“Time and a Half’s the American Way”

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

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Planned Obsolescence of the Salary-Level Tests

In the archives of federal labor laws, the FLSA holds a position nearly comparable to that of the Dead Sea Scrolls—there are other items more ancient, but not many.¹

Whereas coverage under and exclusions from the rest of the FLSA underwent a dynamic transformation during the postwar period, incorporating, for example, large numbers of retail and other workers under a vastly expanded concept of interstate commerce, as well as farmworkers and domestic employees, but also excluding a bewildering array of categories of workers,² regulation of the administrative, executive, and professional exclusions stagnated. Following publication of the Weiss Report in 1949 and of the regulatory revisions it recommended,³ the only significant changes with regard to the duties tests were statutory in origin: special terms for retail and service executive employees in 1961, and exclusion of teachers in 1966 and of certain computer occupations in 1990. Overshadowing these developments, however, was the DOL’s failure to increase the salary thresholds in tandem with even the congressionally rather leisurely enacted and modest increases in the minimum wage; as a result, not only did the ratio between the salary-test levels and the minimum wage never again approach its pre-World War II highs, but, after the DOL, in the words of John Fraser, the Deputy Wage and Hour Administrator from 1990 to 2000, “shirk[ing] its important responsibility,”⁴ ceased increasing them at all after 1975, the salary

²Compare § 13 of the original FLSA with that of any of the postwar codifications.
³See above ch. 14.
levels fell below the minimum wage itself, thus creating the grotesque situation in which it became seemingly lawful for employers to pay excluded white-collar workers both less than the minimum wage and no overtime premium.\(^5\) Ironically, the DOL's dereliction of duty cut the Gordian knot by giving a practical answer to the long avoided theoretical question as to the justification for means-testing white-collar workers' entitlement to overtime protection: as the regulatory salary levels fell far below those in any real-world labor market, the means test de facto disappeared together with the salary test itself, thus depriving ever wider swaths of administrative, executive, and professional employees of any protection whatsoever from overreaching employers intent on imposing long hours without paying for them.

**The Last Salary-Level Increases of the Twentieth Century: 1950-75**

A blonde office worker was in trouble and a figure seemed to be the root of it all. It wasn't the kind of a figure you would expect a woman to worry about though—this was a mathematical one. Being efficient, however, she hurried over to the office accountant because she found herself lamentably short in figuring overtime pay under the Federal wage-hour law.\(^6\)

The only significant revision of general applicability of the interpretive regulations during the rest of the twentieth century involved the salary basis test. In 1954 WHA McComb expanded the interpretation to explain on what basis deductions would or would not be regarded as lawful. For example, the employer forfeited the exemption if it made deductions for absences caused by itself or the business's operating requirements, but did not lose the exemption for making

\(^5\)In this context the following judgment in 2003 by the Congressional Research Service's FLSA expert is incomprehensible: "Defining the terms under which the Section 13(a)(1) exemption is applied is a difficult task equitably to achieve. Perhaps not surprisingly, the duties tests have not undergone major revisions since the 1940s; the salary thresholds, since 1975." William Whittaker, "The Fair Labor Standards Act: Exemption of 'Executive, Administrative and Professional Employees' Under Section 13(a)(1)" at 7 (CRS, RL 31995, July 17, 2003). There may have been no important reason to revise the duties tests; no equitable argument could have justified leaving the salary thresholds unchanged.

\(^6\)Robley Stevens, "Does Your Office Compute Overtime Pay Correctly?" *OM* 17(12):44-45, 84-87, at 44 (Dec. 1956).
deductions when the worker absented himself for a day or more for personal reasons other than sickness or accident. The WHA also gave employers a so-called window of opportunity by declaring the exemption not lost if the deduction was inadvertent or for reasons other than lack of work and the employer reimbursed the worker and promised to comply in the future.\footnote{29 CFR §§ 541.118(a)(1)-(2) and (6), in FR 19:4405, 4406 (July 17, 1954). The only change that the WHA made in response to comments was deleting a provision that would have permitted employers to impose penalties for major disciplinary reasons other than infractions of safety rules. 29 CFR §§ 541.118(a)(5), in FR 19:1321-22; FR 19:4406. In 2003-2004 the Bush administration revised regulations, eliminating the distinction between the regulations and interpretations in an effort, inter alia, to “eliminate confusion regarding the appropriate level of deference to be given” to each. FR 68:15563 (Mar. 31, 2003).}

In November 1955, almost six years after the previous increase in the white-collar regulatory salary levels, and three months after Congress had enacted an increase in the minimum wage from 75 cents to $1.00 (effective March 1, 1956),\footnote{Fair Labor Standards Amendments of 1955, ch. 867, Pub. L. No. 386, § 3, 69 Stat. 711 (Aug. 12, 1955).} the DOL announced that it would hold a hearing on December 12 on the question of what if any changes should be made. In connection with the hearing the DOL prepared a report on earnings data pertinent to a review of the white-collar salary levels.\footnote{FR 20:8388-89 (Nov. 9, 1955). Again it is unclear whether a transcript of the hearings, which were also conducted in Puerto Rico beginning Feb. 15, 1956, is extant. US DOL, WHPCD, Report and Recommendations on Proposed Revision of Regulations, Part 541 under the Fair Labor Standards Act Defining the Terms “Executive” “Administrative” “Professional” “Local Retailing Capacity” “Outside Salesman” 2 (Mar. 1958) (hereinafter Kantor Report).} That survey, also published in November, was based on data that were not generated by a special statistical sample, but were, rather, collected as a by-product of (all) the Wage and Hour and Public Contracts investigations conducted from January to August 1955; consequently, the agency did not consider them representative of all establishments covered by the FLSA.\footnote{US DOL, WHPCD, Earnings Data Pertinent to a Review of the Salary Tests for Executive, Administrative and Professional Employees as Defined in Regulations Part 541, at i (Nov. 1955). For each establishment, the investigator “determined...the number of employees found to be exempt under each of the subsections of Regulations, Part 541, and listed all exempt employees paid less than $100 a week,” at a time when $100 was the short-test salary. Id.} For what they were worth, the study, which surveyed 22,595 of all 762,586 establishments with employees protected by the FLSA, identified a total of 105,540 executive, adminis-
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tative, and professional employees\textsuperscript{11} "who qualified for exemption."\textsuperscript{12} Of this total, 62,830 (or 59.5 percent) were executive employees employed in 15,571 establishments, 26,835 (or 25.4 percent) administrative employees in 7,088 establishments, and 15,875 (or 15.0 percent) professional employees in 2,217 establishments.\textsuperscript{13} Of the 22,595 establishments that the DOL investigated, 6,620 or 29 percent employed no exempt executive, administrative, or professional employees at all.\textsuperscript{14} The department estimated that, as of September 1953, there was a total 2,300,000 such exempt white-collar employees (not including those excluded on the basis of being employed by retail or agricultural employers).\textsuperscript{15}

The survey also revealed that in 1955 the following proportions of excluded white-collar workers were being paid less than the long-test weekly salary that was fixed in 1958: 6 percent of executive employees were paid less than $80, and 14 and 7 percent, respectively, of administrative and professional employees were paid less than $95.\textsuperscript{16}

In his March 1958 report, the presiding hearing officer, Harry Kantor, an Assistant Administrator in charge of the Office of Regulations and Research,\textsuperscript{17}

\begin{itemize}
\item \textsuperscript{11}US DOL, WHPCD, Earnings Data Pertinent to a Review of the Salary Tests for Executive, Administrative and Professional Employees as Defined in Regulations Part 541, app. tab. I at 73, app. tab. V at 77 (Nov. 1955).
\item \textsuperscript{12}Kantor Report at 6.
\item \textsuperscript{13}US DOL, WHPCD, Earnings Data Pertinent to a Review of the Salary Tests for Executive, Administrative and Professional Employees, tab. 40 at 58 (1955).
\item \textsuperscript{14}US DOL, WHPCD, Earnings Data Pertinent to a Review of the Salary Tests for Executive, Administrative and Professional Employees, app. Tab. II at 74 (1955).
\item \textsuperscript{15}US DOL, WHPCD, Earnings Data Pertinent to a Review of the Salary Tests for Executive, Administrative and Professional Employees, app. tab. V at 77 (1955).
\item \textsuperscript{16}US DOL, WHPCD, Earnings Data Pertinent to a Review of the Salary Tests for Executive, Administrative and Professional Employees, tab. 17 at 28, tab. 25 at 39, tab. 33 at 50 (1955).
\item \textsuperscript{17}Harry Simkha Kantor was born in Russia in 1903 and was brought to the United States the following year; he received a B.A. and M.A. from Columbia and did further graduate study. He worked at the U.S. Department of Agriculture and other government agencies from 1926 to 1938, when he joined the Labor Department. From 1958 to 1964 he was an analyst in the Office for Research and Development in the Office of the Secretary of Labor; from 1964 until his retirement in 1969 he was an analyst with the Office of Policy Planning; from 1969 to 1972 he was a consultant with the Office of the Secretary of Labor. \textit{Who's Who in America} 1:1770 (41st ed. 1980-1981). Kantor was first listed in the \textit{Official Register of the United States} in 1941 as principal economist in the WHD, then as senior statistician in 1942, principal industrial economist from 1943 to 1945, industrial economist in 1946-47, as employed in the Research and Statistics Section
\end{itemize}
shed some light on the methodology used by the DOL in setting the regulatory salary levels. Taking as his point of departure that the salary test was designed to function as "an index of status that sets off the bona fide executive from the working squad-leader, and distinguishes the clerk or sub-professional from one who is performing administrative or professional work,\textsuperscript{18}\" Kantor observed that until then the salary tests had been set for the country as a whole "with appropriate consideration given to the fact that the same salary cannot operate with equal effect as a test in high-wage and low-wage industries and regions, and in metropolitan and rural areas, in an economy as complex and diversified as that of the United States." Despite these unavoidable variations in impact, however, Kantor insisted that it was "clear that the objectives of the salary tests will be accomplished if the levels selected are set at points near the lower end of the current range of salaries for each of the categories. Such levels will assist in demarcating the 'bona fide' executive, administrative and professional employees without disqualifying any substantial number of such employees."\textsuperscript{19}\n
Because there was considerable overlap between the salaries being paid covered and excluded workers, the new salary levels had to be "set above the absolute minimum salaries" being paid to the latter group. The inevitable result of new regulatory salary settings during a period when salaries had been rising was that some employers would lose the exemption for some of their employees. This outcome was also to be welcomed because the WHD's experience was that there was "a tendency on the part of employers to misclassify employees, particularly in the administrative and professional categories, when the salary levels become outdated by a marked upward movement of wages and salaries."\textsuperscript{20}\n
\textsuperscript{18}Kantor Report at 2. As at earlier and later hearings, several witnesses contended that the salary tests were unnecessary and/or illegal, and Kantor dismissed their arguments. \textit{Id.} at 3.

\textsuperscript{19}Kantor Report at 5.

\textsuperscript{20}Kantor Report at 5.

\textsuperscript{21}US DOL, WHPCD, \textit{Earnings Data Pertinent to a Review of the Salary Tests for Executive, Administrative and Professional Employees} at ii (1955).
believed that they reflected "the salary patterns with reasonable accuracy." Con­sequently, based on them he concluded that "the lower portion of the range of prevailing salaries will be most nearly approximated if the tests are set at about the levels at which no more than about 10 percent of those in the lowest-wage region, or in the smallest size establishment group, or in the smallest-sized city group, or in the lowest-wage industry of each of the categories would fail to meet the tests."22

Kantor concretized these guidelines by noting that 10 percent of exempt executives in the lowest-wage region, the South, and in the smallest establishments (with one to seven employees) were paid less than $75 weekly; in towns of less than 2,500 population nine percent were paid less than $75 and 14 percent less than $80; in the lowest-wage industry (services), six percent were paid less than $75 and 10 percent less than $80; and nationally 4 percent were paid less than $75. As for exempt administrative employees, 10 percent in the South were paid less than $85, 14 percent in the smallest establishments, 11 percent in the smallest towns, 10 percent in the lowest-wage industry (finance and insurance), and 6 percent nationally. Finally, 9 percent of professional employees in the South were paid less than $90 and 14 percent less than $95; in the smallest establishments 8 percent were paid less than $85 and 13 percent less than $90; 8 percent were paid less than $90 in the smallest towns, and 4 percent were paid less than $85 and 15 percent less than $90 in the lowest wage group (finance and insurance); in the country as a whole 7 percent were paid less than $95. Summarizing, Kantor determined his target range of the lowest 10 percent of salaries to be $75 for executives and $85-$90 for administrative and professional employees. Taking into account changes during the three years since the survey and other factors such as the impact on small establishments with only one or very few executives, he then adjusted these levels slightly upwards to $80 and $95, respectively, and proposed $125 as the short-test on the grounds of maintaining the same ratio to the long-test.23

In April 1958, the DOL published a notice of proposed rule making soliciting comments on its proposal to adopt Kantor's recommendation to increase the executive salary level to $80, the administrative-professional level to $95, and the short-test salary to $125.24 Then in November, Wage and Hour Administrator Clarence Lundquist announced that, effective February 2, 1959, the proposed increases would go into effect.25

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22Kantor Report at 6-7.
23Kantor Report at 7-10.
25FR 23:8962-63 (Nov. 18, 1958). In view of these weekly salary levels, the following account makes no sense: "At the Erie GE plant, the average salaried employee worked 456
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At the beginning of the Kennedy administration Congress undertook a major revision of the FLSA. In the course of discussing H.R. 3935, which Representative James Roosevelt, the chairman of the Special Subcommittee on Labor, had introduced to amend the Act, inter alia, by incorporating retail employers and employees,\(^26\) the House Education and Labor Committee in March 1961, as an accommodation to the newly covered industries, amended the bill to make § 13(a)(1) of the Act’s white-collar exclusions provision read: “except that an employee of a retail or service establishment shall not be excluded from the definition of employee employed in a bona fide executive or administrative capacity because of the number of hours in his workweek which he devotes to activities not directly or closely related to the performance of executive or administrative activities, if less than 40 per centum of his hours worked in the workweek are devoted to such activities.”\(^27\) This change, which became law,\(^28\) represented the first instance in which Congress intervened to specify a white-collar exclusion since 1938. Although the House and Senate reports failed to explain the change,\(^29\) Roosevelt, with

hours of overtime a year, most of which was [sic] uncompensated. The protections offered by legislation on this issue had become almost meaningless for salaried employees by 1960, since employees who earned as little as $200 a month were excluded from the provisions of the Fair Labor Standards Act....” Mark McColloch, *White Collar Workers in Transition: The Boom Years, 1940-1970*, at 145 (1983).


