of press. After failing to persuade the WHA that applying the FLSA to newspaper workers was a violation of their First Amendment free-speech rights, publishers unsuccessfully launched the same attack in court. “Says Wage Law Rule Can Curb Free Press,” NYT, Oct. 29, 1940 (51:2); Lowell Sun Co. v. Fleming, 36 F. Supp. 320, 327 (D. Mass. Nov. 22, 1940), vacated on other grounds, 120 F.2d 223 (1st Cir., June 6, 1941), aff’d, sub nom. Holland v. Lowell Sun Co., 315 US 784 (Mar. 2, 1942).
The only change we propose, and I understand the deans of these schools of journalism agree to it, is the elimination of that right that a professional man shall do the most substantial amount of work similar to that performed by a non-exempt employee. You have never defined the words 'no substantial amount of work' in any way that anybody can make any sense out of in our business. Now, then, a newspaper man, according to our view, can no more pick the time of a story when it breaks than a doctor can pick the time when a baby is going to be born, or a lawyer pick the time when his client gets in trouble; and that is the point that I say I think your question is unfair whether they are paid overtime or what have you.459

Presumably unable to grasp the meaning of Hanson's incoherent first sentence or the relevance of the speech as a whole to the question he had put to Ackerman, Stein repeated his request that Ackerman answer his original question if it was not unfair.460 Instead, the dean, who purported to fear that the WHD's definition of "professional" would interfere with journalism educators' freedom to develop their own curriculum,461 obediently deferred to the publishers' lawyer: "Well, I am willing to accept the answer which Mr. Hanson has given." To document his dissatisfaction with this orchestrated non-responsiveness, Stein expressed his puzzlement and asked the court reporter to read back his question and Hanson's answer.462

Ackerman's choreographed testimony in support of newspaper publishers' efforts to evade employers' new obligation to pay time and a half for overtime work was supplemented by that of the deans of two other leading journalism schools, Kenneth Olson of Northwestern University and Frank Martin of the University of Missouri, who appeared on behalf of the American Association of Schools and Departments of Journalism. The extremes to which the deans were willing to go to accommodate the demands of the principal customers for the schools' final products was embarrassingly on display in the contention of the

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459 "1940 WHD Hearings Transcript" at 186-87 (July 26).
460 "1940 WHD Hearings Transcript" at 187 (July 26).
461 "1940 WHD Hearings Transcript" at 188 (July 26).
462 "1940 WHD Hearings Transcript" at 187 (July 26).
that the work their graduates do as reporters, copyreaders, rewrite men, advertising solicitors, even before they rise to executive positions is professional in character and that the professional classification therefore attaches to all engaged in similar work even though they may not have graduated from professional schools of journalism.

In this contention they are supported by the knowledge that many men now practicing law have not been graduated from law schools but have learned their law in law offices and that in the earlier days, before medical schools were as well developed as they are now, men could become doctors by understudying a local doctor.

This contention is further supported by the knowledge that journalistic work, especially newspaper work is in itself an education.

To prove that the work met the regulatory requirement that it be varied rather than routine manual work, the deans’ report did not shy away from the claim that an assignment to the labor beat or city hall was a “specialization” that “after all is no different from that of the lawyer who specializes in Corporation law or Tax Law or Criminal Law.” No matter how lowly the assignment, the reporter remained a professional. Thus when Stein asked whether selling subscriptions was employment in a professional capacity, Olson replied that it was like “[s]ome of our internes in the smaller hospitals hav[ing] to scrub floors.” After having heard these “learned discourses” of the deans, the Hearst Corporation’s representative decided that “it would be gilding the lily for me to amplify on their statements” and chose not to testify.

After the deans had left the stage, their choreographer, New Deal foe Elisha Hanson, counsel to the American Newspaper Publishers Association and also representing other publishers associations accounting for practically all of the more than 2000 daily and Sunday newspapers papers, finally testified. To document how much newspaper publishers had at stake in the outcome of the white-collar overtime regulation revisions, Hanson cited data from the 1937 Census of Manu-

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463 "1940 WHD Hearings Transcript" at 201-202 (July 26).
464 "1940 WHD Hearings Transcript" at 203 (July 26).
465 "1940 WHD Hearings Transcript" at 222 (July 26).
466 "1940 WHD Hearings Transcript" at 352 (July 26) (Thomas Brennen).
467 For a sense of Hanson’s hostility to the New Deal, see Elisha Hanson, “Official Propaganda and the New Deal,” AAAPSS 179:176-86 (May 1935).
468 "1940 WHD Hearings Transcript" at 273-74 (July 26). The previous day, the National Editorial Association, representing small-town newspapers, had urged adoption of the ANPA proposals, which would have exempt the whole editorial and reportorial staff. Id. at 138, 140-1 (July 25) (William Daley).

