“Time and a Half’s the American Way”

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

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The Stein Report and the Revised Regulations

Office and professional workers are engaged in so many diversified industries that it is difficult to define those who are and who are not covered unless you have the specific situation before you.

Let us put it this way. If you are a stenographer in the office of a business concern which has dealings across state lines...then you are entitled to the benefits of the Act.1

The extensive evidence to which Harold Stein had listened from April to July was so manifestly contradictory that it could have supported a wide range of regulatory reactions, including a reaffirmation of the original definitions. To be sure, Stein in effect confirmed the inconclusiveness of the testimony, but it would be naive to assume that Stein and the WHA had not also been listening to the congressional debates of 1939-40, which, though they failed to result in amendments to the FLSA, nevertheless revealed which way the legislative wind was blowing with regard to the scope of the regulation of white-collar overtime.2 Thus regardless of what the hearings may have taught the WHD about the operation of the exclusions, the deep inroads that employers had achieved both in Congress and in the Roosevelt administration against an expansive development of the scope of white-collar coverage, especially on behalf of workers whose monthly salaries exceeded $150 to $200, underscored the extraordinary political courage that the agency's denial to firms of some significant concessions would have required.

In his report of October 10, 1940, outlining the statutory basis for the Administrator’s power to issue white-collar regulations, Stein—whose construction of the white-collar regulations the WHA, in an accompanying statement, declared that the WHD would follow in enforcing the FLSA3—asserted that “[i]t is clear from the very terms of the act itself that Congress felt that the mere use of the

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2See above ch. 10.
phrase 'employed in a bona fide executive capacity' etc. was adequate as a standard, but inadequate as a detailed rule to guide employers, employees, and the courts.' It is not clear, however, why Stein was so sanguine that Congress's mere invocation of three broad occupational titles sufficed to articulate a standard that the WHD could then transform into a "detailed rule" in spite of Congress's failure to offer any reason whatsoever for the exclusion of white-collar workers from the system of national hours regulation. Stein's uncritical optimism led him to claim that: "Both the present and the proposed regulations are...entirely legal. Both are in full accord with the general policy of Congress as expressed in the preamble of the act and both give practical effect to the specific statutory exemption...in section 13(a)(1)."

The Stein Report

"[U]nless more men are encouraged to go into manual callings, there will be fewer openings for office workers. If there are not as many men as formerly doing the manual jobs, there will not be so many needed to keep the records and accounts. The thing is like a pyramid, with the manual workers at the bottom, providing the base, and with the office workers filling the narrow space at the top. If the top of the pyramid gets all the recruits, it will strain to the breaking point."  

Stein devoted an entire section of his report covering four pages to rejecting some proposals, "most notably perhaps" that submitted by the SSIC, that would have had "the effect of exempting all of that very large group of persons known loosely as 'white collar workers'—generally speaking, all employees except laborers, machine operators and tenders, craftsmen, and maintenance workers." As a matter of legal interpretation, if white-collar workers were not entitled to benefit from the FLSA, "the specific statutory exemptions for named groups of typical white collar employees would not be needed...." Without identifying the authors, Stein stated that some had argued in the alternative that Congress had meant the three statutory categories per se to exclude all white-collar workers. Stein dismissed this claim on the grounds that Congress would have adopted "far

4Stein Report at 2.
5Stein Report at 3.
more general terms” to achieve that end and would not have empowered the WHA to define the terms if it had intended the exclusion to be so sweeping.7

Stein forcefully and memorably criticized proposals to exempt all clerical workers on the grounds that compliance with the FLSA might lead employers to shift them to hourly pay with lower earnings in slack times. While not gainsaying the desirability of weekly or monthly salaries that enabled workers to “adjust their expenditures on the basis of an assured income” as long, Stein added ironically, as they remained employed,

there is little advantage in salaried employment if it serves merely as a cloak for long hours of work. Further, such salaried employment may well conceal excessively low hourly rates of pay. It also does not appear why there should be a reluctance to make occasional or even frequent overtime payments to salaried workers (other than those...specifically exempted employees). Either the penalty payments will discourage long hours of work, or the worker will receive a reasonable compensation for his additional efforts.8

Importantly, Stein went on to add that “under normal conditions” the payment of overtime to salaried workers was as appropriate as it was for hourly paid workers. Moreover, there might also be salaried workers who were not encompassed by the three statutory categories—and if there were, the WHA would be powerless to exclude them. Equally eloquent was Stein’s refutation of the then widespread employer claim that the FLSA’s hours provisions “are or should be applicable only” to workers at or close to the minimum wage: “[I]t is a serious misreading of the act to assume that Congress meant to discourage long hours of work only where the wages paid were close to the statutory minimum. Living conditions can be improved and work spread even where wages are comparatively high.”9

In the same connection, Stein pointed out that arguments in favor of total exclusion “have as an articulate major premise the assumption that all salaried white collar workers enjoy satisfactory working conditions—that they need no protection against oppressively long hours. The record shows the incorrectness of this assumption.” In addition to a government survey disclosing long hours of women office employees and 1930 census data according to which women comprised half of all clerical workers, Stein referred to hearing testimony by the FAECT and the UOPWA for evidence that “vacations with pay are far from

7Stein Report at 6-7.
8Stein Report at 7-8.
universal and that long hours at sedentary occupations are not conducive to health.” From these descriptions Stein concluded that white-collar working conditions “frequently” came within the congressional preambular FLSA findings of those “‘detrimental to health, efficiency, and general well-being.’”\textsuperscript{10} However, he did not raise the issue of the rationality of a statute and a regulation that excluded workers enmeshed in such detrimental conditions. Oddly overlooking the much more plausible profit motive, Stein claimed that the “desire to have all white-collar workers exempted is probably also linked with a forgetfulness of the fact that section 13 (a)” excluded them from the minimum wage too “and an unawareness of the low wages that an astonishingly large percentage of these workers have been paid.”\textsuperscript{11} Since Stein himself in the footnote to the very next sentence referred to an SSIC exhibit with “statements of individual employers requesting exemption for white-collar employees with salaries as low as $12...a week and $52...a month,”\textsuperscript{12} his use of employers’ ignorance as a causal explanation was blatantly inept.

\textit{Executive Employees}

Just as at first the capitalist is relieved of manual labor as soon as his capital has reached that minimum size at which really capitalist production begins, so now he hands over the work of direct and constant supervision of the individual workers and groups of workers to a special kind of wage-laborer. A mass of workers cooperating under the command of the same capital requires, like a military army, industrial superior officers (directors, managers) and noncommissioned officers (foremen, overlookers, contre-maîtres), who command during the labor process itself in the name of capital. The work of supervision is consolidated as their exclusive function.\textsuperscript{13}

Capitalist production itself has brought things to the point that supervisory labor, completely separated from the ownership of capital, is lying around in the street. It has therefore become useless for this supervisory labor to be performed by the capitalist.\textsuperscript{14}

\textsuperscript{10}Stein Report at 8 (quoting, without indicating ellipsis, FLSA § 2(a)).
\textsuperscript{11}Stein Report at 9.
\textsuperscript{12}Stein Report at 9 n.32.
\textsuperscript{13}Karl Marx, \textit{Das Kapital: Kritik der politischen Oekonomie}, vol. 1: \textit{Der Produktionsprozess des Kapitals} 314 (1867).
The former "non-commissioned officers of capital" have turned into a good-sized army, which counts in its ranks more and more privates, who are interchangeable with one another.\textsuperscript{15}

Industrialisation has created vacancies for hundreds of thousands of executives in technical, supervisory, administrative and commercial posts in undertakings. Rationalisation, and particularly the introduction of the "line and staff" system in industrial undertakings and the simultaneous centralisation of responsibility in the office rather than the workshop have led to the appointment of a completely new executive class. [T]here is a thoroughgoing subdivision of the complex duties previously discharged by the executives. Once this subdivision is complete, the jobs done by the lowest grades of salaried employees are often very elementary, and it would be difficult to discover any "intellectual" content in some of these jobs.\textsuperscript{16}

Following the analysis of these various general and preliminary matters, Stein devoted the bulk of his report to explaining his specific recommendations for the three categories of executive, administrative, and professional employees. He offered the most minimal recommendations for revision of the executive exclusion, presumably because employers had also complained least about it. He did recommend three changes: that executives be required to hire or (not and) fire; that the $30 compensation threshold be "on a salary basis"; and that the "no substantial amount" of nonexempt work permitted to executives be set at 20 percent to reduce ambiguity.\textsuperscript{17}

Stein's most important comments were reserved for defending the quantitative calibration of the WHD's original regulation's $30 weekly compensation threshold against employers' complaints that it was too high and unions' that it was too low. Earlier in his report, Stein had observed that, as far as salary tests in general were concerned, witnesses had widely conceded that the language of the congressional exclusion "implies a status which cannot be attained by those whose pay is close to or below the universal minimum envisaged in the act. It was further pointed out that the good faith specifically required by the act is best shown by the salary paid." However, he failed to explain how this consensus could be reconciled with the vast range of proposals (from $0 to $5,000).\textsuperscript{18} More importantly, Stein never

\textsuperscript{17}Stein Report at 12-14, 23.
\textsuperscript{18}Stein Report at 5.
justified the leap he made from accommodating employers’ requests for exempting them from time-and-a-half liability for $7,000-a-year purchasing agents to excluding $30-a-week executive assistants and confidential secretaries. On the other hand, Stein did reject outright the proposal of various employers, including the American Bankers Association, that the salary thresholds be graduated according to local population size. In addition to pointing out the proposal’s incompatibility with the nationally uniform statutory minimum wage, Stein argued that, as with most laws of national application, the best way to “make enforcement possible and to provide for equity in competition” in a huge and diverse country was to select a salary limit that would be “reasonable in the light of average conditions for industry as a whole.”

With respect to executives, even employers largely agreed on the need for a salary-level requirement because the “term ‘executive’ implies a certain prestige, status, and importance.” Since executive employees were denied the FLSA’s protection: “It must be assumed that they enjoy compensatory privileges and this assumption will clearly fail if they are not paid a salary substantially higher than” the mere statutory minimum wage. Otherwise there would be no assurance that the exemption would not “invite evasion” of both the minimum wage and overtime pay provisions “for large numbers of workers to whom” they should apply: “[I]f an employer states that a particular employee is of sufficient importance to his firm to be classified as an ‘executive’ employee and thereby exempt from the protection of the act, the best single test of the employer’s good faith in attributing importance to the employee’s services is the amount he pays for them.”

Stein’s reaction to the suggestion made at the hearings by President Lewis Merrill of the UOPWA of a $5,000 annual salary limit was terse yet oddly incomplete: “while in the abstract there is some justification for the suggestion... , it is equally clear that this is an impractical proposal.” Stein no more identified the justification for a threshold more than three times greater than the WHD’s than he explained why it was impractical. After all, the union’s proposal would scarcely have approached the salaries of real executives: that year (1940) the salary of the

19Stein Report at 6.
20Stein Report at 19.
21Stein Report at 20.
22Adjusted for the rise in the consumer price index, the $5,000 salary would be $67,750 in August 2004; with the minimum hourly wage of 30 cents having risen 17.166-fold since 1940 to $5.15, by this measure the salary threshold would be $85,833.33 in 2004. Neither amount appears irremediably absurd, especially since the Bush administration’s revised white-collar regulations provided a $100,000 super-short-test salary. See below ch. 17.
highest paid executive in the United States, Louis B. Mayer, the managing director for production at Loew’s Inc., amounted to $697,048 or 139.4 times the $5,000 limit, and even the relatively low-paid Charles E. Wilson, acting president and executive vice president of General Motors, received a $100,670 salary or 20 times the threshold. In addition, it should be kept in mind that even the non-boss executives about whose denial of the executive exemption employers had complained were paid salaries in the range of $7,000-$10,000—well above the UOPWA’s recommended threshold.

Stein rejected the proposal of the Indiana Manufacturers’ Association of an $18 weekly salary on the grounds that it would not adequately differentiate between an executive and a craftsman, but at least he felt constrained to offer a justification, albeit a logically defective one. After noting that in the cloak and suit division of the apparel industry the average hourly earnings of manufacturing employees in New York City was $1.40 an hour or $56 a week, Stein offered this non sequitur:

In such industries the $30 minimum is an exceedingly small protection, indeed no protection at all. In general, the difference between the weekly earnings of a skilled craftsman who does no supervising work and the minimum wage required herein for exemption as an executive is not very great in any industry covered by the act. This disparity will tend to decrease rather than increase as time goes on. Thus it appears that the adoption of a rate lower than $30 per week would not afford adequate protection against abuse in a great variety of instances.

The grotesquely inadequate $30 “executive” salary threshold was underscored by data that Labor Secretary Frances Perkins presented to Congress less than a year and a half later: In war industries average wages with overtime were $32 to $33 a week or $1,600-$1,700 a year, while the minimum maintenance for the average family with three children was $1,540 (only marginally below the WHD’s $1,560 annualized executive salary threshold at $30 a week). Why, then, did Stein focus

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23“Louis B. Mayer Tops 1940 Salaries List,” NYT, May 9, 1941 (18:2). The data derived from compulsory filings with the Securities and Exchange Commission. The salary of W.C. Fields—who, thanks to Stein’s innovation, became an exempt artistic-professional employee—the highest paid employee of Universal Pictures, was $255,000

24Stein Report at 20.


26Hearings on H.R. 6790, To Permit the Performance of Essential Labor on Naval Contracts Without Regard to Laws and Contracts Limiting Hours of Employment, to Limit the Profits on Naval Contracts, and for Other Purposes (Mar. 19, 1942), in Hearings Before the Committee on Naval Affairs of the House of Representatives on Sundry
on the inadequacy of a hypothetical salary threshold of less than $30 when he had just affirmed the current (and even greater future) inadequacy of the actual $30 threshold? The question as to whether such a low requirement should be adopted could, according to Stein, be best answered by estimating "(1) the compensating advantages...in the nature of the employment to justify the denial of the benefits of the act and (2) the protection against abuse provided by the entire definition including the salary proviso." Stein tried to bolster the anomalously low executive salary limit by stressing the non- or quasi-monetary perquisites associated with the job: in language that the DOL was still citing (second hand and erroneously attributing it to Congress) 64 years later in defense of its continued low salary thresholds, Stein claimed that the regulatory requirement that an executive direct others implies authority over people, a privilege generally considered desirable to possess. More important, as justification for unlimited hours of work, the opportunities for promotion to higher executive positions are clearly greater for those who already occupy some type of executive position. These intangible advantages are normally, though not always accompanied by more tangible advantages such as paid vacation and sick leave. Still more important is the fact that executives have a greater security of tenure than almost any other group of workers. When a factory retains only a skeleton crew, the foreman is normally a member of that crew; and the other members of the executive hierarchy also tend to retain their positions. Thus even the lower paid executives enjoy certain prerogatives that may be given weight.

Self-contradictorily, Stein himself readily admitted that employers could "abuse" the exemption, precisely because "some foremen and supervisors are paid exceedingly low wages." Nevertheless, with an adamancy that lawful and unlawful abuse later mocked, Stein insisted that "a rather low salary requirement will not impose an impossible task on those responsible for the enforcement of the act, because most claims for exemption under this heading can be analysed [sic] without undue difficulty on the basis of the job itself."
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Following this rather unpersuasive defense of the low salary limit, Stein undertook his one effort at justification by reference to some purpose of the FLSA. Such objectives as preserving workers’ physical and mental health and expanding their free time would not have served Stein’s ends because they would have been as applicable to white- as blue-collar workers. In words that continued to resonate with the DOL more than six decades later as pseudo-legislative history justifying the white-collar exclusions altogether, Stein asserted that:

The penalty payment requirement for overtime work in the case of persons truly employed in an executive capacity would not usually have any considerable effect in spreading employment because in many instances the executive’s work cannot be shared. In any event, it would produce this effect far less commonly than in the case of administrative and professional employees.... Thus a higher salary requirement for “executive” would not result in spreading employment to any very great extent, and particularly not in comparison with the increased employment to be anticipated from a comparable salary requirement for administrative and professional employees.

