“Time and a Half’s the American Way”

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

Marc Linder

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The modernizing of the Fair Labor Standards Act is a continuing project which will be one of the major items of unfinished business of the Congress for the foreseeable future.¹

As with the FLSA as a whole, World War II prompted no changes in the white-collar exclusions. Against the backdrop of simultaneous (but ultimately failed) efforts by the Republicans to expand the white-collar exemptions statutorily during the Eightieth Congress (1947-48), which they controlled for the first time since the Hoover administration, the WHD held another extensive series of regulatory hearings. The resulting Weiss Report and adoption of its recommendations produced the last structural changes that the duties tests underwent during the rest of the century. Despite this dearth of transformative change, the hearings held by Congress and the DOL generated considerable pertinent testimony, which it is necessary and useful to analyze precisely because it continued to fail to raise, let alone answer, the crucial question as to the justification of the exclusion of white-collar workers from overtime regulation.

White-Collar Workers and Unions

Few people expected to live to see the day when meek and harmless stenographers, store clerks, and engineers would be singing “Solidarity Forever” while marching on the picket line.²

[T]he display advertising manager...complained that the white-collar worker was caught


between the business and laboring class and prophesied that some day the white-collar workers "are going to get ourselves some guns and go out and shoot those union bastards."3

At one time white collar workers may have held an enviable status, but they have lost their relative advantages, for one reason, by failing to organize. ... Thus, clerical workers are largely unorganized and need to be protected even more than those workers in manual trades who are organized.4

"For this new group of workers—for these so-called middle class people from the professional, scientific and cultural communities—we're going to have to bring out a more attractive, thoroughly modern union" with "the sweet smell of high status...."

"What was right for grandpa when he was 'working on the railroad' or swinging a pick in a coal mine isn't good enough for the man or woman in the classroom, in the laboratory or in the studio.... And why should it be?"5

"Twenty years from now the majority of clerical workers will be in unions. It's inevitable."6

Because the impact and efficacy of the white-collar overtime regulations, as with any government-enforced labor standards, depended in part on the extent to which the affected workers had overcome their atomization and forged organizations capable of undertaking collective action, an examination of the shape of unionization is helpful to understanding the development of the law. The war and early postwar periods witnessed increasing recognition by white-collar workers that they did not and could not live in splendid isolation from the working conditions that had impelled production workers to self-organization. Even during the depression of the 1930s it had been becoming clear that the difference between clerical and manual workers with regard to security was only one of degree: "The

3The Citizen-News Co. v. Los Angeles Newspaper Guild, 21 NLRB 1112, 1116 (Mar. 26, 1940).
6Louise Howe, Pink Collar Workers: Inside the World of Women's Work 171 (1977) (quoting Sidney Heller, president, Local 888 Retail Clerks International Association).
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advantages ascribed to office work, in contrast to manual work—better working conditions, shorter hours, paid vacations, security, and opportunity for advancement—are largely imaginary, and to the extent that they have foundation [sic] in reality, disappearing.7

The Great Depression gave firms an impetus to rationalize labor processes that had been protected by the prosperity of the 1920s.8 During the 1930s, the urgent need to cut overhead costs and the abrupt reversal of a tight labor market “gave employers every incentive to use measurement plans to impose more factorylike conditions in offices....” Office worker unions began describing the results as flattened wages, firing of older workers, breakdown of protections for men of their less routinized work methods. Business machine firms reported a surge in sales, while more sophisticated combinations of electrical machinery permitted systematizing and centralizing more employees’ work.9

The DOL estimated that in 1935 about 675,000 “‘white collar,’ or at least non-manual” workers were union members, evenly divided between the AFL and independent unions. The leading occupational groups were railway clerks and telegraphers, newspaper editorial employees, public servants, actors, musicians, radio operators, telephone and telegraph employees, retail clerks, stenographers, and office workers.10 A sense of the accommodationist character of the AFL white-collar unions during the early 1930s can be gleaned from the claim of an officer of the Stenographers Local Union 11773 writing in the AFL monthly magazine near the bottom of the Great Depression that: “The modern union need not bring conflict. We are living in a cooperative age. Prolonged struggle between employer and employee represents a loss to both.” He did not even shy away from

7 Dennis, “The United Office and Professional Workers of America” at 34, 42 (quote).
10 US BLS, Handbook of Labor Statistics: 1936 Edition 426 (Bull. No. 616, 1936). The Inter-Professional Association estimated that at the time of the 1930 census there had been three million professional workers, whereas total membership in economic organizations amounted to about 250,000 professionals. Albion Hartwell, “White Collar Organization Gains,” GR, Feb. 1, 1937 (5:1-2). In 1925, the Times, reporting on a National Bureau of Economic Research study, asserted that unions had been “unable to increase their strength appreciably among the ‘white collar workers’ in the 1910-1920 decade,” despite the fact that the unionization rate in clerical occupations had almost quintupled from 1.8 to 8.3 percent, while the aggregate rate had merely doubled from 9.2 to 18.7 percent. “White Collar Men Give Unions No Gain,” NYT, Jan. 26, 1925 (21:1-2).
arguing that thorough unionization brought about so much community of interest and joint responsibility that "loyalty to the employer and duty to the union become synonymous."11

By 1938, Business Week noted that white-collar union membership included 359,200 in the AFL, 204,921 in the CIO, 46,575 in the United Office and Professional Workers of America, and 17,755 in the Newspaper Guild.12 The following year, when the left-wing UOPWA, the leading general white-collar union, had 48,000 members in 49 cities in 26 states, the union claimed that, based on data from the 1930 census—which returned more than one-third of all clerical workers as located in the 10 leading cities—four of eight million white-collar workers came within its jurisdiction, which included, in addition to office workers, insurance agents, social workers, editorial workers, artists, cartoonists, and advertising agents.13

The UOPWA relentlessly insisted on the linkages between the proliferation of mechanized and automated office equipment and speed-up, unemployment, and impairment of office workers' physical and mental health.14 While the FLSA was pending before Congress, the UOPWA's president telegraphed Roosevelt to propose a meeting with a group of white-collar and professional people to discuss these significant changes triggered by the mechanization of office work.15 Propagating as "fact that the white-collar workers are the most exploited group in industrial America," the union, even before Congress had passed the FLSA, vowed to try to remove its "serious limitations."16 When the Senate Education and Labor Committee held hearings in 1939 on a national health program, the UOPWA's legislative committee submitted a statement arguing that: "The lightning speed of today's office machinery creates new health problems for the white collar workers who operate them. [T]he introduction of office mechanization has severely taxed

13Legislative Department, UOPWA, "The Health Problem of the White Collar Worker: Statement of the United Office and Professional Workers of America: Presented to the U.S. Senate Committee on Education and Labor in Support of the Wagner Health Bill --- S. 1620" at 1-2 (June 1939), in #6046 Box 281 Folder 7: Office and Professional Workers of America, United. Legislative Dept. (Kheel Center, Cornell University).
the physical strength and mental balance of office workers. [S]peed-up typified in devices that record the number of typewriter strokes made each day, and the sedentary nature of office work were all cited as conditions producing special health problems."17 Indeed, the union found that the mechanization that had "conquered office as well as factory" had "brought on hysterical condition [sic] of office workers by the end of the day."18

Lewis Merrill, the UOPWA president,19 took great pains to underscore the homogeneity of blue- and white-collar workers with respect to the socioeconomic risks they faced. At the National Right to Work Congress in Washington, D.C., in June 1939, calling unemployment "the outstanding question of our day" at a time when "most New Deal social legislation seeking to curb or stabilize unemployment, often specifically excludes these [white-collar] workers," he urged the setting of new legislative and administrative objectives that would "serve as a barrier to the social abyss into which our economy is permitting the ‘white collar’ workers to drift."20 The UOPWA's general political orientation was revealed by Merrill's claim that "industry, under the grim lash of fading profits, which did not revive through normal methods of exploitation, turned to the area of administration and services with all of its familiar energy [sic], ingenuity, and ruthlessness."

18 Legislative Department, UOPWA, "The Health Problem of the White Collar Worker: Statement of the United Office and Professional Workers of America: Presented to the U.S. Senate Committee on Education and Labor in Support of the Wagner Health Bill --- S. 1620" at 4-5. This submission was, however, not printed in To Establish a National Health Program: Hearings Before a Subcommittee of the Committee on Education and Labor of the United States Senate on S. 1620 (76th Cong., 1st Sess., 1939).
19 According to Irving Howe and Lewis Coser, The American Communist Party: A Critical History 373 (1962 [1957]), the UOPWA, "led by [Communist] party-liner Lewis Merrill, was merely a continuation of an old CP-dominated union, but it now received all kinds of help from other CIO units such as it had never received before." C. Wright Mills, White Collar: The American Middle Classes 318 (1967 [1951]), observed that in the 1930s and early 1940s, larger proportions of white-collar than wage worker unionists were in CIO unions controlled by Communist Party cliques; by 1948, the proportions were 40 percent and 20 percent. This structure was, in his view, an historical accident of the CIO's development: white-collar unions were located mainly in larger cities, especially New York, which was the CP's stronghold.
Although white-collar workers' "somewhat privileged status" belonged to the past, Merrill did not need to remind this audience, living in the world of 1939, of the fascist device, now a matter of history, which is to organize this profound discontent existing among the white collar masses, for the purpose of providing the most reactionary sections of our social and economic life with a base from which they can proceed to organize the most backward elements among all workers...to accomplish the complete destruction of all institutions and barriers which stand in the way of their untrammeled and barbaric exploitation of the whole people. [T]he white collar workers today (who provide a bridge between the manual workers and the middle class, both of whose experiences they share), are in a frame of mind and in an economic situation where they are the natural prey of all sorts of vile demagogery [sic].

Nevertheless, Merrill argued that the contradiction between the average white-collar worker's working-class economic position and his middle-class "social habits and values" was "being resolved daily." The "cruel effects" that the wider use of machines was having on white-collar employment merely revealed that in "this respect the white collar worker is following in the path hundreds of thousands of manual workers have had to travel."

What made the UOPWA noteworthy is that by the late 1930s changes in office work organization had created a large number of lower- and mid-level salaried positions sharply distinguished from the traditional office occupations of bookkeeper, stenographer or secretary inasmuch as they either engaged in only a narrowly specialized sub-operation (such as using an adding machine) or, as general clerks, carried out general, occupationally no longer definable office assistant's and clerical activities. The occupational content of these types of activities had, in the course of an intensifying division of labor, largely been split up or had virtually disintegrated. Consequently, labor union organization based on the principle of occupation would have been just as impossible at the lower levels of the modern office as among the unskilled and semi-skilled workers of modern mass industry. When a number of locals of the Bookkeepers, Stenographers, and Accountants Union broke away from the AFL in May 1937 and merged with several indepen-
dent locals to form the UOPWA, it marked the first attempt nationally to form a union that did not focus on a special industry or individual occupations or professions, but on the organization of all white-collar salaried employees, regardless of industrial branch or occupational borders, conceived of as a stratum with sufficiently similar problems and characteristics to be encompassed within the same organization. According to this conception, shared by segments of labor and management, long-term structural changes in office work, the impact of the Great Depression, and the tendential leveling of the socioeconomic difference between blue- and white-collar workers had made the latter ripe for organization.24

The disparity between the wartime increase in the cost of living and salaried workers’ fixed incomes prompted the Special Subcommittee on Wartime Health and Education of the Senate Education and Labor Committee, chaired by the very labor-friendly Claude Pepper, to devote several days in January 1944 of its extensive hearings to white-collar workers. “For the first time in the history of the United States,” the UOPWA rejoiced, “the white collar workers are getting their day in court.”25 In addition to a broad array of socioeconomic data that Merrill and others brought to the subcommittee’s attention, Foster Pratt, the president of the International Federation of Technical Engineers, Architects, and Draftsmen’s Union, AFL, included among his recommendations amending the FLSA to include technical engineers, architects, and draftsmen.26

During the brief interval between the end of World War II and the demise of Communist unions promoted by the Taft-Hartley Act, the collective bargaining agreements of the UOPWA (whose organizing slogan was: “Don’t be collar blind!—can you live on your salary?”)27 extended to all financial and commercial institutions such as banking, insurance and general commercial offices, graphic arts such as publishing and advertising, nonprofit institutions such as private social service agencies, and office, technical, and engineering personnel employed by manufacturing firms. By name the companies at which members were organized included: Metropolitan Life Insurance, Prudential Insurance, John Hancock Insur-

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ance, the YMCA, International Harvester, Cudahy Packing, Loew's, MGM, Paramount, and 20th-Century Fox.\(^{28}\) Despite the union's rigid ideological framework—the president of its AFL rival, the Office Employees International Union, boasted in 1947 that "we are cooperating closely with the 7,500,000 other A.F. of L. members to preserve the American free enterprise system"\(^{29}\)—it was open enough to appreciate that the working class not homogeneous:

The white collar worker is faced with a great dilemma. He is drawn to the employers because they dress the same way, have many tastes in common and work in offices as he does. And of course there have been cases where immediate supervisors have risen out of the ranks to executive positions.

The white collar worker, therefore, is inclined to feel that he can depend solely upon the employer for a secure, decent existence and chance to get ahead in the world. ...

Only the union can rescue the white collar worker from social isolation.\(^{30}\)

By the same token, the blue-collar labor movement could not afford to continue to ignore office workers. As CIO president Philip Murray told a national conference of white-collar and professional groups at the beginning of 1945: "when white-collar workers 'are driven down to a sort of degenerated economic status, it constitutes a millstone around the workers of the country.'"\(^{31}\)

As the war was drawing to a close, a well-known industrial consultant assured the employer-readers of the venerable magazine *Factory Management and Maintenance* that no such fear as job security united white-collar workers: "Instead, the very fact of their being on salary enormously lessens their interest" in unions. As long as the prevailing set-up convinced them that they were getting the best chance of advancement, it was unlikely that they would join either the CIO office workers

\(^{28}\) Lewis Merrill, *You Can Get It: How White Collar Workers Can Win Higher Pay* 2 (n.d. [1946]).

\(^{29}\) Paul Hutchings, "Office Workers Look at Their Trade," *AF* 54(3):11, 13, 31-32, at 32 (Mar. 1947). A few months earlier Hutchings had used the same phrase, adding: "We know that under our democratic form of government (sometimes referred to as a capital-istic system) we as a people have surpassed all other systems in promoting and improving our standard of livelihood and well-being." The OEIU was also "opposed to foreign ideologies...." Paul Hutchings, ""White Collars Going Union," *AF* 53(9):9, 20, 32, at 32 (Sept. 1946).

\(^{30}\) Merrill, *You Can Get It* at 18-19.

\(^{31}\) "White-Collar Aid Is Offered by CIO," *NYT*, Jan. 16, 1945 (36:5). UOPWA president Lewis Merrill was present as were representatives of the United Wholesale Retail and Department Store Employes of America and the American Association of Scientific Workers.
known to be headed by a "radical collectivist" or the AFL union believed to be run by a "plain racketeer." Events that took place just a few days after the end of World War II shattered that smug attitude. As Business Week reported in mid-September under the title "Clerical Revolt": "Operations of Westinghouse Electric Corp. were crippled this week by the biggest strike of white-collar employees the nation has ever witnessed." A dispute over a demand by the Federation of Westinghouse Independent Salaried Unions (not affiliated with the AFL or CIO) for extension to white-collar workers of the incentive bonus plan for production workers had led to a strike of 12,000 employees in plants and offices in six states. The dispute, according to Business Week, "takes on almost historic importance in dramatizing the 'revolt of the white-collar worker' which forecasters have sometimes predicted." Some observers called it the most important strike since the CIO had crashed into mass production in 1936. If successful, "victory may open up to unionism the biggest area of unorganized territory still remaining 'open shop' in industry." In its second week, the strike showed both that office employees could "stop manufacturing operations cold" and that "unionized white-collar workers exhibit no importantly different characteristics from unionists in overalls." When the FWISU voted to end the strike after 20 days, its president, Leo Bollens, announced that white-collar workers had demonstrated to the white-collar workers of the country that they could be organized and stay out for as long as necessary in a fight for a just cause.