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factures showing that the newspaper and periodical publishing and printing indus-
tries employed 142,639 salaried employees and paid them $273,635,371—both being the highest figures of any industry and larger than those for the industry’s wage workers.469

Making use of his well-honed sense of theatrics, Hanson complained that WHA Andrews had broken a promise he had given Hanson on October 3, 1938 “to administer the Act so as not to interfere with business in its orderly and regular procedure” by virtue of the WHD’s “attempt at universal application of overtime provisions of the law to practically all employees whether or not covered by the law....”470 Continuing in this caricatural vein, he charged that, under the regulations issued, interpreted, and administered by the WHD, “practically no one in the daily newspaper publishing field, except in a few cases a publisher, a general manager, or an editor of a newspaper, may be exempt....”471 Hanson was also able to furnish an innovative basis for employers’ criticism of the WHA’s having “lumped administrative employees into its definition of executive employees.” Turning on its head the traditional canon of construction of labor-protective statutes and associating publishers with employers’ strategy for attacking the overtime provision in general, Hanson insisted that: “The exemption in Section 13 (a) (1) should be construed and applied liberally...in order to be in harmony with the plain purpose and spirit of the Act which is designed to protect low wage groups.” Finally abandoning theatrics for a plausible (albeit unsupported) argument, Hanson contended that Congress had had in mind “the well established distinction between” the executive, who “occupies a position of authority and formulates policies,” and an “administrator,” who “supervises the carrying out of the policies of the executive as they are laid down.”472

469“1940 WHD Hearings Transcript” at 280-81 (July 26).
470“1940 WHD Hearings Transcript” at 293 (July 26). On this alleged promise, see above ch. 9.
471“1940 WHD Hearings Transcript” at 296 (July 26).
472“1940 WHD Hearings Transcript” at 297 (July 26). Hanson offered only ex post facto support for this distinction in the form of a comment two days earlier by the chairman of the Military Affairs Committee in connection with an exemption from a compulsory draft bill for federal executive officers but not administrative employees, distinguishing between policy-making executive officers and administrative officers who were delegated the function of supervising the carrying out of the former’s policies. Id. at 298. Although the House Military Affairs Committee did hold a hearing on July 24, 1940 to discuss Representative Wadsworth’s selective compulsory military service bill, neither committee chairman Andrew May nor anyone else made such a comment that day. Moreover, the bill exempted only cabinet officers. Selective Compulsory Military Training and Service: Hearings Before the Committee on Military Affairs of the House of Representatives on
Without identifying it as such, Hanson reinforced employer support for the NAM's proposed redefinition of "administrative" employees by offering virtually the same three-part disjunctive duties test that the NAM had submitted almost two months earlier—with the single exception that Hanson reduced the salary threshold from $30 to $25.473 Hanson also stated that "utmost confusion" prevailed as to the legal status of more than 16,000 executive or administrative employees on daily newspapers.474

After having listened to Hanson's tirades about "this fantastic legislation and its even more fantastic administration,"475 Stein confessed that "you have stirred up all my oratorical passions, and make me want to give a speech, but I think I will restrain myself."476 Feeling no such restraint, Hanson proceeded to disclose publishing capital's plan to teach workers and the state a lesson about encroaching on its profits in what it regarded as a zero-sum game:

I can tell you what will come if there are any demands for overtime. If they have to apply this law strictly,...any of the privileges that the employees of that newspaper have had over a period of years are going to be taken away. For instance, they have all had rest periods in every department of the newspaper.... They have never had to punch a time clock when they go out on the corner to get a Coco[sic]-Cola or a package of cigarettes or when a girl goes out to talk to her boy friend or talks to him on the telephone. Those privileges have been abused just as they were abused in your departments in the past but the public hasn't done anything about them. Now, if this law is going to be literally applied to that newspaper, the time clocks are going in and he will soon notify the employees that all of those privileges are going to be taken out. ... The person who is five or ten minutes late is...
None of the unionists' "oratorical passions" having been sufficiently stirred by publishers' threatened retaliation, no one responded to Stein's invitation to question Hanson and the hearing was recessed until the next day.

At a short hearing on Saturday, July 27, representatives of several disparate industries testified on the executive-administrative definition. Alexander Maxwell, an electrical engineer at the Edison Electric Institute, which was founded in 1933 to refurbish the public image of private utility companies in the wake of the looting of operating by holding companies most prominently linked to the magnate Samuel Insull and represented most of the industry, proposed a distinctively capacious redefinition of "administrative employee" embracing any employee whose work involved a "responsible assignment for management requiring the exercise of independent judgment and discretion," who was paid at least $30 weekly, and (1) who was part of an executive's immediate staff and whose hours of work therefore depended on his hours; or (2) whose principal duty was direction and supervision of other employees, including the assignment of their individual tasks and of the beginning and quitting times on those tasks; or (3) whose duties were such that direct supervision over or regulation of the time or manner of performance or hours of work was impracticable.

The first sub-category was reminiscent of the broad exclusion of executives' assistants requested and secured by Alfred Sloan from the Black-Connery 30-hour bill in 1933. The second sub-category was clearly designed to exclude supervisors whose sphere of control extended only to individual workers rather than to departments. The third was so capacious it could also apply to blue-collar workers. Without disclosing the factual basis for the claim, Maxwell asserted that the proposal applied to employees who did not perform the kind of work that the FLSA was intended to regulate. Repeating a venerable claim of employers about overtime work and pay, he alleged that the assistants and secretaries on executives' staffs were given compensation and benefits that already took into account "the varying hours which may be imposed" on them by executive office duties.

Assuming, once again without evidence, that any supervisor who controlled others' working hours was also in a position to regulate his own and that, in other words,

477 "1940 WHD Hearings Transcript" at 350-51 (July 26).
478 "A. Maxwell, Aide to Electrical Group," NYT, Feb. 12, 1948 (23:3).
480 "1940 WHD Hearings Transcript" at 387 (July 27).
481 See above ch. 6.
482 "1940 WHD Hearings Transcript" at 388 (July 27).
employers should be FLSA-free to require payless overtime of anyone who could require others to work overtime—a position that Stein’s questioning forced him to abandon—Maxwell asserted without a rationale that such an employee “should not be subject to overtime provisions of the Act.”