\(^28\) *Fair Labor Standards of 1961*, Pub. L. No. 30, § 9, 75 Stat. 65, 71 (May 5, 1961). This same section also transferred from the WHA to the Secretary of Labor the power to define and delimit the terms “any employee employed in a bona fide executive, administrative, or professional capacity” and inserted the phrase “from time to time” so that the provision read “(as such terms are defined and delimitied from time to time by regulations of the Secretary...).”

help from Representative John Dent (who had sought to undermine criticism that Roosevelt had not given the bill’s opponents enough time), in a traditionally choreographed bit of legislative history, inserted into the House floor debate the explanation that we specifically wrote into the bill that those in executive positions who are beginning to learn the business and are on their way up, as well as others who perhaps have advanced to some degree may have up to 40 percent of their time devoted to nonexecutive duties. We used this for a very specific purpose and upon the representation of reliable people in the retail industry who pointed out their particular need for this kind of exemption and because of the fact that in the administration of the present act...there is a limitation of 20 percent, yet in our bill we have in the retail field extended it to 40 percent.

and Beall opposed the repeal on the grounds that the nonsupervisory work of selling and handling stock was an integral part of the work of executives and supervisors in retail and service establishments; they argued that such supervisors were different from machine-shop foremen and that the committee had heard no evidence that any relevant changes had taken place since 1961. Id. at 125. The bill was not enacted and half a year later, when Williams reported out a bill that eventually did become law, it lacked the repeal. Fair Labor Standards Amendments of 1974 (S. Rep. No. 690, 93d Cong., 2d Sess., Feb. 22, 1974). The Republican minority’s failure to specify how retail supervisors differed from production foremen was also a failure to justify excluding either group from overtime protection. Harold Stein had not been guilty of this failure: “While undoubtedly in many instances a working foreman or supervisor is an employee of a mixed type since he does perform some duties in an executive capacity and some duties which are admittedly not so performed, it would be inconsistent with the purposes of the act to encourage excessive hours of work on the part of such foremen by granting an exemption.” US DOL, WHD, “Executive, Administrative, Professional...Outside Salesman” Redefined: Effective October 24, 1940: Report and Recommendations of the Presiding Officer at Hearings Preliminary to Redefinition 17 ([Oct. 10,] 1940) (Stein Report). Harry Weiss had even concluded that: “The primary purpose of the exclusionary language placing a limitation on the amount of nonexempt work is to distinguish between the bona fide executive and the ‘working’ foreman or ‘working’ supervisor who regularly performs ‘production’ or other work which is unrelated or only remotely related to his supervisory activities.” US DOL, WHPCD, Report and Recommendations on Proposed Revisions of Regulations, Part 541 Under the Fair Labor Standards Act Defining the Terms “Executive” “Administrative” “Professional” “Local Retailing Capacity” “Outside Salesman” 32 (June, 1949) (Weiss Report). Weiss’s language was adopted verbatim in the first set of interpretive regulations and remained in place. FR 14:7734; 29 CFR § 541.115(a)(2003).

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In addition to having failed to identify either that "very specific purpose" or employers' "particular need for this kind of exemption," the choreographer of this sole congressional explanation also misled his colleagues by suggesting that there were retail and service industry executives to whom the exclusion would not apply.³²

In the wake of the 1961 amendments, the DOL held hearings in October 1962 to deal with the applicability of the administrative, executive, and professional exclusions to the retail and service industries.³³ The testifying unions included the AFL-CIO, Amalgamated Clothing Workers, Amalgamated Meat Cutters, and Retail Clerks; among the more numerous employer representatives, in addition to individual retail store chains such as Grand Union and Federated Department Stores, were the Chamber of Commerce of the United States, the American Retail Federation, and the National Association of Retail Grocers.³⁴ In March 1962, the DOL also held separate hearings on the white-collar salary thresholds because "[t]he widespread increases in wage and payroll levels which have taken place since these salary levels were established in February, 1959, indicates [sic] that consideration should be given to further changes of these rates."³⁵ Then in July 1963 the DOL issued its Tentative Decision on Proposed Rule Making Proceedings taking into consideration the evidence received at both sets of hearings.

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³²The claim that "Congress considered these limitations on the amount of time that exempt employees could devote to nonexempt duties when it extended the FLSA to retail and service establishments in 1961 and modified them only by setting the tolerance level for executive and administrative employees in those industries at 40%" lacks empirical support—there is no evidence that Congress considered any revisions applying to workers who had been covered before the 1961 amendments. Final Rule on Overtime Pay: Hearing Before the Subcommittee on Labor, Health and Human Services, Education, and Related Agencies of the Committee on Appropriations United States Senate 18 (S. Hrg. 108-542, 108th Cong, 2d Sess., May 4, 2004) (statement of Craig Becker).


³⁴The hearings took place in Washington D.C. from Oct. 15 to 23 and in Puerto Rico on Oct. 29. FR 28:7002 (July 9, 1963). Although the notice stated that the proceedings would be stenographically reported and transcripts made available to interested parties, it is unclear whether any copies are extant.

³⁵FR 27:665 (Jan. 23, 1962) (notice). These hearings were held on Mar. 26-29 in Washington, D.C. and in Puerto Rico on Apr. 9-10. Again, it is unclear whether the transcript is extant. Employees were represented by the AFL-CIO, ANG, IBEW, ILGWU, IUE, OEIU, UAW, USW, and two engineers organizations; among the much larger number of employers organizations testifying were the American Bankers Association, American Retail Federation, Association of Stock Exchange Firms, and the National Restaurant Association. FR 28:7002.

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With regard to salary levels (other than for retail service employees), some employers at the hearings had proposed eliminating this criterion altogether, while others had suggested that they be set at the level of the lowest paid executive employees in the country’s lowest wage and salary areas. Employers’ basic position was not to increase the level at all, but if there had to be an increase, to limit it to the increase in the cost of living. Unions, in contrast, proposed a $125 long-test threshold for executives and $150 for administrative and professional employees alongside a $200 short-test level. Alternatively, they proposed that the executive salary test be set at 30 percent more than the pay of their highest paid supervisee.36

Clarence Lundquist, the Wage and Hour Administrator, dismissed employers’ proposal to eliminate the salary test altogether and also rejected their proposal to key the salary level to the lowest-paid executives in the lowest wage areas: “To do so would be to render the salary test meaningless for all but a relatively few....”37 He did, however, accept their (and especially retail employers’) argument that the administrative salary level should no longer be higher than that for executives, as it had been since 1940, when the WHD decided that the differential was necessary because, unlike the executive category, administrative positions were too heterogeneous to permit a determination of a percentage of non-exempt work as a delimiting characteristic. The higher salary level was thus supposed to guard against employers’ abusive classification of employees, but when the WHD amended its regulations in 1949 to add the same 20-percent “tolerance for nonexempt work” for administrative employees that it had already been applying to executives and also included “definite criteria for determining what constitutes exempt and nonexempt work,” retention of the salary level differential should have become superfluous. Since the work performed by both groups often overlapped, making them difficult to distinguish, and executives were paid salaries at least as high, the WHA determined that identical thresholds “would recognize the realities of their relationship in practice....”38

Lundquist also rejected both sides’ proposals as to salary levels. Survey data for 1961 had shown that 11 percent of establishments paid one or more executives less than $95 and 13 percent less than $100; for administrative employees the corresponding data were 4 percent less than $100 and 15 percent less than $105, while only 12 percent of employers employing professional employees paid them less than $115. He therefore proposed setting the administrative/executive salary thresholds at $100 and the professional at $115, which bore about the same

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36FR 28:7002.
37FR 28:7004.
38FR 28:7004.
relationship to minimum salaries as was the case in the 1958 survey, when 10 percent of establishments employing executives paid one or more less than the minimum adopted for executives and 15 percent in the case of administrative and professional employees.\(^\text{39}\)

Employers’ basic position regarding the application of the white-collar regulations to retail and service industries was that they were inappropriate because a merchandising executive’s status was “determined by the function he performs as part of the management team, whether actually managing an establishment or department or merely participating in its management....”\(^\text{40}\) Retail and service employers therefore proposed a special definition of management that would regard as exempt work “any activity of whatever nature...performed by managerial persons for the ‘purpose of management.’” Employers frankly admitted that their proposals were designed to exempt from minimum wage and overtime pay assistant managers and assistant buyers whom they considered key management personnel but who failed to qualify as executives because they did not supervise two employees and often failed to qualify as administrative because of the salary test. Retail employers claimed that it was necessary to “delegate managerial authority and responsibility downward to the lowest possible echelons.” They contended that assistant managers and buyers were not assistants to the manager or buyer but “in fact have equal authority and responsibility with the manager or buyer in the managerial function.” Thus, in lieu of the requirement that excluded managers supervise at least two employees, retail employers proposed that the regulations recognize that there could be more than one executive in a department. Finally, retail employers urged a relaxation of the regulations for administrative employees as well, proposing that they be renamed “staff employees,” who would no longer even be required to confine themselves to office or nonmanual work.\(^\text{41}\)

Although the WHA dismissed retail and service employers’ contentions concerning the unique functions of their managers, he was “impressed...by the multiplicity of essentially nonmanagerial tasks which executive-type personnel” performed “in the regular course of their duties which,” but for the new special congressional tolerance, “would disqualify such employees for exemption....” Ultimately, however, Lundquist’s appreciation exerted no influence on his proposed treatment of these exclusions; rather, he used the reference to interpret

\[39\]FR 28:7004.
\[40\]FR 28:7002.
\[41\]FR 28:7003. With regard to the request for renaming administrative employees staff employees, Lundquist merely pointed out that interpretive regulation § 541.201(a)(2)(i) already recognized staff (as opposed to line) employees as a subset of administrative employees.
Congress’s creation of the special 40-percent tolerance as “tacit approval” of the propriety and adequacy of the DOL’s pre-existing definitional general 20-percent tolerance.42

Some employers argued against any salary test for retail and service employees because retail practice was to pay part of an executive’s salary in annual bonuses based on sales or profits. In the alternative, they proposed that the then existing salary thresholds be retained, whereas unions contended that all regulations should apply fully to these newly covered sectors.43 Lundquist acknowledged that the then level of minimum white-collar salaries in retail and service establishments was relatively low: in the type of establishment in which all employees would have been excluded as retail employees, 29 percent of executive and 32 percent of administrative employees were paid less than $100, while 13 percent and 19 percent, respectively, were paid less than $80. He therefore proposed setting the long-test thresholds at $80 for executive and administrative employees and $95 for professionals and the short-test level at $125.44

At the same time, the WHA recognized that these levels would not long serve to distinguish between exempt and nonexempt white-collar retail and service workers, in large part because these industries were already “in the process of adjusting their compensation practices to the act’s progressive requirements.” Historically, the DOL’s executive salary level had fluctuated between 73 and 120 times the statutory minimum wage with an arithmetic mean of 92; the multiples at that time were 80 for retail and service and 87 for the rest of industry. If these multiples remained unchanged until 1965, when the standard minimum wage was to go into effect for the newly covered industries, the multiples would become 64 and 80. A multiple of 80, twice the minimum wage for a 40-hour week, in Lundquist’s opinion, “does not appear unreasonable in the light of our previous experience, but a multiple of 64, which is no more than the minimum wage employees will earn for a 56-hour week, will not...be truly descriptive of the wages of executive and administrative employees in retail and service establishments, nor will it serve as a useful criterion in identifying those who are employed in a bona fide executive, [sic] or administrative capacity.” With 71 percent of executives and 68 percent of administrative employees in retail and service industries already being paid at least $100 weekly, the WHA proposed that as of September 3, 1965, the special salary tests for retail and service industries would end and the uniform levels of $100 for administrative and executive employees, $115 for professional

42FR 28:7005.
43FR 28:7003.
44FR 28:7004.
employees, the $150 short test would go into effect.\textsuperscript{45}

The Wage and Hour Administrator rejected the proposal by certain professional groups that professional employees such as licensed engineers and chemists with academic degrees be treated like physicians and lawyers by eliminating the salary test for them altogether.\textsuperscript{46} The Administrator argued that whereas there was "generally no question as to whether practicing physicians and lawyers are actually employed in a 'professional capacity,'" it was not always the case in all of the many fields in which a degree or license was required for chemists or engineers that they were actually being employed in the professional capacity for which their credentials qualified them.\textsuperscript{47}