To be sure, once the post-Taft-Hartley anticommunist campaign took root, the UOPWA's organizing capacity diminished, prompting CIO president Philip Murray in November 1948—when the union's membership was about 70,000—both

33"Clerical Revolt," BW, Sept. 15, 1945 (108-109). According to Kocka, Angestellte zwischen Faschismus und Demokratie at 276-77, 457 n.196, the FWISU in 1939 successfully lobbied against the effort initiated by employers to distinguish between exempted and non-exempted employees by reference to a $225 monthly salary in order to increase the number of the former. Kocka offered no source for this claim, which makes little sense since in 1940 the level was set at $200.
34"White-Collared," BW, Sept. 22, 1945 (102-103). The left-wing United Electrical Workers, which represented the bulk of Westinghouse production workers and 2,000 salaried employees in South Philadelphia, made an aggressive effort to sign up FWISU members without much success, and Westinghouse production workers showed little sympathy with the strike. Id.
36US BLS, Directory of Labor Unions in the United States 36 (Bull. No. 937, 1948). The membership of the other major white-collar unions was as follows: NFFE 93,000;
to take the union to task for its failure to organize and to threaten it with charter withdrawal. Then at the beginning of 1949 he put the UOPWA under "organize—or else" orders. By this time, with the UOPWA in the CIO’s "bad graces," industrial unions were no longer deferring to it with regard to organizing office workers of industrial firms, and in 1948 it was badly hit by defections of right-wing insurance locals. Then in 1949 the UOPWA—with which the Federation of Architects, Engineers, Chemists and Technicians, which was expelled from the CIO for its Communist Party connections, had merged in 1946—was expelled for the same reason from the CIO and disappeared.

Nevertheless, neither the AFL nor the CIO unions had undertaken significant organizing efforts among white-collar workers. The stance of the UAW, one of the CIO’s most prominent unions, is especially instructive. On May 22, 1937, two days before the FLSA bill excluding untold numbers of them was introduced in Congress, Alan Haywood, regional director of the CIO, while predicting that Henry Ford would soon be signing a collective bargaining agreement, "warned white-collar workers that they must organize or be crushed between the industrial workers and employers." Ironically, whatever crushing took place resulted not from white-collar workers’ lack of interest in unionization, but from the UAW’s studied neglect, if not outright rejection, of them. "In general," as the chronicler of its efforts observed in the early 1970s, "the UAW moved from an early rejection and dismissal of possible white-collar organization to an indifferent acceptance of such workers. ... At Ford blue-collar expediency in bargaining away white-collar organizing rights created extensive resentment among that company’s technicians. Even today this continues to be a major liability of the UAW with this group of employees." The international union, with interested locals’ agreement, was initially willing to trade the Union’s white-collar organizing future for “here and now” bargaining gains for blue-collar members.

Certain deals or horse trades were negotiated with automobile management in the Union’s early days. There is a general record of formal and informal exclusion of white-

AFGE 30,500; ANG 25,000; OEIU 22,790; UOPWA 70,000; AFSCME 88,300. *Id.* at 25, 28, 35, 36, 45.

37*Unions Will Drive on Offices,* "BW," Feb. 19, 1949, at 102-104.

38On the Communist Party’s control of the FAECT, see Howe and Coser, *American Communist Party* at 374.


40*See above ch. 9.


collar or similar groups, which at one time or another included foremen, skilled trades personnel associated with technical and engineering employees, laboratory technicians, draftsmen, and office personnel. ... Various concessions for blue-collar groups were gained in exchange. The Union was also involved in even more specific exchanges of white-collar interests for blue-collar benefits. Actually or nearly organized office and technical groups were bargained out of existence....

Not only did UAW collective bargaining agreements expressly commit the union to exclude white-collar workers from its organizing activities, but the union also “repudiat[ed]...embryonic white-collar organizing interest.” For example, the 1941 Ford-UAW agreement excluded from the union’s exclusive representation numerous categories including all employees employed in Ford’s administration building; the 1942 agreement expressly stated that the union would not try to organize workers in those excluded categories. Only after a similar list appeared in the 1946 contract did the 1946 UAW convention pass a resolution against these exclusions, prompting their deletion from later Ford agreements. Nevertheless, these exclusions proved to be a long-term liability for the union in organizing white-collar workers, especially in the Detroit area. Emblematic of the continued...

43Snyder, White-Collar Workers and the UAW at 38, 75.

44At the union’s convention in 1941, a leader of the Industrial Office Workers Amalgamated Local 889, declaring that “[t]his, I believe, is the first time in the history of the U.A.W....that an office worker in the automotive field was given a voice at an International Convention,” contended that if the union started a campaign to organize the 70,000 office workers in the industry, “there should be no further necessity of drawing up contracts with corporations which bargain the rights of office workers away....” Proceedings of the 1941 Convention of the International Union, United Automobile Workers of America 167, 168 (Aug. 4-16, 1941).

45Snyder, White-Collar Workers and the UAW at 38.

46Snyder, White-Collar Workers and the UAW at 39-42. Under the UAW-Ford contract of Nov. 4, 1942, the UAW undertook not to organize “all employees in the...pay roll and employment departments;...all employees at branch plants who are engaged in work which corresponds to that done in (the) Administration Building...; confidential clerks; time study men....” Ford alleged before the NLRB that the UAW was encouraging, supporting, and participating in the UOPWA’s drive to organize Ford employees and that it was the UAW’s intention to transfer to itself any bargaining rights that the UOPWA gained. The UOPWA sought a unit of all office clerical employees except the chief clerk, assistant chief clerk, internal auditor, traffic division head, buyer, sales managers, service supervisors, time study foreman, labor relations department personnel, and employment manager. Ford Motor Company (Chicago Branch) and United Office and Professional Workers of America, C.I.O., 66 NLRB 1317, 1319 n.2 (quote), 1319, 1320 n.5 (Mar. 28, 1946). As late as 1949 a delegate from the aforementioned Local 889 had to remind the...
resentment of office workers and resistance to their admission to the UAW by some members, after yet another resolution was offered at the 1947 convention reaffirming the union’s determination to organize office workers, one delegate, taking umbrage at the notion that salaried employees would be taken within “our Local,” asked rhetorically: “Then we are going to take in the company, is that right...? We might as well.”⁴⁷ The chairman of the resolutions committee had to inform the brother that, although the resolution did not permit supervisory employees into the union, “a $20-a-week clerk who has not got the right to hire and fire has a right to belong to our Union.”⁴⁸

The development of the FAECT, which, as already noted, was intertwined with that of the UOPWA, was more tightly bound up with the exclusions from the FLSA because so many of its members were potentially subject to them as professional employees. The FAECT’s growth was in large part a function of the “economic hardships”⁴⁹ that its members suffered during the Great Depression, when 50 percent of all persons engaged in a technical capacity were unemployed,⁵⁰ and the inflationary boom of World War II.⁵¹ What in principle opened engineers and chemists to “the possibilities of collective action” was their transformation, from the 1920s through World War II, from independent consultants into salaried employees, so that by the end of the war fewer than 5 percent were still engaged in independent practice: “As employees, the members of this group have seen their

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⁴⁹Herbert Northrup, Unionization of Professional Engineers and Chemists 4 (1946).

⁵⁰NICB, Unions of White Collar Employees 7 (Studies in Personnel Policy, No. 51, 1943).

⁵¹According to Jack Culley, “A Primer on Engineering Unionism” at 1-2 (U. Iowa Bureau of Labor and Management, Reprint Ser. No. 12, June 1959), the advent of collective bargaining agreements in the war industries provided the real impetus to the expansion of engineering unions in 1943-45.
conditions of work industrialized, so that, instead of being able to apply their engineering and scientific skills individualistically, many now function as members of a team. The result has often been to blur the lines of distinction between the professional man and the technicians, to confront the former with problems of employment relations, and to bring him into contact with unions of nonprofessional employees." Unionization was fostered, as the National Industrial Conference Board noted in 1943, by the fact that a "large number of technicians in the architectural, chemical and engineering fields are in the same relative position as office and clerical workers when it comes to their compensation, hours and working conditions." Indeed, in an important sense they were even worse off because, as big business's NICB candidly put it, the "professional character of the jobs enables employers to circumvent" the FLSA. Consequently, during the period of rearmament and war in the 1940s, the standard of living of engineers and chemists, like that of other salaried employees, failed to keep pace with living costs, while "production workers' incomes were swelled by overtime pay...."

### Attempted Cross-Fertilization with Taft-Hartley

One reason why the white-collar worker is not as good organization material as the other workingmen is that in almost every office...everybody is somebody’s boss and everybody works under the direction of somebody else—with the sole exception of the proprietor and the newest office boy.55

The UOPWA annual convention in February 1946 may have called for the "Elimination of exemptions from overtime payments for all but bona-fide executives,"56 but once the Republican Party gained control of the Eightieth Congress at

52 Northrup, *Unionization of Professional Engineers and Chemists* at 3-4.
53 NICB, *Unions of White Collar Employees* at 6.
54 Northrup, *Unionization of Professional Engineers and Chemists* at 4.
the elections in November, employer organizations began planning for the rollback of New Deal labor legislation. In the closing days of that year a minority report of the National Association of Manufacturers favored outright repeal of the FLSA as well as of the NLRA and the Norris-LaGuardia Act. The organization's radical objectives were visible in the limited nature of the chief dispute between the minority and majority—namely, "whether the NAM should declare for repeal 'as a necessary prelude to constructive legislation,' as urged by the dissenters, or simply declare, as the majority wished, for those principles that should be set forth in the statutes and refrain from comment on the legislative procedures by which they might be arrived at." This latter strategy, under the name of the Taft-Hartley Amendments, succeeded during the first session in 1947 in fundamentally revising the NLRA in employers' favor. Employers also successfully carried out a similarly broad-gauge attack on the FLSA by means of the Portal-to-Portal Act.

Employers engaged in some cross-fertilization between amendments to the NLRA and the FLSA white-collar regulations. On the one hand, the latter's definition of excluded professional employees was largely incorporated into the Taft-Hartley law in order to confer on such workers the right not to be placed in the same bargaining unit with non-professionals. In turn, employers in 1947-49 representative, mentioned nothing about the white-collar exclusions, although he did criticize the general overtime problem of the fluctuating workweek. Proposed Amendments to the Fair Labor Standards Act: Hearings Before the Committee on Labor House of Representatives 407-31 (79th Cong., 1st Sess., Oct. 15-Nov. 15, 1945 [1946]); "Can't Live Decently on $26 a Week, UOPWA Tells Congressional Committee," OPN, 11(11):1-3-5, 4:3-5 (Nov. 1945).


H.R. 1754 (80th Cong., 1st Sess., Feb. 6, 1947) (introduced by Rep. John Hinshaw, Rep. Cal.); Labor Management Relations Act, ch. 120, Pub. L. No. 101, § 101, 61 Stat. 136, 138 (June 23, 1947) (codified at 29 USC § 152(12)). The FLSA provision imposing a 20 percent tolerance for nonexempt work was not adopted. When a professional engineering witness explained to a House committee that the definition had been "taken almost verbatim" from the FLSA regulations, Illinois Republican Thomas Owens, a very aggressive opponent of labor who died in the middle of his first term, immediately challenged its pedigree: "You think that the wage and hour law is all right, do you?" The witness defensively replied: "I did not say that." Amendments to the National Labor Relations Act: Hearings Before the Committee on Education and Labor House of
unsuccessfully sought to persuade the WHA to adopt the Taft-Hartley Act’s much broader definition of “supervisor” as the definition of an excluded executive employee.⁶¹

From the outset, the NLRB had taken a broad view of the covered status of professional employees. In early 1936, the Board decided a case involving


⁶¹See below. The same broad definition of “supervisory employees” had been used in the so-called Case bill, which would have amended the NLRA. Congress passed the bill in 1946, but President Truman vetoed it and Congress sustained the veto. H.R. 4908, § 12 (79th Cong., 2d Sess., May 25, 1946). There was nothing in the NLRA, according to one major study from 1940, to “prevent professional or ‘executive’ employees from resorting to self-organization for mutual benefit... Some beginning toward the organization of the white-collar, professional and technical workers has already been made. This trend may be expected to increase in tempo with the growing consciousness of the benefits to be derived from collective bargaining even among the groups which hover about the periphery of economic power, in actual contacts and social attitudes, if not in economic well-being.” Joseph Rosenfarb, The National Labor Policy and How It Works 49 (1940). The Board did at times exclude “from bargaining units of rank and file workers executive employees who are in a position to formulate, determine, and effectuate management policies. These employees we...deem to be ‘managerial,’ in that they express and make operative the decisions of management.” Ford Motor Co., 66 NLRB 1317, 1322 (Mar. 28, 1946). A year later, in a decision that the Taft-Hartley Act promptly overruled, the Supreme Court stated: “If a union of vice presidents, presidents or others of like relationship to a corporation comes here claiming rights under this Act [NLRA], it will be time enough then to point out the obvious and relevant differences between the 1,100 foremen of this company and corporate officers elected by the board of directors.” Packard Motor Co. v. NLRB, 330 US 485, 490 n.2 (Mar. 10, 1947). Board policy regarding this category of non-statutory managerial employees, which it itself created, shifted over the years and it was not completely clear whether the Board was merely excluding them from bargaining units together with rank and file workers or from the act altogether. The scope of the category also changed over time; in 1950, for example, the NLRB excluded buyers as representatives of management because they made substantial purchases for the employer. American Locomotive Co., 92 NLRB 115, 117 (Nov. 16, 1950). The Supreme Court, in a substantively sharply divided 5 to 4 decision, sought to put an end to the confusion in 1974 by ruling that managerial employees were not covered by the act at all. NLRB v. Bell Aerospace Co., 416 US 267 (Apr. 23, 1974). On remand, the confusion was restored when the Board ruled that the buyers in question were not managerial employees because they did “not exercise sufficient independent discretion...to truly align them with management...” Bell Aerospace, A Division of Textron Inc., 219 NLRB 384, 386 (July 23, 1975). The inclusion of buyers within the category of “managerial employees” demonstrates that it encompasses both administrative and executive employees under the FLSA white-collar definitions.

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Chrysler Corporation and the 2,300-member Society of Designing Engineers, which had been formed in 1932 to improve the employee status of mechanical engineers, draftsmen, and designers. In response to wage cuts, Chrysler engineers began joining in considerable numbers in early 1935, pushing union membership there up to 476. The principle underlying the Board’s decision in favor of NLRA coverage was rooted in the act’s purposes in a way that was completely alien to FLSA decisionmakers: “They are in no sense executives. The engineers have need of organized strength in common with all wage earners. This is their opinion as shown by the impetus to organization provided by a wage cut uniformly suffered. We can find no reason for differing with them.”

The 1947 House Education and Labor Committee hearing devoted to the bill to amend the NLRA to empower professional workers to segregate themselves from their co-workers displayed the self-contradictory forces underlying such a demand. Vastly exaggerating the professionals’ occupational circumstances in large-scale industrial employment, the bill’s sponsor, California Republican John Hinshaw, contended that: “Regimentation of professional employees...and maintenance of the standards of professionalism...are impossible of joint attainment. ... Neither the output nor the value of professional employees can be standardized as can that of skilled and unskilled labor. The production output of the professional man is the production of his mind while that of the nonprofessional depends largely on his manual skill and dexterity.” Hinshaw went so far as to assert that “the best of them would not be employees at all if they could have adequately equipped laboratories of their own.”

Despite the fact that the logic of capitalist research and development made the concentration of capital and the mass production and employment of scientists and technicians necessary, Hinshaw claimed that his bill was “designed to set free the inventive genius of our engineers and scientists....”