For the third sub-category the utility companies had in mind employees such as right of way men, claim agents, safety engineers, rural agents, and district representatives, who were expected to provide prescribed results without supervision and, if they performed satisfactorily, management was not concerned with how, when, or where. The utility companies’ overreaching was nicely captured by their own job description of the rural or district representative as being the one employee assigned to “furnishing all of the usual services expected by a group” of 500 domestic and rural customers, including meter reading and bill collecting, which non-exempt work typically occupied 25 to 40 percent of his time, and being on call day or night for service work. The employers then self-regardingly concluded that “this occupation should be exempted because of the difficulty of controlling the hours of work both on the part of the individual and by management.” Why a worker who had already suffered the misfortune of working unlimited hours (perhaps because the employer was unwilling to hire a second worker to share the work load) should, in addition, not be paid for those hours, not because they could not be counted and recorded, but because the employer purportedly could not predict them from week to week or exert direct supervisory controls to limit them or insure that the worker had recorded the hours accurately, was not a question within Maxwell’s cognitive framework. Whereas the utility companies tried to place such workers beyond the pale by likening them to outside salesmen, the International Brotherhood of Electrical Workers described most of them in rural areas as “just simply a glorified service man,” over whom the company had “pretty close super-

483“1940 WHD Hearings Transcript” at 398 (July 27).
484When Stein asked him whether it was possible that in some companies authority to authorize overtime work was delegated to someone who otherwise had no managerial function, Maxwell replied that he presumed that the WHD would guard against that possibility. Following up, a skeptical Stein rhetorically asked: “In other words, if that is the sole attribute of management, it would hardly seem adequate in and of itself to make a person eligible for exemption?” Maxwell’s response was obscure: “I think further definition is rather contemplated by anyone who is talking about it.” “1940 WHD Hearings Transcript” at 402 (July 27).
485“1940 WHD Hearings Transcript” at 388 (July 27).
486“1940 WHD Hearings Transcript” at 389 (July 27).
487“1940 WHD Hearings Transcript” at 395-96 (July 27).
488“1940 WHD Hearings Transcript” at 389 (July 27).
vision...after all.”

After having proposed a mélange of exceptionally broad exclusions implausibly grouped under the rubric “administrative,” Maxwell generously averred that the utility companies were not urging that the regulations be “so broadened as to open the way for exemption of all workers who may benefit in some manner from the law,” adding that “the limitations contained in these suggested amendments assure this.” Without the slightest nod at statistics, he asserted that the changes “affect comparatively few employees”; likewise, without any reference whatsoever to the legislative history, he offered the wholly unsupported claim that they “preserve the spirit of the law as we interpret the desires of those who enacted it.” In keeping, presumably, with the utility companies’ post-Insull public relations aspirations, Maxwell promised that they “quite seriously want to have an authentic kind of compliance” with the FLSA, which extended to the incongruously pious affirmation that “[w]e have tried to keep firmly in mind...the difficulty which the Administrator must obviously be under of not letting too many ‘pigs under the gate’ and our proposals represent an attempt to do that.”

Yet another broad multi-pronged exclusion of administrative employees was proposed by the Mid-Continent Oil and Gas Association, whose general secretary, Clarel Mapes, opened this segment of his testimony by observing, plausibly enough, that an executive was “usually...a person who has the greatest responsibility for the success or failure of a business organization or...department...and is usually accountable only to the Board of Directors and the stockholders....” This rather lofty status may well have captured an important dimension of corporate executives’ functions, although it was so restrictive that would clearly have left outside its scope the vast majority of so-called executive employees who could have satisfied the WHD’s definition. In contrast, an administrative employee, who was not in direct contact with the directors of stockholders and bore “a somewhat lesser responsibility” for the business’s success or failure, principally carried out the executives’ policies “through supervising and directing other employees.” Mapes insisted that these demarcation lines were not only “very well drawn,” but were also realized by “[a]lmost every form of modern day business in the

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489 1940 WHD Hearings Transcript” at 483, 484 (July 29) (Lawson Wimberly).
490 1940 WHD Hearings Transcript” at 391-92 (July 27). Maxwell admitted that the distinction between “administrative” and “executive” was “not particularly important, for our purposes at least”: what the utility companies were “really talking about were the functions of management; and it did not particularly matter whether they were called executive or...administrative....” Id. at 393.
491 1940 WHD Hearings Transcript” at 400 (July 27).
organization of their companies and business....

Curiously, however, Mapes failed to adhere to these guidelines in his proposed administrative redefinition, which was designed to exempt those "managerial employees" who could not "qualify for exemption" under the existing definition," but who were "entitled to be exempt...because" in carrying out the executives' policies and orders they exercised "wide discretion and extensive authority and shoulder[ed] great responsibility." That these job characteristics "entitled" them to be unprotected against long working hours was axiomatic for Mapes, who did not even try to justify the claim. Of the four administrative sub-categories—common to all of which was only a $30 salary—devised by the Oil and Gas Association, two had been proposed by other employers and two were original. The former two included those whose primary duty was to manager, direct, or superintend any group of employees and the immediate, direct, and regular assistants of executive, professional, or administrative employees. The two innovative sub-categories were ambiguous and capacious: one involved those who had the power to bind their employer or had charge of its property or goods, while the other encompassed anyone who was customarily and regularly engaged in work: from which the employer was interested only in the results obtained, which required the consistent exercise of discretion and judgment, and the time required for the output of which could not be foretold. This last sub-category, which in no way was tethered to the Mapes's aforementioned requirement of executing executives' policies, could literally have embraced skilled piece-rate production workers.