However, four years later, in 1967, the WHA did except teachers from the salary test at the same time that they were included within the professional exemption\textsuperscript{48} to conform to the 1966 FLSA amendments, which represented Congress's second (albeit entirely unexplicated) intervention to exempt an entire occupational group.\textsuperscript{49} The original bill, H.R. 13712, did not cover elementary or secondary schools or exclude teachers; nor did the bill as it came out of committee. The House adopted coverage of elementary and secondary schools as enterprises engaged in commerce during floor debate without expressly providing for exclusion of teachers or academic administrative personnel. The amendment was offered by Illinois Republican Harold Collier, who stated that he had not discussed the issue with school educators or administrators. His purpose was to "establish equity," so that, for example, a dishwasher in an elementary or secondary school cafeteria would enjoy the same coverage as his counterpart in an old-age home or college. Neither Collier nor anyone else mentioned teachers, let alone insured that they be excluded from coverage. After John Dent, the bill's floor manager, had observed that Collier's "sincerity...has struck me with a warm and corresponding chord," the amendment was agreed to without debate.\textsuperscript{50} The Senate committee deleted this provision not on the basis of the merits, but because the House had not held hearings on the issue, although the committee did express concern "about the

\textsuperscript{45} FR 28:7005.
\textsuperscript{46} FR 28:7002.
\textsuperscript{47} FR 28:7007.
\textsuperscript{48} FR 32:228, 229, 7823, 7824 (Jan. 10 and May 30, 1967); 29 CFR § 541.3(e).
\textsuperscript{49} In 1966, when Congress amended the FLSA to cover public educational institutions, it amended § 13(a)(1) to exclude “any employee employed in the capacity of academic administrative personnel or teacher in elementary or secondary schools....” Fair Labor Standards Amendments of 1966, Pub. L. No. 89-601, § 214, 80 Stat. 830, 837 (Sept. 23, 1966).
\textsuperscript{50} CR 112:11371 (May 25, 1966).
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impact which a possible increase in wages for such employees might have upon local school districts...."51 The conference committee conformed to the House bill, but also added a provision to make it clear that teachers and academic administrative personnel came within the exemption.52

By the end of the 1960s, after the DOL had once again reported “significant increases” in white-collar salaries since the regulatory thresholds had last been set in 1963, it proposed raising the executive-administrative and professional long-test salaries to $130 and $150, respectively, and the short-test salary to $200.53 In 1968 the WHD conducted another survey of white-collar salaries to evaluate the adequacy of the regulatory salary settings. The data, again, showed the lowest salary paid an exempt executive, administrative, and professional in each investigated establishment employing such workers. Unlike the 1955 survey, the establishments chosen for investigation were largely ones in which the WHD had reason to believe that FLSA violations existed, a large proportion of which tended to be in the South and nonmetropolitan areas. Nevertheless, the agency continued to be concerned that “if the salary tests are set too high, they could prevent many bona fide” white-collar employees, “particularly in the South and in nonmetropolitan areas, from qualifying for the exemption.”54 The agency did not identify the deleterious consequences of subjecting such southern and small-town employers to overtime regulation. Since the WHD’s investigation program (rather than a scientifically selected sample) controlled inclusion in the study, the division could not determine the degree to which the results were representative of all establishments; in any event, because that program emphasized employing units with a high violation potential, those with relatively low minimum salary levels were undoubtedly overrepresented.55 The WHD did estimate that as of February 1, 1969, 10 million executive, administrative, and professional employees were covered by the FLSA but excluded by § 13(a)(1), of whom three million were employed in schools and hospitals operated by state and local governments

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54US DOL, WHPCD, Earnings Data Pertinent to a Review of the Salary Tests for Executive, Administrative and Professional Employees as Defined in Regulations Part 541, at 3 (June 1969).
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(elementary and secondary school teachers alone accounting for 2,500,000).  

Between May and October 1968 the Division investigated 36,056 establishments, of which exempt white-collar employees were found in 17,645: 17,453 had at least one exempt executive, 5,635 at least one administrative, and 1,787 at least one professional employee. Of the total 112,049 exempt employees employed in these establishments, 69,930 (62.4 percent) were executive, 22,967 (20.5 percent) administrative, and 19,152 (17.1 percent) professional employees.  

In 19 percent of the establishments, the lowest paid exempt executive was paid a weekly salary lower than the highest paid nonexempt employee he supervised; in 41 percent of establishments, executives who were paid exactly $100—the long-test salary at that time—earned less than the highest paid nonexempt employee they supervised; and in 24 percent of establishments, executives paid $100 earned $25 or more less than the highest paid nonexempt employee they supervised.  

The hearings that the Wage and Hour Administrator announced as beginning on September 16, 1969, lasted three days and proved to be revelatory.  

As the first witness, assistant administrator for research and legislative analysis Clara Schloss, was explaining that the methodology of the collection of salary data by the WHD “would tend to have a downward bias, in that Wage-Hour investigations tend to be directed towards establishments that are relatively low paying establishments,” Louis Jackson, an employer-gadfly who identified himself only as living in New York City, asked Schloss a question that employers had harped on at the DOL hearings in 1940: “Are you not, in effect, trying to set a minimum wage for a class of employees which is completely (ultra-virus) [sic] as far as your department is concerned?”  

When Paul Tenney, a government attorney, inter-  


59US DOL, WHPCD, Public Hearing: “Proposal to Increase Salary Tests for Executive, Administrative, and Professional Employee Exemption” (Sept. 16, 17, 18, 1969) (hereinafter DOL, “Hearing” (1969)). The transcript used here is a rare and perhaps unique copy, which is located in the DOL Wirtz Labor Library in Washington, D.C.  

60DOL, “Hearing” (1969) at 9. The transcript repeatedly referred to Schloss erroneously as “Carla.”  

61DOL, “Hearing” (1969) at 18. The staff report on the exclusion of white-collar workers of the Minimum Wage Study Commission repeated this odd claim and then four pages later contradicted it: “The current salary test as a basic criterion used to identify exempt workers implicitly introduces a minimum wage type concept in the administration
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vended to note that failure to meet the salary tests did not constitute a minimum wage violation, but merely resulted in the employer’s loss of the exemption, Jackson retorted that “[n]o matter how you are dressing up your stories, sir,” whereas Congress alone could enact a minimum wage of $1.60, the DOL was trying to put into effect a minimum wage of more than $100 a week for certain employees. Finally letting go of this unproductive theme, Jackson then turned to a considerably more important point: “in the history of the law the penal provisions of time and a half, back in the Blue Eagle days, was [sic] an attempt to spread the work.” Inquiring “why penalties should be assessed with respect to administrative and executive employees,” Jackson pointedly asked: “Is it the position of this Department that employers will employee [sic] more administrative assistants or more executive help to spread the work? That indeed is the history of the penalties.” Instead of requesting discussion on this crucial question, the hearing examiner John Mealy interjected the patently false claim: “I think your question has been adequately answered. I wouldn’t want this to be an interminable discussion here, which would just slow down the worthwhile matters that we have to consider.”

It was hardly surprising that Tenney chimed in: “I think you are right, Mr. Examiner, we shouldn’t take time for this argument here.” But it was indicative of the labor movement’s failure to challenge the massive exclusion of white-collar workers that Lazare Teper, the research director of the ILGWU, joined in the suppression by observing that courts had upheld the validity of the salary tests, rather than availing himself of the opportunity to turn Jackson’s objection on its head by showing that the very fact of the absence of an overtime pay penalty did indeed dysfunctional promote white-collar unemployment. Jackson himself was doubtless unaware of how right he was in responding that it was “good from time to time to look into some other things we do in the presentation and exchange of

of this provision which is counter to the original intent of the exemption. [I]t is important to note that the salary test is not a minimum wage that employers are required to pay. It is relevant only as a determination for increased hourly wage rates for hours worked in excess of 40 per week and as a convenience to compliance officers....” Conrad Fritsch and Kathy Vandell, “Exemptions from the Fair Labor Standards Act: Outside Salesworkers and Executive, Administrative, and Professional Employees,” in Report of the Minimum Wage Study Commission 4:235-71, at 240, 244 (1981).

62DOL, “Hearing” (1969) at 19-20. How little employers understood the ostensible purpose of the overtime penalty was again on display later in the hearings when David Flowers, representing a North Carolina auto distribution firm, asserted: “As one witness put it, if an employee loses his exemption he must be paid additional amounts in the form of overtime pay, or be raised to a level of salary which will maintain the exemption.” Id. at 326. He overlooked that the legislature’s presumptive preference in this situation was for the employer to hire another worker.
statistics, to see if we are not getting away from the fundamentals of law."63

The labor relations representative of the Chamber of Commerce of the United States, William Walter, offered the labor movement another opportunity to highlight the irrationality of the white-collar exclusion, but once again it went unrecognized. After plausibly claiming that "[t]he time has come...for a reevaluation of the function of the salary test in light of the purposes of the Act,"64 Walter briefly embarked on the same detour about the allegedly unlawfully imposed minimum wage that Jackson had unwisely used to put his audience off. But Walter quickly recovered, emphasizing that: "If the test has any validity, it lies in the concept that a salary requirement provides an essential protection and prevents easy avoidance of the Act. [T]he question that must be addressed now is not whether an increase in the minimum salary levels for exempt employees will help distinguish them from non-exempt employees, and thereby...aid enforcement efforts, but whether such an increase will further the central purposes of the Act"—namely, eliminating labor conditions detrimental to the maintenance of the minimum standard of living necessary for workers' well-being. In the same vein, he noted that "the premise of the exemption is that executive, administrative, and professional employees enjoy satisfactory working conditions, and need no protection against oppressively low wages and hours." Instead of pursuing this potentially fruitful thought, however, Walter drifted off into cliches (derived, to be sure, from the Stein Report)65 almost predestined to brand him as an unengageable ideolog. Thus in pleading that salary tests had to be set in light of all the "compensating advantages," he immediately focused on the "prestige, status and importance" implied by the white-collar titles alone, which "itself has value. Several of them also imply authority over people—another privilege generally regarded as worth something."66

At this point Walter descended into either incoherence or unveiled threats of self-fulfilling promises in illustrating how higher salary tests "could...frustrate the purposes of the Act."67

Paradoxically,...as the salary tests escalate higher and higher, the protection for those who fail to continue to qualify becomes less and less meaningful. ... A presently exempt

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64DOL, "Hearing" (1969) at 24.

65See above ch. 13.


administrative employee, earning the minimum of one hundred dollars a week, would no longer be exempt under the new salary test.... For a forty-hour week...his earnings could be cut to the statutory minimum level of $64, a reduction of 36 percent. And he would then have to work 15 additional over-time hours each week to regain his former weekly pay level.

The National Chamber seriously questions what type of protection it is that would require an employee to work 55 hours a week to maintain his former weekly earnings level without regard to hours worked.

No doubt, some will attempt to justify such action on the ground that the exempt administrative employee is subject to unlimited over-time work without compensation. But this merely points up another serious deficiency in the current proposal: A lack of any meaningful study into actual over-time experience for exempt employees.68

The bizarre upshot of this parade-of-horribles rhetoric was the Chamber’s proposal that the salary tests not be changed until “average over-time experiences have been determined.... Only then can there be a judgment of the protection that will be afforded those who are thrust into non-exempt status. Only then can the salary tests be reasonably keyed to the purposes of the Act.”69

Teper, instead of piercing to the reason for the exclusion of white-collar workers, elicited from Walter that he was an attorney, read him section 18 of the FLSA, and then asked whether the salary reductions in his nightmare scenario would not be a violation of the FLSA, prompting Walter to reply: “I hardly think so. Wages are a matter of private agreement between employer and employee. Most employees in these categories do not operate on a contract basis, and the wage can be determined at any time.”70 Not only had Teper squandered his chance,71 but, grotesquely, neither he nor Walter was aware that the U.S. Supreme Court had resolved the dispute over section 18—“No provision of this Act shall justify any employer in reducing a wage paid by him which is in excess of the applicable minimum wage under this Act, or justify any employer in increasing hours of employment maintained by him which are shorter than the maximum hours applicable under this Act”—in employers’ favor more than a quarter-century earlier.72

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68DOL, “Hearing” (1969) at 27.
69DOL, “Hearing” (1969) at 28.
71Teper shared this blame with AFL-CIO economist Rudy Oswald, who also went off on an insignificant tangent about whether the Chamber of Commerce kept records of the its exempt white-collar employees’ hours. DOL, “Hearing” (1969) at 40-43.
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While director Everett Samsel of the National Institute of Dry Cleaning proposed dropping the salary test altogether because "[e]conomic realities would seem to suggest that an employee assigned to executive, administrative responsibilities would not accept a salary equal to the minimum wage, or any wage paid to a subordinate,"73 Henry Bison, Jr., the general counsel of the National Association of Retail Grocers, maintained that the salary test should be subordinate and not "so high, so unrealistic that anyone who is qualified under the other five requirements of the regulation would be excluded because he didn't meet this sixth one by reason of the fact that the...salary requirement was so high that true bona fide executives would no longer be entitled to the exemption." The absurdity of Bison's protesting against the salary test levels while conceding that "[t]he purpose...of the regulations...is really to determine whether the individual is truly an executive,"74 was revealed by AFL-CIO economist Rudy Oswald: the DOL's proposal of $130 for executive and administrative employees provided no differential over the $129.11 average earnings of nonsupervisory production workers in manufacturing. Indeed, even the AFL-CIO's own proposal of $150 was only 17 percent higher.75

By far the most radical critic at the hearing (and perhaps during the whole post-World War II period) was Anthony Connnole, administrative assistant to Douglas Fraser, UAW executive board member at large, who appeared together with a representative of the Teamsters to present the views of their newly formed (and short-lived) Alliance for Labor Action.76 Although on the surface the ALA seemed to focus on the inadequacy of the salary levels, in fact it stood alone in stressing that the white-collar exclusions had been overinclusive from the very beginning: "The hundreds of thousands of white collar employees who were denied overtime pay by their employers as a matter of policy because their salaries exceed the exemp-

73DOL, "Hearing" (1969) at 116 (quote), 117. William Baker, the director of personnel management of the New Jersey Hospital Association, also suggested eliminating salary tests altogether. Id. at 263.