It was the bill’s permissiveness regarding professionals’ unionization and alliances with national labor unions that sowed the seeds of self-contradiction that New York Republican Ralph Gwinn—who viewed labor standards legislation as

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63Amendments to the National Labor Relations Act: Hearings Before the Committee on Education and Labor House of Representatives 5:2766.
64Amendments to the National Labor Relations Act: Hearings Before the Committee on Education and Labor House of Representatives 5:2767.
65Amendments to the National Labor Relations Act: Hearings Before the Committee on Education and Labor House of Representatives 5:2767.
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socialistic—swiftly detected. He asked Hinshaw directly: “Well, should they be permitted to organize and become part of labor when as a matter of fact they more nearly belong in the managerial group, and would occupy, if they joined labor, rather an inconsistent position?” Suddenly Hinshaw recollected that, his plea on behalf of independent professionals notwithstanding, in “some large...production organizations, such as an aircraft company or a large electrical concern, many hundreds and in cases thousands of professional employees are engaged by these employers, and...as such they are entitled if they choose to have a bargaining unit of their own....” Dissatisfied with this concession to unionism, Gwinn joined issue from a slightly different perspective, asking Hinshaw whether he would grant the same rights to foremen and supervisors with the power to hire and fire; Gwinn succeeded in prompting Hinshaw’s subtly formulated response that, based on his familiarity with large aircraft factories in his district, he knew that some foremen supervising only five workers were also performing manual labor themselves and should therefore “have something to say” on being organized. Although he had apparently failed to elicit the precise response he had been expecting, Gwinn resumed the Socratic dialog by opining that Hinshaw’s professionals “more nearly belong” with supervisors than with labor. Again Hinshaw confounded both Gwinn and his own general argument with a more differentiated analysis: “They do and they do not. It depends on how high in the skill they are. If they are a chief engineer, the medical officer, entitled to cause the discharge of an employ­ee...perhaps they belong to the management group. But if there are large numbers of them employed..., I think they have a right to discuss their problems with manage­ment as a group.” Indeed, Hinshaw specifically drew the conclusion from the massed presence of technical and laboratory professionals that they “certain­ly...have a right to discuss...their hours and working conditions...with manage­ment.” He thus implicitly raised the question as to why, if professionals could collect­ively bargain over their “regimentation” with their employers, it would be inappropriate for the federal government to intervene by establishing a protective ceiling over those hours.

Hinshaw’s acknowledgment that only the relatively small stratum of mana-

66Marc Linder, “‘Moments Are the Elements of Profit’: Overtime and Deregulation of Working Hours under the Fair Labor Standards Act 509-10 (2000).
67Amendments to the National Labor Relations Act: Hearings Before the Committee on Education and Labor House of Representatives 5:2774.
68Amendments to the National Labor Relations Act: Hearings Before the Committee on Education and Labor House of Representatives 5:2775.
69Amendments to the National Labor Relations Act: Hearings Before the Committee on Education and Labor House of Representatives 5:2778.
gerial professionals did not need a union made Gwinn—whose Socratic tables had been turned on him—melancholy: “Mr. Hinshaw, it is a bit shocking to realize from the implications of this bill that lawyers and engineers, professional persons, are so far removed from management that they cannot make themselves directly felt as individuals.” Worse still, Gwinn feared that unions would target “the vice presidents” next.70 Another committee member, Kansas Republican Wint Smith, expressed disbelief: “I have heard everything now. When the builders of bridges and the builders of highways come to Washington to a paternalistic Government for redress.”71

When E. Lawrence Chandler, representing several professional engineering societies with about 100,000 members, testified, the second-ranking Republican on the committee, Gerald Landis of Indiana, sought to persuade him to exclude his membership from the NLRA because if they all organized, then the low-salaried teachers would want to organize: “But the danger is of all these different professional groups forming a union of their own, and I have always thought that the engineers and architects...have had decent wages, salaries and all, which have been pretty high.”72 However, the one-term congressman, failing to explain how a ban on collective bargaining would aid professionals whose salaries were not so high after all—an engineer at GE testified that in a “stratified” profession engineers were “very, very much disturbed” about the rapid pay increase for rank and file workers which “swamps out the real differential”73—was unable to shake Chandler, who, though he favored the open shop, had to accommodate “the young men” among his members who opposed exclusion.74

Yet another anti-labor congressman who abhorred unionization of professional

70Amendments to the National Labor Relations Act: Hearings Before the Committee on Education and Labor House of Representatives 5:2777.
71Amendments to the National Labor Relations Act: Hearings Before the Committee on Education and Labor House of Representatives 5:2791.
72Amendments to the National Labor Relations Act: Hearings Before the Committee on Education and Labor House of Representatives 5:2778.
73Amendments to the National Labor Relations Act: Hearings Before the Committee on Education and Labor House of Representatives 5:2795, 2793 (Mr. Ransom). Ransom summarized the industrial stratification as follows: 15 percent (vice presidents, divisional and assistant divisional engineers considered management) no union was trying to represent; 10 percent (supervisory engineers) were trying to avoid enforced inclusion in the CIO plant-wide supervisory bargaining unit; 35 percent on the monthly payroll were petitioning for bargaining rights to avoid forced inclusion; and 40 percent were brought into the weekly salary group with no choice. Id. at 2794-95.
74Amendments to the National Labor Relations Act: Hearings Before the Committee on Education and Labor House of Representatives 5:2792.
employees was forced to watch his logic turned against him. Texas Democrat Wingate Lucas admonished Chandler that “you are attempting to reduce your status as professional men in seeking protection under the Wagner Act” because they would no longer be permitted to ask for remuneration for their services based on their value “rather than upon the time expended in performing them.” This admission entailed the more damaging admission that employers were in a position to make professional employees account for their time; thus, once again, the objection to government protection of workers from employers imposing long hours lost its force. However, as far as Lucas was concerned, the mere fact that 1,800 Boeing engineers wanted government protection in bargaining for salaries proved that they were “not engineers....” When another engineer told him that engineers wanted to bargain over wages and working conditions, Lucas shot back: “That almost, in effect, reduces them to the status of the other employees,” prompting the engineer to reply: “The younger professional man just out of school is practically in that position, is he not?” Lucas then tried to proselytize the engineer on behalf of the school of hard knocks: congressional exclusion of professional employees from the Wagner Act would give them the “initiative to rise rather than to be stymied, and thereby held to a certain level within the group.” But when the engineer asked him “what redress would the junior professional employee have” on his own, Lucas was forced to concede: “I do not know.”

The 1947 House FLSA Hearings

Ever since the formation of the American Newspaper Guild in 1933, we have been waging a continuing battle to prevent classification of newspaper employees as professional people.

It is not, I assure you, a matter of modesty on our part. Our objections to being rated as professionals have been solely a matter of economics. It has seemed to us that the zealous desire of some to classify us as professionals was not so much to enhance our dignity as to...deny us overtime pay....

75 Amendments to the National Labor Relations Act: Hearings Before the Committee on Education and Labor House of Representatives 5:2799.

76 Amendments to the National Labor Relations Act: Hearings Before the Committee on Education and Labor House of Representatives 5:2800-2801 (Mr. Hathaway).

77 Amendments to the National Labor Relations Act: Hearings Before the Committee on Education and Labor House of Representatives 5:3733 (Milton Murray, president, ANG).
As WHA William McComb noted in his annual report for 1947, significant changes in the economic situation and the DOL’s enforcement experience since 1940 had made necessary revision of the regulations, which had been under consideration for some time: “However, action on this matter was postponed for the reason that it was considered advisable, in the early periods of reconversion of industry from war-time conditions, to delay any revisions. Early in 1947, however, the Administrator decided to take the necessary steps to present the question of revision of the regulations for consideration at a public hearing at which all interested parties will have an opportunity to present their views. As a preliminary step the Administrator appointed a labor-management advisory committee to consider and advise him on the question of revision.”79 Several months earlier, on October 18, 1946, the left-wing United Electrical, Radio and Machine Workers of America had filed a petition requesting that the salary level for all three categories of white-collar workers be increased to $500 per month, but since the WHD investigation was already under way, the petition was “held over for consideration” with other proposals.80 In June 1947, after many labor and management spokesmen had criticized the $30 executive salary level as too low—a position that employers had not previously been well-known for advocating—in view of wartime wage increases, Labor Secretary (and former Washington Senator and U.S. district court judge) Lewis Schwellenbach announced the appointment of the labor-management committee consisting of representatives of the National Association of Manufacturers, Chamber of the Commerce of the United States, the AFL, and the CIO to decide whether to raise the level and consider other exemption tests applicable to “the so-called white collar employees....”81 The committee meeting

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81“To Weigh ‘Executive’ Rule,” NYT, June 18, 1947 (21:3).
on July 9, 1947\(^{82}\) marked the first external action taken by the DOL to reconsider the regulations since 1940.\(^{83}\)

Already in July, at the end of House Education and Labor Committee hearings on increasing the minimum wage, its chairman, New Jersey Republican Fred Hartley, disclosed that the House leaders had “reached a final decision not to touch” the FLSA until the 80th Congress’s second session in 1948.\(^{84}\) Nevertheless, in September, Pennsylvania Republican Samuel McConnell, chairman of Subcommittee No. 4, Wages and Hours of Labor, after conferring with Hartley, decided to hold “open”\(^{85}\) and “exploratory” hearings “without having any specific legislative proposal pending” in October and November, whose scope was now expanded to include other FLSA issues as well.\(^{86}\) In August and September, during the interim between Hartley’s disclosure and McConnell’s announcement, “executives and officers of more than 200 employer organizations throughout the country met in Washington,” as the administrator of one state employers organization informed one of the subcommittee’s members, “and a great deal of their time was spent in discussion of needed amendment to the Wage and Hour Law other than the minimum wage provision.”\(^{87}\) Among the proposed amendments they formulated were that “[h]ighly paid salaried workers should be exempted from the overtime requirements of the law” and that “[w]herever practicable, Congress should define all terms used in the act rather than leave problems of definition for solution by the Administrator or the courts—e.g. executives, professional and administrative employees.”\(^{88}\)

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\(^{84}\)“House Picks Group for Labor Survey,” *NYT*, July 18, 1947 (7:1).


\(^{88}\)“Major Amendments Proposed by Representatives of a Large Number of Industrial Relations Organizations Throughout the Country September 24, 1947,” enclosed with
The high point of these hearings, to whose subject matter McConnell attached "extreme importance," was the colloquy between James West, the director of public relations (in charge of wage-and-hour grievances) at the Buckeye Steel Castings Company, and first-term Minnesota Republican George MacKinnon. West maintained that employers' problems with the white-collar regulations could be addressed by establishing a minimum salary as the sole criterion for overtime pay, which would eliminate border-line cases and contradictory interpretations. To those who would be excluded from overtime pay West offered the consolation that his proposal "would certainly work no hardship on those able employees who would otherwise be entitled to extra compensation, as ability and initiative and the desire to progress will always be present and will be recognized under our economic system." In order to determine the appropriate salary level, West asked what the law's intent was: "It was to take care of the low-paid workers, the hourly and salaried worker, not the type of people that I am talking about." Since the Bureau of Labor Statistics' most recent report stated that average weekly manufacturing wages were $48, West asked rhetorically: "Now, is it necessary under any law to protect workers who are making in excess of that amount?" West's rounding it off to $200 a month then prompted MacKinnon to spark a discussion that Congress had never heard before: "That is all right except for the

letter from Jack Schroeder to George McKinnon [sic] (Oct. 31, 1947). Schroeder called the list of proposals a "digest of their most important conclusions" without identifying the digester. The employers also recommended that the "term 'employ' should be defined to remove from the acts [sic] coverage [sic] 'bona fide' independent contractors."

Letter from Shepard to MacKinnon (Sept. 12, 1947).


The witness immediately preceding West, Frank Morfoot, the secretary and assistant treasurer of Owens-Illinois Glass Co., had made the same proposal of $200 a month as the sole test based on virtually the same arguments, yet MacKinnon, who questioned him at length on this very issue, did not embark on the more fundamental discussion that he had with West. Minimum Wage Standards and Other Parts of the Fair Labor Standards Act of 1938, vol. 2:1051-63.
spread-the-work theory on account of which the act was originally passed."94 Since West had earlier declared that one of the "three simple problems" of which the FLSA was designed to "afford a relaxation" was to "[s]pread employment by establishing a maximum workweek,"95 he had constricted his room for argumentative maneuvering, but he gamely plunged into the interrogation:

Mr. West. Frankly, in a company such as mine and any number of companies, the types of workers we are talking about are at a premium; you cannot distribute that sort of work.

Mr. MacKinnon. You may not be able to do so now, but down through the years it has not always been that way. The fact that you were not able to work your men 10 hours a day has resulted in the employment of more men than would otherwise be the case, has it not?

Mr. West. I question that very seriously.

Mr. MacKinnon. It could not be any other way. If you were permitted to work those men 10 hours, you would not have to employ as many men as when you work them only 8 hours.

Mr. West. I am talking about the executive type of employee, your administrative and professional type of employee. I do not think the fact that we have a law on the subject is going to make any difference as far as the unemployment situation of those people is concerned. Of course, that is only my personal opinion.

Mr. MacKinnon. Practically all of these plants are now on a 5-day basis and you have your executive staff on a 5-day basis. That requires more executive employees to do the same amount of work, just as it requires more employees for the other classifications of work. And I say that from personal experience.

Mr. West. Of course, the work has to be done. The salaries of most of the executive employees are so set up for the work that they do that it would make very little difference to them. ...

Mr. MacKinnon. Of course, the point was in connection with the $200 minimum wage to take care of a certain group of workers. Let me put it this way. Your suggestion might take care of the requirement to put them all on some kind of a fair basis, but your suggestion does not go to that part of the original law which was intended to take care of the distribution of the work. If the purpose were valid then, then it is just as necessary and desirable to distribute the work among those that are getting more than $200 as those who were getting under $200.

Mr. West. ...I still do not believe that this is the type of worker that was contemplated to be covered by the act.

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Mr. MacKinnon. Let me put it this way. You have suggested...that no person who gets more than $200 a month be subjected to the time-and-a-half provision. It strikes me that that would be all right to clarify the exemption. But when you propose not to have anything to supplant the other part of the law which was intended to spread the work, then you are covering only part of the problem. ... You are going to clarify one part but you are going to destroy one of the purposes of the original act. The original purpose was to spread the work, was it not?96

At this juncture in this breathtakingly unprecedented congressional colloquy, West tried to brake the momentum by casting doubt on whether work-spreading was desirable or necessary. MacKinnon, echoing widespread postwar fears of renewed depression, tenaciously refused to allow his point to be sidetracked: "You recognize...that it would take away a substantial encouragement to spread the work if that ever became desirable and necessary again." West again tried to sidestep the main argument by claiming that union agreements "[a]s a practical matter resolved the problem for nonunion salaried workers as well: "I do not believe industry will ever go back to the point where they are going to work their office workers 84 and 90 hours a week, because your production workers are not going to work that kind of hours. It is not necessary to work your office people 10 or 12 hours a day for 7 days a week. It just is not in the picture."97 Just how many hours office employees would be worked West did not reveal, but MacKinnon finally relented,98 shifting instead to the criticism that the $200 threshold might "tend to become a kind of ceiling and result in a loss of productive capacity" because a worker earning near that amount might stop working hard lest he lose his overtime pay.99 Ironically, West’s response—that salaries are "figured on the number of hours that a person would normally work during a workweek or...month"100—undermines employers’ virtually ubiquitous argument that overtime is inappropriate for white-collar workers because their tasks and outputs cannot be standardized in relation to

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98 In response to West’s admission that white-collar employees at his company (unlike those at some others) were not covered by union time-and-a-half provisions, MacKinnon’s statement that “[w]hether they got $200 a month or not would not make any difference” is difficult to understand.
MacKinnon’s unique insight into the applicability of the purpose of the penalty overtime pay regime to white-collar workers was all the more noteworthy for the fact that this one-term congressman, whom twenty years later President Nixon appointed to the D.C. Circuit Court of Appeals, otherwise expressed thoroughly pedestrian anti-labor and anti-communist views, which he shared with his then congressional colleague Nixon. MacKinnon’s analysis was perhaps even more remarkable in light of his overwhelmingly employer-oriented and anti-FLSA constituent correspondence.

In the midst of the subcommittee’s hearings, for example, he received a letter from Leavitt Barker, a name partner of the important Minneapolis corporate law firm of Dorsey, Colman, Barker (of which future Supreme Court Justice Harry Blackmun was also a partner), bemoaning that it was “probably too late to condemn the principle of a minimum wage as socialistic legislation,” but expressing his very strong feeling that “if the principle is accepted at all, the measure should be that of a bare subsistence standard based solely upon considerations of public health and safety and not upon any concept of Government regulation of our economic structure.” Although it was Barker’s “honest belief” that the country’s “best interests...would be served if the Act were repealed in its entirety,” he realized that such a desideratum was “probably not in the picture.” He therefore focused on the

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101 See above ch. 2.