Unlike Stein’s otherwise massively and carefully documented references to hearing testimony in support of various arguments, no footnotes undergirded this allegedly empirical claim. Consequently, not only is it unclear how Stein purported to know that “executive work cannot be shared,” but earlier, when he had taken pains to reassure employers that more than one assistant department head “should certainly qualify for the exemption,” he had insisted that while a small department was “usually supervised by one person,” it was “incorrect to assume that...in a large department the supervision cannot be distributed among two or three employees, conceivably even more.” And even if were true that nature

31In another context Stein did make a radical purposive argument. After noting both that no witness had proposed it and that while it was absurd to speak of a $12-a-week executive, “it cannot be denied that a man can earn as little as $12 a week and still be an outside salesman,” Stein tentatively suggested that “it might be wise to retain the benefits of the act for the lower paid members of this group and particularly to encourage the spread of employment thereby.” Stein Report at 52. However, Stein did not adopt such an approach in his formal recommendations and the regulations have never included a salary requirement for outside salesman. It should be kept in mind that the crucial modifier “bona fide” in § 13(a)(1) of the FLSA does not syntactically govern “the capacity of outside salesman.”

32FR 69:22123-34; see also below chs. 15-17.
33Stein Report at 22.
34Stein Report at 11.
35Stein Report at 12.
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abhorréd two CEOs in one corporation as much as a vacuum, the proliferation of three-shift militarized production virtually while Stein was writing his report revealed that one of the main bottlenecks was firms’ discovery that “they would have to spread their supervisory forces thinly over their entire operations.”36 In other words, increased managerial work loads could be met by absorbing the unemployed to increase the supply of “executives.” Moreover, the weasel words—“usually,” “any considerable,” and “many”—that Stein used to moderate his allegation, while falsely suggesting the existence of quantitative data at his disposal, in fact indicated that even he conceded that some work-spreading was possible. (In addition, the repeated invidious comparisons with administrative and professional employees refute the DOL’s later undifferentiated use of Stein’s statement to justify exclusion of these two groups as well.)37 In the end, then, Stein failed to undermine the case for a higher executive salary threshold.

Stein bestowed special care on setting the salary level for executives because they “are an essential feature of all industry. Many employers employ no administrative employees...; thousands have no occasion to employ professional employees.... But executives—high and low—exist and must exist everywhere.” Because a nationally applicable labor standard, as Stein had observed earlier, was difficult to reconcile with regional salary differentials, and “the salary qualification for ‘executive’ will affect both high and low wage areas, high and low wage industries, and large and small businesses,” he concluded that it was “desirable to retain a comparatively low salary requirement.”38 And although he himself regarded both $30 and $35 as suitable, he opted for the pre-existing $30 salary39—in spite of acknowledging that “a $35 requirement would not be seriously unfair to employers” inasmuch as even an Arkansas statute excluded women managers with salaries above $35 since Arkansas was a “low-wage area and...female employees...are customarily paid lower wages than males—who constitute the great majority of executive employees.”40

36“OPM Expected Soon to Ask 6-Day Week,” NYT, Jan. 12, 1941 (28:1). See also above ch. 10.
38Stein Report at 22.
39Stein Report at 23.
40Stein Report at 22 n.78. On the Arkansas law, see above ch. 6.
The Empirical Untenability of Stein's Construct of a Dichotomous Pattern of White- and Blue-Collar Working Conditions and Social Wages

The weaknesses of these seemingly empirical claims on behalf of a low salary limit, which Stein did not even try to support with citations to the hearing record, are striking. His individual assertions will be analyzed in detail, but anticipatorily it should be recalled that by 1937 even big business had acknowledged that many dimensions of compensation, such as vacations, sick leave with pay, pay for holidays, and dismissal compensation, which had traditionally been withheld from wage-earners, were increasingly no longer the exclusive preserve of salaried employees. Moreover: "In many industrial organizations promotion comes at least as readily to the hourly man as to the salaried employee, especially if the former has some background of technical training."42

Unconcerned with these more realistic themes, Stein operated within his own rigid framework, which cannot withstand scrutiny. First, just how much of a salary reduction did Stein believe that the privilege of bossing co-workers was worth to neophyte executives when they also had to pay the price of "unlimited hours of work"?43 Second, even if low-level executives were in fact more promotable than non-executives, what "justification for long hours of work" did Stein have for the many low-level executives who would either never be promoted or would be terminated altogether? The empirical accuracy of Stein's underlying assumption was contested as early as 1927 by Magnus Alexander, the president of the National Industrial Conference Board:

"Office work...by many is held in greater social esteem than is manual labor, but largely for illusory consideration belonging to a past age. Probably the closer association

41"Fight Barring of Salaried Worker from Wage Law," OPN, 6(3):1:2 at 3:3 (Mar-Apr 1940).
42E. S. Cowdrick, “Report to Clients, 1937” at 8 (Jan. 25, 1938), in Willis Harrington Papers, Accession 1813, Box, 28, Hagley Museum and Library. On this annual report of the Special Conference Committee, see above ch. 2; see also a modified published version in “Overtime Work by Salaried Employees,” Personnel 14(2):90-93 (Nov. 1937).
43According to one contemporaneous authority, it was unnecessary for managers to pay "to exercise control over others" because employers paid them to do so. Ronald Coase, “The Nature of the Firm,” Economica (n.s.) 4:386-405, at 390 (Nov. 1937).
with management and the appearance of greater opportunities for advancement play an
important part in this. But I do not believe that the average industrial worker's opportunity
for promotion is one whit less than that of the office worker."

Third, regardless of what big business knew, Stein himself knew in detail from
hearing testimony—indeed, he himself had stated at the hearings—that paid
vacation and sick pay were ceasing to be a marker of executive status not only vis-
à-vis non-bona fide white-collar workers, but even vis-à-vis unionized factory
workers. For example, Stein himself observed at the hearings that General
Motors had announced that it would soon give one week's paid vacation to all
production workers after one year and two weeks after five years, and that U.S.
Rubber Company had implemented the same policy. The very first witness at the
hearings, M. Toulme, the chairman of the National Wholesale Grocers Association,
had stated that while 95 percent of all industry employees worked 41 hours or more
and 68 percent 45 hours or more, 75-80 percent received vacations and sick pay. A
representative of the oil and gas industry testified that hourly workers in the
petroleum refinery industry had begun receiving paid vacations as early as 1920. Boris
Shishkin, an AFL economist, had testified that paid vacation and sick leave
had become widespread, with between 800,000 and 1,000,000 AFL members
receiving them. Jane Benedict of the Book and Magazine Guild, which was
affiliated with the UOPWA, told Stein that vacations with pay were usual, with two

45Although Malamud, "Engineering the Middle Classes: Class Line-Drawing in New
Deal Hours Legislation," Michigan LR, 96(8):2212-2321, at 2313 (Aug. 1998), was
correct in faulting Stein for making an anachronistic point, she was wrong in assuming that
he had "failed to see the trend," let alone that "his cultural antennae were weak." It should
be kept in mind that at the time: "Employers consider that the vacation is a privilege
granted to the employee as an earned reward for past service. The purpose of the vacation,
however, is to prepare workers for future service; that is, to better fit them for work in the
ensuing year." L. McKenney, "Effect of Shorter Work Week on Vacation Policies for
Office Workers in 1934," in AMA, Office Management Series O.M. 65, at 33-44, at 37
(1934).
46Official Report of the Proceedings Before the Wage and Hour Division of the
Department of Labor In the Matter of: Definition of "Executive, Administrative,
Professional" Employees and "Outside Salesman" at 23 (Washington, D.C., July 25,
1940), in RG 155--Wage & Hour/Pub. Contracts Div. Location: 530, 47:9:3-4/Boxes 10-
14 (hereinafter "1940 WHD Hearings Transcript").
47"1940 WHD Hearings Transcript" at 14 (Apr. 10, 1940).
48"1940 WHD Hearings Transcript" at 123 (June 3, 1940) (A. Nicholson).
49"1940 WHD Hearings Transcript" at 433 (Apr. 12, 1940).
weeks the general practice, partly as a result of the union’s collective bargaining agreements. Marcel Scherer of the Federation of Architects, Engineers, Chemists and Technicians had criticized the SSIC’s proposal to incorporate the receipt of paid vacations and sick leave into the definition of exempt white-collar workers as unrealistic precisely on the grounds that “many production employees now receive these.” Another representative of FAECT added that the union’s contracts provided for one week of paid vacation after one year and two weeks thereafter. In contrast, it was uncommon for non-union draftsmen and related workers to receive paid vacations or sick leave.

As early as 1925, The New York Times, under the headline, “Paid Vacation the Lure of White Collar Jobs,” reported that a study of 1,500 factories in New York State revealed that 90 percent gave paid vacations to office workers and 18 percent to production workers (but 39 percent of plants with more than 2,000 workers did so), with an average of two weeks for office and one week for factory workers. After the enactment of the NLRA, the years from 1935 to 1940 witnessed a steady increase in the number of workers covered by paid vacations (as well as pensions, profit-sharing, and health-insurance plans), as employers undertook expensive efforts to promote worker loyalty and deter unions. The DOL’s own Bureau of Labor Statistics published a survey study in 1938 revealing that in the previous year 39.3 percent of manufacturing workers had worked in plants with vacation plans for wage earners. Moreover, it had only been since 1935 that paid vacations for manufacturing wage earners had become “general”: almost 40 percent of the plants providing paid vacations for wage-earners reported that 1937 was the first year they had offered them. And whatever significance differential non-wage benefits as between blue- and white-collar and between high- and low-paid white-collar employees possessed in 1940 was dissipated during the following decades to the degree that it can no longer justify “unlimited hours of work.” Indeed, as early as 1957, the president of the Office Employees International Union had noted

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50“1940 WHD Hearings Transcript” at 471 (July 27, 1940).
51“1940 WHD Hearings Transcript” at 364 (Apr. 11, 1940).
52“1940 WHD Hearings Transcript” at 492 (July 27, 1940) (C. Rosemund).
531940 WHD Hearings Transcript” at 156-57 (July 25, 1940) (Morris Zeitlin).
54“Paid Vacation the Lure of White Collar Jobs,” NYT, July 6, 1925 (15:4-5).
56Frances Jones and Dorothy Smith, “Extent of Vacations with Pay in Industry, 1937,” MLR 47(2):269-74, at 269 (quote), tab. 1 at 270 (Aug. 1938). Although 95 percent of salaried employees received paid vacations, one-fifth of establishments reported that they provide them.
that many organized manual workers have fringe benefits exceeding those of unorganized white-collar employees. Thus, the DOL’s continued reliance in the twenty-first century on what has become a canard further underscores just how decayed the policy foundations of the white-collar exclusion are.

And fourth and last, although real executives in 1940 may have also enjoyed greater security of tenure and suffered less unemployment than white-collar workers protected by the FLSA, the widespread insecurity, mass firings, and unemployment among middle-managers in recent years have thoroughly discredited this alleged “compensating advantage.” Yet even in 1935, Lewis Corey in his well-known book, *The Crisis of the Middle Class*, depicted a process of decomposition and stratification totally absent from Stein’s account:

Managerial and supervisory employees are comparatively well paid and secure.... But here, too, there is also a proletarianizing tendency.... Management and supervision are increasingly becoming mere routine tasks, simplified, specialized and mechanized, and displacement is a growing danger because of mechanization.... Large numbers of managerial and supervisory employees earn below $3,000 yearly and are threatened by insecurity.

Furthermore, in 1940, Stein heard Morris Zeitlin of the FAECT testify that “if amendments are to be made they should be directed toward inclusion of more skilled and higher salaried employees. For they too are wage earners and subject to all the abuses, insecurity, long hours and unemployment as are all other wage earners, and although their hourly or weekly rates may be higher and their talents, knowledge and skill place them in supervisory positions, under general administrative instruction, their annual average earnings do not exceed that of the average skilled worker.”

White-collar unemployment was a long-standing and highly publicized social and economic problem that antedated the Great Depression. In 1930 in his monumental study of real wages in the United States, economist (and later liberal Senator) Paul Douglas pointed to some of the underlying tendencies. In seeking to explain why salaried and clerical workers had gained only 3 percent in real

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58 See above ch. 2.
59 Lewis Corey, *The Crisis of the Middle Class* 250-51 (1935). However, Corey also stressed that higher-salaried employees and professionals “are a privileged caste whose relation to production and income assures their support of capitalism. They are identified with...the exploiting relation of its [collectivism’s] capitalist forms.... This is partially true of the managerial and supervisory employees.” *Id* at 270.
60 "1940 WHD Hearings Transcript" at 153 (July 25, 1940).
wages since the 1890s compared with 29 percent for manufacturing wage earners, he noted that mechanization of office work had probably proceeded faster than that of the workshop. He also stressed the extraordinary increase in the number of students in high schools, which "have primarily served to recruit juveniles for clerical work, and the vast numbers that have poured out of the high schools have served to keep wages down to a much lower point than would otherwise have been the case." In the 1890s, the clerical class had been a quasi-noncompeting group, which it was somewhat difficult for children of manual workers to penetrate. Conjecturing that the real monetary differences enjoyed by clerical workers were not great—the advantages were primarily social rather than pecuniary—Douglas inferred that "the day seems not far off when all real differences in remuneration between the upper group of hard-handed and the soft-handed groups will disappear...." Indeed, clerical workers' monetary earnings would have increased much less but for the extraordinary increase in demand for them brought about in part by the fact that the increase in the average size of business units caused the administrative staff to expand more rapidly than the workshop itself, which in turn was caused by the increased necessity for knowing costs and the greater emphasis on marketing which, in turn, had derived from the expansion of the market. Frederick Taylor's "movement toward more conscious and intelligent direction of production" had also required expanding the office staff to handle details. This expansion of clerical work enabled high school graduates to be absorbed, and, in turn: "This increased need was also one of the reasons why the business interests of the country were willing to have so much of the resources of the country, and incidentally of their own, devoted to furthering secondary education."61

Douglas's book, which appeared at the beginning of 1930 and stopped its analysis with 1926, did not even reflect the oversupply that was building up during the 1920s and finally burst forth during the Great Depression. Against the background of the explosive increase in the proportion of 14- to 17-year-olds enrolled in high school from 7 percent in 1890 to 73 percent by the time that Stein was writing in 1940,62 it was hardly surprising that the mass production of white-collar workers had already resulted in overcrowding during the Harding-Coolidge-Hoover prosperity years,63 when reports of white-collar unemployment found their way into public consciousness.64

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62C. Wright Mills, *White Collar: The American Middle Classes* 246 (1967 [1951]).
64As early as 1865 Marx had foreseen that the labor power of commercial office workers would be devalued as the acquisition of commercial knowledge and languages was cheapened and the capitalist mode of production directed teaching methods toward
As early as 1923 *The New York Times*, under the headline, “White-Collar Men Desert Desks to Be Bricklayers,” reported that: “‘Parents may be said to have been largely responsible for this surplus of white-collar men.... The ranks of clerical workers have been over-manned because these parents did not want their boys to enter any but socially correct professions.’” The following year Labor Secretary James Davis admonished the National Society for Vocational Education: “‘We are turning out 90 per cent. of our youth equipped only for the so-called white collar occupations, which can provide jobs for only 10 per cent. of them. We cannot keep America in the vanguard of civilization if we permit the American people to become exclusively a ‘white collar’ people.’” The *Times*, quoting the observation of a Guaranty Trust Company vice president that “‘the white-collar army is growing by leaps and bounds,’” added that because of overcrowding, it had become necessary to publicize the fact that “many white collars have frayed edges.”

Availing itself of a commonly deployed explanation, the newspaper opined that in large part because “women, with only themselves to provide for, or a husband’s or father’s support to supplement, accept less wages than men demand,” they were “threaten[ing] to drive men out of ‘white-collar’ employment....”

Once production and employment had begun to plummet in the course of the depression, white-collar workers were conspicuously represented in unemployment and bread lines, and “The Plight of the White-Collar Army” became a widespread journalistic and labor union trope. In September 1931, the Association for the Improving the Condition of the Poor stressed the “plight of unemployed thousands of ‘white-collar’ workers” in New York City, depicting multitudes of clerks, teachers, engineers, architects, doctors, and lawyers as unable to find work after pro-


65*White-Collar Men Desert Desks to Be Bricklayers,” *NYT*, Mar. 11, 1923 (sect. 9, 16:3-4) (quoting a YMCA education director).


67“Demand for Women in Office Work Now Exceeds the Supply,” *NYT*, Oct. 19, 1924 (sect. 9, 9:5-8). However, neither cost nor efficiency was the sole factor, as many employers demanded that they be sent not “‘an old maid,’” but “a modern girl, full of pep,” while Wall Street in particular wanted “dashing girls....” *Id.*

68“Many Are Hunting ‘White Collar’ Jobs,” *NYT*, Feb. 27, 1930 (43:1); “2 Breadlines Feed 2,000 Daily Here,” *NYT*, May 19, 1930 (14:2).