At the last hearing on July 29, union representatives had an opportunity to criticize employers' proposals and to rebut their arguments. Lawson Wimberly of the IBEW was one of very few witnesses who took the position that even the existing regulations were "entirely too broad to define and delimit exemption, in accordance with the provisions of the Act." Consequently, "[m]any workers" were "being denied the protection...that rightfully they should receive because their employers...have been able to classify them as executive or administrative employees." To illustrate, Wimberly pointed to electrical utility companies' classification as administrative employees of line foremen (in charge of crews of two or more linemen) who did not manage a department, could not hire or fire, and were often required to do work after regular hours that otherwise non-exempt employees would perform. In order to eliminate the possibility of "twisting and distorting the

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492 "1940 WHD Hearings Transcript" at 413-14 (July 27).
493 "1940 WHD Hearings Transcript" at 418 (July 27).
494 "1940 WHD Hearings Transcript" at 416 (July 27).
true definition of the word administrative," the IBEW proposed a revision of the joint executive-administrative definition that, in addition to raising the salary threshold to $40, specified that the discretionary powers exercised by such workers had to relate to the establishment’s “policies or affairs” (as opposed to the method of performing their work). The point of this new proviso was to insure that an administrative or executive employee was “someone who at least had a voice in what...the policy of the establishment was.” Thus despite the IBEW’s atypical attack on the overly broad scope of the existing regulatory exclusions, the union’s rather modest proposals were designed simply as quick fixes for several very specific abuses and not as an initiative to dismantle the exclusionary regime at large, as evidenced by the alacrity with which Wimberly was willing to classify the next higher-up supervisors, general line foremen (who were apparently not eligible for union membership) as exempt.

In an appearance on behalf of the International Federation of Technical Engineers, Architects, and Draftsmen’s Union—an AFL affiliate, which had combated the FAECT’s militancy—its president, C. L. Rosemund, who had personally sabotaged the FAECT’s effort to merge with his union because of its “subversive connections,” underscored the union’s reasonableness by agreeing that it was “rather far fetched” for consulting engineers for big firms being paid $10,000 to $20,000 a year to get time and a half. In approaching the problem of coverage, “the safest bet is not to attach so much importance on [sic] what the dictionary says but on just what Congress intended to do. This is an emergency measure. It was to raise the living standards and the consumer capacity of our people and at the same time to increase...jobs.” By keying the statutory purpose so tightly to the Depression, Rosemund failed to explain how to identify congressional intent once the “emergency” was over and work-spreading was no longer the highest priority; consequently, such a narrow, contingent position could make it easier for employers to attack the basis of hours regulation in more prosperous periods. Unable, however, to foresee the impending war-driven absorption of unemployment, the union focused on the here and now, where, “if you go ahead

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496 "1940 WHD Hearings Transcript" at 477 (July 29).
497 "1940 WHD Hearings Transcript" at 479 (July 29).
498 "1940 WHD Hearings Transcript" at 485 (July 29).
499 "1940 WHD Hearings Transcript" at 481 (July 29).
and have anything passed here which will make it possible to work our men any number of hours without compensation, they are going to work them, and work them plenty. We don’t want to work the men overtime. We want more men employed....

A different viewpoint was offered by Sidney Cohn, a lawyer representing the American Communications Association (as well as 50 AFL and CIO unions), which opposed using a salary threshold as an exclusionary criterion in large part because the top of their members’ wage scales reached $40 to 60 a week. Consequently, they proposed leaving the executive-administrative definition as it was except for eliminating the ($30) salary level altogether. Cohn failed to explain why they did not instead propose setting the salary threshold far above prevailing wage scales as, for example, the UOPWA had suggested. (In contrast, the Western Union Division of the Commercial Telegraphers Union proposed increasing the executive salary threshold to at least $50 because “we feel it is our duty to protect as far as possible all minor executives” and that “junior executives or people in semi-executive positions” benefited from the overtime provisions.) Stein was puzzled by Cohn’s resistance to the salary requirement, especially since it was merely one of seven conjunctive criteria and was designed to settle doubtful cases. Cohn allowed as how he could see the WHD’s logic, but persisted in characterizing $30 as “absurd” in numerous settings where it did “not come within tens of dollars” of the normal union scale. Ultimately he was willing to acquiesce in the salary requirement if eliminating it would cause more trouble, but Stein did not solicit from him an acceptable higher figure.

The ACA’s rejection of any revisions seems to have been driven by its judgment that by 1940 “a great many of the employers have accepted the principles of the Act. By opening the door to these proposed revisions, you are going to get employers in the frame of mind, where they will start litigating all over again on just what and who is covered.... Cohn illustrated this apprehension by reference

502 “1940 WHD Hearings Transcript” at 489 (July 29). It is well worth noting that in responses to Stein’s questions, Jane Benedict, the executive secretary of the Book and Magazine Guild, a UOPWA local representing publishing employees, observed that, where the law was strictly observed, its effect had been largely overtime pay rather than reduction of hours, and that a majority of members who had formerly gotten time off preferred cash. Id. at 469-70 (July 27).

503 “1940 WHD Hearings Transcript” at 509-12 (July 29).

504 “1940 WHD Hearings Transcript” at 546, 547 (July 29) (Hugh McKenny, counsel, and Stein).