102 David Binder, “George E. MacKinnon, 89, Dies,” NYT, May 3, 1995 (D21:1). That MacKinnon had scarcely mastered the FLSA was underscored by his assertion that the act’s definitional term “employ” was a “broader term than suffer and permit” [sic; in fact “suffer or permit to work”]. Minimum Wage Standards and Other Parts of the Fair Labor Standards Act of 1938: Hearings Before Subcommittee No. 4 of the Committee on Education and Labor House of Representatives, vol. 4:2575 (80th Cong., 1st Sess., Nov. 17-Dec. 17, 1947). Like almost all Republicans, MacKinnon voted for the Portal-to-Portal Act and the Taft-Hartley Act. “House Vote on Portal Pay Measure, NYT, Mar. 1, 1947 (2:4-5); “Vote in House Overriding Truman’s Veto,” NYT, June 21, 1947 (2). In support of legislation banning the Communist Party, MacKinnon declared on the House floor that there was “nothing illegal about outlawing something that is evil. Bank robbers, assassins, murderers...are outlawed.” CR 94:6141 (May 19, 1948). As a judge on the most important appeals court for NLRA cases, MacKinnon wrote a decision that was principally responsible for depriving taxicab drivers of collective bargaining rights on the grounds that they were not employees but lessors. Local 777, Democratic Union Or. Comm. v. NLRB, 603 F.2d 862 (D.C. Cir. 1978); Marc Linder, “Towards Universal Worker Coverage Under the National Labor Relations Act: Making Room for Uncontrolled Employees, Dependent Contractors, and Employee-Like Persons,” UDLR 66(4):555-602 (Summer 1989).

103 Several firms wrote him urging amending the FLSA to exclude highly paid workers.
"serious economic and social repercussions" of increasing the minimum wage once an "economic depression occurs": it "would add...to the ranks of the malcontents and provide a fertile field for the activities of the Communists among us whose objective is anarchy and ultimate overthrow of our existing government." In case MacKinnon regarded his letter as "alarmist talk," Barker—who was on a first-name basis with him—hastened to assure the congressman that he was "convinced that the danger is real, the most realistic and serious objection to any increase whatsoever in the existing minimum rate which from this point of view is probably already much too high." Without adopting any of Barker's ideologically freighted terms, MacKinnon matter-of-factly replied that the committee was "fully cognizant" of the effect of an increase in the minimum wage "in a possible recession," but that "some raise in the rate has not been opposed generally." Prompted by Barker to furnish MacKinnon with "factual matter," Jack Schroeder, the general manager of Associated Industries of Minneapolis—with whom MacKinnon was also on a first-name basis—not only believed that Barker was "absolutely right" about the minimum wage, but informed the congressman that "one of the most general complaints heard from employers has been that the investigators employed by the Wage and Hour Division adopted the tactics of the 'gestapo'" by trying to "induce employees in private conferences in their offices after working hours to file complaints against their employers...." Without any of his usual bluntness, MacKinnon thanked him for the "very informative material," which was in conformity with the information and suggestions the committee had already received.

Of special interest is an exchange with the St. Paul Committee on Industrial

Relations—a name that the open-shop Citizen’s Alliance took in 1937— as the House hearings were ending in December 1947. Its executive secretary, W. H. McMahon, wrote MacKinnon suggesting that the statutory overtime rate be fixed at time and a half the minimum wage and asking whether the idea sounded “feasible” to him. MacKinnon forthrightly responded that several witnesses had already made this suggestion to the committee: “The substance of it is to ignore the spread work phase of the Act and to convert it into merely providing a minimum wage law. The Committee will certainly give serious consideration to that approach. Frankly, I do not believe it will be adopted by the Congress.” This reply was consistent with MacKinnon’s aforementioned colloquy with West and characteristic of his candid tone to those he viewed as politically unrealistic correspondents. Thus, for example, to an employers organization urging him to consider a pending bill to repeal the FLSA, “at least as a counter-measure for many of the unsound proposals which have been advanced,” MacKinnon bluntly replied: “There is absolutely no chance that Congress will repeal the Fair Labor Standards Act.”

Individual firms also advised MacKinnon of their specific complaints and suggestions. A Minneapolis home furnishings wholesaler displayed a sense of humor in observing that the WHA and courts had “narrowed work includable under ‘20% non-exempt work’ to a point where an Executive just sits.” Because employees

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111H.R. 4599, § 1 (80th Cong., 1st Sess., Nov. 28, 1947 (introduced by Max Schwabe, Rep. MO), declared that “Congress cannot legislatively fix wage rates paid by employers in conflict with economic forces without seriously upsetting our economy....”


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who had “shown their ability and proved by performance that they can handle responsible work should be relieved from the necessity of punching a time clock,” it also recommended that highly paid salaried workers be relieved of overtime pay.114 Another Minneapolis firm suggested leaving the salary level for white-collar workers at its prewar level of $200.115

As the House subcommittee hearings stretched into November, Paul Hutchings, the president of the AFL-affiliated Office Employees International Union (OEIU), whose 30,000-35,000 members represented about 0.5 percent of all white-collar workers, opposed any amendment excluding office and clerical workers from the protection of the FLSA.116 The most belligerent questioning was conducted by the House Education and Labor Committee’s general counsel, Irving McCann, whose anti-labor and anti-communist fervor had, two months earlier, exploded into physical violence against a witness whose own verbal aggressiveness he could not abide.117 His penchant for hyperbole was also visibly on display in his question to


117 At a House Education and Labor Committee hearing on jurisdictional strikes in Hollywood film studios the AFL’s general counsel Joseph Padway protested the “‘Gestapo proceedings like Mr. McCann is trying to make,’” shouting at him that he was not afraid of him or anyone like him. McCann then “grabbed the AFL counsel with both hands, and forced him backwards, until Mr. Padway fell over a chair onto the floor. His glasses were knocked off. ... The more than 200 witnesses...shouted, and women shrieked, until the two men finally were separated after about a 30-second scuffle.” Instead of reprimanding McCann, the subcommittee chairman, Carroll Kears, merely said that he was “‘very sorry about this incident,’” adding that McCann had been under great strain because two subcommittee members were absent. When the president of the letter carriers union demanded that McCann disqualify himself from further participation on the grounds of bias and prejudice, McCann “sneered”: “‘Here...comes a man who five years ago was a letter carrier pretending to tell a Congressional committee how to run its affairs—a man with more brains in his feet than he has in his head.’ This evoked an astonished gasp from the audience.” McCann then made an “amiable apology” after the president demanded one to himself and “‘every letter carrier in the United States postal service.’” Gladwin Hill,
a former WHA as to whether "the vice president of some large company, with a salary of $100,000 a year, should not be able to come in and ask for overtime because of the fact that he was fired for perhaps getting drunk last Friday night...." McCann asked Hutchings whether he favored "allowing a person to be exempted from the provisions of the wages-and-hours law if he wanted to be...." Hutchings definitively said no, but, lest he be misunderstood, emphasized that the labor movement felt that it was "part of the free enterprise team. ... I believe in the free-enterprise system. ... I think it is the one beacon light of hope in the world today...." Such testimonials apparently failed to impress Kansas Republican Wint Smith, who seemed to be astounded that anyone might object to permitting a worker to say: "I want to work an excess number of hours...and I'm not going to charge you with any overtime."

A sense of the radical revision of the FLSA at which some industrial employers were aiming was given by a group of 19 Cleveland firms employing more than 50,000 workers, which advocated total repeal of the overtime provision. Short of that maximalist goal, the coalition proposed this definition of "executive" consisting of "commonly accepted meanings":

one who is charged with the responsibility for the achievement of the objectives of the establishment in which he is employed, or of a customarily recognized department or

"Padway Is Felled by Rival at Inquiry," NYT, Aug. 20, 1947 (1:3, 14:2-3). The next day the Times editorialized that McCann's behavior had been "a disgrace which degrades still further the standing of Congressional hearings," but allowed as he had not been "at his best" and merely called on the committee to give him a rest "at least until he can cool off." Amusingly, the official record of the hearing describes McCann's violent physical attack on Padway as "(Discussion off the record.)." Jurisdictional Disputes in the Motion-Picture Industry: Hearings Before a Special Subcommittee of the Committee on Education and Labor House of Representatives, vol. 1:287 (80th Cong., 1st Sess., Aug. 11-Sept. 3, 1947).


119 Minimum Wage Standards and Other Parts of the Fair Labor Standards Act of 1938, vol. 3:1575. McCann, who was not embarrassed to reveal that he absorbed his knowledge of the world from Readers' Digest, repeated this question with regard to night shifts after having read about "B type people" who function best at night. Id. at 1579.


122 See Linder, "Moments Are the Elements of Profit" at 105-107.
subdivision thereof, or who regulates or assists in regulating the course and conduct of
other employees therein, and whose compensation does not depend upon his working any
fixed or customary number of hours.\textsuperscript{123}

Indiscriminately throwing executives together with lowest-level supervisors,
this definition in effect sought legal approval of the pre-existing practice of making
salaried employees work long but uncounted hours. That the Cleveland firms
intended to exclude low-level supervisors from the FLSA was clear from their
alternative proposal to substitute as the sole criterion that the “executives” be paid
at least 10 percent more than the average base pay of the highest-paid quarter of
the group (of supervisees) in which they were employed.\textsuperscript{124} Labor’s reaction to this
initiative can be gauged by a resolution adopted by the International Association
of General Chairmen of the Brotherhood of Railway Trainmen, assembled in
Cleveland in January 1948. Viewing the Cleveland employers’ “backward recom-
mandations” as “a part of the over-all program, of which the Taft-Hartley Act is
also a part, designed to destroy not only living standards in America, but also to
destroy American labor unions,” the union resolved to “turn back this legislative
assault....”\textsuperscript{125}

In late November, shortly before the DOL’s white-collar regulatory revision
hearings were schedule to begin, WHA McComb testified before the House Labor
subcommittee, emphasizing that the white-collar regulations had “caused people
to say a lot of things which they felt were justified, but actually were not.” Since
the regulations were nevertheless “being corrected” in connection with the up-
coming hearings,\textsuperscript{126} the subcommittee seized the opportunity to bring its desiderata
to his attention. Taking the lead, once again, general counsel McCann, reciting an
employer’s testimony, asked McComb whether the WHD should protect “a man
getting $400 a month” to insure that he either did not work more than 40 hours or

\textsuperscript{123}“Statement Submitted by a Group of Cleveland, Ohio, Firms, with Recommended
Changes in Wage-Hour Legislation, with Particular Reference to the Fair Labor Standards
Act of 1938,” in \textit{Minimum Wage Standards and Other Parts of the Fair Labor Standards
Act of 1938}, vol. 4:2846, 2851.

\textsuperscript{124}\textit{Minimum Wage Standards and Other Parts of the Fair Labor Standards Act of
1938}, vol. 4:2851.

\textsuperscript{125}“Resolution of International Association of General Chairmen, Brotherhood of
Railroad Trainmen, Cleveland, Ohio, January 7, 1948,” enclosure with letter from A. F.
Whitney, president, Grand Lodge Brotherhood of Railroad Trainmen, to George
MacKinnon (Jan. 12, 1948), in George E. MacKinnon Papers, Location 144.J.19.2F, Box

\textsuperscript{126}Minimum Wage Standards and Other Parts of the Fair Labor Standards Act of
1938, vol. 4:2439.
received time and a half if he did. The WHA refused to answer, preferring to await his own hearings, but promising to give the subcommittee information well before it reported to the full committee. McCann then tried a somewhat different tack with Harry Weiss, who was about to preside over the WHD hearings. Explaining that the subcommittee had had “some rather distressing reports from employers” about the 20-percent nonexempt work tolerance and that he was “trying to get these things into the record so that the Administrator may consider them in his work next week,” McCann asked Weiss: “Do you not think...it would be a very definite improvement to this act if the Congress...exempted all managerial employees from the act regardless of the pay, or anything else?” After Weiss had replied that it would still be necessary to define “managerial employees” and that if the term were defined to include all white-collar employees, he would not agree with it, McCann hastened to add that he meant “presidents, vice presidents, treasurers, cashiers, secretaries, and people who hold office in a...business, or people who are owners or who have supervisory jobs such as defined in our Taft-Hartley law.” When McComb allowed as such a definition might bring clarity “if we get the proper testimony” at the hearings, McCann unveiled the possibility of legislative intervention: “I wish you would consider the idea—and I think you will—whether or not Congress may clear up this problem better than regulations would.” Since his power to issue regulations stemmed from Congress, McComb had little choice but to note that the WHD would make its recommendations to the committee and “let the committee decide whether we should regulate or whether you should do it by law.”

Bull-doggedly, McCann stayed on point, this time reading a statement from the comptroller of the Pittsburgh Plate Glass Company that whereas, in its opinion, Congress “intended to exempt all highly paid office and nonmanual employees,” the WHA still required employers to make the same duties-test showing for $400 or $500-a-month as for $200-a-month employees. Weiss’s reply that until the Portal-to-Portal Act was passed that year, the division had had an inspection policy instructing inspectors “not to look behind a man earning $325 a month where his duties appeared generally to be of the kind described in the regulations” prompted

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McCann to ask McComb whether $325 "should be the basis for a law exempting such employees by the Congress...." Harvesting yet another declination to answer for the record, McCann turned to Weiss, who gave a straight answer: he "might well agree" with $325 for executive employees, depending on the definition of term, but he also mounted more resistance to yielding regulatory power than had his boss, suggesting that the WHD's "experience shows that it is easier for an administrative agency to define those terms than it is for Congress, because we can change it from time to time as difficulties develop with the term." McCann took no umbrage at Weiss's defense of his agency's jurisdiction, but underscored that "certainly we are not bothering about anybody who is going hungry or being in want, when we speak of someone getting $325 a month...." Neglecting to mention that Pittsburgh Plate Glass had in fact proposed a $400 salary level, McCann went further and suggested that Congress "might well adopt" the $325 threshold to exclude executive, administrative, and professional employees from time and a half pay, before Samuel McConnell, the Pennsylvania Republican who chaired the subcommittee, recognizing that the real world of the workplace might be a tad more complex than his legal counsel realized, finally intervened to caution: "You have to be very careful that you do not make the regulations so that the job of supervisor becomes unattractive. Perhaps he would then prefer to be just an employee, and not have a title."  

In a lengthy post-hearing written supplementary statement submitted in December after the WHD hearings had begun, McComb observed that the testimony before the subcommittee had been so "widely divergent" that some witnesses wanted the salary test eliminated while others wanted only a salary test. Nevertheless, despite these divergences, McComb argued that "[t]he problem involved in this whole group of proposals is not a question of fundamentals but of applications, particular situations and fringe questions." The WHA's judgment was

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accurate in the sense that no one (with the possible exception of MacKinnon)\textsuperscript{135} had seriously contested the exclusion of white-collar employees, although some congressmen\textsuperscript{136} and employers favored the elimination of statutory overtime pay for any white-collar or perhaps any workers at all.\textsuperscript{137} In any event, whatever regulatory amendments for which the WHD hearings might demonstrate a need, McComb opined that legislative action was unnecessary.\textsuperscript{138}

At the end of October 1947, \textit{U.S. News and World Report} observed that although doubt had been expressed as to whether employees earning $5,000-10,000 a year needed time and a half, any changes in the FLSA depended on whether the Republican Party leadership wanted to make a campaign issue out of them; some Republicans wanted to increase the minimum wage in order to offset enactment of the Taft-Hartley amendments and to make it hard for President Truman to veto FLSA amendments that also included provisions that labor opposed.\textsuperscript{139} A month later the news magazine reported that it was likely that the FLSA would undergo a major overhaul in 1948 with an increase in the minimum wage to 65 cents but reduced overall coverage. On the other hand, although some employers were pushing for a revision that would abolish premium pay and

\begin{enumerate}
\item In one limited context—refuting Representative Owens' factually incorrect claim that Congress in 1938 had not intended the FLSA to require payment of time and a half on wages above the minimum—McComb did assert that "the work-sharing objective...applies to all workers." \textit{Minimum Wage Standards and Other Parts of the Fair Labor Standards Act of 1938}, vol. 4:2516.
\item Illinois Republican Thomas Owens, a first-year congressman who died before his term was up, advocated limiting time and a half to the minimum wage, in part because he believed that work-sharing was no longer a goal, and rejected Harry Weiss's argument that "[i]n another year or so you may well have a flood of overproduction in many of the consumer industries." \textit{Minimum Wage Standards and Other Parts of the Fair Labor Standards Act of 1938}, vol. 4:2515, 2517 (quote).
\item For example, a joint statement submitted to Congress by 46 state and national industrial employers organizations declared that with the "‘share-the-work’ slogan of the 1930s...a thing of the past...the overtime requirements” of the FLSA had “served their purpose and should be repealed.” “Joint Statement by a Group of Industrial Organizations with Respect to Proposed Amendments to the Fair Labor Standards Act of 1938,” \textit{Minimum Wage Standards and Other Parts of the Fair Labor Standards Act of 1938}, vol. 4:2852, 2855.
\end{enumerate}
legalize straight-time wages for hours over 40, it was unlikely that Congress would enact such a change in an election year—a plausible explanation of the Republicans’ failure to enact any FLSA amendments in 1948 while they still held a congressional majority. In fact, by July 1948, in the legislative rush, the aforementioned increase in the minimum wage together with removal of various groups of workers from coverage had been sidetracked because “Republican leaders...decided against pressing for enactment at this time.”