74DOL, "Hearing" (1969) at 48.

75DOL, "Hearing" (1969) at 165-66. Although it came to only $153.85 a week, Louis Rothchild, counsel for Menswear Retailers of America, manifestly believed that he was acting generously in proposing $8,000 a year as the sole test of an excluded bona fide administrative or executive employee to simplify enforcement. Id. at 235.

tion standard, are the exploited victims of a low standard.” Implicitly the union alliance was taking the DOL to task for having issued regulatory definitions contravening a much more labor-protective legislative intent: “The salary standards since their inception have consistently denied protection to hundreds of thousands of workers who were intended to be covered by” the FLSA. The ALA drew out this implication in a claim that sounded plausible enough, but lacked any empirical support, in particular any explanation of congressional inaction following publication of DOL’s first set of exclusionary definitions in 1938: “If the drafters of the original Act were here today, I’m sure they would protest most vigorously any action such as is proposed that would deny pay for overtime work to workers striving to attain a moderate standard of living...”

The ALA pointed out that in 26 of the 30 years since the Stein Report (1940-41 and 1963-64 being the only exceptions) average weekly wages for 40 hours at straight-time pay for manufacturing production workers had exceeded the DOL salary threshold for executive employees. The salary standard for administrative employees has been lower during the previous five years and 11 of 30 years in all, while the higher professional employee salary level had been lower in eight years. If UAW automobile production workers were taken as the point of comparison, the DOL salary levels for professional and administrative employees had been lower in 24 of the 30 years, including all 18 years since 1951; for executive employees, the salary standard had been lower than auto workers’ 40-hour wage in all 30 years—by an average of $26.99 (compared to $13.66 for administrative and $10.16 for professional employees).

The ALA also drew empirical conclusions from the past for current salary level settings: “[T]he data clearly indicates that the salary standards established in 1960 were grossly inadequate at the time they were set. Updating those figures to 1968 simply perpetuates the mistakes of the past.” The union observed that data from the Bureau of Labor Statistics’ own National Survey of Professional, Administrative, Technical and Clerical Pay for the lowest level of employees the WHD considered exempt showed that the average weekly salary in 1968 of all 6 occupations (chemist II, engineer II, accountant III, auditor III, job analysts III, managers office services I) was $184.70, and that only 1 percent earned less than $130 and 7

77DOL, “Hearing” (1969) at 247.
80DOL, “Hearing” (1969) at 243-44.
81DOL, “Hearing” (1969) at 244-46.
82DOL, “Hearing” (1969) at 248.
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percent less than $150.\textsuperscript{83} The ALA therefore argued that:

Any realistic standards should not be set at such a low level that virtually all of the workers who might possibly be considered exempt would not be affected by the standard, yet the data made available in the National Survey of Professional, Administrative, Technical and Clerical Pay of June 1968 indicates that this is exactly what will happen with the proposed salary standards. [T]he salary standards proposed are virtually [sic] so low that no employees at the lowest level of exempt jobs would be affected by that and virtually no employers would be required to pay overtime to persons whom they now consider as exempt. ...

It is crystal clear...even without any updating of the data, that the proposed salary standards are already below typical salary levels for non-exempt occupations in the U.S. The salary standards proposed by the Administrator are completely unrelated to the actual practices of private industry in compensating employees for overtime work.\textsuperscript{84}

The ALA buttressed this last claim by reference to a 1967 National Industrial Conference Board study showing that 52 percent of manufacturing companies paid FLSA-exempt employees for overtime work; among firms with more than 20,000 employees, the proportion reached 70 percent. Of 94 companies using a maximum salary level to determine whether to pay for overtime, 84 percent paid those earning more than $154 a week ($8,000 a year); the highest bracket was $385 or more per week ($20,000 a year). Only 3 percent set the maximum as low as $115-153 a week ($6,000-7,999 a year).\textsuperscript{85}

In spite of this barrage of data and historical criticism, the ALA nevertheless proposed salary thresholds that were hardly radically discontinuous with the DOL's settings: for executive and administrative employees $170—which "is still considerably below the earnings needed to provide a moderate standard of living for a typical worker and his family, and is substantially below the pay level where manufacturing companies generally begin to deny pay for overtime hours worked"—$195 for professionals, and a $260 short test. But neither these proposals nor the ALA's call for an automatic annual escalator formula prompted any

\textsuperscript{83}DOL, "Hearing" (1969) tab. 2 at 249 (citing BLS, National Survey of Professional, Administrative, Technical and Clerical Pay (Bull. 1617)). The lowest average weekly salary was $171.74 for chemists, of whom only 3 percent earned less than $130; the occupation with the highest proportion earning less than $150 was 16 percent for managers.

\textsuperscript{84}DOL, "Hearing" (1969) at 250-51, 254-55.

\textsuperscript{85}DOL, "Hearing" (1969) at 255-56 (citing NICB, Overtime Pay for Exempt Employees (Studies on Personnel Policy No. 208, 1967)).
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comment or questions from the DOL or employers.86

In January 1970, several months after the close of the hearings, the Nixon administration DOL responded by asserting without a shred of (legislative-history) evidence that unions' proposed increases would "cause the loss of the exemption to a substantial number of employees who were intended by Congress to be exempt." Wage and Hour Administrator Robert Moran "elected, as in the past, to propose salaries which are not geared to high wage areas (such as the Northeast and West) but which take into consideration the lower wage nonmetropolitan areas of the South." Thus of the lowest paid executives determined to be exempt in investigated establishments for all regions in 1968, 20 percent received less than $130 weekly compared with only 12 percent in the West and 14 percent in the Northeast. The WHA did concede that "[v]ery significant evidence that the current salary tests are no longer meaningful is the finding that in one out of every five establishments the lowest paid exempt executives for whom data were collected during the May 1-October 31, 1968, period actually earned less than the highest paid nonexempt worker whom he supervised." Moreover, 1969 earnings data showed that only 5 percent of the lowest paid executives and 3 percent of the lowest-paid administrative employees determined to be exempt had salaries as low as $100, with 5 percent of their professional counterparts below $120. Consequently, without an increase, the salary tests would be rendered meaningless except for few employees.87 In the end, the WHA raised the salary levels only to $125 for administrative and executive employees, $140 for professionals, and $200 for the short test.88 Even a proposal as modest as annual adjustment of salary levels, which the WHA conceded had "some merit," especially since amendments took place about every seven years, was too radical for adoption and "require[d] further study"—the progress that such study ever made being signaled by the fact that the salary levels were raised only once more (in 1975) and then never again for the next three decades.89

Studious congressional neglect of the white-collar overtime exclusions was prominently on display during the 1971 debates on amending the FLSA, which included proposals to repeal the exclusion of bona fide administrative, executive, and professional employees from the protections of the Equal Pay Act, a provision within the FLSA prohibiting sex discrimination in wage payments for equal work.90 So self-explanatory had the first exclusion become that when Senator

86DOL, "Hearing" (1969) at 259-60.
88FR 35:885.
89FR 35:884.
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Philip Hart discussed his bill to apply the Equal Pay Act to them, he assured his colleagues: "My bill would not, of course, in any way remove or affect the existing exemption for these white-collar workers from the minimum wage and overtime provisions" of the FLSA. Similarly cavalier was the neglect accorded the exclusion from overtime regulation by Judith Lonnquist, legal counsel for the Chicago chapter of the National Organization for Women. Testifying that the white-collar exemption had been used as a loophole to avoid coverage of equal pay requirements, she mentioned that a major employer in the Midwest classified secretaries and other "clericals" as executives. While the WHD had been quick to disregard such job-classification subterfuge, "the employees so classified, propagated into believing they are management, may not realize that they are entitled to equal pay...." Oblivious of their entitlement to overtime pay, the NOW lawyer insisted that "[i]nherent in the FLSA are advantages not only for professional, executive and administrative personnel, but for all employees," without being able to identify the advantages accruing to excluded white-collar workers.

In September 1970, WHA Moran, reopened the question of the occupational scope of the exclusion of professional employees in the wake of the 1966 FLSA amendments, which had made the Act applicable to paramedical employees, hospitals, nursing homes, and residential care establishments. At the same time, he announced that the WHD was also considering the exemption status of employees in data processing, including program operators, programmers, and sys-


tems analysts, who performed “a variety of tasks which are difficult to measure in terms of their significance and importance to management.” Then, too, the Division took up the propriety of classifying as “professional” “certain highly paid occupations (i.e., highly skilled technicians in the electronics and aerospace industries),” which were “not in a field of science or learning,” but which were learned primarily by means of extensive experience and on-the-job training. The hearing scheduled for December 1, 1970 would also hear testimony on the need for a minimum salary level for outside salesmen. This final issue of the feasibility of a minimum salary requirement was placed on the agenda because outside sales employees had complained, “in many cases,” about “being exploited. Complaints range from those who receive no pay...to those who must work excessively long hours to earn a disappointing payment....” The hearing, which was postponed until February 2, 1971, was not a vehicle for reacting to WHD proposals (which did not exist), but to furnish the agency with information.

By the end of 1971, the WHD, after considering the evidence gathered at the hearings from February 2 to 11, decided, for various reasons, not to take any direct regulatory action on any of the aforementioned matters. With regard to data processing employees, employers unsurprisingly argued that systems analysts and programmers (and even junior programmers) should be classified as “professional.” Stymied in satisfying the regulatory definition by the absence of any requirement of a college degree for entry into the occupation, the dearth of college computer science courses, and the lack of a certification requirement for employment, employers proposed a postsecondary technical course and on-the-job training and work experience as a substitute. The employee representatives who testified were

94 FR 35:14268-69 (Sept. 10, 1970). As early as the late 1950s the DOL had begun studying job classifications such as programmers and systems analysts in the data processing industry with respect to the white-collar exclusions. US DOL, Annual Report, 1960, at 243.


96 FR 35:17116 (Nov. 6, 1970).


98 Without further explanation the WHA stated that the hearings had not generated sufficient evidence of the need for a salary-level test for outside salesmen to justify altering the regulation. FR 36:22976-79 at 22977 (Dec. 2, 1971). Although he also concluded that the regulatory definition of “professional employees” did not need revision to deal with paramedical occupations, the WHD did supplement the illustrations in the interpretive regulations to explain what would qualify as the requisite “prolonged course of specialized intellectual instruction” for medical technologists; likewise, it stated that x-ray technicians lacked the opportunity to exercise the requisite level of discretion and judgment to qualify. Id. at 22976-77, 22978 (§ 541.302(e)(1)), and 22979 (§ 541.306(b)-(c)).

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just as adamantly opposed to being shoe-horned into the professional category, feeling that “to expand the exemption was an invitation for employers to work such employees longer hours with no additional compensation.” In the end, the WHD decided against inclusion of data processing employees in the professional category for two distinct reasons, one pertaining to the evolution of the occupation, the other to preserving the integrity of the regulatory definition. First, it found that “at the present time the computer sciences are not generally recognized by colleges and universities as a bona fide academic discipline” and there was “too much variation in standards and academic achievement to conclude logically that data processing employees are part of a true profession of the type contemplated by the regulations.” Second, the WHA contended that adoption of the employers’ alternative to formalized intellectual education “would seriously weaken the professional exemption by allowing employers to claim the exemption for various kinds of para-professional and subprofessional groups.”

Employers of highly paid technicians (including those paid less than $200 a week) in the electronic and aerospace industries, the funeral industry, news media, and employment placement agencies recommended that the regulations be revised to exclude these workers from overtime protection. The technical employees themselves, however, took the opposite position, citing as reasons not only loss of overtime pay, but also longer working hours and—most interestingly—“resultant increase in unemployment....” Without revealing a clear basis, but apparently assigning weight to the hearing evidence that for the most part the technicians in question “were paid at levels that were not exceptionally high in relation to current salary levels for those occupations which are universally recognized as professional,” the WHA found no reason to amend the definition.

Four years after the previous increase in regulatory salary levels and one week after President Nixon’s resignation, the new Wage and Hour Administrator, Betty Southard Murphy, issued a notice of proposed rulemaking. Noting that since 1970 the consumer price index had risen 27 points and the minimum wage had been increased, she proposed that in order to make the tests “realistic, interim salary tests are being proposed, pending a study” during the following six months, after which “a further change, if necessary,” would be made. In the meantime the WHA proposed $160 for administrative and executive employees, $185 for professionals, and a $300 short-test salary.