505 “1940 WHD Hearings Transcript” at 519-20 (July 29).

506 “1940 WHD Hearings Transcript” at 512-13 (July 29).
to the Radio Marine Corporation of America which had in collective bargaining voluntarily reduced hours from 44 to 40 without going through the intermediate statutory step of 42 because they preferred the settled level that the FLSA established. Then, however, the company did an about-face, requesting exemption for its marine radio inspectors on the grounds that their work was predominantly intellectual and varied in the sense that they rarely knew what would confront them when they left for a job aboard ship.507 This development was especially worrisome in a comparatively law-abiding employer:

Well, I respectfully submit that every plumber’s duty is primarily intellectual if we accept their standard. No man, no electrician, no plumber, no man who goes out on a repair job, knows what confronts him. Yet Radio Marine Corporation which has been one of the large corporations which has gracefully accepted the principle underlying the Wage and Hour Law, now sees an opportunity to muddy the waters and they have got radio repair men in the class of intellectuals. I think that is a fairly absurd contention, but it is going to be inevitable if you start fooling around with your very clear and well thought out present exemptions.508

In other words, creating possible exemptions for covered workers indirectly encouraged “those who do not like the theory behind the Wage and Hour Act, namely the spread of employment. [T]here is no way of satisfying the employers.”509 Moreover, the unions feared that that once employers secured an exemption from the overtime provision, they would seize on it “as gospel and as precedent” to exclude the same occupations from social security, workers compensation, and the NLRA.510

The American Newspaper Guild, which purported to represent 11,500 (or about one-half of all) editorial employees on daily papers,511 testified through its secretary-treasurer, Victor Pasche, whose combative criticism of Hanson and the journalism school deans a tendentious piece in Editor & Publisher characterized as having sounded “the only clashing note.”512 Most employees under Guild con-

507“1940 WHD Hearings Transcript” at 513-14 (July 29).
508“1940 WHD Hearings Transcript” at 514 (July 29).
509“1940 WHD Hearings Transcript” at 515 (July 29).
510“1940 WHD Hearings Transcript” at 522-23 (July 29).
511“1940 WHD Hearings Transcript” at 550 (July 29).
tracts received minimum weekly salaries of $40 to $75 (and others considerably more), and before the advent of the FLSA, overtime compensation was equal time off rather than time-and-a-half cash.\footnote{1940 WHD Hearings Transcript” at 550 (July 29).

Despite the solicitude expressed by publishers and their “closely allied” journalism schools on behalf of newspaper employees’ need for professional status, the “employees themselves have...expressed themselves clearly in favor of obtaining exactly the kind of protection, regardless of descriptive verbiage[,] which is intended by” the FLSA.\footnote{1940 WHD Hearings Transcript” at 552 (July 29).} While conceding that the term “professional” was subject to loose usage, Pasche doubted whether the ANPA or the journalism deans “would seriously argue that we should claim professional status on the basis of the usage of the word in the expression ‘the world’s oldest profession.”\footnote{1940 WHD Hearings Transcript” at 557 (July 29).} Choosing to contest merely the application of the definition to reporters rather than to challenge the principle (if there was any) underlying the exclusion of professional employees, the Guild had no compunctions about trading a title for statutory overtime protection: “It is not detracting in any way from our legitimate pride in the craft of news gathering and writing or the technique of advertising solicitation, to recognize frankly that neither one has a professional status and that it is a skilled craft, entitled to the same kind of protection as any other craft.”\footnote{1940 WHD Hearings Transcript” at 558 (July 29).} Pasche was willing to distance the Guild even further from the lofty title by scornfully observing that the deans’ contention that even those who did not attend journalism school were professionals logically meant that “the professional classification evidently attaches to the former copy boy who never got past grammar school, who has just been assigned to the night police beat, and is doing an excellent workmanlike job covering it.”\footnote{1940 WHD Hearings Transcript” at 559 (July 29).} Since the deans were well aware that “the average city editor still looks with a doubtful eye upon the school of journalism graduate and is at least as likely to hire the latest cub from the ranks of the alert copyboys,” Pasche thought...
"only fair to ask whether desire for more solid recognition of schools of journalism has anything to do with the support" that the deans gave to the publishers’ entire position.518

One of the most important discussions at the hearings took place at their very end because representatives of labor and management in the Hollywood movie industry were by and large willing to engage each other in a relatively open, frank, and lengthy exchange instead of merely trading invective, rhetoric, and preconceived debating points—an achievement all the more surprising in the context of the employers’ aforementioned proposal for excluding from coverage as administrative employees all of the shooting troop’s members. Quite astonishingly for paid advocates in such forums, they even confessed ignorance and implied that they might not be in possession of all the answers. One of the protagonists was George Bodle, an attorney, who appeared on behalf of the Screen Writers Guild and other unions representing 4,700 persons employed by members of the Motion Picture Producers and Distributors of America.519 Interestingly, of these unions, the members of the Screen Writers Guild, the Screen Publicists Guild, and the Society of Motion Picture Interior Decorators were already considered FLSA-exempt by the guilds and the producers, but they nevertheless opposed all amendments.520