The sustained intense hostility that Republican members of the labor subcommittees displayed toward the coverage of virtually any white-collar workers whose salaries exceeded the minimum wage strongly suggests that if Dewey had beaten Truman and the Republicans had retained their control of Congress, the FLSA would have been as radically revamped as the NLRA. If the Republicans failed to take advantage of their brief legislative supremacy to enact amendments excluding even more white-collar workers from overtime coverage, the Democrats, following their surprise retention of the presidency and recapture of congressional control for 1949-50, never even put expansion of coverage on their FLSA agenda: executive, administrative, and professional employees, as the business press reported as early as February 1949, would remain exempt.

The 1947-48 Wage and Hour Division White-Collar-Regulation Hearings

Paid overtime for salaried workers is not a general employment practice. A few hours of extra work to finish a special task from time to time generally is disregarded by both worker and employer. Office employers are not overtime conscious.

\[140^{140}\] "Wage-Hour Change Coming?" *USNWR*, Nov. 28, 1947, at 24, 26.
\[141^{141}\] "Moves to By-Pass Labor-Law Changes," *USNWR*, July 11, 1948, at 50.
\[142^{142}\] Fair Labor Standards Act Amendments of 1949: Hearings Before a Subcommittee of the Committee on Labor and Public Welfare United States Senate on S. 58, S. 67, S. 92, S. 105, S. 190, S. 248 and S. 653 (81st Cong., 1st Sess., Apr. 11-22, 1949) (no bill proposed amending coverage of white-collar employees). In its statement, even the CIO failed to include these workers among the excluded who should be covered, although it stated that all workers should be covered by the overtime provision. Id. at 177, 182.
In October, while the House FLSA hearings were still underway, Wage and Hour Administrator William McComb gave the public notice that, because it appeared “advisable,” based on “changes in economic conditions” since the white-collar regulations had been issued, to “consider amendments...which will more effectively carry out the purposes of the exemptions,” and also because the UE had filed its (aforementioned) petition to increase salary level to $500 a month, the WHD would hold a hearing beginning December 2, 1947. In addition, McComb announced that witnesses would be heard on whether certain specified changes (of a relatively limited scope) should be made.\textsuperscript{145} A “revaluation” of some conclusions reflected in the regulations had, McComb remarked in his 1948 annual report, become “imperative” in the light of changes in the economy since 1940 as well as of the fact that many employers had improperly considered employees exempt, with the result that large sums of back wages had been due.\textsuperscript{146}

The hearings, over which Harry Weiss—who, as director of the WHD’s Research and Statistics Branch, had participated in the 1940 hearings—presided,\textsuperscript{147}

\textsuperscript{145}FR 12:6896 (Oct. 22, 1947). In addition to soliciting comment on the need to revise such terms as “primary duty,” “sole charge,” “salary basis,” and “general business operations,” the WHA mentioned amending one of the administrative employee definitions (from “nonmanual office or field work”) to read “office or nonmanual field work.”


\textsuperscript{147}Weiss was born in 1907 and in 1933 received a Ph.D. (having written his dissertation on workers compensation) from the University of Wisconsin, where he was an assistant to John R. Commons. He worked at the National Industrial Recovery Board from 1933 to 1936 and the Social Security Board from 1936 to 1938 before joining the Labor Department in 1939. He was executive director, Office Manpower Administration, 1959-61, and Deputy Assistant Secretary of Labor for International Affairs, 1962-67, before becoming an industry consultant. \textit{Who's Who in America} 2:3419 (40th ed. 1978-1979). Weiss was listed in the \textit{Official Register of the United States} for the first time in 1941 as principal economist in the Wage and Hour Division; in 1942 he was acting director of the Economics Branch, and director from 1943 to 1947; in 1948 he became director of the Wage Determinations and Exemptions Branch; in 1950 he was Assistant Administrator in the Office of the Wage and Hour Administrator and in 1951 Assistant Administrator in charge of the Division of Wage Determinations, Regulations, and Exemptions; during the Korean War he was Executive Director in the Office of Executive Director of the Wage Stabilization Board; he then returned as Assistant Administrator in Charge of Determinations, Regulations, and Statistics in 1954-55; from 1956 to 1958 he was Assistant Administrator in charge of the Office of Wage Determinations; in 1959 he became Defense Mobilization Coordinator in the Office of the Secretary of Labor. \textit{ORUS 1941}, at 172; \textit{ORUS 1942}, at 207; \textit{ORUS 1943}, at 243; \textit{ORUS 1944}, at 255; \textit{ORUS 1945}, at 247; \textit{ORUS 1946}, at 196; \textit{ORUS 1947}, at 191; \textit{ORUS 1948}, at 232; \textit{ORUS 1949}, at 449;
turned out to be very extensive, stretching out over 22 hearing days with more than a hundred witnesses in addition to 140 briefs and statements in lieu of personal appearances.\textsuperscript{148} Although it is unfortunate that the National Archives has reported that it was unable to locate the very lengthy hearing transcripts,\textsuperscript{149} the substance of the detailed hearing report supports the surmise that by 1947-48, unlike the more fluid and contentious situation in 1940, the structural limits of the white-collar regulations had become so taken for granted that little political space remained for iconoclastic or basic framework-challenging views. Instead, the consensus, in which the union movement had acquiesced, that large numbers of white-collar workers would and should be excluded from overtime regulation and that the entitlement of their covered colleagues—unlike that of blue-collar workers—to overtime pay should be means tested, meant that the focus was on relatively minor adjustments to a largely uncontested doctrine.

In addition to the hearing report, contemporaneous newspaper accounts offer additional, if sporadic, detail of the hearings, which, like those in 1940, were devoted to separate industries, including manufacturing (general, food, heavy, and cotton), extractive, transport, distributive, communications, general office employees, professional groups, publications, farm products processors, and banking and insurance.\textsuperscript{150} The New York Times published relatively lengthy articles on the first few days' hearings, but then lost interest except in the one subject in which its owners had their own personal financial stake—whether newspaper reporters were

\textit{ORUS 1950, at 508; ORUS 1951, at 465; ORUS 1952, at 528; ORUS 1953, at 581; ORUS 1954, at 476; ORUS 1955, at 470; ORUS 1956, at 575; ORUS 1957, at 584; ORUS 1958, at 566; ORUS 1959, at 525.}


\textsuperscript{149}The hearing report included a reference to a transcript page number as high as 3679. \textit{Weiss Report} at 88 n.238. To a request for information about the 1947 hearings, the National Archives replied: "Record Group 155 does not include any other hearings relating to the definition of 'executive,' 'administrative,' and 'professional' employees aside from the [1940] hearings we previously discussed. The subsequent hearings were apparently not brought into the National Archives as permanent records. There is no explanation I can offer as to why. We regret that we cannot be of more assistance to you in your research.” Email from Tab Lewis, Archivist, Civilian Records, Textual Archives Services Division (Oct. 2, 2003).

\textsuperscript{150}The hearings to Review Pay Law Exceptions,” \textit{NYT}, Nov. 30, 1947 (15:1).
excluded professionals. On the opening day, December 3, the very first witness, Walter de Bruin of Goodyear Tire and Rubber, proposed that a salary of more than $200 a month should create a presumption that an executive, administrative, or professional employee was excluded from the FLSA; the burden would then shift to the employee to prove that he was not excluded. The UE’s $500 threshold he characterized as “so absurd as not to require comment.” The United States Independent Telephone Association both opposed any change in the salary limitations and, taking a position shared by many employers who protested restrictions on their “flexibility,” proposed eliminating the 20-percent ceiling on so-called non-exempt work. An overly optimistic representative of the Borg-Warner Corporation urged the DOL not to undertake any major regulatory changes until Congress decided what changes to make in the statute itself. The hearing chairman duly responded that the department would withhold the regulatory revisions if there were indications that Congress was going to amend the FLSA.151

The UE buttressed its $500-a-month proposal the next day by presenting six “factory workers” to substantiate its “contention that employers were arbitrarily relying on salary cut-off points to differentiate between exempt and non-exempt workers.” The point was sharpened by calling largely employees of the General Electric Company, whose white-collar conditions were, according to the union, above average. Interestingly, these workers appeared (at least according to the Times account) not to be traditional white-collar workers at all, but targets of a subterfuge. Thus a “production and tool planning man” testified that when he received a 17-cent-an-hour increase in 1943, GE also “put him into an exempt classification” and eliminated overtime compensation, with the result that his net weekly pay increase amounted to 40 cents. Although he was not an executive,

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administrative, or professional employee, the only explanation the company gave him was that he "became exempt by getting $200 a month." Other witnesses testified that when their departments worked overtime, "they received less pay than employees subordinate to them." In attacking the $500 proposal, some employers appeared not to have grasped the basic purpose of the overtime law: when, for example, a representative of the Heating, Piping and Air-Conditioning Contractors National Association complained that members could not pay such a salary without hampering operations or pricing themselves out of their market, he failed to understand that they could sidestep that predicament altogether by hiring an additional worker and thus avoiding the choice between overtime pay and higher salaries.\textsuperscript{152}

At the third day's hearing, as labor and capital debated where to draw the salary line between covered and excluded white-collar workers, the lawyer for the Standard Oil Company of Ohio suggested that if the salary line for exempt executives were set at $100 a week, unions would seize on it to raise wages generally, prompting the ILGWU's assistant research director to protest that they "don't give a tinker's dam what the boss pays his son-in-law or uncle" as a supervisor or executive.\textsuperscript{153}

The National Association of Manufacturers appeared at the hearing on December 12 devoted to manufacturing. The content of the statement of its associate counsel, Reuben Haslam, has been preserved because the NAM had it inserted into the record of a Senate FLSA hearing a few months later.\textsuperscript{154} Inferring from the paucity of court cases involving administrative employees that that definition was "workable and generally satisfactory," Haslam instead focused on the definition of "executive" employees, from which he urged deletion of the nonexempt work tolerance, which was (as many employers' representatives including the Chamber of Commerce agreed) its chief problem.\textsuperscript{155} He sought to broaden the definition of "executive" by contending both that the NRA codes had used it and "supervisor"
“interchangeably” \footnote{156}{Fair Labor Standards Act Amendments: Hearings Before a Subcommittee of the Committee on Labor and Public Welfare United States Senate, Part 2:929.} and that adoption of the Taft-Hartley Act’s definition of “supervisor” \footnote{157}{Fair Labor Standards Act Amendments: Hearings Before a Subcommittee of the Committee on Labor and Public Welfare United States Senate, Part 2:931.} was appropriate not only because that statute and the FLSA were “designed to protect the interests of the same...classes of workers,” but also because the new definition of “supervisor” “appears to encompass that class of worker exempt from” \footnote{158}{See below.} the NRA codes’ wage and hour provisions “as executives and supervisors.” None of these claims can withstand scrutiny as Senator Claude Pepper pointed out a few months later. \footnote{159}{See above ch. 7.} Although it is true that the NRA codes extensively excluded executives and supervisors (and other white-collar workers), \footnote{160}{The Oxford English Dictionary dates the first use of this term (which originated in the United States) to 1902; Oxford English Dictionary 5:522 (2d ed. 1989). However, a computer search of The New York Times disclosed an earlier use of “business executive”: it quoted Roswell P. Flower—a millionaire banker—as saying at the 1891 New York State Democratic convention that nominated him for governor: “I shall remain a plain businessman, a plain business executive.” “The Convention at Work,” NYT, Sept. 17, 1891 (1:5-6, 2:4). The term did not show up again in the Times until 1907, becoming common by World War I.} they did not use the terms interchangeably for the obvious reason that they were not then (nor are they now) synonyms. Because an “executive” \footnote{161}{Dale Beach, Personnel: The Management of People at Work 171 (4th ed. 1980 [1963]).} “holds a high-ranking management position,” the term “has status connotations” \footnote{162}{Karl Marx, Das Kapital: Kritik der politischen Oekonomie, Vol. 1: Book 1: Der Produktionsprozess des Kapitals 314 (1867).} not attaching to a mere “supervisor,” huge numbers of whom occupy the bottom rungs of employer hierarchies as the “industrial non-commissioned officers...who command...in the name of capital.” Haslam was such a careless propagandist that in his attempted demonstration he himself quoted the NRA administrator as referring to code exceptions encompassing “executives and their personal secretaries and other employees engaged in a supervisory capacity....” \footnote{163}{Fair Labor Standards Act Amendments: Hearings Before a Subcommittee of the Committee on Labor and Public Welfare United States Senate, Part 2:929 (quoting at third hand but accurately).} Moreover, the Taft-Hartley definition was primarily designed to exclude foremen from self-organization rights on the anti-
paternalist grounds that such protection would interfere with the rugged individualism that, according to the House Labor Committee, conferred on them and other supervisors the “ability to take care of themselves without dependence upon the pressure of collective action.” Indeed, Representative Hartley’s committee declared that it would be “wrong” not to expel foremen from the NLRA because inclusion would discourage what made them foremen in the first place—namely, that they were “those best qualified to get ahead.”164 This myth was blatantly contradicted by the experience of World War II, when foremen complained that, because they were not paid overtime while production workers were, on average their wage barely exceeded that of their supervisees. Indeed, foremen, who even before the war had (like white-collar workers) been subjected to pay cuts, enjoyed neither job security nor seniority and were often paid only 5 to 10 cents more an hour than production workers. Because the postwar foreman had to a great extent become “only a ‘straw boss,’” who no longer had the power to hire or fire or set production standards, the group had developed “serious grievances against management,” which collectively found expression in the Foreman’s Association of America.165

Without explaining why the NAM had changed its mind, Haslam retracted its recommendation of a salary test from 1940 on the grounds that it was unnecessary if the regulation properly emphasized the employee’s principal activities. Referring to suggestions made at the 1947 hearings that the WHA adopt “some general definition of executive with an extremely high salary requirement” that “would make it practically impossible for an employer to misclassify executives,” Haslam drifted off into factless rhetoric by charging that, instead, the proposal “would make it practically impossible for the bulk of employers to classify any of

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164 Labor-Management Relations Act, 1947, at 16, 17 (H. Rep. No. 245, 80th Cong., 1st Sess., Apr. 11, 1947). The unserious nature of employers’ proposals to adopt the Taft-Hartley definition was underscored by the joint statement of a large group of employers organizations to the House Labor subcommittee asserting: “As the term ‘executive’ implies, these very people, to a large measure, control their own time. Many work when they see fit to work; go home when the job is done. Generally speaking, only the individuals themselves are in a position to know whether they perform the same type of work as is performed by nonexempt employees during 20 percent of their working time.” “Joint Statement by a Group of Industrial Organizations with Respect to Proposed Amendments to the Fair Labor Standards Act of 1938,” Minimum Wage Standards and Other Parts of the Fair Labor Standards Act of 1938, vol. 4:2852, 2859. This description, as applied to huge numbers of the supervisors excluded by the NLRA, is and was risible.

their employees as executives.” While choosing not to take exception to the proposition that “only a few employees in each small plant occupy management positions,” Haslam insisted that it did not justify depriving “smaller employers” of the exemption that Congress meant to give them. In spite of this ardent attack on salary definitions, Haslam then did an about-face and proposed one that, to invert his rhetorical flight of fancy, would have made it possible for any employer to classify all of its supervisors as exempt executives. Acknowledging that from a WHD inspector’s standpoint it “would be most helpful” if he could make exemption determinations just based on company records, Haslam offered a rather spongy proviso with a very low salary threshold under which “any employee performing managerial, administrative, or professional duties of the general character described in the foregoing definitions, and who is paid the equivalent of $300 or more per month on a salary basis is deemed an ‘executive,’ ‘administrative,’ or ‘professional’ employee...even though he may not otherwise strictly qualify for exemption under all of the specifications of the applicable definition.”