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longed unemployment had exhausted their savings.\(^70\) The deterioration of conditions was most especially marked in New York City, where as early as 1925 most workers had white-collar jobs. Of 2.5 million employed, clerks (excluding those in stores) were the largest group, encompassing 140,000 men and 70,000 women. No other city in the world employed so many stenographers: 75,000 (of whom 5,000 were men); counted were also 80,000 bookkeepers, cashiers, and accountants.\(^71\) At the nadir of the depression in January 1933, 28 percent of family heads seeking assistance at the Emergency Work and Relief Bureau in New York were clerical or professional employees, more than twice as high as the proportion the previous winter.\(^72\) Generally, even employers recognized that: "During the depression...many salaried men found that their supposed security of employment was a delusion; that they were about as likely to be laid off as were their wage earning associates."\(^73\)

That professionals had felt the full brunt of the depression was revealed by a Columbia University survey that reported phenomenally high unemployment rates of 98 percent for architects, 85 percent for engineers, and 65 percent for chemists.\(^74\) Although reporting much lower absolute figures, the Bureau of Labor Statistics revealed that the unemployment rate in the engineering profession had skyrocketed from the end of 1929 to the end of 1932 from 0.7 percent to 10.9 percent.\(^75\) From 1929 to 1934, the number of persons in or trained for engineering rose by 25.3 percent, while opportunities for employment rose by only 4.4 percent; the result was "a large amount of unemployment and intense pressure to find nonengineering work." In 1934 14.1 percent of engineers were engaged in nonengineering jobs and 8.5 percent were unemployed: "Had it not been for the large increase in the employment of engineers by public authorities, the effect of the depression on the profession would have been even more disastrous." Private engineering employment fell 8.2 percent, while public employment rose 46.8 percent. More than 34 percent of engineers reported unemployment at one time or another between 1930 and 1934; by the end of 1934, 5 percent of all (or about one-half of all unem-

\(^{70}\) "Predicts Dire Need for Private Relief," NYT, Sept. 29, 1931 (27:8).

\(^{71}\) "White-Collar Workers Most Numerous in New York City," NYT, Mar. 15, 1925 (sect. 9, 9:6-8).

\(^{72}\) "White-Collar Men Form 28% of Idle," NYT, Jan. 17, 1933 (5:1-2).


\(^{74}\) "Unions for Technicians," NR, Jan. 24, 1934, at 295-96.

ployed) engineers were on work relief.\textsuperscript{76}

By 1935, the well-off were venting intense hostility over relief programs, particularly those tailored to white-collar workers.\textsuperscript{77} In a special report on government assistance that had been rendered to professional, technical, and other service workers, the Works Progress Administration declared that:

Many people of the favored economic groups seem to regard it as desirable that a destitute person shall be disciplined. The discipline they think of is manual labor. They like the idea of putting a destitute musician down in a sewer or putting a child psychologist at a sewing machine. This brutal attitude of manual discipline which is abroad in the whole Western world is a prime ingredient of atavistic political reaction. Fortunately, it has not thus far controlled our work program.\textsuperscript{78}

It was in this same combative spirit that Corrington Gill, the assistant administrator of the Federal Emergency Relief Administration, called attention to the presence on the relief rolls of more than 750,000 experienced white-collar workers—including all professional groups, former proprietors, clerical employees, and sales people—or 11.75 percent of a total national relief count of 6,400,000: “We can no more afford to lose their trained abilities by allowing them to deteriorate than we can afford to line them up against the wall and shoot them or allow them to starve.”\textsuperscript{79}

Data on relief recipiency offer a sense of the absolute and relative extent and the composition of white-collar destitution during the first half of the 1930s. From

\textsuperscript{76}US BLS, \textit{Employment and Earnings in the Engineering Profession 1929 to 1934}, at 3, 8, 9 (Bull. No. 682, 1941) (by Andrew Fraser, Jr.). Median annual earnings of engineers fell from $3,412 in 1929 to $2,286 in 1934. \textit{Id.} at 10.


\textsuperscript{78}WPA, \textit{Government Aid During the Depression to Professional, Technical and Other Service Workers 9} (n.d. [1936]). Maoist resort to forced manual labor for intellectuals in the 1950s and 1960s suggests that the practice was not the monopoly of one class.

\textsuperscript{79}Corrington Gill, “White-Collar Work in Relief Defended,” \textit{NYT}, Apr. 14, 1935 (E7:1-5). In New York City, white-collar workers accounted for 102,000 or 24.8 percent of all 412,000 relief recipients.
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1929 to 1932, 700,000 or 30 percent of salaried workers in manufacturing, construction, mining, and transportation were disemployed compared to 42 percent of wage earners. The 560,000 white collar or service workers—or 10 percent of all—on relief rolls in March 1935 were categorized under four headings: professional and technical (82,000), including 20,000 teachers, 15,000 musicians, 6,800 nurses, 6,200 engineers, 4,500 draftsmen, and 3,800 actors; nonagricultural proprietors and managers (80,000); office workers (216,000); and sales (181,000). The 1930 census counted 14 million such workers or about 30 percent of the total. From mid-November 1933 until mid-March 1934 (when it was being dismantled) the Civil Works Administration reached a peak employment of 4.5 million workers, of whom more than 450,000 were white collar. The FERA’s employment peaked in January 1935 at 2,512,000, of whom 10 percent were service workers: “White collar projects employed almost one third of all women and about one twelfth of all men.” Between March 1935 and January 1936, the number of white-collar and professional-technical workers on relief increased 12 percent and 25 percent, respectively, while that of the relief rolls in general dropped 2 percent, so that these groups represented one-ninth of all recipients.

In 1936 the *Times* reported that white-collar workers had begun to come into the relief picture as far back as 1931 when Emergency Unemployment Relief Committee had made the startling discovery that there were more than 50 applicants for every office job that commercial agencies had to offer. During the depression about 30 percent of relief applicants in New York City had been clerical and professional employees. The newspaper then offered this grim picture of “Brain-Workers on Relief”:

If the phrase “white-collar worker” had been used in 1873 or 1893 it would have been listened to with a blank stare. Just between the World War and the boom of the Nineteen

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80WPA, *Government Aid During the Depression to Professional, Technical and Other Service Workers* at 3-4; *Monthly Report of the Federal Emergency Relief Administration December 1 through December 31, 1935*, table C-2 at 61.

81WPA, *Government Aid During the Depression to Professional, Technical and Other Service Workers* at 7. CWA workers, unlike those supported by the FERA, were on the federal payroll: “The agency took half its workers from relief rolls; the other half were people who needed jobs, but who did not have to demonstrate their poverty by submitting to a ‘means’ test.” Leuchtenberg, *Franklin D. Roosevelt and the New Deal* at 121.

82WPA, *Government Aid During the Depression to Professional, Technical and Other Service Workers* at 10.

83WPA, *Government Aid During the Depression to Professional, Technical and Other Service Workers* at 11.

84“Brain-Workers on Relief,” *NYT*, July 5, 1936 (sect. 9, 9:1-2).
Twenties it would have suggested a man whose pride led him to prefer a low-paid office position to a job carrying higher pay which would require him to wear overalls. Now it implies a peculiar problem in the great pool of unemployment—one which has arisen in connection with every relief program since 1930 and proved a puzzler to [Works Progress] Administrator [Harry] Hopkins in Washington....

During the latter half of April 1937—as the Roosevelt administration was drafting the FLSA bill that would exclude so many of them—236,000 people were "employed on WPA white-collar projects," which were necessary because of adoption of a policy of providing jobs for unemployed along the line of their usual occupations. These white-collar workers on the WPA rolls included artists, musicians, actors, writers, physicians, nurses, teachers, salesmen, stenographers, typists, and other office workers. The (voluntary) census of unemployment in 1938 counted a total of 5,816,975 unemployed males (including emergency workers), including 130,633 professional persons, 90,708 nonfarm proprietors, managers, and officials, and 491,397 clerks and kindred workers. Among the 2,028,041 unemployed females, 95,446 were professionals, 5,429 proprietors, managers, and officials, and 453,222 clerks and kindred employees. By this time, Alba Edwards, who created the Census Bureau's socio-economic classification system in which white-collar workers occupied a prominent place, wrote that their average salary was "only enough to meet the demands of a very moderate standard of living." Moreover, the white-collar worker's "job will support him from day to day while he is at work, but he lives face to face with the hazard of unemployment and face to face with the certainty of old age."

Early postwar socio-economic developments should also have called into

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85 "Brain-Workers on Relief."
88 Alba Edwards, "Growth and Significance of the White-Collar Class," AF 45(1):32-34, at 34 (Jan. 1938). In Britain, too, the impact of unemployment on white-collar workers during the Depression changed their attitude toward the £250 salary ceiling on non-manual workers' eligibility for unemployment insurance. "Till about 1929, there was general acceptance of the existing exception. ... In the past five years, the attitude of many employees has been changed, no doubt as a direct consequence of the depression. From 1930 onwards insecurity of tenure spread into sections of the population who had felt themselves immune from unemployment; a persistent demand began to be made by various associations of professional and clerical workers in favour of raising the remuneration limit." Unemployment Insurance Act, 1935: Report of the Unemployment Insurance Statutory Committee on Remuneration Limit for Insurance of Non-manual Workers 4 (1936).
question the DOL’s insistence on adhering to Stein’s rigid framework. By 1950, C. Wright Mills confirmed that “manual workers, represented by unions, are demanding and getting precisely the type of privileges once granted only white-collar people.”89 In 1954, the *Journal of Business*, edited at the University of Chicago Business School, also placed its imprimatur on the convergence thesis by publishing an article that outlined the development. It pointed out that some manual workers had begun getting what is perhaps the most important of white-collar privileges in the 1920s—paid vacations; the much stronger trend that began in the late 1930s was given great impetus during World War II by the War Labor Board policy and received powerful momentum during the postwar high-employment economy:

By now, most manual employees receive paid vacations.... As a group, salaried employees receive somewhat more liberal allowances. There is much overlapping, however, and the trend toward equalization appears to be continuing.

Before World War II, few manual employees received paid holidays, while salaried personnel usually enjoyed six or more holidays with pay. Only a little more than a decade later, a situation of near equality between the two groups has been achieved. ... While few manual employees receive sick leave with pay, the rapid development of group sickness and accident insurance has substantially offset the advantage held by the salaried employees.90

And the same year, *Business Week*, reporting that only 309,500 of 4,300,000 non-government white-collar workers were in white-collar unions and a further 240,000 in industrial unions, pithily observed that the gap between white- and blue-collar workers’ wages and benefits “May Be Gone Forever.”91

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89 *White Collar* at 300.
91 “It May Be Gone Forever,” *BW*, Nov. 6, 1954, at 64-70. As of 1953, these white-collar unions had the following membership: Railway Clerks, 130,000; OEU, 40,000; Retail, Wholesale, and Department Store Union, 28,000; and National Federation of Salaried Unions, 27,000. These industrial unions had the following white-collar membership: UAW, 80,000; United Steelworkers, 60,000; International Union of Electrical Workers, 20,000; and International Brotherhood of Electrical Workers, 20,000. Of five million retail workers, the Retail Clerks had 250,000, the Meat Cutters 75,000, the RWDSU 60,000, and the Teamsters 40,000 members. *Id.* at 68.
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Administrative Employees

If you would redefine the administrative section so as to provide that any white collared employee receiving $150.00 a month should be exempt from the maximum hour privilege, you would unshackle business to an amazing extent.92

Stein’s most pivotal revision—the recommendation that administrative employees be detached from the category of executive employees—potentially created such a vast new exclusion of administrative employees who were not bosses that it is unclear how Stein could have imagined that the 1938 regulations had also been in “full accord” with congressional policy. The only such policy to which Stein referred (or could have referred, since the FLSA contains no other) was embodied in the preamble, which, however, he did not quote. What Congress expressed there was the finding that “the existence...of labor conditions detrimental to the maintenance of the minimum standards of living necessary for health, efficiency, and the general well being of workers (1) causes commerce and the channels and instrumentalities of commerce to be used to spread and perpetuate such labor conditions among the workers of the several States;...(3) constitutes an unfair method of competition in commerce; (4) leads to labor disputes burdening and obstructing commerce and the free flow of goods in commerce....”93 Stein did, however, quote from a very recent appellate court decision holding that exemptions should be interpreted narrowly because the FLSA’s purpose was to “eradicate...the evils attendant upon...long hours” and “exemption would tend to defeat its purpose.”94 To draw out this judicial logic: Congress had either already defeated its own purpose by excluding bona fide executive, administrative, and professional employees or avoided such a self-defeating step by laying down a “standard” (to use Stein’s term) designed to enable the WHA to read the unexpressed (and demonstrably vacant) congressional mind and to define the universe of excluded

92“1940 WHD Hearings Transcript” at 252 (July 26, 1940) (statement of J. Raymond Tiffany, Book Manufacturers Institute, accounting for 90 percent of all book manufacturers, employing 12,000 employees, of whom 1,500 are white-collared; id. at 248).
94Stein Report at 2 (quoting Fleming v. Hawkeye Pearl Button Co., 113 F.2d 52, 56 (8th Cir. June 26, 1940). The case did not involve the white-collar exclusions in § 13(a)(1), but those related to fishing in § 13(a)(5). Stein’s typographical error (“exemption”) has been corrected (“exemptions”).
workers whose long hours would not be detrimental to their own or any covered workers’ health, efficiency, or general well-being. However, the only way that the WHA could transform that vague and empty standard into a substantively appropriate detailed rule would have been to determine empirically which workers passed that virtually unpassable test. Yet Stein collected no data that could have demonstrated that long hours neither harmed some white-collar workers nor deprived others of employment.

His recommendation to sever administrative from executive employees and subject them to an expansive definition was the most telling proof that Stein had moved even further from such a realistic methodology than the drafters of the 1938 regulations—who, as a later WHA observed, must be deemed to have been closer to congressional intent than any later regulators95—although it may be true that he was nevertheless more attentive to the congressional use of commas textually setting off administrative employees from their executive and professional co-excludees. Stein observed that criticism of the WHA’s failure to separate the two categories in 1938 had perhaps been more frequently repeated than any other at the hearings.96 However, he doubted the validity of the narrower contention that the failure constituted a violation of the WHA’s statutory duty “since ‘executive’ and ‘administrative’ are used synonymously in common speech and court decisions.” Its proponents had undermined it further by submitting definitions of “administrative” so broad that they engulfed and thus rendered superfluous “executive” as an independent term.97 Stein was by and large content with the existing joint definition of “executive” and “administrative” insofar as it applied “with particular aptness to persons who are commonly called ‘bosses.’ The range of exemption is broad. It extends from the president of a large and complex corporate structure down to the foreman in charge of a very minor department.” Although Stein must surely have known or sensed that “common speech” definitely did not regard every petty foreman, supervisor, or boss as encompassed by the much loftier term “executive,” he was willing to leave the definition, with “minor modifications,” unchanged because it did “describe and exempt the person who possesses and wields specific executive authority.” In contrast, however, the hearings had re-

95Telephone interview with Tammy McCutchen, Washington, D.C., Sept. 16, 2004. To be sure, proximity to a blank congressional slate or mind may be no more enlightening than distance from the same.

96Stein Report at 3.