Bodle was especially critical of the MPPDA’s proposed redefinition of “administrative employee” as one assisting an executive employee because it failed to define “assist” and in fact every employee in a department could be said to assist its manager. The revision would exempt hundreds of the studios’ office workers because the relatively high salaries could not serve as a marker with 56 percent of their office and clerical employees and virtually all secretaries to executive and administrative employees being paid $30 a week or more.521 Labor’s concern with these proposals was rooted in statutory purpose: more than 400 members of the Screen Office Employees Guild were unemployed, “most of them victims of recent economy drives in the studios.” Unwilling to countenance yet more discharges, the unions therefore opposed the revisions.522

Bodle offered an entirely different view of the work process and the alleged technical constraints on the length of the working day than Mitchell had presented four days earlier. He explained that hundreds of times a year an “emergency” happened, 6 p.m. came, and the set designer had still not completed the drafting

518 "1940 WHD Hearings Transcript” at 560-61 (July 29).
519 "1940 WHD Hearings Transcript” at 580 (July 29).
520 "1940 WHD Hearings Transcript” at 582 (July 29).
521 "1940 WHD Hearings Transcript” at 586-87 (July 29).
522 "1940 WHD Hearings Transcript” at 590 (July 29).
of a set design, which was to be constructed that night by a crew of craft workers already called in with the shooting set for next morning. "Is this situation," Bodle asked,

sufficient to justify the employment of this set designer for unlimited hours without payment of overtime? Obviously not. After all, the Fair Labor Standards Act does not prohibit the employment of workers after forty-two hours in a week. It simply requires the payment of overtime at one and one-half times the regular rate. If a man’s work is so essential to the production process that a limitation on his hours of work would delay production, his work is sufficiently important to justify the payment of time and one-half for overtime.  

The unions’ position on “professional” employees was seemingly more radical. The existing definition was “satisfactory” to them, yet the whole situation of “professionals” had changed since the time, not long past, when the term had meant a self-employed minister, lawyer, or doctor who set his own working hours:

With the present day tendency toward the employment of professional people by firms, it is difficult to see any substantial reason for distinction being drawn between an employee professionally trained and any other employee. Long hours are just as onerous for the man professionally trained as they are for any other employee, and to make the dividing line between exemption or non-exemption from the Act the professional character or non-professional character of a man’s work, seems to me to carry over into the Act a distinction which no longer possesses much validity.

It is our opinion that every employee who does not exercise supervisory or executive duties should be protected against long and inhuman hours by the Fair Labor Standards Act regardless of whether he is employed in a professional capacity or not. In view of this we are naturally opposed to any broadening of the term “professional” to permit exemption of more employees.

This atypically fundamentalist approach stood in curious contradiction to the fact that unions found the existing regulation “satisfactory” despite the fact that it exposed large numbers of professional workers to “long and inhuman hours....” Here Bodle pointed to the screen set designers, who did highly detailed work that caused considerable eye strain if continued over a long period of hours in any day or week; indeed, one of the primary reasons that they had organized was to limit

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523"1940 WHD Hearings Transcript" at 595 (July 29).
524"1940 WHD Hearings Transcript" at 595 (July 29).
525"1940 WHD Hearings Transcript" at 597 (July 29).
their hours: “[t]hanks to” the FLSA they worked only 42 hours at straight time.526 To be sure, Bodle did not mention whether time-and-a-half pay diminished eye strain. Be that as it may, if the producers’ redefinition were adopted, the set designers would be exempt and “faced with the problem of protecting the limitation in their hours under the Wage and Hour Act...by their economic strength alone.” If they turned out to be unable to maintain their past gains, unemployment would be further increased: already in 1940, one-third of the members of the Screen Set Designers had been unemployed at all times—especially alarming for a union that had never accepted as a member anyone who did not have a job in the industry. Consequently, Bodle argued, if the screen set designers were to secure their livelihood, the appropriate legal approach was not to exclude even more of them from overtime regulation, but, on the contrary, to require a further decrease in hours until unemployment was eliminated.527

The overall impact of the adoption of the producers’ proposed amendments would, according to Bodle, be the exemption from hours limits of more than 30 percent of workers in Hollywood not already exempt. The employers’ “fundamental objective” was to make it lawful for them to work hundreds of studio workers then limited to 42 hours at straight time unlimited hours. Once again rooting his critique in statutory purpose, Bodle concluded by asserting that adoption of the MPPDA’s amendments would be a perversion of the FLSA, making of it an instrument not for alleviating, but creating more unemployment.528

At this point, Stein, before questioning Bodle, asked Mitchell, the MPPDA’s lawyer, to remind them of the groups of employees that the producers wanted to exclude as so-called key or shooting-troop administrative employees.529 In this almost serendipitous way, labor and management wound up in face-to-face discussion, while Stein’s own role receded. When Mitchell discovered that Bodle had not seen the supplementary material that he had filed, he suggested that the unions had unduly alarmed themselves: while admitting that the definitions might be too broad, Mitchell cautioned that they were subject to review in light of their possible impact. Nevertheless, he insisted that the MPPDA’s purpose was “simply to make exempt those people in the executive and administrative class whom we now treat as exempt”—and not anyone else. In this context the producers were focused on the shooting troop: since it was necessary to work them more than 40 hours a week and “impossible to replace” them because they were “keyed into the operation,” the employers had long ago entered into contracts with them or their organizations

526"1940 WHD Hearings Transcript” at 600 (July 29).
527"1940 WHD Hearings Transcript” at 601 (July 29).
528"1940 WHD Hearings Transcript” at 602, 603, 605 (July 29).
529"1940 WHD Hearings Transcript” at 606-607 (July 29).
providing for higher wages “than the fellow gets when he works around on the lot in other jobs.” Because producers were already paying these workers higher wages to reflect their longer hours, they took the position that “to swing that specialized treatment...over on to a forty-hour week with time and a half overtime...would cause industry a hardship we don’t believe we ought to be required to take.” Mitchell again emphasized that if they had overshot the mark and tried to exclude other workers, that problem had been rectified in the supplementary submission.530