The hearing on newspaper reporters in mid-January appears to have been a reprise of the session in 1940, with the Times management doubtless taking delight in asserting that “Guild Fights ‘Professional’ Status.” The ANPA again submitted statements from journalism school deans attesting to the reporters’ professional status, while the Guild’s vice president Sam Eubanks insisted that the publishers’ sole intent was to make their employees more subject to their whims by removing legislative protection. Eubanks also denied that the Guild was seeking to compel publishers to pay anyone $500 a month: “They can earn $50 as far as we are concerned, but pay them when they work overtime.” And Cranston Williams, the ANPA general manager, contended that a reporter’s freedom of action was related to the creative nature of his work so that his objective was measured only by his own intellectual capacity: “Some reporters are actually, in a general way, their own bosses, regulating their own time.” At least one publisher registered a dissent:

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166 Fair Labor Standards Act Amendments: Hearings Before a Subcommittee of the Committee on Labor and Public Welfare United States Senate, Part 2:931-32. According to Haslam, 70 percent of NAM members employed 500 or fewer workers. Id. at 925.


William Block, the publisher of the Pittsburgh Post-Gazette and the Toledo Blade protested telegraphically to the ANPA president that the latter did not represent him in his request to exempt a large number of employees from the 40-hour-week rule: “In our opinion, only top ranking highly paid writers and editors should be exempt.” In response to the deans’ statements, the president of the American Association of Schools and Departments of Journalism declared that they had spoken in their personal capacities and did not represent the association’s views.¹⁷⁰

The 1948 Senate FLSA Hearings

It was not so long ago that...[s]alaried employees worked from 44 hours a week and up and as many evenings as their boss demanded, without receiving any compensation for the overtime.¹⁷¹

Two weeks after the hearings ended, the Times reported that bankers who had been following them had been advised that no changes in the regulations were contemplated in the near future because it was expected that the WHA would postpone any amendments until after it became clear whether Congress was going to amend the FLSA.¹⁷² What Congress might do became clear on March 25, 1948, when Minnesota Republican Senator Joseph Ball introduced the Republicans’ omnibus FLSA revision bill (S. 2386), which added an exclusion of “any employee employed on a salary basis amounting to not less than $100 a week.”¹⁷³ At the time he explained that this “new exemption...would not change the exemption now applicable to executive, administrative, and professional employees but would make it unnecessary to consider the close questions often arising under the latter

¹⁷¹Leo Bollens, White Collar or Noose? The Occupation of Millions 2 (1947).
¹⁷³S. 2386, § 13(b)(3) (80th Cong, 2d Sess., Mar. 25, 1948). The bill also defined “salary basis” as follows: “An employee shall be deemed to be employed ‘on a salary basis’ if all or part of the compensation of such employee is made up of weekly, semi-monthly, monthly, or annual payments predetermined in amount and not subject to reduction because of variations in the number of hours worked: Provided, That deductions may be made for absences in violation of, or in excess of the time allowed under, a reasonable annual or sick-leave plan applicable to the salaried employees of his employer.” Id. § 3(o).
exemptions by providing a fixed standard for high-salaried workers.”174

Ball himself chaired the Labor Subcommittee (of Senator Taft’s Labor and Public Welfare Committee), which three weeks later opened hearings on Ball’s and other bills amending the FLSA. The $100 a week blanket exclusion generated considerable testimony. That Wage and Hour Administrator McComb and Weiss, the director of the wage determinations and exemptions branch who had recently presided over the regulatory hearings and was writing his report, were not hostile to its adoption may help explain why 21 months later they incorporated a compromise version in the form of the $100 short test into the revised regulations. McComb and Weiss were constrained to agree that the “proposal would, of course, simplify enforcement,” but added that it should be limited to office and nonmanual field workers, thus foreclosing the possibility that employers would put skilled workers on a salary and then employ them “for excessive hours without overtime pay.” Ball appeared taken aback that the witnesses could suspect “very much danger that skilled workers who are able to command more than $5,000 a year could be maneuvered into that kind of deal,” but Weiss admonished him that he was too much influenced by “the acute labor shortage.” In contrast, during periods of labor surplus “possibilities of that kind were definitely taken advantage of.” No resolution was achieved, but when Weiss added that he assumed that Ball “had in mind the white collar field,” Ball repeated that “[o]rdinarily, skilled production workers are not on a salary basis,” prompting Weiss to suggest that the possibility of extension to blue-collar workers be eliminated.175

Indeed, two weeks before the hearings began McComb had already written a letter to committee chairman Taft stating that he “would not interpose an objection to the exemption” if it were limited to office and nonmanual field workers.176 And, in a written statement supplementing his testimony, McComb repeated this concession in spite of the proposal’s “direct effect” of making the overtime provision inapplicable to white-collar workers “who are not now exempt.”177 Presumably the DOL agreed with committee counsel Archibald Cox, whose “Memo­randum in Explanation of S. 2386” asserted that these “higher-paid employees...do

not require the protection of such legislation as" the FLSA and that, consequently, Ball's proposal would, "without weakening the basic safeguards where they are required," eliminate the administrative mistakes made in trying to identify the exempt and nonexempt.\textsuperscript{178} In any event, the DOL approved of the Republicans' approach knowing that the existing white-collar regulations would become moot unless their salary thresholds were "kept below $100 a week."\textsuperscript{179}

In contrast, the AFL opposed the proposal outright.\textsuperscript{180} Its national legislative representative, Walter Mason, admitted that "[a]t first glance this might appear to be a very reasonable provision since one would hardly expect an employee earning as much as $100 a week to be in need of protection of the Fair Labor Standards Act. However," adopting a universalist position with which the AFL had not previously been intimately associated, he added that "the principle of overtime compensation for all time worked after 40 hours weekly...should apply without exception to all employees regardless of the size salary which they might earn." Moreover, Mason pointed out, given the continual rise in wage rates and the steady increase in the number of employees earning more than $100 a week, the amendment's "practical effect...would be to create a large and increasing group of salaried employees deprived of any rights to overtime compensation." Consequently, some salaried workers would find that a pay increase above $100 "would actually mean a reduction in take-home pay since overtime compensation would be lost." Interestingly, only as a final brief point did the AFL representative allude to the potential negative impact on its own members—"higher paid production workers"\textsuperscript{181}—which had been the DOL's principal concern.

An even more radical position on the salary bar was adopted by the independent National Federation of Salaried Unions,\textsuperscript{182} whose president Leo Bollens filed a written statement declaring that there was "no justification for salary limitations above which overtime need not be paid." The reason that he offered was clearly unavailable to the AFL: "No limitation is placed upon hourly paid


\textsuperscript{181}Fair Labor Standards Act Amendments: Hearings Before a Subcommittee of the Committee on Labor and Public Welfare United States Senate, Part 1:120-21

\textsuperscript{182}See "Independent Union Leaders Begin Drive to Organize a Third Labor Movement," \textit{NYT}, Apr. 5, 1946 (18:6-7).
employees, many of whom take home more pay than the trained office employee who has spent several years and a considerable amount of money obtaining his education.” This interjection of stratum resentment may have been an example of deficient alliance building, but neither then nor since has anyone explained why blue-collar workers’ entitlement to overtime pay should be decoupled from their wage levels, while their white-collar counterparts with salaries (say) only one-fourth as high should be excluded. In the end, even Bollens compromised, allowing as executives could be excluded, but if Congress insisted on retaining the $100 threshold, it should apply only to employees who were guaranteed an annual salary.183

Not embarrassed to disclose that it had opposed passage of the FLSA a decade earlier, the Chamber of Commerce of the United States felt vindicated that it had not been “amiss in seeing the difficulties that would arise.”184 Nevertheless, its representative, Herbert Ramel, vice president of a piston ring manufacturing corporation owned by New York University and a member of the chamber’s labor relations committee, tried to engage the proposed amendments.185 Specifically, he urged Congress to take matters into its own hands and define “executive” and “professional” employees statutorily by adopting the definitions it had just grafted onto the Taft-Hartley Act. Totally ignoring the different purposes of the laws and their exclusions, Ramel asserted that since these groups were what they were by virtue of their activities, there was “no good reason” to define them differently under the NLRA and FLSA. Despite the chamber’s preference for duties tests, the terms “could very well be supplemented by an over-all exemption on the basis of salary alone,” just not one as high as $100 a week because the FLSA’s purpose was to insure minimum wages, not “to provide a means for the harassment of employers through administrative imposition of penalties for nonobservance of interpretive rulings and regulations designed to provide for the payment of overtime to salaried employees whose remuneration is far in excess of the minimum hourly rate prescribed by law.” Personally he would have set the threshold at $300 to $325 a month, and even this figure “should be carefully studied for

the impact it would have upon our economy.'\textsuperscript{186} (The Southern States Industrial Council, whose representative J. H. Ballew had played such a prominent role at the 1940 DOL hearings, also suggested, after coaxing by Senator Ellender, $75 a week.)\textsuperscript{187}

A member of the committee but not of the subcommittee, Florida Democrat Claude Pepper, a staunch supporter of labor who lost his Senate seat two years later, inserted into the hearing record a refutation of Ramel's proposal to adopt Taft-Hartley's "executive" definition. Proceeding from the assumption that the chamber's purpose was "obviously" to broaden the group of employees excluded from the FLSA, Pepper observed that "executive" and "supervisor" had "wholly different" meanings: the former an economic and the latter a functional relationship to management. That Congress excluded supervisors from the right to self-organization because their divided loyalties made it impossible to protect them was not only no reason for denying them FLSA protection, but "the very fact" of the exclusion from the NLRA underscored the importance of including them within the wage-hour law. Finally, the mass-production working foremen and supervisors excluded by the Taft-Hartley Act were not only not executives, but were "subjected to all of the evils which" the FLSA was "designed to remedy."\textsuperscript{188}

The American Newspaper Guild was the only union that chose to re-enact for the subcommittee's benefit the debate that had been staged a few months earlier by the DOL.\textsuperscript{189} (The UE did submit a written statement reiterating its $500 a month proposal designed to prevent abuse and eliminate costly duties-test analysis and litigation.)\textsuperscript{190} Its executive vice president, Sam Eubanks, was particularly concerned about the $100 threshold because an above-average proportion of employees in the newspaper industry and all of the Guild's members were salaried; he estimated that at the very least 9,000 nonsupervisory salaried employees were paid $100 a week or more. Eubanks rejected all three "rationalizations for this effort to reduce the coverage" of the FLSA: 1) the overtime provision was not designed to cover higher-paid employees; 2) higher-paid salaried employees "cannot do their work within a regular 40-hour schedule, and consequently the

\textsuperscript{189} See above ch. 14.  
\textsuperscript{190} Fair Labor Standards Act Amendments: Hearings Before a Subcommittee of the Committee on Labor and Public Welfare United States Senate, Part 2:1252.
requirement of overtime pay is costly or disruptive or both”; and 3) since they were actually executive, administrative, or professional employees anyway, they should be exempted without reference to salary levels. In attacking the first claim Eubanks pointed out, as has only rarely been done by overtime pay protagonists, that: “Long hours do not become less detrimental to health and efficiency merely because the employee earns more than the average salary.” What he failed to observe, however, was the lethal obverse for those who favor overtime pay instead of maximum hours—namely, that overtime premiums do not lessen those detriments either. With regard to the second point, Eubanks stated that publishers under ANG contracts had had no difficulty in creating schedules that permitted higher-salaried employees “to do their work properly in 40 hours”—so much so that “the amount of overtime now required of the employees in the daily newspaper industry we have under contract is too small to be worthy of any consideration.” On the third point, Eubanks involved himself in a blatant inconsistency: after relating that the ANPA had opposed establishing any salary test on the grounds that it was superfluous because reporters were all professionals, Eubanks then charged that the $100 amendment “appears to be drafted particularly for the benefit of newspaper employers....” This factually implausible claim—after all, the WHA, as Eubanks himself admitted noted a little later, estimated that 50,000 to 100,000 workers would be directly affected, of whom the Guild believed 10,000 were employed in the newspaper industry—bestowed an easy debating point on Ball, whose refutation, however, highlighted the proposal’s expansively exclusionary purpose with all imaginable clarity: “There are plenty of salaried workers who get over $100 a week who would not qualify as administrative or executive employees under the Administrator’s definition—a great many of them.”

194Fair Labor Standards Act Amendments: Hearings Before a Subcommittee of the Committee on Labor and Public Welfare United States Senate, Part 2:743. Eubanks himself opposed any salary test, but his opposition was not consistent and, without naming a figure, he did not oppose a figure that was so high that the number excluded would be “negligible.” Id. at 748 (quote), 749.
Ball would presumably have preferred to characterize his amendment as anti-paternalist rather than punitive. Eubanks’s opinion that the “very fact” that the ANG had grown so much showed that “the higher paid people in the industry are not capable of taking care of themselves” and needed either a union or protective legislation was manifestly more than Ball could stomach: “God help America when the majority of the people whose abilities are such that they can command a salary of $100 a week, feel that they cannot stand on their own feet, that they need protection from anything. I think that is the road to collectivism, if ever I heard it.”197 Similarly, after Eubanks had explained that, under Ball’s proposal, a publisher could save $35 worth of overtime for a 50-hour week by raising a $95-a-week reporter’s salary five dollars, Ball retorted: “You rather amuse me, Mr. Eubanks, when you talk about employers exploiting men making $100 a week. I think, frankly, the people of the United States would be somewhat amused at the concept.”198 It turned out, however, that it was the people of Minnesota who were not amused and six months later made Ball, whom the labor movement had targeted for defeat, a one-term senator.199 In any event, Ball’s choice of $100 as the boundary marker between rugged and ragged white-collar individualists was hardly scientifically calibrated at a time when the average weekly earnings of all nonsupervisory production workers in manufacturing were $53.12 and those of their counterparts in transportation equipment (including autos) were $61.12,200 while the hourly wage rate for tool-and-die makers and patternmakers at the GM, Ford, and Chrysler assembly plants in Detroit reached $2.03.201 Indeed, Eubanks himself pointed out to Ball that just days earlier the Typographical Union had achieved an agreement with newspapers in New York City for a day printers’ scale of $99 for a 36.25 hour week and $109 for a 35-hour night shift. While not suggesting that such wage-earners be included in the $100 exemption, Eubanks


199 Though a zealous advocate of Taft-Hartley and other anti-labor measures, Ball was not a stereotypical Republican reactionary. In 1944, refusing to support Dewey for president on account of the latter’s isolationist views, he took the unusual step of backing Roosevelt. Turner Catledge, “Ball Stand Jolts GOP,” NYT, Oct. 4, 1944 (38:6); “Ball to Support Roosevelt as Hope for World Peace,” NYT, Oct. 23, 1944 (1:1).


explained that there was no reason to distinguish between the two groups, both of which bore the same relation to management. Ball ventured no refutation.

The only point on which Ball—who had himself been a political reporter for the St. Paul Pioneer Press and militant Guild member (until he broke with the union in 1937 over communists and affiliation with the CIO) before he was appointed to the Senate to fill the term of a deceased senator in 1940—and Eubanks were able to agree was that there were no "standards by which one can adequately define for legislative purposes a professional" reporter. The only criteria that Ball was able to articulate—"ethics" and "considerable training...although special college training may not be necessary"—amounted to little more than the sense that some skill was involved: "you cannot take anybody off the street and make a good reporter out of him...." Little wonder that under these unfavorable definitional circumstances Ball intuited that only a dollar amount could serve publishers’ (and other employers’) exclusionary interests.