The “vast majority” of comments that the Employment Standards Administration received in response objected that the proposed increases were inflationary.
Arguing that the 50-percent increase in the short-test salary exceeded the rise in the Consumer Price Index, the NAM suggested a 25 percent increase to $250 as "more consistent with what has happened in the economy." More specifically, the NAM complained about the burden of having to comply with the duties tests if the proposed $300 short test were implemented: "Throughout industry, there are many supervisory positions, both in the plant and in the office, which pay less than $15,600. To establish the upper limit at that level would create administrative chaos since, for a substantial percentage of employees with responsibilities that are generally executive or administrative, it would become necessary to document all the other tests to ensure compliance with the law."102 In sharp contrast, Nat Goldfinger, the AFL-CIO research director, commented to Murphy that although the union organization was aware that in the early days of the FLSA "concern was expressed that the salary tests might be set too high and thus tend to disqualify for exemption persons whom the Congress intended to exempt," the proposed increases would not be effective enough. Instead, the AFL-CIO proposed $200 for administrative and executive employees, $225 for professionals, and $350 for the short test.103 A one-day public hearing on October 22, 1974, produced "an almost-solid negative reaction from witnesses" except the AFL-CIO. In particular retail businesses complained that the proposed salary thresholds were "too high to prevent" [sic; should be "enable"] administrative and executive employees, especially in the South, rural areas, and in small stores, from being exempted. Employers also objected to any interim increases at all, demanding that no changes be instituted until the detailed wage study had been completed.104

In February 1975, four months after a one-day hearing,105 Murphy announced the new salary levels effective April 1, 1975. While continuing to accept the consumer price index "as a guide for establishing these interim rates," the WHA cut back the proposed increases below the inflation rate "in order to eliminate any inflationary impact," setting the long-test salaries at $155 and $170 respectively.106 Without revealing how she had arrived at the conclusion, Murphy also found in retrospect that her proposed $300 short test was "too high"; but acknowledging that the salary levels "have become obsolete and interim rates are required to protect

103Letter from Nat Goldfinger to Betty Murphy (Sept. 11, 1974), in DLR, No. 199, E-1 (Oct. 11, 1974).
105FR 39:33377 (Sept. 17, 1974).
the interests of all concerned, including employees and employers,” she reduced it by almost 17 percent to $250. The WHA justified an increase on the grounds that: “For example, there are indications that certain employers are utilizing the high salary test to employ otherwise nonexempt employees”—that is, those performing nonexempt work beyond the 20 or 40 percent tolerance allowed for executive and administrative employees—“for excessively long workweeks. Such employees do not qualify for exemption under the...regular salary tests and some may no longer qualify for exemption under the interim upset salary test....” Murphy’s successors may have taken her warning that the use of interim rates was not to be considered a “precedent” all too seriously: for the next 29 years, no increase at all was considered a precedent, leaving Murphy’s settings in place into the next millennium.

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A person who can qualify for these exemptions...does not need, nor does he want, in my personal experience, the so-called protection of the over-time provision. He’s working to do a job.108

The effectiveness of the FLSA white-collar exclusions was captured by special BLS surveys during the 1970s showing that the proportion of professional employees working more than 41 hours a week and receiving premium pay during the month of May between 1973 and 1979 ranged between 16.6 and 21.0 percent, while the corresponding range for managers and administrators was 11.3 to 12.9 percent. In contrast, about 60 percent of clerical workers and 70 percent of blue-collar workers received premium pay.109 The discrepancy was even greater among those who worked 60 hours or more: whereas only about 7.5 percent of the professional and technical workers and managers and administrators working 60 hours

107 FR 40:7092.
109 US BLS, Long Hours and Premium Pay, May 1979, tab. B at A-6 (Spec. Lab. Force Rep. 238, 1980). The proportion of professional and blue-collar workers working 41 hours or more was about the same, while that of managers and administrators was much higher and that of clerical workers much lower. Id. These BLS occupational categories were not identical with the FLSA statutory/regulatory categories.
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or more hours in 1979 received premium pay, 53 percent of clerical and blue-collar workers did.\textsuperscript{110}

A little more than a year after the Carter administration took office and three years after the last round of increases, Wage and Hour Administrator Xavier Vela, based on increases in the consumer price index, the statutory minimum wage—in 1977 Congress enacted an increase in the minimum wage to $2.65, $2.90, $3.10, and $3.35, effective in 1978, 1979, 1980, and 1981, respectively\textsuperscript{111}—and various wage and salary indexes, informed the public that the existing interim regulatory salary thresholds “no longer provide basic minimum safeguards and protection for the economic position of low paid executive, administrative, and professional employees, as contemplated by” Congress and the DOL. He therefore proposed increasing the executive-administrative and professional long-test and the short-test salary levels to $225, $250, and $350, respectively, and solicited comment for a one-day hearing in May.\textsuperscript{112} In fact, the hearings lasted three days (May 8-10, 1978), at which 22 witnesses testified and in conjunction with which numerous written comments were submitted.\textsuperscript{113} Arguing that the proposed increases were inadequate, some employee-commenters pointed out that the new salary levels were lower than the average hourly wages paid to nonexempt workers in many industries.\textsuperscript{114} One “misconception” that the DOL found prevalent among employer-commenters (especially among those with fixed or declining revenues) was that “they would have no option but to lay off some of their employees, if the levels were raised.”\textsuperscript{115} This attitude can be understood to mean that, instead of spreading employment by hiring additional workers, these employers would be motivated not to have the work done: in other words, the work that until then had been performed during overtime hours had to be done gratis or not at all. The attitude was also unsurprising in light of a contemporaneous DOL survey that found a “significant inverse relationship...between the percentage of executive employees with scheduled hours of more than 40 per week and weekly salary levels.”\textsuperscript{116} Although em-


\textsuperscript{112}FR 43:14688 (Apr. 7, 1978).

\textsuperscript{113}FR 46:3011 (Jan. 13, 1981). It is unclear whether hearing transcripts are extant.

\textsuperscript{114}FR 46:3011.

\textsuperscript{115}FR 46:3011-12.

\textsuperscript{116}US ESA, \textit{Executive, Administrative and Professional Employees: A Study of}
ployers' and unions' opposing comments were "similar to comments that have historically been made when increases in the salary tests have been suggested," the DOL nevertheless undertook such an "intensive review" of its own methodology that had generated the proposed increases that almost three years passed before it finally took public action in January 1981.117

One reason for this self-paralysis was the vigorous and principled objections to the proposed increase in salary thresholds filed with the DOL by the Council on Wage and Price Stability on June 9, 1978.118 The COWPS took the strong position that: Congress had offered no rationale for the exemptions in the FLSA; the regulations creating the salary thresholds lacked any explanation as to why they had been chosen; the regulatory proposals failed to explain the nature of the "basic minimum safeguards and protection of the economic position of low paid executive, administrative, and professional employees as contemplated" by § 13(a)(1) and the regulations; and since no rationale had been given for the salary test, "no consistent reason for or methods of changing it can be or is offered."119 The critique culminated in the statistical-methodological injunction that the DOL "must avoid becoming involved in the circular process whereby it uses its salary tests to define who is employed in an executive, administrative or professional capacity and then uses this group of workers and their wage levels to determine the amount by which to raise the salary test. Some independent criterion must be used to determine the appropriate salary test or increases in that test (such as the minimum hourly wage or even the CPI) or else an independent criterion must be used to define the group of exempt workers and their salary must be used to determine the minimum exempt salary level."120

The COWPS's acute—and in part unprecedented—the-emperor-has-no-clothes-type criticisms were incongruously conjoined with dogmatic speculation.

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Salaries and Hours of Work at 2.

117FR 46:3012.

118The COWPS, which was created by the Council on Wage and Price Stability Act, Pub. L. No. 93-387, 88 Stat. 750 (Aug. 24, 1974), was authorized to intervene in rule-making before any federal department or agency "in order to present its views as to the inflationary impact that might result from the possible outcomes of such proceedings." Act of Aug. 9, 1975, Pub. L. No. 94-75, § 4, 89 Stat. 411 (adding § 3(a)(8) to the COWPS Act).


about Congress’s purposes. The Council conjectured that “Congress no doubt recognized that” the three white-collar groups “are offered unique advancement, training, and often fringe benefits and that their work was more of a mental than a manual nature that could not as easily be governed by the clock. In 1938 Congress was trying to effect a redistribution of income and omitted” the three groups” from that redistribution...since it no doubt felt that the potential advancement and rewards of this type of employment were sufficient to protect the economic status of these workers.”121 The Council’s repetitive rhetorical use of “no doubt” could not disguise its ignorance: whereas the minimum wage may have been designed to redistribute income from capital to labor, the overtime provision was intended to shorten the workweek to 40 hours and to redistribute hours from overworked to underworked workers. It was not fully employed workers’ economic status, but their social status that was at issue; and even if unemployed workers’ economic status was implicated by the redistribution of working hours to them, there was no evidence that unemployed white-collar workers’ “potential advancement” and benefits could protect that status while they were jobless.122

The COWPS went on to assert that the rationale behind the DOL’s use of a salary test “can be easily surmised. Setting a minimum salary for exemption that is significantly higher than the minimum wage for a forty hour workweek insures that no salaried worker will be working for less than the minimum hourly wage when overtime work is considered. As long as the exempt salary level is high enough this purpose will be served and all possible redistribution benefits of the salary test will accrue to society.” The Council then suggested that the DOL use certain methods for setting salary tests that would “reflect the apparent intent of Congress to insure that no employee receives less than the minimum hourly wage even after overtime is considered.” The COWPS failed to explain its leap from surmising that the DOL had formed this intent to attributing it to Congress as well, but it did illustrate that if the salary threshold were pegged to 60 hours a week and thus 60 times the minimum wage ($2.65 at the time), the resulting $159 minimum exempt salary would equal the income of a minimum wage worker working 53 hours a week with overtime pay: “Few, if any of the lowest paid supervisors work

122See above ch. 2. To be sure, the COWPS was scarcely alone in its exclusive focus on money instead of time; the WHD itself routinely adopted the same position. For example, in an opinion letter it declared that the WHA was constrained to interpret exemptions narrowly “because the application of an exemption deprives an employee of the monetary benefits which the Act otherwise provides.” US DOL, WHD, Opinion Letter, WH-376 (Mar. 5, 1976) (Westlaw).
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in excess of 53 hours a week and so the intent of Congress to protect these employees would be preserved.” In the end, the COWPS urged the DOL to withdraw its salary level proposal because it was “unnecessary to protect workers,” Congress had not required it, and it was inflationary.123

The Council’s guesswork was breathtaking, especially since, when the WHD had set the salary threshold for the first time in 1938, the volume of public (including congressional) attention riveted on it was arguably at its maximum. Yet the $30 level that the WHD fixed was about twice as high as the COWPS’s method would have warranted. That the Council in 1978, when the ratios between the salary levels and the minimum wage had sunk to their historically lowest or near-lowest points, nevertheless proposed that the DOL leave well enough (i.e., $155 a week) alone verged on the preposterous—though, to be sure, no more so than the surmise that Congress was satisfied that in the midst of the deepest depression in U.S. history white-collar workers could safely be excluded from overtime protection so long as they earned the equivalent of 25 cents an hour straight-time for 60 hours because their “unique advancement” opportunities would protect them (but not against overwork, which remained outside the Council’s ken). Regardless of its tenability, the COWPS’s argument reinforced the DOL’s inaction for the following three years.

In the interim, the Minimum Wage Study Commission, which Congress had created in 1977, inter alia, to study and report and make recommendations on “the exemptions from the...overtime requirements” of the FLSA,124 undertook a re-examination of the white-collar exclusions, which was one of its least imaginative efforts. The Commission, after noting that about 13 million executives, “administrators,” and professionals were exempt, simply asserted that “[t]he statutory language is clear in its intent to exempt such employees....”125 Even if Congress had used these three words—and in fact Congress did not use “administrators”126—the commission failed even to articulate, let alone grapple with, the obvious question as to what Congress meant by them and whether it was plausible that Congress intended that the DOL should ultimately exclude such a huge proportion of the working population from hours regulation. (The MWSC’s failings in this regard were seminal in that the Bush administration, in seeking to justify its regulatory revisions in 2003, referred back to the Commission as the source of all of its

126See above ch. 9.
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information on the “scant” legislative history.” 127 The MWSC offered a reason for recommending elimination or retention of all the other numerous exclusions from the minimum wage and/or overtime provision of the FLSA. 128 Only with regard to retaining the white-collar exclusions did the commission not even purport to have an explanation: “The Commission recommends that this exemption be retained and that salary test levels used as a partial criterion to determine eligibility for this exemption be raised to the historical level prevailing during the period 1950 to 1975 and adjusted upward as necessary to maintain this historical relationship.” In the same vein it merely went on to point out that whereas from 1950 to 1975 the executive salary test had been increased several times to maintain a level of twice the minimum wage for 40 hours, by 1981 the salary test had fallen to 15 percent above the minimum wage. 129

The only vote that the MWSC took on this exclusion was on this narrowly and mechanistically framed motion: “The historic relationship both with respect to the salary test and to the upset test should be re-established and maintained in the future.” Five of the six commissioners who voted approved, the only No vote being registered by the commission’s sole nonagricultural employer, S. Warne Robinson,130 board chairman of G. C. Murphy Company of McKeesport, Pennsylvania, a retail chain of variety stores.131

To be sure, in an earlier section of its “Findings and Recommendations” volume the Commission did mention seven cases justifying exemptions from the

127 FR 68:15561 (Mar. 31, 2003). See also below ch. 16.
131 Report of the Minimum Wage Study Commission 1:i. In the 1980s the company sold out and its stores were later closed by the successor firm. http://www.geocities.com/zayre88/R_murphy.html. In his 43-page “Minority Report,” Robinson—who was opposed to a statutory minimum wage altogether—after asserting that “[p]erhaps in no other section of the Commission’s report did the majority display such a total disregard for the available evidence as its recommendation on the longstanding exemption” for white-collar employees, leveled the bizarrely nonsensical charge that the commission’s “ill-considered recommendation” to update the salary levels “would effectively eliminate this important exemption.” Report of the Minimum Wage Study Commission 1:206-207. How increasing the weekly salary level above $155 would have effected this result Robinson failed to explain, but alluding to the Reagan administration’s action four months earlier, he insisted that the DOL’s recent attempt to raise the salary level “substantially” had been blocked “because of its serious inflationary effects and its potential for disrupting vital labor-intensive industries, including the retail and service trades.” Id. at 207.
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overtime provision, one of which, “Compensatory privileges and non-standardized work output,” was illustrated by reference to administrative, executive, and professional occupations. The MWSC, conveniently using the subjectless passive, reported:

Although these employees often work more than 40 hours a week, it was argued that the value of compensatory privileges is sufficient to offset wages lost by nonpayment of an overtime premium. Moreover, work output in these occupations cannot be standardized relative to a specific time period, thereby negating the employment-expanding effects of an overtime provision.