When Bodle countered that, on account of the prevailing unemployment, the blue-collar craft unions representing, for example, standby painters in the shooting troops, preferred putting all employees on a limited workweek, Mitchell contended that the crucial factor of their non-fungibility subverted all such work-spreading schemes:

[I]f you put them on a 40-hour week with time and a half for overtime the standby man will just have to work longer hours and we will have to pay him overtime. It won’t make one hour’s more employment because he is not replaceable while the shooting unit is in operation. You can’t bring in a standby painter for half a day and another man for the other half; it just has to be the same man all day long, and all week long while the set is in operation. So I think that may be their position, but I don’t think it will do them any good on employment.531

Instead of dissecting Mitchell’s non-fungibility claim, Bodle merely pointed to the studios’ tendency to put many non-shooting-troop craft workers on similar flat-salaried, extended workweeks.532

At this point Mitchell, switching subjects, objected to the unions’ making arguments based on the movie industry’s economic conditions, which he deemed immaterial.533 Bodle, however, pointed out that the economic argument was relevant because alleviating unemployment by work spreading was one of Act’s basic purposes, “and if we could consider definitions purely in the light of dictionary definitions and legal decisions it would be one thing, but I presume that matters of

530 “1940 WHD Hearings Transcript” at 607-609 (July 29). As Stein astutely pointed out, regardless of what the producers said about not intending to exempt certain employees: “If the definition was so drafted that its practical effect would be exemption, you would at least be within your legal rights...three years from now to say, well, though we didn’t intend to exempt them, they are exempt under the new regulations and we want to bargain accordingly. [S]o we must scrutinize this very carefully to see that it might not have that accidental effect.” Id. at 616-17.

531 “1940 WHD Hearings Transcript” at 611 (July 29).

532 “1940 WHD Hearings Transcript” at 611-613 (July 29).

533 “1940 WHD Hearings Transcript” at 613 (July 29).
policy are going to be considered if and when any redefinitions are made. Certain-
ly, any redefinitions which tend to defeat the purpose of the Act and create instead
of alleviate unemployment, depart just that much from the announced intention of
Congress...."

Unwilling to engage Bodle any further on this point, Mitchell turned to the
question of professional employees. After Bodle had confirmed that “[i]n theory”
the unions objected to any dividing line between professional and non-professional
employees and acknowledged that Congress had made such a line, Mitchell
rhetorically asked whether the Wage and Hour Administrator was not therefore
“bound to make a dividing line between people that are truly professional and
those that are not....” Forced to deviate from theoretical principle, Bodle replied:
“Well, I think it should be narrowly drawn. Now, that is the only point because I
don’t think there is any economic justification for the division that you are certainly
attempting to make and I think the division that is ordinarily made.”

Here Bodle should have felt it incumbent on himself to explain to Stein how
his fundamentally irrefutable position that professionally trained employees were
no more deserving of “long and inhuman hours” than any other workers could be
operationalized under a statute that required the distinction, but failed to offer any
guidance whatsoever as to where to draw it. Perhaps Bodle could have constructed
a plausible argument on the basis that what made professional employees “bona
fide” consisted precisely in the fact that they did not work such unacceptable hours
and were also not subject to unemployment. However, if everyone, including pre­
sumably Congress, knew that in fact many physician- and attorney-employees did
work excessively long hours, thus rendering such reasoning risible, labor’s only
option was to advocate legislative revision—a strategy that, in light of the
consolidation of the anti-New Deal congressional coalition, must have appeared
both hopeless and, given unions’ limited commitment to organizing professional
workers, a sub-optimal use of whatever political influence they possessed. Unsur­
prisingly, under these circumstances, labor preferred sticking with the less ob­
noxious original regulations. But if their arguments for revision transcended the
powers of the administrative agency, using the same arguments to support a stand-
pat position to fend off employers’ proposals for expanded classification may have
been doomed to fail.

Unlike Bodle, William Smith, general counsel for the Screen Directors Guild,
did contest the classification of second assistant directors as exempt key men in the
shooting troop, describing them as mere messengers or gofers for the first assistant
directors, engaged in routine work without any independent authority. With a

534“1940 WHD Hearings Transcript” at 614 (July 29).
535“1940 WHD Hearings Transcript” at 619-20 (July 29).
starting hourly wage of 90 cents and working up to as many as 100 hours a week, the second assistant directors voted to remain under the FLSA and their collective bargaining agreement confirmed their overtime entitlement. Moreover, many of them were unemployed or only intermittently employed. Without denying any of these claims, Mitchell nevertheless sought to elicit from Smith the admission that “it would be impractical in the course of shooting a picture to take that particular man off and replace him with another man.” Astonishingly, however, Smith, who was the chief legal adviser of the union representing the second assistant directors, confessed that he was “in the embarrassing position of knowing nothing of the technical operations of a motion picture studio, so I would not attempt to make a statement.” And even more astoundingly, this confession prompted Mitchell, who had repeatedly and insistently made this very claim the basis of the producers’ proposed expansion of the category of excluded administrative employees, to chime in: “All right, I am not either.”