Several employers organizations requested that Congress itself intervene by writing exclusions directly into the FLSA. Of foremost interest was the National Association of Manufacturers, whose counsel, Raymond Smethurst—a ubiquitous witness at early postwar FLSA and NLRA hearings—testified on a broad range of issues, including the white-collar exclusions. He focused on executive employees, urging Congress to adopt the Taft-Hartley Act’s definition of supervisory employees. Although he expressed approval of the $100 ceiling in S. 2386, he criticized it for its failure to define those performing managerial or executive duties. For the rest, Smethurst confined himself to inserting into the hearing record the statement that his associate counsel Haslam had presented at the DOL hearings a few months earlier and that on this very point has already been seen not to have been a paragon of clarity.

The American Institute of Accountants was disturbed that its members in general, whose junior accountants’ salaries at the outset of their careers did not
reach $200 a month, and members in some smaller localities, whose accountants were paid less than $200 a month, had been unable to take advantage of the professional exemption. Even more disturbing was that the WHD’s agents went beyond ascertaining the salary level to scrutinize the accountants’ work and sometimes concluded that it did not meet the duties test, “in many cases” recommending that particular employees “be excluded from the professional class.” Unable to “afford to engage in such extended controversy and turmoil,” employer accountants “usually acquiesce,” but then were forced not only to pay time and a half to some accountants, but to suffer “lower morale” among the accountants whose exempt professional status was not contested and therefore received no time and a half payments. Because accountants often worked overtime—and “[o]bviously, accountants cannot work on a job in shifts because the knowledge acquired by those who began an accounting examination is essential to its continuation and completion. There must be continuous effort by the same minds”—and their employers did not want to pay them extra for it, the American Institute of Accountants requested that Congress simply amend § 13(a)(1) by adding a proviso that “staff accountants employed by certified public accountants shall be considered as employed in a professional capacity.”

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The American Bankers Association expressed its disappointment that after having felt, in the wake of the 1940 DOL hearings, that the revised regulations were a “substantial improvement” that “provided a more liberal exemption for executive and supervisory employees of banks,” it had to deal with the WHA’s “restrictive interpretations.” It viewed Ball’s $100 threshold as of “some help to larger banks but...of no value to the smaller banks, many of which do not pay even their chief executive officer” that much. Without furnishing the subcommittee a finished text, the ABA suggested that the salary test be based on an (unspecified) salary percentage differential instead of a dollar amount and that Congress statutorily eliminate the ceiling on nonexempt work. (At the 1947


210Fair Labor Standards Act Amendments: Hearings Before a Subcommittee of the Committee on Labor and Public Welfare United States Senate, Part 2:1086. The ABA also revisited the issue of hours-averaging for which it had pleaded at the 1940 DOL hearings. Now it urged Congress to amend § 7(b) to permit banks to average hours over four weeks as long as they paid time and a half for daily hours over 12 or weekly hours over 56. The ABA claimed an entitlement to such an exemption on the grounds that banks
House hearings a banker had submitted a proposal, prepared with the cooperation of the ABA, setting the salary level for executives at least 20 percent above the average regular rate of pay of the non-exempt employees under the executive's direction and for professional and administrative employees at least 20 percent higher than the average rate of pay of nonexempt clerical employees in the same establishment.\textsuperscript{211}

The seriousness with which influential segments of big business in the early postwar years combated the status quo in—not to mention any contemplated expansion of—hours regulation is captured by the campaign conducted by General Motors president Charles E. Wilson for a longer workweek. At the annual Congress of American Industry held at the Waldorf-Astoria hotel, he, NAM president-elect Morris Sayre, and other \textquote{leading industrialists called...for...temporary lifting of the work week standard in the wages and hours act as the only way to raise real wages while combating high prices at home and misery, economic stagnation and the spread of the \textquote{police state} abroad.\textquote{}} Wilson \textquote{attacked the forty-hour week as \textquote{a heritage of the days of planned scarcity}, \textquote{a job rationing measure.}\textquote{}} Displaying solicitude on behalf of America's proletariat, Wilson held that \textquote{the penalty for extra hours of work interferes with the rights of many, particularly of lower paid and unskilled workers, to earn a better living....\textquote{}} Wilson's call for longer and harder work was echoed by Sayre, who, citing his Puritan roots, opined that it \textquote{would be a wonderful thing if the work week was increased from} 40 to 42 hours.\textsuperscript{212}

As late as 1948 Wilson was still advocating a 45-hour week. In chiding labor for having \textquote{made a \textquote{sacred cow} of the forty-hour week when...the welfare of the country was at stake,\textquote{}} he sounded less like the head of the largest manufacturing firm in the country accounting for half of world manufacturing output,\textsuperscript{214} and more like the German iron and steel capitalist August Thyssen, writing the German chancellor four years after the end of World War I that the \textquote{most unfortunate thing} that the revolution had been able to bring Germany was \textquote{the undifferen-

\begin{quote}
were \textquote{in effect under a contract, whether arrived at by collective bargaining or not,\textquote{}} by virtue of guaranteeing a full week's pay even when they worked fewer than 40 hours. \textit{Id.} at 2:1085.
\end{quote}

\textsuperscript{211}Minimum Wage Standards and Other Parts of the Fair Labor Standards Act of 1938, vol. 3:2049 (Robert Downie, president, Fidelity State Bank, Kansas).

\textsuperscript{212}Will Lissner, \textquote{Longer Work Week Is Urged by Industry to Raise Wages,\textquote{}} \textit{NYT}, Dec. 6, 1947 (1:2-3, 8:3).

\textsuperscript{213}C.E. Wilson Renews 45-Hour-Week Plea," \textit{NYT}, Apr. 21, 1947 (24:3).

\textsuperscript{214}W. Woytinsky and E. Woytinsky, \textit{World Population and Production: Trends and Outlook} 1004-1005 (1953).
tiated introduction of the eight-hour day for all workers and salaried employees. For over 4 years we carried on war against the whole world, all our work during this time was economically unproductive. We lost the war. The Entente has taken away our fleet, our colonies, all our foreign assets, and a large part of our country. In addition, for years we have had to deliver to the enemy many billions in gold and physical assets. And still the German people, which had to work 10 hours during the peace to feed itself, believes it now needs to work only 8 hours and could live better than before the War.”

At the other end of the political spectrum, the 1948 Progressive Party platform called for all workers to be covered by the FLSA.

The Weiss Report and the 1949 Regulatory Revisions

It should only be if the person is really an executive assistant with responsibility that entails making independent judgments and use of discretion. There are some high-level people that fit this. However,...most in that category are, excuse me, glorified secretaries doing prescribed work and should get overtime. The basic premise of the overtime exemption should be questioned and...salary should be the cut-off—not what you do. The fact is that many employers look for ways to push people into these categories so that they can force you to work long hours with no extra pay.

In June 1949, a year and a half after the hearings had ended, the WHD finally issued Weiss’s report, which had presumably been delayed because the DOL had been waiting to see whether congressional action would preempt its regulatory revisions. But once the Republicans had lost control of Congress and the Democrats had failed to make the white-collar exclusions a part of their plans for amending the FLSA during the Eighty-First Congress, the department felt free to proceed. Although no longer dealing with uncharted regulatory and administrative territory and thus more constrained than Stein had been nine years earlier, Weiss, facing an even more extensive hearing transcript, produced a longer report than Stein’s. Despite its greater detail, however, the Weiss Report was less focused on

217Email from the human resources director of a large private employer to Marc Linder (May 13-14, 2003).
fundamentals, which had largely been settled in 1940, and more concerned with adjustments.

Weiss’s first step was to reject proposals to adopt the Taft-Hartley Act’s definitions of “supervisor” and “professional.” Employers had testified in behalf of this revision primarily because it would have eliminated the 20-percent non-exempt work ceiling and the salary-level test.218 Weiss criticized as unsound the underlying assumptions that the Taft-Hartley Act and the FLSA had the same general objectives and that the definitions were intended to encompass the same classes of employees. To begin with, Congress defined “supervisor” and “professional employee” for radically different reasons—to deny the former collective bargaining rights and to confer on the latter special self-organization rights to form separate bargaining units if they preferred not to bargain together with non-professionals; in contrast, Congress defined “bona fide executive” and “professional employees” for the same purpose—to exclude them from overtime protection—regardless of whether or how they were organized. Second, the very fact that Congress had already excluded supervisors from collective bargaining rights had made “increasingly important the need to distinguish carefully between those whom the Congress meant to exempt as ‘bona fide executives’ because they do not need” the FLSA’s protections, “and those who, though they may perform some supervisory duties” do need the FLSA’s protection “because they do not have the privileges and benefits which normally accrue to bona fide executives.”219

Hearing testimony on the exclusionary salary levels had run the gamut from abolishing them altogether to making them the sole criterion and, quantitatively, from leaving the dollar-amounts unchanged to raising them to $500 a month. Unsurprisingly, employers were primarily concerned that, if the thresholds were set above a certain amount, they would be required to start paying for some white-collar employees’ overtime work that they claimed Congress had left unprotected.220 The WHD strongly supported a salary test on the grounds that it was “a ready method of screening out the obviously nonexempt employees, making an analysis of duties in such cases unnecessary.” And although the failure to update the levels had weakened their effectiveness and reinforced the trend toward

218 Weiss Report at 3.
219 Weiss Report at 4-5.
220 Weiss Report at 6-7. Local 119, Technical Engineers, Architects, and Draftsmen’s Union, AFL, taking the position that salaried employees should not be exempt from the overtime provisions, urged elimination of the salary requirement and revision of the definition to exempt as “professional” only those whose compensation was limited to fees, bonuses, dividends, or other emoluments. Id. at 9 n.29.
employer misclassification, Weiss attributed some of these violations to employers' mistaken notion that salary level was the sole criterion and their treatment, for example, of "clearly nonexempt" administrative employees as no longer entitled to overtime pay as soon as their salaries reached $200.

That the salary levels had to be raised to what Weiss called "more realistic" amounts was a foregone conclusion at a time when the salaries of office boys in large cities exceeded the $30 executive test and large numbers of clerks were paid more than the $200-a-month administrative-professional test-level. Unsurprisingly, while most labor witnesses supported a salary level of $500 a month or $100 a week, employers' range was much lower—from $40 a week to $300 a month.

Satisfied with the guidelines shaped by Stein in 1940 in setting salary levels, Weiss, too, believed that they should "approximate the prevailing minimum salaries for this type of personnel and [be] above the generally prevailing levels for nonexempt occupations...." Weiss noted that according to some testimony in 1947-48, the $30-a-week executive salary level may have been too low, but he added that Stein himself had been "fully aware that it was a relatively low figure" and that Stein's reasons "appear to have been valid in the light of conditions in 1940 and for the most part are still valid." Consequently, like the $30 in 1940, the new figure "should be somewhere near the lower end of the current range of prevailing salaries for executives" (as well as for administrative and professional employees).

Stein, as already discussed, was willing to make do with a salary level so low that it was hardly greater than a skilled craftsman's wages (and would become even less favorable over time) on the dubious grounds that bossing other people and heightened chances of promotion were compensating factors and that work-sharing and thus employment-spreading was not possible among executives or was less possible than among administrative and professional employees.

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221 Weiss Report at 8.
222 Weiss Report at 8 n. 27. That some management witnesses proposed salary levels as the sole tests might be explicable on the grounds that such a system would facilitate evasion of the law. Id. at 9.
223 Weiss Report at 10.
224 Weiss Report at 11-12. Without explanation, Weiss asserted that the "'prevailing minimum salary' is not necessarily the same as the lowest salary received by such persons. The salary level selected for executives obviously cannot be the salary of the lowest paid supervisory person or the lowest paid person considered by an employer to be an 'executive.'" Id. at 11 n.47.
225 Weiss Report at 12.
226 US DOL, WHD, "Executive, Administrative, Professional...Outside Salesman" Redefined: Report and Recommendations of the Presiding Officer at Hearings
Weiss offered no evidence that he had independently analyzed Stein’s assumptions or collected data on them.

Weiss acknowledged that DOL data revealed that between October 1940 and April 1949 average hourly and weekly earnings of all manufacturing employees had risen by more than 100 percent (107.5 percent and 101.1 percent, respectively), but he nevertheless chose to raise the executive salary level only by 83 percent to $55, in spite of the fact that it was “somewhat lower in relation to average weekly earnings for all manufacturing of $52.70 in April 1949 than the $30 test was in relation to comparable average weekly earnings of $26.20 in October 1940.” This “somewhat lower” not only turned out to be 4.4 percent compared to 14.5 percent, but was also an understatement because Weiss failed to take into account that the 1940 setting had itself not been adjusted vis-à-vis its original fixing in 1938, during which interim average weekly earnings of non-supervisory and production workers in manufacturing had risen by 13.1 percent. In any event, Weiss had apparently become too close to his subject to be able to step back and recognize the absurdity of treating as an “executive” an employee whose salary barely exceeded the wage not only of highly paid craftsmen, but of the average factory worker as well.

Weiss did concede that there was “merit” to the argument that $55 was too low, but dismissed it on the grounds of lower pay for executives in smaller establishments, although in a footnote he admitted that the differentials were small. Thus, in the end, Weiss accorded methodological primacy to the claim that “[t]he salary test for bona fide executives must not be so high as to exclude large numbers of the executives of small establishments. In these establishments, as in the large ones, the level selected must serve as a guide to the classification of bona fide executive employees and not as a barrier to their exemption.” (The DOL’s solicitude on behalf of small firms’ equal right to require supervisors to work additional hours without pay also manifested itself in Weiss’s rejection of the proposal—by the Pittsburgh Plate Glass Company—that a bona fide executive supervise at least six employees: “in very small enterprises...the supervisor of even

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Preliminary to Redefinition: Effective October 24, 1940, at 21-22 (1940) (Stein Report).

See above ch. 13.

227 Weiss Report at 13 (percentages calculated from Weiss’s absolute data).
228 Weiss Report at 14.
231 Weiss Report at 14 n.54.
232 Weiss Report at 15.
Early Post-World War II Finishing Touches

as few as two employees is very close to the top management...”)233

Weiss increased the salary level for administrative and professional employees from the equivalent of $50 a week to $75. This 50-percent increase was smaller not only than what he had determined for executives, but also than that for the salaries of white-collar employees generally.234

Weiss’s chief innovation was the creation of three “Special Provisos for High-Salaried” white-collar employees, which were not the single-criterion salary tests that several employers had advocated, but which embodied such a low dollar-threshold that they were never able to function as screening devices. With the Republicans, for the time being, unable to impose their purposes on a FLSA amendments bill, the WHD was no longer under any informal pressure to adopt some version of Senator Ball’s $100-a-week single-criterion test for excluding salaried (white-collar) employees. Indeed, without legislative amendments (such as those of S. 2386), Weiss noted, an exclusionary definition in terms of a high salary alone would not be “consistent with the intent of Congress...and would be of doubtful legality since many persons who obviously do not fall into these categories may earn large salaries.” Although Weiss did not identify the occupations of such persons with high salaries (as opposed to wages), he did mention blue-collar craftsmen, whom the Seventy-Fifth Congress indisputably did not wish to exclude. Nevertheless, Weiss did recommend a $100-a-week salary in tandem with a two-part abbreviated duties test235 on the grounds that such a “short-cut test” would facilitate administration because, in the Division’s experience, at that salary those whose primary duty was the performance of work characteristic of bona fide executive, administrative, or professional employment met, “with only minor or insignificant exceptions,” all the basic duties tests.236

233 Weiss Report at 45.


235 The two criteria were: for executives—primary duty of management and direction of two or more employees' work; for administrative employees—primary duty of performing office work directly related to management policies or general business operations and work requiring exercise of discretion and independent judgment; and for professional employees—primary duty of performing work either requiring knowledge of an advanced type in a field of science or learning, which included work requiring consistent exercise of discretion and judgment, or in a recognized field of artistic endeavor including work requiring invention, imagination, or talent. Weiss Report at 89-90.