97Stein Report at 4 (citing, e.g., the proposals of Montgomery Ward and the American Bankers Association). Conversely, Stein also rejected proposals making “administrative” merely a lower form of “executive” because the terms “must not overlap if effect is to be given to each of the words in an act of Congress.” Id. at 24.
revealed that "in modern business there has been an increasing use of persons whose authority is functional rather than departmental. Primarily they determine or affect policy or carry out major assignments rather than give orders to individuals." As examples of those "performing a variety of miscellaneous but important functions in business" he repeated those that employers had mentioned at the hearings—personnel managers, credit managers, buyers, claims agents, auditors, wage-rate analysts, supervisors of machine tools, executive assistants, purchasing agents, tax experts, and safety experts. And while many of these employees had mixed responsibilities qualifying them as bosses and thus as exempt under the 1938 definition, there was also a "large group who either do not qualify or whose qualifications are dubious."101

In order to give this "large group" their due by removing them from the regime of national hours limitation, Stein concluded both that "a reasonable interpretation of section 13 (a) (1) can include exemption for certain employees with miscellaneous policy-making or policy-executing responsibilities" and that a separate definition would be the easiest way to create this exemption.102 Indeed, his assertion that the convenient but "not essential" separate definitions "describe two different groups of employees both of whose duties may warrant exemption" lacked any explanation whatsoever as to why, within white-collardom, the performance of certain kinds of work justified long workweeks and that of others did not. Thus without the slightest nod to the necessity to justify this vast expansion of the universe of unprotected workers by reference to its benign effect on them, but with a massive bow to the NAM, whose proposal he "principally" adopted,104 Stein hastened to detach the statutory terms, although joint definition was also "entirely legal".105

While the usage of the two terms is so vague and overlapping that there is no generally recognized and precise line of demarcation between them, it does no violence to the common understanding of the words to apply "executive" to the person who is boss over

100Stein Report at 4 n.14.
102Stein Report at 4.
103Stein Report at 4.
104Stein Report at 25. He added that similar proposals had been submitted by the Illinois Manufacturers Association, MPPDA, and ANPA, "[s]ome of the special wording" of the last-named's proposal also having been adopted. Id. at 25 n.84.
105Stein Report at 3.
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men and to apply “administrative” to the person who establishes or affects or carries out policy but has little or no authority over the specific actions of other individuals.106

As expansive as Stein meant the new definition to be in 1940, the example of run-of-the-mill customer service claims adjuster Dorothy Haywood107 is a constant reminder of how its luxuriant growth has made a mockery of its “policy-making or policy-executing responsibilities” roots, which had themselves been totally bereft of any rational basis for excluding anyone from protection from overwork.

Stein’s most lasting achievement, as already noted, was his bifurcation of the executive-administrative exclusion and the creation of an independent categorical exclusion of administrative employees. By confining “executive” to those who exercised “some form of managerial authority,” he was able to reserve “administrative” for those performing “a variety of miscellaneous but important functions in business.” And while admitting that other dichotomous conceptions of two largely overlapping categories were possible, proposals making “administrative” merely a lower form of “executive” were inappropriate because then “executive” would always qualify under the administrative definition and could just as well have been omitted from the FLSA.108

In addition to a monthly salary of $200, his recommended definition meant an employee:

(B)(1) Who regularly and directly assists an employee employed in a bona fide executive or administrative capacity..., where such assistance is nonmanual...and requires the exercise of discretion and independent judgment; or
(2) Who performs under only general supervision, responsible nonmanual office or field work, directly related to management policies or general business operations, along specialized or technical lines requiring special training, experience or knowledge, and which requires the exercise of discretion and independent judgment; or
(3) Whose work involves the execution under only general supervision of special nonmanual assignments and tasks directly related to management policies or general business operations involving the exercise of discretion and independent judgment.109

106Stein Report at 4-5. According to Ralf Dahrendorf, Class and Class Conflict in Industrial Society 255 (1975 [1959]), staff specialists (whom he defined largely as professionals such as engineers, chemists, physicists, lawyers, and psychologists), were “linked with the line of authority by an intricate system of cross-relations without...having immediate authority except over their secretaries and assistants....”

107See ch. 2 above.


Stein described the problem of defining an excluded administrative employee as twofold: on the one hand, it had to be broad and general enough to include employees performing a great variety of tasks; on the other hand, it had to "contain such delimiting requirements, principally a salary requirement, as will prevent abuse."\textsuperscript{110} It might have been impolitic for Stein and the WHA to admit it, but the central problem in defining the administrative employees whose working hours Congress did not intend to regulate was the legislature’s failure to identify them and the very hazy associations that the word, unlike "executive" and "professional," conjured up in popular usage.\textsuperscript{111} In Stein’s more circumspect language, because administrative employees performed "extremely diverse functions," which were in many cases difficult to identify—after all, "it is not hard to call a janitor a ‘superintendent’...if some result desirable to the employer will flow therefrom"—it was necessary to evade the duties tests altogether: "the final and most effective check on the validity of the claim for exemption is the payment of a salary commensurate with the importance supposedly accorded the duties in question." Unlike the situation with executive and professional workers, salary level had to come to the rescue of non-isolatable gradations of administrative responsibility, authority, and prestige. Although neither Congress nor Stein ever articulated a justification for privileging employers to impose unlimited hours on employees with above-average degrees of responsibility, authority, and prestige, Stein himself was at a loss to devise, over a broad range of administrative jobs, an "automatic way of distinguishing between" that segment of workers and "a mere cog in a large industrial wheel."\textsuperscript{112}

Deprived of any "description of duties...which in and of itself can prevent abuse or...differentiate between those...who may reasonably be exempt under the act and those who deserve and require its benefits," Stein could do no more than append "discretion and independent judgment" as a distinguishing element to each of the three subcategories of administrative employee. To be sure, he never attempted to explain why the exercise of such discretion and judgment should serve to subject these workers to long hours. Where even this criterion proved inadequate, "inclusion or exclusion should be determinable by...a completely objective requirement. This proposed objective requirement is, of course, the payment of a stated salary," which is "the best and most easily applied test of the employer’s good faith in claiming that the person whose exemption is desired is actually of such importance to the firm that he is properly describable as an employee employed in a bona fide administrative capacity." Although Stein never explained

\textsuperscript{110}Stein Report at 24.  
\textsuperscript{111}See above chs. 2 and 9.  
\textsuperscript{112}Stein Report at 25.
why "importance to the firm" should trump the employee's need for free time and society's need to share work and avoid unemployment, he offered as an additional reason for a salary-level requirement for administrative employees that, whereas the definitions of executive and professional employees had clauses barring them from exemption if they performed a substantial amount of nonexempt work, he did not propose such a clause for administrative employees because their functions were so heterogeneous that it would create a "disproportionately weighty" enforcement problem to identify nonexempt work. Consequently, in the absence of such a "guard against abuse," the salary level had to be set high enough to prevent abuse. Stein's problem, in other words, lay in the inability to discern any tangible definitional substance common to administrative jobs. This intellectual difficulty was, to be sure, peculiar to this category, but it merely made transparent what was less visible with regard to the executive and professional categories—namely, that he had failed to articulate any empirical or principled reason for characterizing any white-collar workers as not "deserv[ing]" the benefits of state-enforced hours protection.

Having already admitted that no characteristic (other than the spongy and ungeneralizable notion of performing "important" functions) unified the group of undeserving administrative employees, Stein proceeded to describe the three subgroups set out in his recommended definition. The first comprised assistants to (excluded) executive or administrative employees: modern industrial (and government) practice was making increasing use of such executive, confidential, and administrative assistants, who themselves lacked executive authority. The creation of these jobs was driven by the necessity that in large organizations certain officials, whose duties had attained such scope and required so much attention, delegated the lesser "work of personal scrutiny, correspondence, and interviews...." To frustrate employers' exemption claims for mere messengers and stenographers, Stein relied on the aforementioned criteria of discretion and independent judgment to identify "the true executive secretary who, although she may take dictation and do some typing, is primarily employed because of her ability to distinguish between callers at the office and carry out other special and important duties."


114 As Fleming observed after issuing the new regulations: "It is difficult...to find a common denominator for a well-paid executive assistant to a president of a large corporation, a well-paid lease buyer for an oil company, and a well-paid customer's broker, even though there is no dispute that all three should be exempt." Letter from Philip Fleming to Elbert Thomas (Nov. 19, 1940), printed in CR 86:6613-15 at 6615 (App.) (Nov. 19, 1940).

115 Stein Report at 27. The Employment Policy Institute's suggestion that the Bush
(Here Stein perhaps had in mind the secretary in "her capacity as daily confidante to one of the gods" of a firm's "Olympic council" as portrayed in Sinclair Lewis's World War I-era office-centered novel *The Job.*)116 It is almost, but not quite, superfluous to note the (unintentionally) comic dimension of Stein's use of a worker's experience-based knowledge of which callers her boss would grant an audience to as a sufficient criterion ("discretion and independent judgment") for depriving her of protection against that boss's overreaching in forcing her to remain at work all the hours he is there (and/or, in the even more absurd case, all the hours he is not there). Instead of imagining that he was engaged in formulating quasi-objective criteria for justifying exclusions from the country's only nationally mandatory labor standards regime, Stein would have preserved more consistency had he availed himself of the open and blatant pandering to bosses' prerogatives that Senator Vandenberg had successfully promoted during the debate on Black's 30-hour bill seven years earlier: "I do not think a man should be expected to have a separate private secretary the last 2 hours in the day, and I do not think it is practicable to expect him to have an extra stenographer the last hour of the day, because that sort of service necessarily is personal and continuous."117

Stein's second subgroup of administrative employees—whose definition he took in large part verbatim from the corresponding definition in the Classification Act of 1923 for the civil service118—comprised staff (as opposed to line) employees administration's proposed regulation in 2003 excluding executive assistants from overtime regulation if they are "delegated authority to arrange meetings, handle callers, and answer correspondence" could, because such authority was not unusual, cause hundreds of thousands of secretaries and executive assistants to lose their overtime pay rights, overlooked that the WHD had already marked them for exclusion 63 years earlier. Ross Eisenbrey, "The Department of Labor's False Claims About the Overtime Rule" at 4 (July 26, 2003), on http://www.epinet.org.


118The act defined the lowest (assistant) administrative grade as including "all classes of positions the duties of which are to perform, under general supervision, responsible office work along specialized and technical lines, requiring specialized training and experience and the exercise of independent judgment...." Classification Act of 1923, Pub. L. No. 516, ch. 265, § 13, 42 Stat. 1488, 1495. In their standard sociological analysis of occupations, which also appeared in 1940, Anderson and Davidson observed that clerical occupations varied greatly, some bordering on business management and others primarily concerned with manual routine. The range of occupations included bookkeepers, cashiers, accountants, clerks, shipping clerks, messengers, office boys and girls, errand boys and girls, stenographers and typists: "These diverse occupations have an element in common in that they are directly related to the management of industry and trade without having

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and functional (rather than department) heads. As advisory specialists or quasi-consultants to management, such legal advisors, tax and insurance experts, and investment and foreign exchange consultants overlapped with professional employees. As those in charge of functional (and sometimes one-man) departments, they included credit managers, purchasing agents, and personnel and labor relations directors, who (especially in the “higher brackets”), while establishing procedures that all of the firm’s employees had to follow, frequently supervised no employees and were therefore not statutory executives.119 There is no doubt that these office employees represented the group of relatively well-paid non-bosses that formed the most effective grist for employers’ and anti-FLSA congressmen’s propaganda mills during the debates of the Seventy-Sixth Congress on amending the white-collar regulations. Nevertheless, as with highly-paid executives and professionals, although time-and-a-half compensation might have been of subordinate financial meaning to them—keeping in mind that the positive purpose of premium overtime payments is of dubious value and self-contradictory for all workers120—since Stein did not even try to demonstrate empirically that no significant reserve army of unemployed advisors, consultants, and experts remained to be re-employed, that such jobs were inherently unsusceptible to work-sharing and -spreading, and that these workers’ well-being was not impaired by long hours, he failed to justify their exclusion.

The third and final subgroup encompassed those performing amorphous and ill-defined “special assignments requiring individual activity and judgment and directly related to management policies or general business operations.” Often these tasks were performed away from the employer’s place of business by traveling auditors, lease buyers, location managers, and other similarly atypical workers. Stein stressed that this “field...is rife with honorific titles that do not adequately portray the nature of the employee’s duties,” instancing a witness’s testimony that a utility company field representative was “a glorified serviceman.” Among those who performed special assignments on the firm’s premises he mentioned account

final responsibility for its operations.” H. Dewey Anderson and Percy Davidson, Occupational Trends in the United States 584-85 (1940). Oddly, this definition approximated one of Stein’s sub-definitions of “administrative employee,” although Stein excluded such occupations from it. Later, Anderson and Davidson admitted that: “The relationship between occupations on the clerical level is loose at best, the binding idea being that they serve or promote transactions and report or record such activity.” H. Dewey Anderson and Percy Davidson, Recent Occupational Trends in American Labor: A Supplement to Occupational Trends in the United States 46 (1945).

120Linder, Autocratically Flexible Workplace at 41-55.
executives in advertising firms, customers' brokers in stock exchange firms, and assistant buyers.\textsuperscript{121} In unconditionally recommending what was basically the NAM's proposal, Stein forgot or suppressed the profound skepticism that he had expressed toward a similar proposal by the movie studios regarding administrative employees executing "special assignments" with discretion and judgment and without direct supervision. Using a blue-collar example as an ad absurdum argument, he had suggested that an industrial homeworker who was expected to return finished garments without being told how or when to do the work might qualify.\textsuperscript{122}

Summarizing his view of this hodge-podge of workers and inserting what had by now become a labor standards enforcer's self-justifying and -hypnotic mantra, Stein concluded: "These miscellaneous groups include many employees who need the protection of the act as well as many who should obviously be exempt. The salary test and the requirement concerning the use of discretion and judgment should adequately draw a line between them."\textsuperscript{123} In fact, the only thing obvious about Stein's conclusion was that there was nothing obvious about which workers were non-bona fide administrative employees and thus needed protection and which were bona fide and did not. Stein himself came close to conceding this point when he added that (all that) all three subgroups had in common was that they were "all what is known loosely as white collar employees." In contrast, skilled craftsmen, such as tool and die workers, whose weekly earnings for 40 hours could exceed $100, were "traditionally...paid on an hourly basis and at overtime rates for overtime work. This is appropriate. Whatever their value to the employer, it would be improper to describe them as 'administrative' employees."\textsuperscript{124}

Granted that labeling them "administrative" employees made no sense, Stein nevertheless offered no reason whatsoever as to why his intuition that highly skilled and paid unionized workers in short supply should be paid overtime did not apply to all white-collar workers. His only pragmatic excuse for not taking a position on this issue would have been that the same Congress that had excluded some white-collar workers, had neither excluded such blue-collar workers nor empowered the WHA to issue regulations concerning them.

When it finally came to setting the salary threshold on which he had already staked so much for differentiating between deserving clerical (or non-bona fide administrative employees) and undeserving administrative employees,\textsuperscript{125} Stein

\begin{enumerate}
\item \textsuperscript{121} Stein Report at 28.
\item \textsuperscript{122} "1940 WHD Hearings Transcript" at 68 (July 25).
\item \textsuperscript{123} Stein Report at 28.
\item \textsuperscript{124} Stein Report at 28-29.
\item \textsuperscript{125} Stein Report at 31.
\end{enumerate}
frankly conceded that it was "difficult to determine precisely where to draw the line," especially since witnesses' proposals had ranged from a low of $18 a week (Indiana Manufacturers Association) to $5,000 a year (UOPWA). He also referred, rather casually, to the $150 and $200 exemption thresholds proposed by the Barden and Norton bills during the Seventy-Sixth Congress. In light of the Roosevelt administration's and the WHA's acquiescence in the intense political pressure for a $200 ceiling, it is plausible that Stein's ultimate selection of this figure was much less arbitrary than his quantitative reasoning made it seem.

In the end, Stein wound up relying on two precedents—the federal government's pay practices and a WHD report on the salaries of certain clerical workers and accountants. Stein found what he regarded as an "important guide in determining at what point an employee should be considered an administrative employee rather than a clerk" in the government's Clerical, Administrative, and Fiscal (CAF) Service classification system. Stein's reliance on this reference point was ironically part of a seamless web. First, Congress had not given these workers a raise in ten years. Second, the structure of the system itself was in part and the denial of overtime pay to any of these workers was wholly derived from a survey that the government had conducted in the 1920s of private employers' pay practices. Third, even as Stein was depriving large numbers of white-collar workers earning more than $200 a month of overtime protection, the Congress, impelled by the enormously increased work load brought about by militarization and then World War II, was in the process of entitling federal white-collar workers with considerably higher salaries to overtime pay. And fourth, many members of and witnesses before Congress later referred to Stein's regulations as a base point without realizing that he had ostensibly been tracking Congress's own schema from the 1920s.

The CAF system—which comprised classificatory definitions from the Classification Act of 1923, which Stein in large part adopted verbatim for defining administrative employees—divided the clerical grades 1-6 from the administrative grades 7-14 (and executive grades 15-16). Stein noted that "several years ago," when the Personnel Classification Board had reported to Congress on classification problems, the annual salary range for the highest clerical grade was $2,300-$2,800 and for the lowest administrative grade $2,600-$3,100; thus the averages of the two adjacent and overlapping ranges were $2,550 and $2,850, and $2,700 was the "turning point" between "the clerk and the administrative official." Having

126 Stein Report at 30; see above ch. 10.
128 For a detailed discussion of all these issues, see below ch. 19.
129 Stein Report at 31. In fact, by the time Stein was writing in 1940, the report was
found similar salaries for equivalent non-governmental positions ($2,550/$2,950 or an average of $2,750), Stein concluded that there was "some reason" to use $2,700 as the salary test to distinguish between clerical and administrative employees.130

Even if these figures were representative of prevailing pay practices, Stein failed to explain why a mandatory labor standards statute, which was designed not to mimic private employers' practices—otherwise why would the FLSA have been needed if the private labor market was already securing workers the conditions that Congress deemed socioeconomically acceptable?—but to prohibit them, should be using them as guides. Again, Stein's only candid response would have been that it was above his own pay grade to question Congress's unquestioned exclusion of some white-collar workers.