One final and much more successful effort was undertaken by labor to refute the producers’ proposal to classify shooting-troop members as non-fungible administrative employees. Steve Newman, the international representative of the International Alliance of Theatrical Stage Employees, who opined that those workers were the producers’ sole real concern and that 2,000 of the union’s members would wind up being excluded from FLSA coverage. The capacious definition that the employers offered would have classified as an administrative employee any worker who was “an essential member of the staff of the head” of any department or unit and “whose service by reason of his special or technical knowledge is pertinent to the particular production process [and] cannot be restricted as to hours without hindering, reducing or delaying production.” Behind this verbiage, which betrayed none of the “usual attributes of administrative employees,” Newman detected the employers’ real purpose: “they would make greater profits if they worked certain employees 60 or 70 hours a week.” Moreover, the distinction—“between excessive hours of skilled and important and unskilled and unimportant workers”—underlying this classification was alien to the FLSA and “introduce[d] a most novel and unique interpretation of the word ‘administrative.’”

Unlike the other affected unions, the IATSE actually surveyed its locals on the alleged non-fungibility of their members (including first cameramen) who were alleged key persons in shooting troops, discovering that that they could be and

536:“1940 WHD Hearings Transcript” at 623-30 (July 29).
537:“1940 WHD Hearings Transcript” at 632 (July 29).
538:“1940 WHD Hearings Transcript” at 635 (July 29).
539:“1940 WHD Hearings Transcript” at 636-37 (July 29).
frequently were replaced after 42 hours without any loss in efficiency. Indeed, one local pointed out that a provision in one collective bargaining agreement requiring an exceptionally high hourly rate after 16 hours and a 10-hour rest period between calls “constantly” impelled studios to call in other first cameramen to avoid running afoul of these provisions.

Faced with actual knowledge, Mitchell, who had just proclaimed his ignorance, wisely called on an experienced studio official for rebuttal, who, however, immediately admitted that he could not refute any of the findings that the IATSE had submitted, but asserted that they were merely “the minority, the emergency, the unfortunate, cases....” Much more damaging to the producers’ case was Pelton’s admission that “it is not physically impossible...to replace anybody except the actor, whose face you are photographing. But it is far from economical and it is not practical....” Having thus revealed the real reason for the employers’ initiative, Pelton further undermined their position by demonstrating that neither he nor they had understood the purpose and functioning of the overtime penalty/premium:

If we were going to have a 40 hour week for those people, you could do it with a terrific penalty of money. At the present time, that has all been negotiated and compensated by money. The mean pay of the first cameraman is $348.00 a week. Some...get as high as $750 a week. I don’t understand if the theory is the $750 man is supposed to work a 40 hour week and his hourly rate would be some $20 an hour and after 40 hours he should be compensated time and a half. ...

There are various deals for different people. In the cameraman’s deal you can hire a cameraman on an eight hour basis and pay him time and a half after eight hours. You can hire him with a guarantee of four weeks, on a 54 hour basis. You can hire him with a guarantee of six months on a 60 hour basis.

This practical exposition of how the real world of “deals” worked in Hollywood before the advent of the FLSA fully corroborated Pelton’s insight that “I don’t understand...the theory”: like many employers in numerous industries, he failed to grasp that nationally mandatory hours regulation, even—or, perversely, perhaps especially—in the attenuated version of an overtime penalty, cannot be lawfully overridden on the grounds that the (allegedly high) wage already reflects the predicted overtime work. Hours regulation as a component of labor standards

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540 “1940 WHD Hearings Transcript” at 643, 648-49 (July 29).
541 “1940 WHD Hearings Transcript” at 649-50 (July 29).
542 “1940 WHD Hearings Transcript” at 661 (July 29) (Pelton’s first name along with his job title was inadvertently omitted from the record).
543 “1940 WHD Hearings Transcript” at 661-62 (July 29).
is not about money—it is about time, preserving and enlarging a life-sphere separate from and not subordinate to alienated production. For that very reason such time cannot lawfully be bought or traded off for money. Even in the (dysfunctionally) money-driven time-and-a-half overtime regime, the congressional and popular expectation was that the penalty would be severe enough to act as a powerful deterrent. To the extent, however, that the penalty rate was not accurately calibrated to serve that purpose or that the obverse side of the penalty—the premium that, to use the twenty-first-century catch phrase, enables workers “to make ends meet” self-contradictorily afforded workers an incentive to subvert the hours standard, it is easy to understand why many employers came to the conclusion that the FLSA overtime provision was, on the contrary, only about money: “The wage scale has been negotiated...on a basis that they must work the long hours with the troupe and they are compensated on that basis...."

544 See below chs. 16-17.

545 Linder, Autocratically Flexible Workplace at 41-55.

546 "1940 WHD Hearings Transcript" at 662-63 (July 29) (Pelton). Many years later a new deal was worked out excepting the motion picture industry from the salary basis requirement on the grounds that employers for economic reasons, ratified by collective bargaining agreements, did not employ on a continuous weekly basis highly paid employees who otherwise met the salary-level duties tests. Finding the producers’ formal petition reasonable, the WHD promulgated a proposed regulation in 1953; having received no comments, the WHD issued the final rule, which set the salary level at $200, at a time when the short-test salary level was $100. FR 18:2881 (May 19, 1953), 3930-31 (July 7, 1953). The amount, however, not raised again until 1975, when it became $250, where it stood until 2004, when it increased to $695. 29 CFR § 541.5a (2003); FR 69:22273 (Apr. 23, 2004) (proposed § 541.709).