236 Weiss Report at 23. The claim that the introduction of the short test has held the WHD “hostage to successful Congressional efforts to thwart the increases in the upset salary levels necessary to reflect...inflation” was not documented and finds no support
It is not clear whether Weiss believed that he was in effect implementing (using Ball’s dollar amount) the NAM’s (aforementioned) proposal that $300 per month be the sole criterion, provided that the employee performed the already existing regulatory duties “of the general character...even though he may not otherwise strictly qualify for exemption under all the specifications....”\(^{237}\) Nor was the proposal solely the NAM’s preserve: Weiss was also accommodating a number of large corporations such as Corning Glass Works, Goodyear Tire and Rubber, and Pittsburgh Plate Glass.\(^{238}\) Although Weiss did set the short-test salary level one-third higher than the NAM’s proposal, he failed some management representatives, who had suggested figures as high as $500 a month,\(^{239}\) and hardly complied with his own precept that the “special proviso must be based on a salary considerably higher than the [long-test] minimum salary levels.”\(^{240}\) Having recommended that the long-test salary level for administrative and professional employees be fixed at $75 per week, Weiss could not convincingly argue that $100 satisfied his criterion—especially when, as pointed out earlier, skilled blue-collar craftsmen had already crossed that iconic threshold.

Weiss, who opined that “the term 'bona fide executive' was not intended to apply solely to the type of executive who spends his time behind desk constantly making decisions and directing his subordinates,”\(^{241}\) rejected the initiative of the AFL and Office Employees International Union to restore to the term some of the lofty status associated with it in common parlance and limit its applicability to those who made “‘decisions which can really stick....’” They had proposed adding to the definition that “he participates in the formulation of policy relating to his field of responsibility,” but Weiss dismissed it out of hand because its adoption “would probably result in a material change in the present standards for exemption by defeating the exemption for many bona fide executives who under modern business organization execute rather than formulate policy.” Specifically he meant that “there are many executives in business organizations who are charged with the supervision of men and the management of departments but who carry out policy formulated by others.”\(^{242}\) Regardless of whether the unions, in their effort to insure that the category of “executive” did not sweep in petty supervisors whom employ-

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\(^{237}\) Weiss Report at 22 n.85.
\(^{238}\) Weiss Report at 22 nn.81, 82, 84.
\(^{239}\) Weiss Report at 23 n.89.
\(^{240}\) Weiss Report at 23.
\(^{241}\) Weiss Report at 33.
\(^{242}\) Weiss Report at 47.
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ers treated almost as oppressively as the rank and file with regard to their working hours, had articulated the new definitional criterion appropriately or not, Weiss’s dismissive attitude toward narrowing the huge scope of the exclusion reflected the DOL’s seamless tradition of uncritical acceptance of the subversion of a central labor standard that lacked any rational policy basis.

Another excellent example of arational policy making was Weiss’s treatment of the administrative assistant to a bona fide executive or administrative employee:243: “The work of determining whether to answer correspondence personally, call it to his superior’s attention, or route it to someone else for reply requires the exercise of discretion and independent judgment and is exempt work of the kind described in the regulations. Opening the mail for the purpose of reading it to make the decisions indicated will be directly and closely related to the administrative work described. However, merely opening mail and placing it unread before his superior or some other person would be related only remotely, if at all, to any work requiring the exercise of discretion and independent judgment.”244 Even granting arguendo the difference in the levels of discretion and independent judgment involved, why should the worker who reads the correspondence be forced to work overtime without pay? This is precisely the type of fundamental question that someone with Weiss’s experience should have raised—especially since there was absolutely nothing in the FLSA itself that preordained an answer—but, as with everyone else in the WHD who has ever participated in public discussion of the issue, his preoccupation with talismanic show-stoppers (“discretion and independent judgment”) totally disabled him from taking a fresh look at the unarticulated underlying policy.245

243The 1940 regulation read: “who regularly and directly assists” a bona fide executive or administrative employee, “where such assistance is nonmanual in nature and requires the exercise of discretion and independent judgment....” § 541.2(B)(1), in Weiss Report at 94. Weiss recommended adding “proprietor” as an assistee at the request of the National Institute of Cleaning and Dyeing. Id. at 70-71, 70 n.203, 89. The WHA adopted it as 29 CFR § 541.2(c)(1), in FR 14:7706.

244Weiss Report at 57. The WHA codified this language verbatim in the new interpretive regulations issued at the end of 1949 and retained it unchanged. FR 14:7730-45 at 7739 (Dec. 28, 1949); 29 CFR § 541.208(d) (2003).

245Consequently, when the Clinton administration WHD issued an opinion letter advising an executive secretary (in contradiction of the Stein and Weiss reports and 29 CFR § 541.201(a)), that she was not an exempt administrative employee, it did so on the grounds that she did not exercise sufficient discretion and independent judgment:

This is in response to your recent letter regarding the application of the Fair Labor Standards Act...to your executive secretary position. You ask whether you would qualify
This disability also manifested itself in connection with Weiss’s recommendation that the 20-percent tolerance for nonexempt work also be introduced for bona fide administrative employees. Most representatives of labor and management had voiced opposition to it at the hearings, but for opposite reasons. Employers (including the NAM) opposed it because they believed that at the time the WHD permitted a greater (or even unlimited) tolerance; in contrast, unions had assumed that until then the performance of any nonexempt work effected a disqualification.\textsuperscript{246} In recommending the adoption of the 20-percent rule, Weiss argued that: “While it is entirely reasonable to exempt an employee who performs a small amount of such unrelated clerical or low-level work, it would be contrary to the purposes of section 7 (a) and 13 (a) (1)...to extend the exemption to employees who spend a substantial amount of time in such activities.”\textsuperscript{247} Yet neither Weiss nor anyone else at the DOL has ever explained what those purposes were and why it would be any more or less reasonable to empower employers to require administrative assistants rather than clerical workers to work unlimited hours without additional compensation.

\textsuperscript{246} Weiss Report at 53-54.
\textsuperscript{247} Weiss Report at 59.

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As executive secretary, you answer, screen and direct telephone calls, open and sort incoming correspondence, compose memos and general correspondence, type and proof correspondence and other documents, transcribe dictation, make copies and send faxes. You also maintain the employer's calendar, schedule and set-up meetings, appointments and travel, maintain contact with employer while on travel, provide reminders of due dates, etc., set-up and maintain filing system, prepare expense reports, maintain bookkeeping records and documents, handle company deposits for pension plans, and assist visitors with transportation, meals, reservations, hotel accommodations or leisure activities. ...

We have reviewed your job description and it is our opinion that, as executive secretary, you would not qualify for exemption as an “administrative employee” under the criteria of Regulations, Part 541.2. It would appear from the information submitted that your primary duty involves the performance of routine clerical work rather than the performance of work directly related to management policies or general business operations of the employer, even though you may exercise some measure of discretion and judgment as to the manner in which you perform your clerical tasks. ... In addition, the duties that you perform do not require the level of discretion and independent judgment as required in the Regulations; rather, it would appear that you are using skills in applying techniques, procedures, or specified standards acquired through special training or experience. (See section 541.207 of the Regulations.)

One of the subdefinitions of “administrative” employee in the 1940 regulations had included performing “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....” In his notice the WHA had asked the public to comment on whether one phrase in it should be amended to read “office or nonmanual field work....” The purpose of the proposal was to broaden what had already been the exclusion that had made least sense by “mak[ing] it clear that office work regardless of whether it is manual or nonmanual in nature is exempt work if it has the other characteristics of exempt work described in the regulations.” The WHD raised the issue because the 1940 language had led to the misunderstanding that only nonmanual office work was exempt. The ever so slight change was designed to signal that the Division “recognizes the accepted usage of the term ‘white-collar’ to include all office workers and is consistent with the purpose of including in the administrative exemption only employees who are basically ‘white-collar’ employees.” A number of (presumably union) witnesses were skeptical of this change lest it exempt employees engaged in the “routine operation of office machines,” but Weiss pooh-poohed such fears on the grounds that typists, calculating machine operators, and others could not meet the other requirements. Weiss did not specify which ones he had in mind, but presumably the most plausible one from his perspective would have been their failure to exercise “discretion and independent judgment.” However, in the light of the history of employers’ imaginative efforts to impute such qualities to the most mundane work, skepticism about relaxation of an already spongy and capacious definition was understandable.

Employers’ expansionary proclivities were not long in manifesting themselves: what publicly intrigued employers about this minor change in phrasing was not the possibility of expanding the universe of excluded white-collar workers; rather, some management representatives (including the Chicago Association of Commerce and Industry) proposed deleting “nonmanual” to make possible the extension of the exclusion to those performing manual work. Weiss dismissed this proposal out of hand because its adoption would have changed the white-collar character of the administrative exclusion and might even have made it possible to

\footnote{\textsuperscript{248}§ 541.2(B)(2), in \textit{Weiss Report} at 94.} \footnote{\textsuperscript{249}\textit{Weiss Report} at 93.} \footnote{\textsuperscript{250}\textit{Weiss Report} at 59. This language was by and large adopted in the 1949 interpretive regulations and was retained intact. \textit{FR} 14:7736; 29 CFR § 541.203(a)(2003).} \footnote{\textsuperscript{251}\textit{Weiss Report} at 60.} \footnote{\textsuperscript{252}\textit{Weiss Report} at 60 n.184.}
extend it to craftsmen and highly skilled manual workers who might also exercise discretion and judgment.\textsuperscript{253} To be sure, Weiss also immediately muddied the waters by declaring that, although an employee who “performs so much manual work that he cannot be said to be primarily engaged in office or nonmanual field work,...is not basically a ‘white-collar’ employee and should not qualify for the exemption,” nevertheless, an “office employee...is a ‘white-collar’ worker” and under the new wording “would not lose the exemption on the grounds that he is not primarily engaged in ‘nonmanual’ work....”\textsuperscript{254} He sought to broaden the exclusion even further by recommending that the term “field work” be interpreted to include work taking place in factories so that, for example, the employer of an “efficiency expert” who performed most of his work in a factory would not lose the administrative-employee exemption and be required to pay for his overtime hours.\textsuperscript{255}

The major and enduring coup that the NAM and employers had pulled off in 1940, inducing the DOL to promulgate a broad definition for excluded administrative employees that embraced the phrase “directly related to management policies or general business operations,”\textsuperscript{256} came under attack at the 1947-48 hearings by unions as too broad and by employers as too restrictive. The National Federation of Salaried Unions proposed deleting “general business operations,” while the ILGWU suggested “general business policies” instead. The Communications Workers of America’s proposal identified what was most irrational about this subdefinition by urging that it be amended to require administrative employees to perform “‘work directly related to the administrative rather than the production operations of the company.’” Although most employers found it too limiting because, inter alia, it limited the exemption to “‘the top levels of management, where they are engaged in the determination of basic policies,’” astonishingly the Standard Oil Company of Ohio wanted it deleted because it “‘actually imposes no restrictions and tends therefore to confuse the proper application by employers of the otherwise readily understood provisions of these subsections.’”\textsuperscript{257} Ultimately, Weiss agreed with labor that the phrase should describe administrative (as opposed to production) activities including work performed by white-collar employees in “‘servicing a business’ by advising management, planning, negotiating, purchasing, promoting sales, and business research, but he also stressed that it was not limited to those who participated in formulating management policies, but also

\[\textsuperscript{253}\textit{Weiss Report} at 60.\]
\[\textsuperscript{254}\textit{Weiss Report} at 60-61.\]
\[\textsuperscript{255}\textit{Weiss Report} at 61.\]
\[\textsuperscript{256}\text{See above ch. 11.}\]
\[\textsuperscript{257}\textit{Weiss Report} at 62.\]
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included those whose work affected them or who carried them out.258

In addition, Weiss decided that the phrase "should not exclude from the exemption employees whose duties relate directly to the management policies or to the general business operations of their employers' customers." By circumventing the obstacle that such workers were engaged in production for their own employers, Weiss was able to extend the exclusion from overtime protection to the "many bona fide administrative employees," such as tax experts and financial and labor relations consultants who performed "important functions as advisors and consultants but are employed by a concern engaged in furnishing such services for a fee."259

The phrase "directly related to management policies or general business operations," in Weiss's view, also applied to those whose "work affects business operations to a substantial degree...." And although he conceded that it was impossible to formulate rules indicating "the precise point at which work becomes of substantial importance to the management or operation of a business," Weiss knew the difference when he saw it: whereas the cashier of a bank performed "work at a responsible level and may therefore be said to be performing work directly related to management policies or general business operations," the bank teller did not.260 Similarly, statisticians who merely tabulated data "clearly should not be treated as exempt," but if they analyzed data and drew conclusions from them that were "important to the determination of...financial or other policy," then they should be. Why the one group should be within and the other outside of the regime of working time regulation it did not even occur to Weiss to attempt to explain. This failure was all the more discordant because Weiss in this very context emphasized that: "The fact that there are a number of other employees...performing identical work should not affect the determination of whether they meet this test so long as the work of each such employee is of substantial im-


259 Weiss Report at 65. The WHA adopted this language in the 1949 interpretive regulations and retained it intact. FR 14:7737; 29 CFR § 541.205(d)(2003). For an example of a case in which the employee's loss of overtime protection hinged on the distinction between employer and customer, see Webster v. Public School Employees of Washington, Inc., 247 F.3d 910, 915-17 (9th Cir. 2001). Ironically, the defendant employer was a labor union, which successfully argued that its members and their bargaining units were its "customers," to which the employee, who negotiated collective bargaining agreements for them, provided administrative services. Why the employee agreed that the members and bargaining units were the union's customers is unclear.

260 Weiss Report at 63.
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In the realm of professional employees, Weiss rejected the proposals of several industries that entire occupations be excluded from the FLSA regardless of the specific duties of particular individual employees. Among such employer groups were the ANPA with respect to all persons engaged in gathering news and editorial content, the American Institute of Accountants regarding all junior accountants working for public accounting firms, and the National Association of Broadcasters regarding all radio announcers. In contrast, the ANG testified that only top-flight newspaper employees were professionals, while the American Federation of Radio Artists (AFL) argued that no staff announcer could qualify as exempt. Weiss concluded that the blanket exclusions were inconsistent with the language and purpose of § 13(a)(1), though his reasoning, oddly enough, suggested that exemption was a benefit for the workers in question so that the across-the-board approach "would discriminate against other occupations...in which each individual is required to meet the standards set in the regulations in order to qualify for exemption." Weiss sympathized with the organizations’ objective of achieving recognition on a par with law and medicine, but declared it unrelated to the purposes of § 13(a)(1). In September 1949, three months after publication of Weiss’s report, Wage and Hour Administrator McComb gave notice of proposed rule making based on the report and proposed a $55 long-test for executives, a $75 administrative-professional long-test, and a $100 short-test. While these increases, according to McComb, would expand coverage, “other changes would tend to have the opposite effect”; he did not think that the revisions would “materially change the number of employees affected,” which he estimated at 2,500,000. At the end of

261 Weiss Report at 64.
262 Weiss Report at 74.
263 Weiss Report at 76-78.
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December 1949, the WHA issued virtually the contents of Weiss's recommendations as final regulations, pursuant to which, as of January 25, 1950, the executive salary level was increased (83.3 percent), for the first time in 12 years, to $55, while the administrative-professional salary level was raised (62.5 percent) for the first time in a decade to $75. The newly created universal short-test salary was set at $100.  

Four days after promulgating the new legislative regulations, McComb issued a detailed set of white-collar interpretive regulations, which were in large part taken verbatim from the nine-year-old Stein Report (as well as from the Weiss Report) and which more than half a century later remained largely intact.

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Public Contracts Divisions: Fiscal Year 1949, at 19 (1949).

266 FR 14:7705-7707 (Dec. 24, 1949). At its next annual convention following the issuance of the final regulations, which were timed to become effective at the same time as the 1949 FLSA amendments in January 1950, the report of the UE's general officers devoted considerable space to attacking the latter, but said nothing about the former. United Electrical, Radio and Machine Workers of America, Report of General Officers 1950: 15th International Convention September 18-22, 1950, at 33-35 (1950). The UOPWA, which, following enactment of the Taft-Hartley amendments was preoccupied with non-compliance with them, published no articles in its renamed newspaper, Career, which ran through Sept. 1, 1950, on the 1949 white-collar regulatory changes.


268 Part of the provisions on newspaper writers was taken from an earlier enforcement release. § 541.303(f), in FR 14:7741; US DOL, WH & Public Contracts Division, Manual of Newspaper Classifications (Apr. 1943).