The other guide on which Stein drew for setting the salary test was the probable percentage of persons in certain occupations who would be exempted: if a large proportion of those in highly routinized occupations were excluded, then the salary test would fail to distinguish between the deserving and undeserving. A WHD study (of mostly smaller towns in 1935-36) revealed that almost five percent of stenographers, typists, and secretaries earned more than $1,800, but fewer than 1 percent earned more than $2,400. On the assumption that only few of them had "truly responsible positions," while "the enormous majority" performed "routine clerical work," Stein—once again without explaining why exercising responsibility should serve to deprive workers of overtime protection—concluded that $1,800 would not "guard against abuse." As plausible as this conclusion seemed, its converse was bereft of any apparent empirical or logical basis: "a figure higher than $2,400 would tend to include within the coverage of the act

already 10 years old and, as he knew (id. at n.106 and 43 n.134), the salary ranges had been raised (but not in 10 years). As of 1930, the range for grade 6 was $2,300-$2,900, while that for grade 7 was $2,600-$3,200. Thus the averages were $2,600 and $2,900 and the overall average was $2,750. Act of July 3, 1930, Pub. L. No. 523, ch. 850, 46 Stat. 1003, 1004. To be sure, the salaries of some workers in the highest (principal) clerical grade 6 exceeded those of some workers in the lowest (assistant) administrative grade 7. Their job descriptions also overlapped, with the former including the performance of, "under general supervision, exceptionally difficult and responsible office work, requiring extended training and experience, the exercises [sic] of independent judgment or knowledge of a specialized and complex subject matter, or both, and a thorough knowledge of office procedure and practice, or to serve as the recognized authority or adviser in matters requiring long experience and an exceptional knowledge of the most difficult and complicated procedure or of a very difficult and complex subject...." Classification Act of 1923, § 13 at 1495.

130Stein Report at 31.
certain workers whose work carries with it a status that may well deserve exemp-
tion from the act." Why the highest 1 percent of stenographers in terms of pay 
(or, for that matter, any workers paid more than $200 a month) "deserve[d]" to be 
forced to work long hours remained as mysterious as why any worker's "sta-
tus"—whatever that unexplained term meant—should be a relevant consideration. 

Stein's reasoning became even more fractured when he shifted his attention to 
bookkeepers and accountants (in New York City in 1937). Since eight percent 
of those engaged in bookkeeping, which was "of course one of the most routine of 
all the normal business occupations," earned more than $50 a week, Stein con-
cluded that it was "again...obvious that adequate protection for a group of workers 
who need the protection of the act because of habitually long hours is not provided 
unless the salary limit is raised to at least $50 a week." Although, once again, 
Stein did not even try to justify why the upper eight percent of bookkeepers should 
be exposed to "habitually long hours," he nevertheless asserted that the fact that 
50 percent of accountants and auditors earned at least $50 a week demonstrated 
that this salary threshold "would not also exclude persons who properly deserve the 
exemption...." Because these occupations required "far more training, discretion, 
and independent judgment" than bookkeeping, their incumbents were bona fide 
administrative (or professional) employees "in the proper sense of the terms." 

Whatever sense that was, Stein failed to explain why accountants in the lower half 
of the pay scale should be protected against low hours.

Stein was so impressed by this $200 monthly salary that he ultimately chose it 
despite the fact that "the best indicator of the appropriate amount is probably" 
the aforementioned $2,700 annual salary for civil servants. His initial hesitation 
to adopt the latter figure related to the $2,550 threshold for civil service profes-
sional employees: since administrative and professional employees were overlap-
ning groups, it was desirable to use one salary limit for both. But instead of using 
$2,625 (or $218.75 per month) as the average of both, he unmediatedly interjected 
the notion that because the FLSA applied to low-wage industries and areas and to

131 Stein Report at 31-32. Stein cited US DOL, WHD, Report on Proposal to Exempt Clerical Employees From the Hours Divisions [sic; should be Provisions] of the Fair Labor Standards Act, (March 1, 1940). On this report, see above ch. 10. Stein did not point out the coverage or time of the study.

132 Stein erroneously stated that these data were taken from "the same study." Stein Report at 32. The data were included in the same WHD report as those on stenographers, but the WHD took them from two totally independent sources; the New York data were collected during a "period of business better than that covered by the earlier study." U.S. DOL, WHD, "Report on Proposal to Exempt Clerical Employees From the Hours Pro-

133 Stein Report at 32.
high-wage groups, "[c]aution," which dictated the adoption of a "somewhat lower" figure, entitled him to shave $225 off the best indicator in order to arrive, by sheer coincidence no doubt, at the $2400 annual or $200 monthly threshold\(^\text{134}\) on which Andrews, Roosevelt, Norton, Fleming, and the House Labor Committee had already agreed in 1939.\(^\text{135}\) Any other reason prompting Stein to favor employers and injure workers with marginally above-average salaries in low-wage areas and industries is difficult to discern, especially since his rationale was inconsistent with his earlier programmatic observation that because a law of national application could not account for "every small variation occurring over the length and breadth of the country," salary thresholds should be "reasonable in the light of average conditions for industry as a whole."\(^\text{136}\)

**Professional Employees**

Once a privileged group in society, the professionals too have been caught in the swamp of capitalist decline. ... "Mass production" methods applied to training professionals quickly created an over supply or at least more than the present organization of production could absorb. ...

The market of professionals or "educated labor" became as overstocked as manual labor. "It is no longer the manual workers alone who have their reserve army of unemployed and are afflicted with lack of work," wrote a prominent economist years ago. "The educated workers also have their reserve army of idle...."

Those who entered the professions in the last seven or eight years discovered quickly enough that the time had past [sic] when they could hang out their shingles and begin doing business on their own. They found that if they were to practice their professions at all it would be as salaried employees. ... At present four out of every five professionals are salaried employees.

Salary cuts, unemployment, and insecurity have forced professionals to realize that, like others who work for wages, they would have to resort to collective action if their interests were to be protected.\(^\text{137}\)

Even on the professional level, increasing specialization and routinization have reduced the creative aspects of their work for many highly trained salaried professionals.\(^\text{138}\)

\(^{134}\) *Stein Report* at 32.

\(^{135}\) See above ch. 10.

\(^{136}\) *Stein Report* at 6.


\(^{138}\) Burns, "The Comparative Economic Position of Manual and White-Collar
One of the great inducements for a person to become a registered nurse is the knowledge that in entering a nursing career, she's joining a fully recognized profession. We submit that it is tremendously important to the national interest to be recognized as professionals by the Department of Labor.

Regardless of the other criteria by which persons may be judged as professionals, it is the Department of Labor's definition which is most definite and tangible. If a registered nurse is not a professional under that standard, she would be less than a professional in her own eyes and in the eyes of others. Hospitals must continue to offer the best possible care to the American public, but to do this, we feel that we need your assistance.139

Stein recommended a number of revisions in the sub-definitions of "professional" employees, the overall effect of which, as he himself candidly conceded, was to "exempt more employees than have heretofore been exempt. In fact, the exemption is made broad enough to provide an opening for abuse in its application." In addition, his most radical change, the exclusion of artistic professions, hinged on what even Stein acknowledged as "subjective judgment." In order to "prevent abuse" linked to these innovations, Stein also introduced for the first time a salary-level test for professional employees, to which he assigned so much importance as a compliance and enforcement tool for executive and administrative employees. He also characterized the adoption of the salary test for professionals as "the only substantive change...regarding this term which imposes a more rigorous requirement. All the other changes merely clarify the existing definition or widen its scope."140 That monthly salary, $200, was, as already noted, constructed in a manner similar to that for administrative employees and, like that one, was intentionally set at a somewhat lower level than was justified by the overlapping salary threshold between subprofessional and professional employees in the federal government and private sector.141 Stein's conscious downward deviation from the labor market was especially remarkable in light of his declaration that the salary level was not only "the best single test of the employer's good faith in characterizing the employment as of a professional nature,"142 but was also

139US DOL, Wage and Hour and Public Contracts Division, Public Hearing: "Proposal to Increase Salary Tests for Executive, Administrative, and Professional Employee Exemption" at 286-87 (Sept. 16, 17, 18, 1969) (David Hitt, associate director, Baylor University Medical Center, appearing for Am. Hosp. Assoc.).
140Stein Report at 36.
141Stein Report at 43.
142Stein Report at 42.
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of major importance in retaining the benefits of the act for a group of employees whose hours of work are frequently long, whose hourly rate of pay has frequently been low, and who frequently have enjoyed no compensatory advantages in the form of security of tenure and vacations with pay that are more common among executive and administrative employees.\(^{143}\)

Stein offered no explanation either for the absence of an artistic-professional exclusion from the original 1938 regulations\(^{144}\) or for his decision to recommend one in 1940. His only even arguably self-revelatory insight was the obscure comment that although “only the most tortuous construction” could tease out of the current regulations an inclusion of artists, “the general qualifications and methods of work of the bona fide artist make it reasonable to include such workers with the definition of ‘professional.’”\(^{145}\) What those common qualifications and work methods were, how Stein knew that Congress meant to include artists among the excluded professionals, and what statutory purpose would be served by depriving artists of overtime protection are all questions that Stein never raised, let alone answered.\(^{146}\) The mystery surrounding Stein’s innovation is compounded by the

\(^{143}\)Stein Report at 42. During the war, the BLS confirmed that white-collar clerical and professional employees, numbering about 11 million, “have always received modest incomes....” US BLS, Trend of Earnings Among White-Collar Workers During the War 1 (Bull. No. 783, 1944).

\(^{144}\)He noted that “while there is no specific record of the matter available, it appears that in drafting the present definition no thought was given to persons employed in the artistic professions, such as acting or music....” Stein Report at 35.

\(^{145}\)Stein Report at 40.

\(^{146}\)The previous year, in response to demands for standard occupational information to support the job placement activities of the U.S. Employment Service, the DOL published the first edition of its Dictionary of Occupational Titles. It characterized professional occupations as “predominantly requir[ing] a high degree of mental activity by the worker and...concerned with theoretical or practical aspects of complex fields of human endeavor. Such occupations require for the proper performance of the work, either extensive and comprehensive academic study, or experience of such scope and character as to provide an equivalent background, or a combination of such education and experience.” It then distinguished between occupations such as mechanical engineer, doctor, architect, and astronomer, which were “primarily concerned with the development or practical application of formal and well-organized fields of theoretical knowledge,” and those such as editor, actor, and librarian, which were “concerned with activities that demand acquired abilities which may properly be considered of a professional character, but may not require the background of a formal field of knowledge.” US DOL, US Employment Service, Dictionary of Occupational Titles, Part II: Group Arrangement of Occupational Titles and Codes 1 (June 1939).
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fact that, unlike the separate definition for administrative employees, which the NAM and many employers had strongly urged, no witnesses at the hearings advocated on behalf of an artistic exemption.  

The new sub-definition recommended by Stein (and adopted by Fleming) included among bona fide professionals any employee engaged in work predominantly original and creative in character in a recognized field of artistic endeavor as opposed to work which can be produced by a person endowed with general manual or intellectual ability and training, and the result of which depends primarily on the invention, imagination, or talent of the employee....

Thus the three additional requirements that artistic professionals had to meet in order to relieve their employers of overtime liability were being engaged in work (1) that was “in a recognized field of artistic endeavor”; (2) that was “predominantly original and creative”; and (3) whose result depended primarily on the employee’s “invention, imagination, or talent....”

Stein specified that by “field of artistic endeavor” he meant fields such as music, writing, theater, and the plastic and graphic arts. The requirement of originality and creativity was not difficult to apply to musicians, composers, conductors, and soloists, painters, and cartoonists. It was, he conceded, “perhaps more difficult” to draw the distinction in the field of writing, but it was clear that essayists, novelists and scenario writers would meet the criterion, provided that they chose their subjects and submitted a finished work to their employers, although most such writers would have been excluded from the FLSA in any case as non-employees.

When he tried to make the leap to newspaper writing, however, Stein’s logic and the plausibility of his classificatory innovation collapsed. His discovery of newspaper work as a “recognized field of artistic endeavor” was sufficiently counterintuitive to have merited at the very least a brief explanation, but none was forthcoming. Instead of elucidating the unorthodox notion that journalists were any more artistically creative than any other non-fiction writers, Stein immediately-

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147 Hollywood film producers were a possible exception, but their focus in this regard was make-up artists. See above ch. 12.
148 Stein Report at 55.
149 Stein Report at 41.
150 In an effort to insure that publishers were freed of overtime regulation, one author grotesquely tried to demonstrate journalists’ artistic creativity by pointing to the example of a reporter who received a Pulitzer Prize for reporting that she later admitted was fabricated. Edward Cavanaugh, “Journalists as Professionals: Rethinking Professional Exemptions under the Fair Labor Standards Act,” Loyola of L.A. Entertainment L.J.
ly took refuge in the irrelevant circumstance of salary level: "The requirement would also be met, generally speaking, by persons holding the more responsible and better-paid positions in the editorial departments of newspapers or in advertising agencies. The fulfillment of this and the two other related qualifications in occupations of this type is largely a matter of degree, and the degree is usually best evidenced by the salary received. For this reason, the proposed salary requirement will tend in itself to preclude from the exemption newspaper workers whose work is, in general, not 'original and creative in character,' etc." Astonishingly, then, Stein had merely presumed, without a shred of evidence or even argument, the existence of artistic creativity among journalists and then, having hypostatized it, turned salary level into its indicator, although salary could just as well have indicated other, more pedestrian, qualifications such as the "intelligence, diligence, and accuracy" that he more plausibly attributed to reporters.

As for the third criterion—"invention, imagination, or talent"—it was self-explanatory that the likes of actors, musicians, singers, painters, short story writers, and other artists would "normally" meet this requirement. Concerning newspaper workers, however, he likened the distinction to that concerning originality and creativity: "Obviously the majority of reporters do work which depends primarily on intelligence, diligence, and accuracy. It is the minority whose work depends on 'invention, imagination, or talent.'" How the WHD was supposed to identify that minority Stein did not explain.

Overall, then, Stein placed a huge proportion of artist-employees—the very sorts of WPA workers who had sat in and held him hostage in his office just three years earlier—beyond the pale of federal wage and hour protection. In comparison, most of Stein's other revisions of the exclusion for professional employees were rather minor. The most important and interesting of them was his revision


151 Stein Report at 41.

152 Stein Report at 41.

153 In excluding all musicians, Stein resolved (by fiat) the dispute that had arisen under the Alien Contract Labor Act in the 1880s and 1890s, when unionized musicians had argued that run-of-the-mill musicians were not "artists" within the meaning of the law and therefore did not come within the exemption for artists from the prohibition on importing contract labor. See above ch. 5.

154 Stein Report at 41.

155 See above ch. 11.

156 For example, Stein deleted the requirement that a professional exercise discretion and judgment with regard to "manner and time of performance" and free from "active direction and supervision," because otherwise doctors, lawyers, actors, and musicians
of the requirement that a professional employee's work be "[b]ased upon educational training in a specially organized body of knowledge"; instead, such work now required "knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study...."157 This new and more stringent language Stein adopted almost verbatim from a decision handed down by the highest court of New York State barely six months earlier.158

Stein had interrupted the hearing on July 27 to announce that a member of the DOL legal department in attendance had brought to his attention a recently received memorandum from its regional attorney in New York, which was of "considerable general interest" regarding the subject matter of that hearing. He quoted briefly from the memorandum, which was devoted to the case—which had been reported on the front page of the New York World Journal on July 9—and in particular read aloud the aforementioned definition with no accompanying comment.159 The New York State case involved a 1935 state law imposing a tax on unincorporated businesses, which, if "carried on by a corporation would be taxable"; but the law also excluded the practice of law, medicine, dentistry, or architecture, precisely because these professions "under current law cannot be conducted under corporate structure...." In addition, the law excluded "any other case" in which more than 80 percent of the gross income was derived from personal services actually rendered by the individual or partners "in the practice of any other profession" and in which capital was not a material income-producing factor.160 The recalcitrant taxpayers in question were customhouse brokers, whom the New York Court of Appeals had no difficulty viewing as failing its newly coined definition, which it regarded as "implicit in the term 'professional,'" especially since two of them had apparently never attended college, while the third, a lawyer, had testified that a legal education was unnecessary.161

would fail to qualify. Stein Report at 37. As with the executive exclusion, he also changed "no substantial amount" to 20 percent of nonexempt work. Id. at 40.