In the following two paragraphs the Commission then appeared to offer its own (albeit ambiguous) assessment of these two claims. It commented that “[t]o the extent” that excluded white-collar workers received “fringe benefits beyond those received by nonsupervisory employees, a direct monetary tradeoff may exist.” In particular, “[i]ncreased tenure, security, higher base pay and improved advancement opportunities” could “also be viewed as substitute compensation for lack of overtime premium pay provisions.” Whatever the hypothetical validity of this argument, the DOL’s regulations, as the Commission could (or at least should) not have been unaware, have never tested for the presence of any of these non-wage terms or conditions of work. Consequently, it was and remains unclear whether in fact these excluded employees actually enjoyed such benefits or whether covered white-collar or even blue-collar workers did as well. Nor did the Commission reflect on how to evaluate the appropriateness of basing exclusions from mandatory norms of labor standards legislation on speculation concerning the future careers of myriad employees who, after having conferred on their employers the benefits of supra-normal hours for months or years, may wind up never snatching the dangled carrot of a promotion. Moreover, the MWSC also failed to explain not only how to quantify the “tradeoff” (and over what time period), but also how to make any monetary benefits commensurable with the multifariously deleterious effects of long working hours over long periods of time.

As to the non-standardized work output argument, the commission asserted that overtime penalties could “most easily” expand employment “where employees are perfect substitutes for each other such as factory assembly-line workers, machine operators, sales-counter clerks, and in jobs that do not require independent

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134 Report of the Minimum Wage Study Commission 1:120.
discretionary decision making. At the other extreme, employment levels of most executive, administrative and professional jobs would not increase with required overtime pay...[t]o the extent that performance on these jobs depends on individualized job requirements...."135

Unfortunately, the commission failed to go beyond these bare assertions to explain why one person engaged in independent discretionary decisionmaking 80 hours a week could not be joined by a co-worker so that each worked 40 hours a week. The commission also neglected to ask the crucial question as to how many of the then 13 million excluded white-collar workers were more like portrait painters whose unique talents could not be duplicated by a second-shift artist and how many were more like Dorothy Haywood and her 50 co-workers processing damage claims.136 Critical, too, was the MWSC's failure to probe why, even if these workers were non-fungible, any of them had to be working more than 40 hours in the first place.

The problem, apart from the deficiencies already noted, with this justification is twofold: first, the MWSC never made it clear whether it fully accepted the argument or was merely reporting others' opinion;137 and second, the commission also recorded a countervailing "Justifying the Elimination of Exemptions to the Overtime Provisions of the FLSA." Whereas the first justification was framed in terms of situations in which the employment-spreading effect of overtime penalties were stymied,138 the second was immune to it:

After more than 40 years under the Act, it may be reasonably argued that the 40-hour workweek is widely accepted by the American public. The work spreading objective of the maximum hour provision...has been largely achieved and continued overtime exemptions are therefore anachronistic. As a result, all employees should receive the overtime premium to reinforce the acknowledged public acceptance of the 40-hour workweek and to provide additional compensation for the inconvenience and added risk of injury associated with overtime work. Under this view, the employment-expanding effect of the penalty wage, which was a major original consideration for maximum hour legislation, is minimized or considered irrelevant.139

Nevertheless, the MWSC failed either to evaluate this argument or to make an express judgment as to whether this eliminationist justification should have pre-

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135 Report of the Minimum Wage Study Commission 1:120.
136 See above ch. 2.
137 It used, for example, the subjectless passive "it was argued...." Report of the Minimum Wage Study Commission 1:119.
139 Report of the Minimum Wage Study Commission 1:120.
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vailed.

The rigid framework (as well as the data) that the commission used here were supplied by the two staff members (a senior economist and his research assistant) who wrote the detailed chapter on the white-collar exclusions.¹⁴⁰ Conrad Fritsch and Kathy Vandell, who were as little able to transcend mere assertions as the commissioners, contended in their "Executive Summary"¹⁴¹ that:

The basic justification for the exemption resides in the nature of the work performed by exempt employees. Unlike factory employment and clerical jobs, executives, administrators and professionals perform duties whose output is not clearly associated with hours of work per day. In conducting their duties, they are expected to exercise individual discretion and make independent judgments. ... Moreover, unlike occupations subject to the maximum hour provisions of the Act, the nature of the work performed generally precludes the potential for job expansion associated with the standard FLSA overtime premium.¹⁴²

Fritsch and Vandell offered no empirical or theoretical support for these claims in the body of the chapter either. Ironically, they even conceded that their only source was itself based on mere assertion. Relying on the subjectless passive, but presumably referring to the Stein Report, they stated that "it was asserted that reducing the hours worked by executives would not increase employment since executive work cannot be easily spread."¹⁴³ What Stein really wrote, as a side comment in the context of seeking to justify his decision to recommend "a comparatively low salary requirement" for executives, was that the overtime penalty "in the case of persons truly employed in an executive capacity would not usually have any considerable effect in spreading employment because in many instances the executive's work cannot be shared. In any event, it would produce this effect far less commonly than in the case of administrative and professional employees...."¹⁴⁴ Thus Stein not only expressly distanced himself from the assertion with respect to administrative and professional employees, but, by using "usually" and "many," made it clear that he was not alleging the impossibility of work-sharing even for


¹⁴¹Fritsch and Vandell, "Exemptions from the Fair Labor Standards Act" at 235.

¹⁴²Fritsch and Vandell, "Exemptions from the Fair Labor Standards Act" at 236.


¹⁴⁴US DOL, WHD, "Executive, Administrative, Professional...Outside Salesman" Redefined: Report and Recommendations of the Presiding Officer at Hearings Preliminary to Redefinition: Effective October 24, 1940, at 22 (1940) (Stein Report).
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Fritsch and Vandell then concluded their "Executive Summary" by asserting that "[t]here is no good rationale for eliminating this exemption. It was included in the Act as enacted in 1938 following the precedent of the National Industrial Recovery Act and existing state statutes. There has never been serious discussion about its elimination." The authors, who helped maintain this unserious tradition, could just as well have added that there has never been a serious discussion of the purpose of excluding white-collar workers. They also contributed to that tradition by remarking that such "workers were exempted because they were believed to be typically earning salaries well above the minimum wage level" without offering any reason for imposing a means test on protection from being overworked.

Fritsch and Vandell asserted that a further basis for exclusion, "particularly in the case of professionals, [was] that the work performed was often difficult to standardize in relation to a specified period of time, making enforcement of overtime provisions difficult." Even if it is true, as Stein observed, that "the work produced by a sculptor or a violinist is not subject to standardization" and that therefore "the results can[not] be standardized 'in relation to a given period of time,'" this circumstance does not warrant the conclusion that enforcing compliance with the overtime law would be difficult. After all, as Stein approvingly paraphrased a witness, "although a lawyer...might be confined to regular office hours, he may within that time determine the actual number of hours required for satisfactory preparation or examination of each lease or document." In other words, regardless of how idiosyncratic or creative a professional employee may be, the actual number of hours he worked may be no more difficult to ascertain than for an assembly-line worker.

In spite of the manifest dysfunctionality of the 1975 interim salary test, which had already "become obsolete" by 1978, the Carter Administration, "[a]s a result of unexpected delays," the cause of which it did not reveal, waited another three years before it issued a final rule. This delay apparently stemmed from the aforementioned opposition by the COWPS. Despite employers' "outraged protests" and threats to sue to enjoin implementation of the regulation, Carter, "lobbing a small

145See above ch. 13.
146Fritsch and Vandell, "Exemptions from the Fair Labor Standards Act" at 236.
147Fritsch and Vandell, "Exemptions from the Fair Labor Standards Act" at 240.
148Fritsch and Vandell, "Exemptions from the Fair Labor Standards Act" at 240.
149Stein Report at 38.
150Stein Report at 37.
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bombshell at employers,” proceeded with the rule on January 7, the day after the MWSC had reported that employers violated the FLSA more often with regard to salaried than hourly-paid employees.\(^{152}\) On January 9, 1981, less than two weeks before the Carter administration came to an end, Donald Elisburg, the Assistant Secretary for Employment Standards,\(^{153}\) finally issued the final rule embodying higher salary-level tests to go into effect on February 13, one month after publication in the *Federal Register* and three and a half weeks after the inauguration of President Reagan. Raising the executive-administrative and professional long-test salaries to $225 and $250 in 1981 and $250 and $280 in 1983, respectively, and the universal short-test salary to $320 and then $345 two years later was justified on the grounds that the 1975 salary tests—which had already become “obsolete” by 1978—were “no longer high enough to be even a rough guide to exempt status, because employees at this time who satisfy the tests for duties and responsibilities are generally paid much higher salaries than the current salary test levels.”\(^{154}\) The urgency of the increase derived from “[t]he purpose of the salary test,” which had “always been to prevent evasion of the FLSA by the designation of an excessive number of workers as executives, administrators or professionals, with minimal or nominal duties designed to barely meet the duties and responsibilities requirements of the exemption.”\(^{155}\) The DOL no more explained the nature of the “unexpected delays” in issuing the regulations than it did the basis for not adjusting the long-test levels upward to account for increases in white-collar salaries between 1978 and 1981 or the reason that the short-test salary in 1983 would still be five dollars lower than that proposed by the DOL in 1978.\(^{156}\)

Repeating the DOL’s forty-year-old position that the salary level is “the best single test” of employers’ bona fides in classifying their employees as executives, Elisburg observed that in order to fulfill that function, the salary test “ha[s] to be


\(^{153}\)According to Elisburg, who was the main force behind raising the salary level, the White House and the Office of Management and Budget caused the initial delay; at the end of Carter’s term, when the president finally agreed to the increase, there were so many last-minute regulations pending that in the rush it was not possible to insure that the regulation went into effect before Reagan took office. The AFL-CIO’s lukewarm support for what it viewed to be an inadequate increase left Elisburg with little political strength to fend off Administration opponents of any raise. Telephone interview with Donald Elisburg, Washington D.C. area (earphone) (Nov. 17, 1993). John Zalusky, an economist with the AFL-CIO, confirmed that unions were not satisfied with the proposed salary test regulation. Telephone interview, Washington, D.C. (Nov. 18, 1993).


\(^{155}\)FR 46:3011.

\(^{156}\)FR 46:3012.
increased periodically to take into account the higher salary levels that...are in fact paid to bona fide executive...employees."^157 Because the DOL contended that the exclusion of managers had always been based on their receipt of "compensatory privileges and benefits which are superior to those of other employees," the salary test level "must be periodically adjusted" to reflect not only increases in the minimum wage but also in average salaries of executive employees.^158

In announcing a new executive long-test salary of $225 for 1981 and $250 for 1983 superseding the old salary test, which it variously described as "seriously outdated," "ineffective[ ]," and "virtually useless as a guide for employers and the Department of Labor in determining FLSA exemption status," the DOL urged employers to understand that the increase would enhance regulatory certainty: "Formerly, employers could rely on the salary test as a good indicator of whether an employee was likely to be exempt or not. Now that the test levels are lagging so far behind actual salaries, employers who do so could be misled into inadvertent noncompliance with the FLSA."^159 (The DOL apparently regarded its own regulation as a guide for employers only, showing no concern for whether the test reliably instructed employees as to whether they were lawfully or unlawfully being "exempt" from the burden of being paid the minimum wage and premium wages for overtime.)^160 To be sure, the DOL’s obfuscatory assertion made no sense: by complying with an "obsolete" salary test, employers assumed no risk whatsoever of being deemed in violation of the FLSA by the DOL—so long as their employees performed the aforementioned "minimal duties designed barely to meet the duties and responsibilities requirements of the exemption."^161

Instead, employers gained the certainty of immunity from liability under the FLSA for extracting unpaid overtime hours from employees without alternatives.


^158 FR 46:3016.

^159 FR 46:3016.

^160 Employers, in turn, prefer self-help: "It is not customary...to ask the [DOL] to classify all of a firm’s employees, for...the agency is generally more liberal with overtime benefits than the average employer would be. Most employers classify their own personnel..." E. Gottlieb, Overtime Compensation for Exempt Employees 7 (AMA Research Study 40, 1960).

^161 FR 46:3011. Similarly incomprehensible was Elisburg’s assertion: "‘If you do not have a realistic salary test, you have to start counting the number of hamburgers the assistant manager fries to find out if he is really exempt from the act.’" “A Raise for Low-Level Bosses.”
This employer overreaching vis-à-vis low-paid hybrid supervisor-grunts was documented, for example, by appellate litigation against Burger King Corporation. Its "deliberate corporate policy" of requiring "exempt" assistant managers to spend more than half of their fifty-four hour workweeks performing the same work as their supervisees was driven by the firm's desire to avoid paying premium overtime rates or any wages at all: "Were the Assistant Managers to abstain from production work, more hourly employees would be needed, ‘thereby “blowing payroll”—that is, spending more than the store’s budgeted amount for hourly labor.’" Such practices directly subverted the mandatory overtime premium’s goal of applying financial pressure on employers "to spread employment to avoid the extra wage...."

The niceties of the calculus entering employers’ decisions as to whether to comply with the FLSA were made moot, however, by the Carter administration’s postponing until the last days of its term the promulgation of the revised salary tests, which were scheduled to go into effect February 13, 1981. Employers’ “in-furiat[jion] at this and other lame-duck decrees” swiftly vanished as President Reagan, in one of his first official acts, issued as part of his overall deregulatory program a memorandum on January 29, 1981, postponing for sixty days all pending final regulations. The same day, the DOL stayed the effective date of the regulation indefinitely, reopening the comment period. The new Secretary of Labor, Raymond Donovan, himself a construction firm executive, justified the suspension by reference to the "devastating" impact the increased salary test would have had on small businesses. Donovan’s efforts to eliminate such “unwarranted obstacles which cost the economy billions of dollars a year” were ap-
Plauded by the Chamber of Commerce of the United States, which welcomed his “‘play[ing] hardball on regulatory reform.’” In March, the DOL, in the spirit of Reaganomic marketization that echoed employers’ complaints about the alleged burdensomeness of the salary test, specified that it was seeking public comments about “the probable economic impact of raising the salary tests to the revised levels....”