157 Stein Report at 53, 55.
158 The language used by the court differed slightly: "knowledge of an advanced type in a given field of science or learning gained by a prolonged course of specialized instruction and study." People ex rel Tower v. State Tax Cmmn, 282 NY 407, 412 (Apr. 16, 1940). Stein made two basic changes: the knowledge had to be "customarily" acquired and the course of study had to be "intellectual."

159 1940 WHD Hearings Transcript" at 381-82 (July 27).
160 1935 NY Laws ch. 33, § 1, at 388, 389.
161 People ex rel Tower v. State Tax Cmmn, 282 NY at 410-12. Stein insisted that the court had taken the language from the article "Professions" in the Encyclopedia of the
Although Stein recognized that "the problem raised under" the tax law was different from the one presented by the FLSA, he argued that "the same general principles may apply," meaning that both decisionmakers had to limit "professional" to "those professions which have a recognized status and which are based on the acquirement of so-called professional knowledge through prolonged study." Stein, who had no legal training, had self-deprecatingly observed at the hearings: "I can't cite cases on insurance companies and I can't even argue the law. I am not competent to do so." The main difficulty with Stein's use of the decision was his neglect of the important difference in the context and function of the exemption in the tax law and the FLSA as well as of the distinction between an exemption and an exclusion. Congress mislabeled the exclusions of white-collar and other workers "Exemptions": an exemption is freedom, for example, from having to pay a tax, whereas an exclusion denies a benefit such as overtime pay. (If employers straightforwardly litigated exemptions as their own rather than, perversely, on behalf of their unwilling employees, the analogy to tax exemptions would be more precise.) Because the FLSA is a humanitarian statute, the courts have interpreted the exclusions from it narrowly so that as few workers as possible lose its benefits: "Any exemption from such humanitarian and remedial legislation must...be narrowly construed, giving due regard to the plain meaning of statutory language and the intent of Congress. To extend an exemption to other than those plainly and unmistakably within its terms and spirit is to abuse the interpretative process and to frustrate the announced will of the people." To be sure, since neither Congress nor anyone else has identified the purpose of the exclusion of the trinitarian formula, no court that has cited this canon of construction has been able to support its ruling by reference to the purpose of this exemption (as opposed to that of the statute or the overtime provision).

In contrast, New York State courts, while also adopting the policy that tax

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Social Sciences, but nothing in the decision suggests such a borrowing and the court's language was certainly not close enough to the article's to have constituted plagiarism. Stein Report at 38; A. M. Carr-Saunders and P. A. Wilson, "Professions," Encyclopedia of the Social Sciences 12:476 (1937).

162Stein Report at 35.

1631940 WHD Hearings Transcript" at 192 (July 10). One of his sons (both of whom are lawyers) did not believe that his father had known how to do legal research. Email from Adam Stein (Mar. 31, 2004).

164See above "A Note on Terminology" at xx-xxiv.


166Most of the cases that have cited this canon dealt with FLSA exemptions other than that for white-collar workers.
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exemptions are to be construed "somewhat rigidly," insist that the "interpretation should not be so narrow and literal as to defeat its [the exemption's] settled purpose." Because of this somewhat more relaxed treatment of tax exemptions than is articulated in the FLSA cases, it was possible that the same term—in this instance, "profession" or "professional"—could and should have been construed to have a different scope under the two laws.

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169 The New York State courts also appear to have developed somewhat more relaxed interpretation of tax exemptions than federal courts, which have tended to "apply the rule of construction that 'statutory exemptions from taxation...are to be strictly and narrowly construed.'" BA Properties, Inc. v. Government of the United States Virgin Islands, 299 F.3d 207, 215 (3d Cir. 2002). See also IHC Health Plans, Inc. v. Cmm'r, 375 F.3d 1188, 1194 (10th Cir. 2003). Or, as the U.S. Supreme Court has enunciated the principle on more than one occasion: "The income taxed is described in sweeping terms and should be broadly construed in accordance with an obvious purpose to tax income comprehensively. The exemptions, on the other hand, are specifically stated and should be construed with restraint in the light of the same policy." Commissioner of Internal Revenue v. Jacobson, 336 US 28, 49 (1949). See also Bingler v. Johnson, 394 U.S. 741, 751-52 (1969) (recognizing the "principle that exemptions from taxation are to be construed narrowly"). The principle had been laid down before Stein wrote his report. E.g., New Colonial Ice Co. v. Helvering, 292 US 435, 440 (1934).
170 To be sure, on the facts of the case, the customhouse brokers would not have passed muster as "professionals" under the 1938 or 1940 FLSA regulatory definitions. The specific case of the New York tax law was a depression-era measure designed "for the support of the government and to produce additional revenues to meet the financial emergency with which the state is faced..." 1935 NY Laws ch. 33 at 388. The Court of Appeals did not expressly hold that the exemption should be interpreted narrowly, but simply ruled that the legislature’s purpose was to tax non-corporate businesses “competing with corporations” and that the reason for the statutory exemptions “makes clear the Legislature’s intent...to reach by tax those vocations which, if conducted in corporate form, would be the subject of taxation.” People ex rel Tower v. State Tax Cmmn, 282 NY at 409, 411. The court did not, however, explicate the legislature’s purpose in nevertheless exempting professions other than law, medicine, dentistry, and architecture that faced no legal impediments to incorporation. As a consequence, the courts were later at times unable to articulate a coherent reason for classifying would-be exempt taxpayers as practicing a profession or not. For example, in Teague v. Graves, 261 AD 652 (1941) a divided court held that an industrial designer was practicing a profession despite the lack of an advanced education; neither the majority nor the dissent based its conclusion on the purpose of the exemption. By the end of the 1940s, the courts circumvented this difficulty
Stein's final contribution to the crafting of the professional exclusion was the gloss he put on the subsection of the original regulation that a professional's work be "of such a character that the output produced or the result accomplished cannot be standardized in relation to a given period of time." Stein saw no reason to revise this provision because "the phrase 'result accomplished' indicates that, to obtain a standard...the result itself must be of the kind that can be standardized." This claim made sense to him because: "Obviously the nature of the accomplishment of each biologist or architect or lawyer will differ, even though other biologists or architects or lawyers perform similar work at times. It is equally apparent that the work produced by a sculptor or violinist is not subject to standardization." Consequently, the results of professional employees' work could not be standardized in relation to given period of time because "the results themselves

by shifting the focus of their statutory analysis. A corporate finance and reorganization consultant who lacked a college degree argued that the exemption of certain occupations denied him equal protection: because "the legislative intent...was to tax noncorporate enterprises which would have been taxable if carried on by a corporation...the exemption...of certain enterprises from which corporations are not barred, is discriminatory and unconstitutional." According to the court: "The fallacy of this argument is that no business has been declared exempt. The distinction which the Legislature, the Tax Commission and the courts have consistently drawn, is between a business and a profession. If an individual is engaged in the former, he is taxable; if he is practicing the latter, he is exempt. All those conducting unincorporated businesses are in the same taxable category, and those practicing professions are, with certain qualifications, exempt, whether the professional pursuit be open to a corporation or not." New York ex rel Moffett v. Bates, 276 AD 38, 40 (1949), aff'd, 301 NY 597 (1950), cert. denied, 340 US 865 (1950). Availing itself of this analysis, courts at times denied the exemption to an undisputed learned professional, such as a very well known economics professor at New York University who was a high-profile consultant, on the murky grounds that his "service deals with the conduct of business itself rather than the application of some separately developed art or science in the needs and uses of business." Backman v Bates, 279 AD 1115, 1116 (1952), aff'd, 305 NY 839 (1953). See also Kormes v. Murphy, 9 AD2d 1003 (1959). Ironically, in devising a separate definition to exclude artistic professionals, Stein jumped to the conclusion that: "Since the exemption in New York tax law would not involve workers of this type, the opinion of the court is of no guidance...." Stein Report at 35. In fact, the Court of Appeals later had no difficulty finding that, under the same law, Donald Voorhees, "recognized as one our nation's leading orchestra conductors and musical directors," met its earlier definition of practicing a profession because music had become a recognized field at some of the country's most respected universities. Voorhees v. Bates, 308 NY 184, 192 (quote), 189, 190 (1954).

\[171\] § 541.2(a)(iii), in Stein Report at 55.
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are largely unstandardized.”172 Although participants in the debate over the white-collar exclusion later sought to use this provision and Stein’s gloss to support continued discrimination in favor of employers of professional workers, capitalist organizational imperatives have in the years since 1940 made enormous strides toward standardizing the results themselves and in relation to time for many professionals, including physicians (critical pathway and managed care techniques regulating the number of patients per day and minutes per patient) and lawyers (billable hours requirements).173

**The Revised Regulations**

“Protection for the typical white collar worker from inconsiderate exploitation as to his or her working hours will continue,” Colonel Fleming declared as he issued the new regulations.174

On October 12, 1940, the same day that the Wage and Hour Administrator made the Stein Report public, Fleming also published a revised set of white collar regulations— to go into effect October 24, the same day on which the overtime trigger was lowered from 42 to 40 hours175—which, again, merited coverage above the fold on the front page of The New York Times. While declaring that “the typical white collar worker...would continue to be protected from exploitation as to minimum wages and working hours,” and especially from “long hours without

172 Stein Report at 37-38.
175 No estimates were possible of the number of workers who might receive overtime pay after the trigger was lowered to 40 hours because there was “no way of ascertaining how many employers will spread the work to eliminate overtime,” but the WHD estimated that 2,650,000 workers in affected establishments were likely to be working more than 40 hours in any fairly busy week, 700,000 of whom had been receiving time and a half before the law had required it: “By penalizing overtime Congress hoped to encourage the employment of additional labor and it is felt that substantial gains have been made in this direction.” Louis Stark, “Nation’s Industry Goes on 40-Hour Work Week,” NYT Oct. 20, 1940 (sect. 4, 10:1). See also “Forty-Hour Week Affects 2,000,000,” NYT, Oct. 23, 1940 (25:8).
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overtime payment to make up for managerial inefficiency or to keep down pay­rolls,” Fleming stressed that “the new regulations were written under the belief held by him and his associates that the Wage and Hour Law was not to cover people like Hollywood stars or types of business administrators earning high salaries.” The major revisions dealt with the exclusion of administrative employees, resulting in the exclusion of an estimated additional 100,000 of them. Without attempting to quantify the outcome, Fleming also noted that he had both broadened the definition of “professional” by including artistic professions and narrowed it by requiring a $200-a-month salary. Finally, Fleming optimistically assured the public that enforcement would continue to expand as more and more clerical workers in covered workplaces became aware of their rights and “‘have the courage to bring violations to our attention.”176 The regulatory changes recommended by Stein and adopted by Fleming largely remained in effect even after the revisions of 2004.177

Fleming hewed strictly (and virtually verbatim) to the Stein line in the regulations that he issued on October 12, repealing and superseding all previous regulations pursuant to § 13(a)(1). In addition to adopting Stein’s most important revision—detaching the administrative from the executive exclusion and creating two separate categories—Fleming implemented Stein’s revised (conjunctive) criterion for the executive definition by substituting for “who does no substantial amount of work of the same nature as that performed by nonexempt employees of the employer”: “whose hours of work of the same nature as that performed by nonexempt employees does not exceed twenty percent of the number of hours worked in the workweek by the nonexempt employees under his direction; provided that this subsection...shall not apply in the case of an employee who is in sole charge of an independent establishment or a physically separated branch establishment.”178 Fleming also adopted Stein’s recommendations that executive employees have the authority to hire or fire (rather than hire and fire) and that it be made explicit that the $30 compensation be on a salary basis.179

176Louis Stark, “Wage Head Revises White Collar Pay,” NYT, Oct. 14, 1940 (1:2, 11:1). The article did not explain how the figure of 100,000 was derived. According to “Fleming Redefines Employees Exempt from Overtime Pay,” JC, Oct. 14, 1940 (1:3), the new regulations “affect[ed]” about 250,000 workers; the article did not make clear whether the number encompassed newly excluded and included workers or merely the former.
177See below ch. 17.
17829 CFR § 541.1(f), in FR 5:4077 (Oct. 15, 1940).
17929 CFR § 541.1(c) and (e), in FR 5:4077. Previously, according to Fleming, the executive “exemption was applicable to hourly paid employees if their hourly pay was sufficiently high to produce $30 a week.” Letter from Philip Fleming to Elbert Thomas
Stein's most enduring and transformative contribution was his fateful definition of the "employee employed in a bona fide...administrative...capacity," which the WHA also adopted verbatim. In addition to requiring the same $200 monthly compensation "on a salary or fee basis" as for professional employees,\textsuperscript{180} this new regulation specified the following disjunctive but capacious duties tests:

1. who regularly and directly assists an employee employed in a bona fide executive or administrative capacity..., where such assistance is nonmanual in nature and requires the exercise of discretion and independent judgment; or
2. who performs under only general supervision, responsible nonmanual office or field work, directly related to management policies or general business operations, along specialized or technical lines requiring special training, experience, or knowledge, and which requires the exercise of discretion and independent judgment; or
3. whose work involves the execution under only general supervision of special nonmanual assignments and tasks directly related to management policies or general business operations involving the exercise of discretion and independent judgment.\textsuperscript{181}

Fleming also adopted verbatim Stein's revisions of the definition of "professional" employee, which in their extensiveness fell midway between the other two. In order to highlight the more intricate nature of these changes, the text is set out below with Stein's additions in italics and the deleted provisions from 1938 enclosed in square brackets:

The term "employee employed in a bona fide *** professional *** capacity" in section 13 (a) (1) of the Act shall mean any employee who is—

- (a) [Who is customarily and regularly] engaged in work—
  1. (i) [predominantly intellectual and varied in character as opposed to routine mental, manual, mechanical, or physical work, and]
  2. (ii) [requiring the consistent exercise of discretion and judgment in its performance [both as to the manner and time of performance, as opposed to work subject to active direction and supervision], and]
  3. (iii) [of such a character that the output produced or the result accomplished cannot be standardized in relation to a given period of time, and]
  4. (b) [Who does no substantial amount of work of the same nature as that

\textsuperscript{180}29 CFR § 541.2(a), in FR 5:4077. Fleming stressed to employers that paying workers a $200 salary did not automatically cause them to be excluded: the duties tests also had to be met. "Limits Exemption Under Wages Act," NYT, Oct. 15, 1940 (47:1).

\textsuperscript{181}29 CFR § 541.2(b), in FR 5:4077.
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performed by nonexempt employees of the employer] whose hours of work of the same nature as that performed by nonexempt employees does not exceed twenty percent of the number of hours worked in the workweek by the nonexempt employees; provided that where such nonprofessional work is an essential part of and necessarily incident to work of a professional nature, such essential and incidental work shall not be counted as nonexempt work; and

[(iv)] (5) (i) [Based upon educational training in a specially organized body of knowledge] requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study, as distinguished from a general academic education and from an apprenticeship, and from training in the performance of routine mental, manual, [mechanical] or physical processes [in accordance with a previously indicated or standardized formula, plan, or procedure]; or

(ii) predominantly original and creative in character in a recognized field of artistic endeavor as opposed to work which can be produced by a person endowed with general manual or intellectual ability and training, and the result of which depends primarily on the invention, imagination or talent of the employee, and

(b) compensated for his service on a salary or fee basis at a rate of not less than $200 per month (exclusive of board, lodging, or other facilities): Provided, That this subsection (b) shall not apply in the case of an employee who is the holder of a valid license or certificate permitting the practice of law or medicine or any of their branches and who is actually engaged in the practice thereof.182

Reactions

[T]he application of scientific management procedures and mechanization has insured that the requirements for carrying out most white-collar activities would be relatively low.183

The new regulations spawned predictably mixed reactions. On the House floor on October 14, Lawrence Connery, who had been elected in 1937 to the congressional seat of his deceased brother (the eponymous advocate of the 30-hour and FLSA bills), criticized WHA Fleming on the first anniversary of his appointment on the grounds that “his whole approach to the problems presented” by the almost three-fold increase in wage and hour complaints was “first, to exempt the firms complained against from the provisions of the statute, in some cases even

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182 29 CFR § 541.3, in FR 5:4077-78.

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against the obviously stated congressional intent.... Almost daily,” he added, the WHD “issues a release exempting additional thousands from one or another provisions [sic] of the act.” 184 Connery then appended the texts of pieces from the Washington Post and Newsweek to the same effect. 185

President Roosevelt’s public reaction to Stein’s work product was opaque. When asked about the new professional and administrative worker regulations at his news conference on Oct. 15, 1940, he replied: “I don’t know anything about it except what I read.” 186 If his reading included the Journal of Commerce—which, regarding the FLSA as “a revolutionary piece of legislation,” 187 editorially welcomed the elimination of “troublesome uncertainty as to overtime payments for relatively highly paid white collar employees about whom the authors of this law were clearly not concerned” 188—then he knew what he had presumably been planning all along: “Prospect of Congressional enactment of any major changes in the wage-hour law this session is now understood to be definitely forestalled by the several rulings of Wage-Hour Administrator Fleming.” 189 And although “[i]ndustry’s reaction to the new definitions of administrative employees...was as favorable as expected by” the WHD, some confusion about it prevailed, “the most erroneous conception” being that an employee performing more than 20 percent non-exempt work was nevertheless not entitled to overtime pay for any bona fide administrative work that he did perform. 190

In letters—to Joseph Curran, president of the National Maritime Union and the

185 CR 86:13565.
187 “Wages and Hours Inspections,” JC, July 30, 1940 (2:2). The newspaper editorially opposed the FLSA’s setting of “uneconomically short maximum hours of work for skilled labor” and its requirement of “payment of punitive and very burdensome overtime wage rates.” “Labor Law Amendments,” JC, June 5, 1940 (2:1-2).
188 “Wages and Hours Law Clarification,” JC, Oct. 15, 1940 (2:1-2).
189 “Wage Act Revision Seen Forestalled by Fleming,” JC, Oct. 15, 1940 (1:2). The “sweeping revisions of the former regulations” also referred to the definition of “area of production.” The article referred to “several measures” which had been pending in the Senate for months “radically revising the law,” although defeat of the House bills in May had been widely viewed as definitive since the Senate lacked a majority to pass such legislation.
190 “Confusion over Fleming Hours Definitions,” JC, Oct. 24, 1940 (1:4). Following many inquiries, Fleming stressed that not “all white collar workers earning more than $200 a month were...exempted”: the duties tests also had to be met. “Limits Exemption Under Wages Act,” NYT, Oct. 15, 1940 (47:1).
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Greater New York Industrial Union Council (CIO), and B. O. Lum, business representative of the Seattle Association of Technical Engineers and Architects (AFL), who had protested against the new definitions—that Fleming made public on October 27, he asserted that, contrary to their apprehensions that the new regulations would remove large groups of workers from the maximum workweek provisions, these "exemptions...would not be so extensive as had at first been believed." In spite of the enormous expansion of the universe of excluded administrative employees that Stein effected, Fleming made the astonishing claim—at least as reported by The New York Times—that the term had been "more tightly defined."\(^{191}\)

To lend credibility to this implausible assertion, Fleming had recourse to a thoroughly atypical and small subgroup: Under the original regulations of 1938, "exemption" had been "denied to a large group of well-paid employees, many of whom were exceedingly important in the functioning of business. Cases could be cited where purchasing agents and personnel directors and persons of that type receiving as much as $7,500 or $10,000 a year were not eligible for exemption.... This just didn’t make sense.” Equally misleading was Fleming’s claim that: “At the other end of the scale are office personnel performing routine clerical tasks such as typists, comptometer operators, shipping clerks, etc. In my opinion these employees are as clearly in need of the benefits of the Act as the Purchasing Agent and the Personnel Director...are not.” However, no new definitions were needed to protect such workers, who could never have been lawfully excluded from overtime pay under the old regulations, whose merged category of executive and administrative employees was defined by reference to managerial and hire/fire powers.\(^{192}\) Similarly beside the point was Fleming’s boast that the new “definition of ‘administrative’ does not permit the exemption of...employees who perform manual tasks such as tool and die makers, no matter what they earn.” And empty rhetoric, bereft of any supporting evidence, was the WHA’s conclusion that he, any more than of his predecessors or successors, had ever considered the purpose of exposing millions of white-collar workers to unfettered employer power regarding hours of work: “It is my considered judgment that with these significant limitations, employees who meet the requirements of the administrative definition are properly exempt from the wage and hour provisions of the Act.”\(^{193}\)

On November 18, Senator Elbert Thomas, the chairman of the Senate Education and Labor Committee, requested that Fleming comment on the criticism that


\(^{192}\) BNA, Wage and Hour Manual 468-69 (1941).

\(^{193}\) BNA, Wage and Hour Manual at 470 (1941).
his revised regulations had excluded from the FLSA “many hundreds of thousands of employees whom Congress had intended to cover.” In a further apologia, Fleming conceded in his reply of November 19 that he did not know how many employees had, as a result of the new regulations, been shifted from covered to excluded status and vice versa: “I am convinced, however, that the total effect has been to bring within wage and hour protected a very large number of those who formerly could have been excluded, and that those who now find themselves removed from the protection are in the higher paid categories and stand less in need of it.”\textsuperscript{194} The admission of ignorance concerning the quantitative impact of the white-collar regulations may be refreshing in contrast with more recent claims of certitude.\textsuperscript{195} Nevertheless, Fleming’s claim that higher-paid workers had less need for protection suggested that they may have had some need—a conclusion that manifestly begged for a justification in terms of the basis for that comparison as well as of the countervailing reason for denying that protection. Once again, in the absence of evidence that the excluded categories of workers did not face unemployment or any adverse physical or mental impact from long hours, the suspicion remains difficult to dispel that the exclusion rested solely on an unreflective value judgment that workers with salaries above a relatively low threshold simply did not “deserve”\textsuperscript{196} time-and-a-half pay. That criterion, however, was always the weakest foundation for any regime of overtime regulation, even regarding low-paid workers. And ironically, in spite of the DOL’s persistent rejection in recent years of a purely salary-level-based coverage system, that unexplicated notion of merit continues to undergird denials of the necessity for reducing the number of excluded white-collar workers.

At the AFL’s annual convention in November, the executive council, while conceding that the original regulations were “not necessarily perfect,” expressed the conviction that the “extremely difficult task of developing a definition which would fit all types of industries in all situations was carried out with notable success by the first Administrator, Elmer F. Andrews, in 1938....” Because Congress itself had already made the FLSA “an extremely flexible statute” by having written directly into it “[n]umerous qualifications, exceptions and exemptions...to make the application of the basic wage and hour standards as acceptable to the industry as possible,” the AFL had been able to “prove[ ]” at the hearings that “employers utterly failed to show any hardship had been sustained by them as the result of the application of the original definition....” Consequently Labor had

\textsuperscript{194}Letter from Philip Fleming to Elbert Thomas (Nov. 19, 1940), printed in CR 86:6613, 6615 (App.) (Nov. 19, 1940).

\textsuperscript{195}See below chs. 16-17.

\textsuperscript{196}Stein Report at 32.
awaited the revised regulations "with much concern." Astonishingly, by the time of the next convention, the executive council, with a year to have reflected on the new white-collar regulations, concluded: "While certain modifications may be desirable in the definitions, they represent a substantial improvement over those previously in effect." The organization was of the impression, for example, that they required considerable discretion and independent judgment and did not permit bona fide white-collar workers to spend a substantial portion of their working time on nonexempt work. However, since the AFL had previously lauded the original regulations for imposing the condition that "in order to be eligible for exemption, employees must do 'no substantial amount of work of a non-exempted nature,'" which had "made it difficult for employers to widen the application of the exemption and to extend its application to the types of workers the Act was designed to protect," the source of the alleged improvement remained unclear.

In contrast, the CIO was no more persuaded by Fleming’s letter to Curran and Lum than it had been by his and Stein’s revisions. In his report on November 18, 1940, to the organization’s annual convention, President John L. Lewis argued that the new regulations had effectuated some of the goals that the “combination of Tory Democrats and Republicans” had failed to secure in Congress. In first place he (erroneously) mentioned that the WHD had “removed the overtime limitations” on the hours worked by executive, professional, and administrative employees paid more than $200 a month.

By December 1940, Fleming was virtually boasting to the NAM of the lengths to which he had gone to accommodate employers’ demands for a separate and expansive category of excluded administrative employees. In an address to the organization in New York he stressed that:

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197 Report of Proceedings of the Sixtieth Annual Convention of the American Federation of Labor at 105, 107 (Nov. 18-29, 1940). It is unclear why a report delivered in November closed before the regulations had been issued more than a month earlier.


201 Daily Proceedings of the Third Constitutional Convention of the Congress of Industrial Organizations at 75. Stein and Fleming had in fact left the salary-level test for executives at $30 per week. A resolution on behalf of the ANG, UOPWA, and FAECT urged the WHA to “tighten[ ] administrative exemptions....” Id. at 202.
[Industry kept asking us about the important fellow in large organizations who didn’t boss people—the assistant to the president, the personnel adviser, the purchasing agent. He is considered an executive. He eats in the executive dining room. Anyway, his salary is so high that if he were paid time and a half for overtime, he would have serious doubts he earned it.

We took care of that fellow in our new definitions. We termed him an administrative employee. We accepted the idea that his work is too important to measure in hours. But we asked that that importance be measured on the pay check. We required that the pay check be at least $200 a month.  

The provision in the 1938 regulatory definition, under which an excluded executive employee could engage in “no substantial amount of work” of the same kind as covered employees, had, according to Fleming, “caused more questions than any other requirements.” Accordingly, he relaxed this “exceedingly troublesome phrase” to read: “whose hours of work of the same nature as that performed by nonexempt employees do not exceed twenty percent of the number of hours worked in the workweek by the nonexempt employees under his direction.” In addition, a proviso made even this limitation inapplicable to “an employee who is in sole charge of an independent establishment or a physically separated branch establishment.” Nevertheless, even this accommodation failed to satisfy the NAM, which in 1941 unsuccessfully requested that the WHD change its interpretation by using the specific employer in question rather than the industry as the standard by which to judge how much work putative managerial employees were performing of the same nature as that performed by nonmanagerial employees. The WHD rejected the proffered interpretation because it would have exempted many non-executive employees.

202 Philip Fleming, Address before the NAM, New York City, Dec. 12, 1940, in CR 86:6693, 6694 (App.).
203 Stark, “Wage Head Revises White Collar Pay” (11:1).
204 Letter from Philip Fleming to Sen. Elbert Thomas (Nov. 19, 1940), in CR 86:6613, 6615 (App.).
205 29 C.F.R. § 541.1 (f), as published in FR 5:4077 (1940). Following the incorporation of retail and service employment, the provision read: “Who does not devote more than 20 percent, or, in the case of an employee of a retail or service establishment who does not devote as much as 40 percent, of his hours of work in the workweek to activities which are not directly and closely related to the performance of the [supervisory] work described in paragraphs (a) through (d) of this section.” 29 C.F.R. § 541.1 (e) (1999). On the elimination of these restrictions in 2004, see below chs. 16-17.
206a “Division Refuses to Redefine ‘Executive,’” WHR 4:509-10 (Sept. 22, 1941). The WHD gave as an example of an unjustified exemption an employee who performed
Employers in the wholesale distributive trades had been particularly eager to "convince the Wage-hour Administrator that the boss' secretary is an executive in her own right...." The "rub" arose from the "does no substantial amount of work" clause: 'The boss' secretary could meet all the other requirements, but by taking dictation or typing letters—work similar to that done by nonexempt employees—she must come under the act. Wholesalers urged that this clause be stricken from the definition...." 207 Stein and Fleming had not accommodated this particularly outlandish request; Fleming's exquisitely sexist-paternalistic explanation to the NAM in December was indelible:

[I]f there are employees in factories or offices who need the protection of an overtime penalty, the girl clerical worker is one of them.

We all know her. We all like her. We know the sound of her high heels clicking in at 9 o'clock. ... Your wife approves of the way she dresses and you know that is the highest compliment your wife can pay another woman. ... She decorates the office and makes it a pleasanter place to work.

There isn't much in the game for her. Yet she's as loyal and as willing to work long hours as the most ambitious of your junior executives.

And our inspections reveal that she frequently does work long hours. Usually because of inefficient supervision, and sometimes because some ambitious executive wants to make a record. She is unorganized and she was unprotected until the wage and hour law went into effect.

Well, now when she works more than 40 hours a week, she is paid time and a half for overtime. Compliance is spreading and time and a half for overtime means that she is not going to work long hours often. Management is going to regard such overtime charges in the same light as demurrage on freight cars that could just as well have been unloaded. And I think this will make for greater efficiency. Your executive who gets going around 3 o'clock in the afternoon will have to get started closer to 9 a.m. 208

supervisory work 1 or 2 hours daily and bookkeeping the rest of the day in a firm that had no other bookkeeper. H.R. 8624 (76th Cong., 3d Sess., 1940) (Charles Kramer, Dem. CA), would have written the language suggested by the NAM directly into the definition of an employee employed in a bona fide executive capacity. On the bill, see above ch. 10.

207 "Who's an Executive?" BW, Apr. 20, 1940, at 34.

208 Philip Fleming, "Two Years of the Wage and Hour Law," in Wage and Hour Manual 70, 72 (1941 ed.) (address delivered Dec. 12, 1940 to the American Congress of Industry of the NAM). More recently, employers' efforts to excuse their extraction of payless overwork from secretaries has stood the entire policy underlying the FLSA on its head by blaming the victim. Inverting and perverting the importance that the Stein Report attributed to "prestige," employers have sought to explain away their violation of the overtime provision by claiming: "Despite working overtime, many secretaries insist on being exempt because they view it as a sign of prestige...." This comment was made by
Six weeks before the revised regulations were issued, the General Executive Board had reported at the UOPWA annual convention held over the Labor Day weekend: "It is apparent that attempts to emasculate the Fair Labor Standards Act through 'redefinition' are not being relaxed and are being centered on the white collar field as the opening wedge in a campaign for destruction of the act itself. Our membership and the unorganized must be mobilized to register effective protest against any contemplated changes in definition or administration of the act."209 Lewis Merrill, the president of the union, which had perhaps more at stake in the regulations than any other union, called on the membership to rally to the defense of the societal standard, which he did not stigmatize as aiding only marginal workers, whose vulnerability was compounded by their total reliance on government bureaucrats for compliance:

The Fair Labor Standards Act is an Act of sound social significance, the only measure which promises in any way to stabilize the bases of wage structures and employment opportunities in this country. The inclusion of white-collar workers is largely the result of conferences of legislative committees through national organizations. Too little activity is going on, in the cities where our locals unions are located, in this connection. Unless...we develop programs in local unions designed to make this the property of the membership and the unorganized, white-collar workers in this country are no longer going to have the regulations of this Act.

It is a vitally important Act to any organization that wants to carry on collective bargaining.... If we eliminate white-collar workers from this Act we are going to pay a heavy penalty in the kind of contracts we negotiate, in the kind of people we organize.... In addition to popularizing the importance of the Fair Labor Standards Act, it is vitally necessary also that local unions undertake responsibility in securing enforcement of this measure. Every local union must consider this problem in the most systematic way if we are to prevent the ripping of this legislation, as it affects white-collar workers, from the statutes of the United States.210

Ultimately, the convention adopted a resolution opposing "any amendments of the regulations which would re-define the terms of 'executive, administrative or professional employees'" and urging "extension of the Act to include all white-

the president of a firm that conducted a survey of 600 companies finding that 46 percent "exempt one or more of their secretarial levels from overtime pay" even though "27% of this group believe some exemptions wouldn’t stand up to Labor Department scrutiny." Christopher Conte, "Labor Letter," WSJ, Mar. 9, 1993 (A1:5) (Westlaw).

209A Summary of the Proceedings of the Third Constitutional Convention of the United Office and Professional Workers of America 79 (Aug. 31-Sept. 6, 1940).

Following publication of the amended regulations, the UOPWA newspaper informed members under the hopeful headline, "Higher Paid Worker Still Covered in Wage-Hour Act," that:

The new rulings, eagerly interpreted by the press to exclude an estimated 200,000 employees, were further clarified in a conference held on Nov. 8 with the Administrator and representatives of the UOPWA, CIO, and other white collar unions. Although Colonel Fleming denied a request for repeal of the rulings pending a test of their application, he agreed to a procedure outlined in a letter by Lee Pressman, CIO General Counsel.