The comments that it did receive were largely from restaurants—orchestrated especially by Burger King—many of them identical and charging that the proposed increases were inflationary and would reduce the number of “secondary level management positions....” Burger King’s aggressive stance was typified by the comments of its vice president for public affairs, Ronald Platt, who opposed any increase in “government mandated wage rates” on the alleged grounds that by the DOL’s “‘own admission, most of these workers are already above such minimum levels due to the operation of free market forces.’” Finally, almost a year before two federal appeals courts had granted Burger King this exemptionalist interpretation, Platt presciently commented to the DOL that “‘managerial personnel are capable of doing work which is and work which is not directly related to executive responsibilities at the same time,’” so that Burger King managers might be “working in a production capacity...and at the same time supervising the work of many hourly employees.”

After the submission of the employers’ comments the process of regulatory revision once again became dormant, and not until Reagan’s second term did the DOL renew its interest in the salary tests. The trade press had reported in 1983 that “[u]pon reflection, the Reaganites concluded that the Carter-proposed salary test increases were not so unreasonable after all.” DOL officials were said to be...

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169FR 46:3011-12.
171“Majority of Comments Thus Far Oppose FLSA Salary Test Rule,” DLR, No. 69, A-5 to A-8 (quotes at A-7) (Apr. 10, 1981). Hotel employers were not only prominently represented among the commenters, but also managed to manipulate some of their employees into submitting comments as well. For example, a large proportion of the letters that the DOL received from the industry stemmed from the Hyatt Regency in Lexington, Kentucky, whose executive chef wrote: “‘Whoever made this last-minute payoff by the Carter Administration to labor should be sent to a hardworking job in the hotel industry; I would love to be HIS supervisor.’” Id. at A-7.
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preparing a redraft by the end of the year "(probably containing several key concessions to restaurant industry lobbyists concerned over the Government's unwillingness to recognize more than one overtime-exempt manager per food-service unit)." But this proposal, too, was postponed as mysteriously as it had been initiated. Deeming the intervening four years insufficient for a review of the regulations, the DOL once again reopened the comment period. This time it expressly solicited comments on whether the test should be eliminated altogether. After the comment period was extended yet again in 1986, employers' organizations were unable to formulate a united deregulatory program. In the face of union demands for a doubling of the long-test salary to $320-$325, the National Mass Retailing Institute urged outright elimination of the test. The Association of General Merchandise Chains, however, declined to support this position, in part for fear that the alternative would be ""far more detailed and burdensome inquiry [by DOL enforcement agents] into exempt employees' duties and responsibilities."" Despite the retail trade press's reports of the DOL's accommodation of the employers' proposed relaxation of the duties test, this clash of lobbyists, too, failed to produce any agency action.

Here the extremes met as the "if it ain't broke don't fix it" opposition to an increase in the salary test mounted by Burger King and other employers was matched by the relief expressed by the AFL-CIO that the dreaded "brutaliz[ation]" of the test by the Reagan administration had never materialized. Nevertheless, inaction systemically favored employers: under the regulatory status quo the salary test was further eroded by inflation and minimum-wage increases, creating a de facto enforcement vacuum. By the end of the George H. W. Bush administration, which posted a "Next Action Undetermined" notice in its semi-annual DOL agenda, proposed rulemaking was no longer even rumored.

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173 Ken Rankin, "Labor Dept. Quietly Shelves Plans to Rewrite Labor Practices Rules," NRN, Nov. 7, 1983, at 6 (Nexis). Although only one employee per establishment may fall under the "in sole charge of an independent establishment" exemption, more than one may qualify under the general duties test. 29 CFR §§ 541.1(e), 541.113(d) (1993).


179 FR 54:44,366-67 (1989); see also id. at 16,443-44.

180 All the DOL could muster was a buried footnote that consideration of the salary tests "will be undertaken in connection with any future rulemaking." FR 57:37,666 n.1
Ironically, the only occasion on which Congress even mildly criticized the DOL for failing to raise the salary thresholds after 1975 was linked to rare congressional intervention to direct the DOL to exempt a certain group of white-collar occupations from the FLSA as “professional.”181 In 1989, in the course of floor debate on the Minimum Wage Restoration Act, Minnesota Republican David Durenberger—who in 1981 had written to the Reagan DOL opposing any increase in the salary-level tests182—offered an amendment “to address an inequity that currently exists in the Department of Labor’s interpretation of ‘professional employee’” under the FLSA. Joined by Senators John Kerry and Edward Kennedy as cosponsors, Durenberger proposed that:

Not later than 90 days after the date of enactment of this Act, the Secretary of Labor shall promulgate regulations that interpret the professional exemption contained in section 13(a)(1) of the Fair Labor Standards Act of 1938 (29 U.S.C. 213(a)(1)) in a manner that permits computer systems analysts, software engineers, and other similarly skilled professional workers to qualify under such section for such exemption. Such regulations shall ensure that such employees shall continue to be eligible for such exemption even if such employees are compensated on an hourly basis, except that to qualify for such exemption such employees shall be compensated at an hourly rate that is at least 6 1/2 times greater than the applicable minimum wage rate under section 6 of such Act (29 U.S.C. 206).183

In thanking the bill’s managers for accepting his amendment, Durenberger justified it on the (factually shaky)184 grounds that:

In 1973, the Department of Labor issued regulations specifically excluding employees in the computer field from the professional employee exemption.

The Labor Department stated that there was too great a variation in the standards and academic requirements to conclude that employees in the computer science field are true professionals.

Therefore, these employees are covered by the minimum wage and overtime provisions of the FLSA. Over the last 16 years the computer science field has advanced dra-
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Today universities offer intense course studies in computers on both an undergraduate and graduate level.

In fact, the field of computers is advancing each day, and it is considered to be an integral part of the high technology field.

Computer programmers, systems analysts and software engineers are respected professionals, who should be treated as such.

In addition, in 1986 Congress added another twist to this issue when we adopted the Tax Reform Act.

An amendment to the Tax Reform Act requires certain independent computer consultants working for a broker to convert from independent contractor status to employee status for tax purposes....

These computer programmers, analysts, and software engineers contract their work through a broker or third party, and are paid at an hourly rate substantially higher than the minimum wage.

They generally set their own work schedules, including the number of hours they work each week, and they voluntarily enter into written contracts with brokers to be paid on an hourly basis.

However, because they are no longer independent contractors for tax purposes and because they are not considered professional employees, they are covered by the minimum wage and overtime requirements of the FLSA.

In my view, the Department of Labor’s 1973 assessment of employees in the computer field is outdated.

I believe that these computer specialists meet the employment test of work that is “predominantly intellectual and varied in character” set out in the professional exemption.\textsuperscript{185}

Senators Kerry and Kennedy, who were presumably engaged in constituent service work on behalf of Route 128 employers, eagerly followed Durenberger’s lead. Kennedy, who was chairman of the Senate Labor and Human Resources Committee, confined himself to noting that Durenberger’s amendment was a “fair and worthwhile improvement,” which the committee has not considered,\textsuperscript{186} whereas Kerry spoke at some length on how a prosperous Massachusetts economy hinged on employers’ ability to work computer employees long hours without having to pay premium rates for overtime:

Under current rules, the Department of Labor operates with a 16-year-old rationale that these workers cannot qualify for the professional exemption in section 13(A) because “computer sciences are not generally recognized by colleges and universities as a bona fide

\textsuperscript{185} CR 135:6151-52.

\textsuperscript{186} CR 135:6152.
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academic discipline with standardized licensing, certification or registration procedures." Well, times have changed. In Massachusetts, these technical workers are highly educated, highly skilled, and highly paid. They are the backbone of many of the high-technology industries that fuel our growing economy. It is imperative that they be exempted from these provisions so that they are able to provide services as efficiently and productively as possible.

DOL's salary guarantee requirement is unreasonable when applied to these highly skilled, highly compensated employees who earn between $25 and $100 an hour.

An exemption is necessary because it recognizes that the world has changed since the Department of Labor made its rulings. In Massachusetts, DOL has targeted several companies for audits for failure to pay time-and-a-half overtime to highly paid technical workers. This just does not make any sense any more.

Many companies, large and small, in Massachusetts depend on the services of computer programmers and other highly technical workers to solve problems. The nature of the free-lance computer programmer’s business is that the hours are unpredictable. They are compensated well, even though on an hourly basis. The Department of Labor must recognize that the economy has changed in the past 16 years, and that our computer programmers, systems analysts, software engineers, and other similarly skilled technical workers are, indeed, professionals.

[T]he current use of the technical services professionals covered by this amendment is an important factor in keeping Massachusetts', and the Nation's, high-technology industries flexible, responsive, and competitive. These characteristics of our industry must be increased, not reduced, if our standard of living is going to increase. This amendment provides one small, specific way in which we can reinforce those critical characteristics of a competitive American industrial base.\(^{187}\)

Neither Kerry nor anyone else having asked why these computer workers could not work 40 hours with the additional hours being spread among others, the Senate quickly agreed to the amendment,\(^{188}\) and although the House bill lacked such a provision,\(^{189}\) in conference the House receded. More importantly, the bill’s managers, including the chairmen of the House and Senate Labor Committees and other leading committee Democrats, expressly added in the conference report of May 8, 1989, that:

The managers are also concerned that the salary tests in these regulations have not been adjusted since 1975. When the Secretary of Labor adjusts these tests, this level of six and one-half times the minimum wage should serve as a guide to the appropriate levels for the

\(^{187}\text{CR 135:6152.}\)

\(^{188}\text{CR 135:S3742; S. 4 (101st Cong., 1st Sess., 1989).}\)

\(^{189}\text{H.R. 2 (101st Cong., 1st Sess., 1989).}\)
Since the minimum wage at the time was $3.35 an hour, and the bill provided for increasing it to $3.85 in 1989, $4.25 in 1990, and $4.55 in 1991, the salary threshold could have been increased to $21.78, $25.03, $27.63, and $29.58, which, on the basis of a 40-hour week, worked out to $871.20, $1,001.20, $1,105.20, and $1,183.20, respectively, at a time when the weekly short-test salary threshold was only $250. Had the Labor Secretary in fact applied this guideline, the estimated 20,793,000 executive, administrative, and professional employees who fell under the white-collar exclusions191 would have been sharply slashed.

Republican Senator Orrin Hatch, the ranking minority member on the Senate Labor and Human Resources Committee, did the same calculations and the horror that he expressed on the Senate floor a week later was hardly surprising given that he believed that even "an increase in the minimum wage is an ineffective means of helping the working poor in our society."192 Since Hatch knew that the FLSA white-collar exemptions applied to about 20 million workers and the average annual incomes of managers was $28,000, he asked Senator Kennedy:

Are we...instructing the Secretary of Labor to increase the entire 13(a) salary tests which are now set at not less than $250 per week to a level that would equal over $870 per week...? In annual terms this directive would increase the threshold from $12,500 to $43,500. If that is so...it would mean that if the minimum wage were indeed raised to $4.55 an hour as is being attempted under this bill...any manager would have to earn about $60,000 per year to qualify for an exemption as an executive, as a professional, or as an administrative employee. It would also mean that the vast majority of the approximately 20 million senior level employees currently covered by this bill would no longer be exempt. It would mean that almost every business...would have to start paying people overtime. ...

If that is not what we mean, and the language seems to say that, I think we should make sure that this statement of direction is not misinterpreted by the Secretary of Labor or by the many business people who would be affected by a major expansion of the coverage of the Fair Labor Standards Act.

So I ask the distinguished Senator from Massachusetts just what it means, and can we instruct the Secretary of Labor in such a way to make it clear that we are not going to have to pay overtime for everybody who is willing to work extra hours...for the benefit of the countless businesses in America without overtime today? And they are willing to do so...
because they are managers, and they are administrators. They are professionals or they are executives. Because if it means the other, then it is going to be a further deterioration of rights and privileges throughout this country, and a loss of tremendous business expansion in this country. As a matter of fact, I think there will be a lot of businesses going out of business.193

To Hatch’s relief, Kennedy confirmed that beyond the computer workers there was “no requirement for other employees who are subject to the salary tests,” but he did reiterate that the bill managers’ statement suggested that the “this level of 6½ times the minimum wage should serve as a guide.” And although he noted that there was “no mandate,” Kennedy added that: “Since it has not been changed since 1975, it is a guide, and one I hope is followed soon.”194

President George H. W. Bush vetoed the minimum wage bill, but the House and Senate promptly passed new bills, which contained the same directive to the DOL concerning computer programmers.195 And consistent with Kennedy’s response to Hatch, his Senate committee report contained exactly the same expression of concern about the white-collar salary levels as the aforementioned conference report,196 while the House report was even more definite and specific: “In undertaking the necessary revisions in these salary tests, the Secretary of Labor should use as a guide the level of six and one-half times the minimum wage as an appropriate distinction for a professional salary test.”197 Without explanation, Representative Austin Murphy, the chairman of Labor Standards Subcommittee, on November 1, 1989, made a unanimous-consent request to strike the computer employees provision from the bill, to which there was no objection.198 Inclusion of the provision on computer professionals “was the intent of everyone in Congress in passing this bill,”199 but, oddly, “[l]ast minute concerns” about its wording arose on the day it was brought to the House floor; because there was not enough time to review and revise the language, the provision was dropped from the bill that was enacted in 1989. However, the following year, having “had plenty of time to

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194CR 135:9506.
consult with both [sic] industry, professionals and Members of this body,” Murphy offered a “technical” amendment, with slightly different wording, to cover all concerns. Murphy regretted that “in the computer industry where most of the employees are high-technology, high-paid, beyond minimum-wage levels,...we failed to exempt those high-technology, high-paid employees from the overtime provisions, and in order that we can provide that industry with the right to continue and grow in our American system, we would like to have those employees exempted from the overtime provisions.” Why the computer industry in particular could not expand without privileged access to uncompensated overtime work Murphy did not explain. With the enactment of Murphy’s amendment as a free-standing bill in 1990, for the first time in the FLSA’s history Congress excluded an occupational group from overtime protection solely by reference to salary level. Senator Kerry celebrated passage as “an important step that removes antiquated Government regulations from the backs of employees and employers and helps take at least one positive step toward more efficient management of our important human resources. And the future economic strength of Massachusetts and our Nation.”