It was agreed that where serious questions of interpretation arose, interested parties would present the matter direct to Washington rather than on a regional basis, and that formal conferences between employer-employee groups involved would be held. In case of disagreement, public hearings would be held and evidence presented, on the basis of which action would be taken. In addition, if experience demonstrated necessity for revisions of the regulations, it was agreed that hearings would be held to consider the problem.212

The UOPWA, which had attended the conference together with other CIO-affiliated left-wing white-collar unions (the Guild, the FAECT, and the American Communications Association), warned that "reactionary employers will try to make salary earned as the final basis for classifying workers under these definitions, thus excluding them from the law." The union did not explain why it regarded the duties tests as a more reliable safeguard for workers, but it did urge locals "to report violations immediately so that a practical test can be made of the procedure agreed upon with the Administrator."213

The FAECT declared that the ruling exempting hundreds of thousands of employees from the FLSA "acts only in the interest of employers who are already adequately protected and benefited in their profits in national defense—their normal profits, their excess profits, and now the super-profit on overtime work."214 Attacking the revised definition of "professional" as "arbitrary, one-sided, and maliciously perpetrated," the FAECT appealed to Roosevelt, Perkins, and Fleming to set it aside. In contrast, the directors of the Metropolitan section of the American Society of Civil Engineers endorsed it as preserving protection for low-

211 A Summary of the Proceedings of the Third Constitutional Convention of the United Office and Professional Workers of America at 274.
213 "Higher Paid Worker Still Covered in Wage-Hour Act."
The Stein Report and the Revised Regulations

paid engineering employees “against exploitation while at the same time freeing the higher-paid men, whose work is largely professional, from the restrictions of the act.”215

The Engineering News-Record, a week after an initial article reprinting the new definition and pointing out that Fleming had cautioned against assuming that anyone paid more than $200 a month was exempt,216 published a lengthy editorial that, shying away from the brute fact that many employers would no longer be required to pay time and a half to their engineer-employees, was programmatically focused on the possibility that “the new definitions will prove to be a milestone in the efforts of engineers to strengthen their standing as professional men.” In contrast, under the earlier regulation, “professional” had been interpreted “quite narrowly, which had the effect of including within the limits of the act a large group of engineers...who would not otherwise be included under...an act designed to protect low-paid employees from exploitation.” The magazine, in other words, took the typical employer position of that time that long hours were not injurious to professional workers’ health and welfare and that their abolition would not lead to work-spreading. Rather, the original regulations’ impact lay in inducing employers to seek to avoid violations by requiring that such engineers’ “time be kept just like that of men in less responsible positions; and because the penalty for overtime work under the act is high, the practical effect has been a lot of ‘clock punching’ on the part of men who had little interest in watching the clock.” By requiring a $200-a-month salary, the amended definition “eliminates the possibility of an employer using a professional classification for the exploitation of low-paid men.” The editors commended the WHD for “its courage” in enlarging the scope of “professional” under the new regulations “despite strong opposition on the part of interested unions to any broadening of the scope of the terms executive, administrative and professional.” At the same time, the magazine criticized professional engineering organizations for having failed to testify at the hearings: “The ball was carried by the manufacturers; and as a result, the unions quite naturally see in their interest an ulterior motive.”217

The American Newspaper Guild deeply resented the Stein-Fleming revisions. Secretary-Treasurer Pasche, the union’s witness at the hearings, “[d]eclaring that the value of the Wage Hour law had ‘been definitely lessened’ by the new definitions,” stated on behalf of the International Executive Board Contracts Committee


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that the Guild ""more than ever must rely for hours regulations on our organized strength and contract protection."" Without explaining how the duties test was any less deficient, Pasche argued that ""basing definitions on salary earnings appears to us to ignore one of the stated purposes of the FLSA, to spread employment, something which can be done...by limiting hours in the higher brackets as in the lower."" Justifiably noting that the definition of "administrative" employee "appears to raise the widest possibility of doubt and of claims to exemption in respect to office and so-called white-collar workers generally," he added:

Undoubtedly claims to exemption will be made in respect to all confidential secretaries, some assistant city editors and even their assistants, and to a variety of other newspaper jobs. The Guild can and must resist such claims, and undoubtedly very few of them will stand the test of full application of the definition. It is important, however, to note that the division's report places repeated emphasis on the $200 salary line as a test of good faith of job classifications. This undoubtedly will be interpreted by many employers as justifying them in claiming as exempt any editorial or commercial employe earning $200 a month.

The extent to which the definitional innovation of central interest to the Guild, namely that of artistic-creative professional employees, covered reporters was, according to Pasche, "uncertain and has been exaggerated." Perhaps not fully appreciating the potential for expansive interpretation embedded in this novel classification, he concluded that "the exemption would include very few newspapermen...." Nevertheless, and in spite of Fleming's statement that typically reporters assigned to regular beats and copydesk men would not "qualify for exemption even if they are paid $200 a month," Pasche anticipated that emphasis on the salary line would nevertheless lead to claims and confusion.

The Guild's sharp criticisms of the regulations notwithstanding, newspaper publishers were not quite so satisfied as engineering employers. While gratified that overtime pay had been eliminated for 200,000 or so actors, branch managers, cashiers of small banks, accountants, and newspapermen, Newsweek, perhaps on behalf of its fellow publisher-employers, bemoaned that the revised rules offered only moderate relief from the burden of complying with hours restriction in offices because most office workers were still covered. Editor & Publisher reported

218"Pasche Assails Redefinitions in Hour Law," GR, Nov. 1, 1940 (1:1, 4:1-3).
219"Pasche Assails Redefinitions in Hour Law" (4:2).
220"Pasche Assails Redefinitions in Hour Law" (4:2-3).
221"Third Year Finds the Wage Act Finally Reaching 40-Hour Goal," Newsweek, Oct. 28, 1940, at 36.
that Fleming had said at a press conference that the salary requirement alone would mean that 75 percent of reporters nationwide would fail to meet the test. The problem of "continuous assignment" (to cover, for example, political trips and athletic training camps) would be met by new rules because such work rarely fell to anyone paid less than $50 a week and otherwise qualified. Overall, then, the WHD "will permit the paycheck to balance the scales of 'professional' determination."222

The Guild's optimism about the impact of the new regulations was tested by the WHD's publication in 1943 of a manual of job classifications for the newspaper industry, whose "peculiar conditions...made it desirable to classify the various types of duties...performed by employees, with a view to indicating" the enforcement policy that the WHD would adopt.223 The Manual of Newspaper Job Classifications contributed to the development of the intellectually indefensible sub-category of artistic-creative professional employees that Stein had created and bequeathed to overworked reporters. The WHD took as its starting point that: "Only writing which is analytical, interpretive or highly individualized is considered to be creative...." Instead of explaining what any of these characteristics had to do with artistic creativity, the WHD proceeded to illustrate the sub-category of exempt writers by turning first to editorial writers, who wrote "comments on topics of timely interest, usually taking a stand on controversial topics or interpreting news events.... Editorial writing appears to be original and creative...and is, therefore, considered to be exempt work." How any of these activities betokened artistic creativity and, more specifically, why pontificating about current events qualified as a recognized field of artistic endeavor were not even questions that occurred to the WHD to pose, let alone answer. Having already conceded that only "with possible rare exceptions" were newspaper writers learned professionals,224 the WHD was no longer in a position to justify why an editorialist who was required, for example, to have a doctorate in international relations or economics might plausibly be classified as a learned professional, whereas editorialists with no such academic-intellectual education who merely spouted off hack-

neyed opinions of the kind that appear by the hundreds every day on editorial pages should be classified as an artistic-creative professional. The WHD’s discussion of columnists, who were given “considerable latitude in expressing [their] personal views,” suffered from the same deficiencies, but at least here it added the potentially pertinent fact that they had “no fixed schedule of hours of work.” The only problem with this fact was that as relevant as it might be to the issue of overtime regulation, it was as irrelevant as an indicator of artistic creativity as was the columnist’s “relat[ing] anecdotes about...sports, politics, fashions, or motion pictures....”

The most important group of journalists discussed in the Manual was the “special reporter,” who covered “assignments of exceptional difficulty and importance” and wrote feature articles requiring “a considerably higher degree of judgment” and “ability to organize materials” than were required of other experienced reporters. The “few top-flight reporters” who fit this description were “distinguished from the nonexempt news reporters” by virtue of: covering “the most important ‘policy’ stories and news events...not entrusted to other reporters”; writing stories that required “continued investigation over relatively long periods of time”; relative freedom from supervision and control over their hours of work; a highly individualized style and a by-line; and “salaries commensurate with the higher degree of ability required of them....” As essential as these special abilities or skills may be for the more challenging tasks they carried out, none of them had anything to do with artistic creativity. The unprincipled basis on which the WHD nevertheless affixed that label to such reporters appeared to be an unexplicated and unsubstantiated analogy to learned professionals, who would doubtless have been declared exempt had they written the same newspaper articles with the help of their academically acquired specialized knowledge. However, 

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225 It seems improbable that the WHD ever intended to or did undertake content analyses of editorials to distinguish the original and creative ones from the rest—nor, given the generality and absoluteness of its guideline, would such a case-by-case investigation have been called for.


228This pattern was clearest with regard to another sub-group, the “special writer,” who was “an authority in his particular field,” who wrote analytical articles interpreting problems and conditions. US DOL, Manual of Newspaper Job Classifications at 6. Such a person seemed to have acquired the knowledge of a learned professional without the academic training. Stein had left open the possibility of making “the exemption available to the occasional lawyer who has not gone to law school, or the occasional chemist who is not the possessor of a degree in chemistry, etc., but it does not include the members of such quasiprofessions as journalism, in which the bulk of the employees have acquired
since the WHD’s own regulations foreclosed it from calling the "top-flight reporters" learned professionals and the statute did not authorize it to exempt sub-professionals, the WHD may simply have arbitrarily forced them into the prorcrustean bed of artistic-creative professionals as a concession to the ANPA.

Stein's and the WHD's illogic, whose saving grace was its self-confinement to only "few" journalists, perpetuated itself in the interpretive regulations that were promulgated in 1949-50.229 Not until several high-profile cases in the 1980s and 1990s and the Bush administration's regulatory revisions of 2003-2004, however, did the illogic metastasize to engulf the majority of reporters.230 Even then, however, the Bush DOL bestowed high praise on Stein by observing that "much of the reasoning" of his report "remains as relevant as ever."231

These early struggles over whether white-collar workers would be subject to wage and hour regulation can be understood best in connection with the more fundamental campaign that broad segments of the employing class were conducting against the overtime payment provision in the FLSA. Their principal objective was limiting time-and-a-half liability to the minimum wage, thus relieving firms of any obligation to pay overtime on wages and salaries in excess of this largely sub-market rate—at least in the nonunion sector.232 In this context, the largely unorganized mass of white-collar workers could play a vital dual role in employers' strategy: on the one hand, objectively, simply by virtue of being a constant reminder of the reality of the existence of a huge exclusion from the overtime-regulation system that could be politically expanded at any time; and, on the other hand, subjectively, as a kind of role model of a politically inert multitude fatalistically unable to contest employers' agency.

The CIO strove to subvert the potential macro-social impact of this reservoir of passive acquiescence in disentitlement. In this spirit, John L. Lewis, who had resigned a few days earlier as CIO president (over his opposition to Roosevelt’s election to a third term) told the FAECT’s annual convention on November 30, 1940:

Technicians, engineers, all the categories lumped under the term “white collar worker” are coming to realize that their interests lie with all the workers.

They are learning this...through the hard experience of finding themselves just as much the victims of depression layoffs and unemployment as the industrial workers their

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229See below ch. 14.

230See below chs. 16-17.


232Linder, The Autocratically Flexible Workplace at 263-78.
employers had tried to teach them to disregard.

"In recent years those same white collar workers, so essential to the enterprise of modern industry, have come to understand that when business volume fell off and plant operation began to subside...they, although a part of management and a part of plant operation, were laid off and dispossessed of their jobs with the same ruthless enterprise that was applied to the millions of manual workers throughout the country."

Even as employers pursued their strategy, part of the business press itself was confirming Lewis’s analysis and undermining their claims that exempt white-collar workers neither needed nor expected overtime protection. For example, half a year before the United States entered the war, *Nation’s Business*, the organ of the Chamber of Commerce of the United States, recycled an updated version of the piece by Edward Cowdrick of the big business group, the Special Conference Committee, that had made the rounds in 1937. After repeating his earlier observation that salaried workers’ lack of overtime pay was no longer offset by “privileges” such as annual vacation, sick leave without deductions, holiday pay, time off to take care of personal matters, job security, and good chances for promotion, that had traditionally been denied to wage earners, Cowdrick conceded that: “It is natural, therefore, that many exempt employees question the fairness of putting in unlimited overtime without extra compensation....” He then admonished employers that the argument that, having already paid production workers for overtime, they “can’t afford the usually much smaller outlay involved in doing the same thing for employees in the upper brackets,” was “dangerous” because it suggested to the exempt employees that they “take their case to Congress or to the unions.” The Chamber of Commerce magazine went on to recommend payment of time and a half to “office workers in the lower exempted positions—those who are closest to the rank and file and whose duties differ only

233"Lewis Tells CIO: White Collar, Manual Workers Have Same Interest," *CIO News*, 3(49), Dec. 2, 1940 (8:3-5). The article used quotation marks for some but not all of Lewis’s speech.

234See above chs. 2 and 9. From 1923 to the late 1930s Cowdrick had been the secretary of the influential Special Conference Committee, a clearinghouse on personnel management and labor relations of a dozen of the biggest corporations. *Violations of Free Speech and Rights of Labor: Hearings Before a Subcommittee of the Committee on Education and Labor United States Senate*, Part 45: Supplementary Exhibits: The Goodyear Tire & Rubber Co.—The Special Conference Committee 16785 (76th Cong., 1st Sess., Jan. 16, 1939).


236Cowdrick, “When the Boss Works Late” at 19.
slightly from those of the non-exempts....” While it was “true that these employees are closely related to management,” Cowdrick argued that “they may be even closer to labor. In the matter of compensation, they are likely to be more interested in the size of their pay checks than in the maintenance of their status in the managerial ranks.”237 Apparently most employers not only agreed with Cowdrick’s claim that “[t]hese employees have been subject to much exploitation in some companies,” but insisted on enjoying the fruits of that exploitation: only 13 percent of companies surveyed reported paying time and a half to some or all classes of exempt workers.238

Nor did the WHD undertake any revisions to alter that behavior: with the exception of one minor war-related formal regulatory amendment of the white-collar regulations implemented a month after the United States entered the war,239 the Stein-Fleming regulations of 1940 marked the end of WHD innovation in this area for almost a decade. The only significant change made in white-collar overtime rules during the intervening years came in the form of a WHD release in 1944 on the effect of disciplinary deductions on compliance with the requirement that employees be paid on a “salary basis” Although the salary had to be a “predetermined amount...not subject to reduction because of variations in the number of hours worked or in the quantity or quality of the work performed during the pay period,...disciplinary deductions...made for unreasonable absences would not” per se prove that the employer had not paid the employee on a salary basis. “On the other hand,” because it was “well recognized that bona fide executive, adminis-

237Cowdrick, “When the Boss Works Late” at 114-15. In contrast, for highly paid professional and administrative employees “who may be on the same intellectual and social levels as the top executives,” Cowdrick recommended keeping their overtime work to “the lowest possible minimums”; where “severe emergencies” thwarted this approach and such an employee “put in an excessive amount of overtime” that was not compensated, “he should be given equivalent time off (actually not theoretically) at a season which is convenient to him.” Id. at 115.


239The exception, amending § 541.2(b), was designed to exclude pilots ferrying planes to England and was deleted in 1949: “(4) who is engaged in transporting goods or passengers for hire and who performs, under only general supervision, responsible outside work of a specialized or technical nature requiring special training, experience, or knowledge, and whose duties require the exercise of discretion and independent judgment.” FR 7:135 (Jan. 6, 1942); FR 7:332 (Jan. 17, 1942).
trative, and professional employees are normally allowed some latitude with respect to time spent at work,” if employers made deductions for the kinds of absences that employees were “ordinarily allowed”—such as going home early or taking an occasional day off—then they were in violation of the salary basis requirement. That the WHD did not, however, intend to deprive employers of their disciplinary powers emerged from the final clause, according to which they would not lose the exemption if “under the circumstances of a particular case, such absences must be considered unreasonable.”