In its interim final rule in February 1991, the DOL sought to divine congressional intent in “resolv[ing] certain ambiguities in the statute,” while defending its existing regulations as in fact already permitting the computer programmers and others “to qualify for exemption” if they were paid on a salary basis and met the duties tests. Despite statutory silence on the status of computer professionals not paid on an hourly basis, the DOL decided that Congress intended that “highly skilled workers in the computer field” paid more than \(6 \frac{1}{2}\) times the minimum wage “should be exempt without regard to the basis of their compensation,” although it

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201 Congress directed the Labor Secretary to exempt certain computer programmers and others: “Not later than 90 days after the date of enactment of this Act, the Secretary of Labor shall promulgate regulations that permit computer systems analysts, computer programmers, software engineers, and other similarly skilled professional workers as defined in such regulations to qualify as exempt executive, administrative, or professional employees under section 13(a)(1) of the Fair Labor Standards Act of 1938 (29 U.S.C. 213(a)(1)). Such regulations shall provide that if such employees are paid on an hourly basis they shall be exempt only if their hourly rate of pay is at least 6 1/2 times greater than the applicable minimum wage rate under section 6 of such Act (29 U.S.C. 206).” Act of Nov. 15, 1990, Pub. L. No. 101-583, § 2, 104 Stat. 2871. See also 29 CFR §§ 541.3(a)(4) and (e), 541.303 (2003).
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also concluded that those paid on a salary basis whose salary equaled or was less than $6\frac{1}{2}$ times the minimum wage "should continue to be eligible for exemption" if they met the duties test. The regulatory process, however, was not over: the DOL invited interested parties to submit comments, evaluation of which together with promulgating a final rule took the Department a year and a half. A number of employers organizations commented that the interim final rule was inconsistent with the statutory intent because the law required the Labor Secretary to permit salaried computer workers to qualify as exempt regardless of whether their compensation exceeded $6\frac{1}{2}$ times the minimum wage. Unsurprisingly, numerous workers employed in the computer fields at issue who were hired through "service firms" and were paid premium overtime on an hourly basis "expressed general opposition" to the statute. Most interesting of all was the correspondence that the DOL received from members of the House Education and Labor Committee who had been the chief sponsors of the bill, Murphy and the ranking Republican member, Representative William Goodling, who also contended that the interim final rule was inconsistent with the statute and congressional intent. Based on these comments, the DOL concluded that the commenters were right: the exemption was not limited to computer employees whose compensation exceeded $6\frac{1}{2}$ times the minimum wage. Thus under the final rule, the exemption was not limited to those paid more than $6\frac{1}{2}$ times the minimum wage, whether on an hourly or salary basis.

The upshot of these changes, which, unsurprisingly, were "pushed through by computer industry trade groups," was the potential for "big savings for companies that pay programmers on an hourly basis...." To be sure, computer industry officials observed that the new law would make little difference to hardware and software companies since they by and large paid their full-time employees on a salaried basis, who were therefore already exempt. The principal impact was expected on the industry’s counterpart to temporary personnel agencies, which sent out programmers to computer companies and users as part-time employees who, as already noted, until 1986 had been treated as non-employees not covered by the FLSA at all; once the Congress had amended the Internal Revenue Code to put an end to that scam, employers successfully lobbied for this new method of avoiding overtime regulation for hourly employees.

From such inconspicuous and inauspicious circumstances thus arose the one

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204 FR 56:8250-51 (Feb. 27, 1991) (to be codified as 29 CFR § 541.5c).
206 FR 57:46743, 46744-45 (to be codified at 29 CFR §§ 541.3(a)(4), (e), 541.303).

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Notable, albeit nonbinding, congressional expression of dissatisfaction during the last quarter of the twentieth century with the DOL’s failure to update the white-collar salary thresholds. In 1996, Congress intervened regarding computer workers again, this time both to freeze the trigger wage at $27.63 an hour (6.5 times the minimum wage of $4.25 before it was increased that year), if the computer workers were paid on an hourly basis, and to create an entirely separate categorical exclusion no longer subject to the DOL’s definition of “professional” employee.208

Even when the minimum wage had reached $5.15 in 1997 and thus the ratio of the computer exemption wage to it had fallen to 5.4, the Clinton administration

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made no effort to increase the salary thresholds at all.209 Instead of fixing them at 6.5 or 5.4 times the minimum wage, the DOL permitted the ratio between the long-test salary for professional employees and the minimum wage to sink below 1.0 for the first time and that between the short-test salary and the minimum wage to plummet to 1.2.210 (Significantly, in testimony before the House Labor Standards Subcommittee in 1993, the AFL-CIO proposed nothing more robust than increasing the salary threshold to three times the minimum wage as "a level commensurate with truly executive, administrative and professional occupations....")211

In 1993 the Acting Assistant Secretary for Employment Standards and Deputy Wage and Hour Administrator in the Clinton administration conceded the "absurdity of having a salary test that's lower than the minimum wage,"212 while another national DOL official both characterized as "totally embarrassing" the agency's having permitted the test-salary to become obsolete and acknowledged that "we're not out there looking for section 541 violations."213 The Clinton administration DOL repeatedly announced that the white-collar overtime regulations were on its regulatory agenda.214 In 1994 it announced that, with 23 million workers within the scope of the white-collar exemptions, the salary level tests "are outdated and offer little practical guidance in the application of the exemption. ... Because the regulations are sorely out-of-date, a comprehensive rulemaking is necessary. ... Legal developments in court cases are causing progressive loss of control of the guiding interpretations under this exemption and are creating law without considering a comprehensive analytical approach to current compensation concepts and workplace practices."215 Yet even after the General Accounting Office in 1999

209According to John Fraser, the Deputy Wage and Hour Administrator at the time, Maria Echaveste, the WHA, did prepare a proposal to increase the short-test salary level to 6.5 times the minimum wage, but the DOL rejected it several times. As far as Fraser was aware, this initiative was never made public. Telephone interview with John Fraser, South Otselic, NY (July 14, 2004).

210See below tab. 4 and 5.


212Telephone interview with John Fraser, Washington, D.C., Nov. 19, 1993, at 9 a.m. CST.

213Telephone interview with Ray Kamrath, Wage and Hour Division, Office of Policy, Planning, and Review, Washington, D.C., Nov. 8, 1993, at 11:00 a.m. CST.


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had found the salary level to be universally regarded as "virtually meaningless" and in need of revision,216 Clinton's Assistant Secretary of Labor for Employment Standards made brutally clear how hopeless the prospect for raising the salary level had become when he elevated employers into "constituencies" of the DOL: "any change in the current regulatory structure requires balancing the diametrically opposed, conflicting interests of the many and differing constituencies that would be affected. The views of interested parties are intractably held on opposite sides of the various issues under these regulations."217

Because Congress expressly delegated to the Secretary of Labor the authority to issue so-called legislative regulations elucidating the meaning of an "employee employed in a bona fide executive, administrative, or professional capacity," they "have the force of law as much as though they were written in the statute."218 Legislative regulations, however, "are as binding on the courts as if they had been directly enacted by Congress" only to the extent that they "are reasonable."219 Thus if the DOL issued a regulatory definition that either was originally or, through the passage of time, became "arbitrary, capricious, or manifestly contrary to the statute,"220 a federal court must, in a proper case, declare it invalid. In particular where "there is no longer a rational connection between the facts originally supporting the exclusion...and the regulation as it operates today[, t]he original purpose of the regulation...has become so detached from actual effect...as to make the current regulation arbitrary and capricious...."221 Moreover, such invalidation

217Letter from Bernard Anderson to Cynthia Fagnoni, GAO, in GAO, Fair Labor Standards Act at 53. The WHA echoed these remarks in calling changes "extremely unlikely in the short-term."
The Fair Labor Standards Act: White-Collar Exemptions in the Modern Work Place: Hearing Before the Subcommittee on Workforce Protections of the Committee on Education and the Workforce House of Representatives 9 (Serial No. 106-104; 106th Cong., 2d Sess., May 3, 2000) (statement of T. Michael Kerr). Significantly, WHA Tammy McCutchen stated after she had left office that employers' intense opposition to increasing the salary thresholds was easily explicable: the latter was like an increase in the minimum wage, but one with which, after a quarter-century of inaction, they had long since stopped having to deal. Telephone interview with Tammy McCutchen, Washington, D.C., Sept. 16, 2004.
218Helliwell v. Haberman, 140 F.2d 833, 834 (2d Cir. 1944).
219Fanelli v. United States Gypsum Co., 141 F.2d 216, 218 (2d Cir. 1944).
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is powerfully supported by the protective purposes of the FLSA, which require courts to interpret exemptions narrowly and against employers.222

As a result of long-term agency neglect, political stalemate, and/or lack of civil courage—even Clinton’s Wage and Hour Administrator, the daughter of migrant farmworkers, sought to excuse her failure to exercise her power to increase the salary levels on the grounds that it would “alienate the other interested parties” such as McDonald’s223—the justification for what might once have passed muster as a minimally reasonable regulation had, through the mere passage of time, “long since evaporated.”224 The fact that the minimum wage more than doubled between 1975 and 1997 rendered the salary test a “clearly obsolete”225 regulation so lacking in the requisite rationality and reasonableness as not merely to be “unrelated to the tasks entrusted by Congress”226 but to have turned them on their head. (Significantly, at a House hearing in 2004, Secretary of Labor Elaine Chao, while not specifically referring to the salary level test, testified that the DOL would be violating its statutory duty to define and delimit the terms that Congress used in § 13(a)(1) if it did not update the regulations.)227 Based on the Administrative Procedure Act’s mandate that federal courts invalidate agency regulations found to be “arbitrary, capricious, [or] an abuse of discretion,”228 other agencies’ failure to adjust similar monetary indexes for inflation during shorter periods has

Hazard v. Shalala, 44 F.3d 399, 404 (6th Cir. 1995). But see Gamboa v. Rubin, 80 F.3d 1338, 1343 (9th Cir. 1996) (“the Secretary’s failure to adjust the automobile equity $1500 limit for inflation since its adoption almost 15 years ago has thwarted Congress’s purpose in establishing the AFDC program and the Secretary’s own rationale for adopting the $1500 limit”), vacated on other grounds sub nom. Gamboa v. Chandler, 101 F.3d 90 (9th Cir. 1996).


226Walling v. Yeakley, 140 F.2d 830, 832 (10th Cir. 1944) (discussing the executive exemption and quoting Gray v. Powell, 314 U.S. 402, 413).

227Assessing the Impact of the Labor Department’s Final Overtime Regulations on Workers and Employers: Hearing Before the Committee on Education and the Workforce House of Representatives (108th Cong., 2d Sess., Apr. 28, 2004), on http://edworkforce.house.gov/hearings/hrarchive.htm. Shortly after resigning as WHA, Tammy McCutchen agreed that by the 1990s a lawsuit challenging the validity of the salary thresholds as arbitrary and capricious should have and probably would have been successful. Telephone interview with Tammy McCutchen, Washington, D.C., Sept. 16, 2004.

prompted courts to declare welfare regulations invalid.\textsuperscript{229}

The Clinton administration’s failure to undertake any public initiative to raise the salary test level contrasted sharply with the alacrity with which the president himself asked Congress to raise another long unchanged threshold—that for Social Security coverage for domestic workers. As soon as the $50 per quarter threshold became politically embarrassing for him, when several of his prominent nominees were revealed to have violated the Internal Revenue Code by having failed to pay Federal Insurance Contributions Act taxes on behalf of their maids and nannies,\textsuperscript{230} President Clinton informed Congress that “‘[t]he financial threshold in the law is outdated, having remained unchanged for the past four decades. It is time to amend the law.’”\textsuperscript{231} Congressional inaction since 1950 with regard to this threshold had favored domestic workers—at least those who worked for the fewer than one-quarter of employers who complied with the law.\textsuperscript{232} Although it was on notice that tens of thousands of domestic workers would lose benefits,\textsuperscript{233} no “conflicting interests of the many and differing constituencies” deterred Congress from quintupling the threshold and relieving many affluent recipients of maid services of em-

\textsuperscript{229}Maine Association of Interdependent Neighborhoods v. Petit, 659 F. Supp. 1309, 1323 (D. Me. 1987) (141 per cent increase in inflation over fourteen-year period invalidated Medicaid resources regulation).


\textsuperscript{232}Hearing on Proposals to Simplify and Streamline the Payment of Employment Taxes for Domestic Workers Before the Subcommittee on Social Security and the Subcommittee on Human Resources of the Committee on Ways & Means House of Representatives, 103d Cong., 1st Sess. 5 (Mar. 4, 1993) (statement of Marshall Washburn, IRS) (mimeo 5); Michael Wines, “Panel Eases Employers’ Tax on Domestic Workers,” \textit{NYT}, May 12, 1993 (C18:3).

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employment tax liability.  

Similarly, in 1992, when the DOL concluded that its regulation defining what it means for excluded white collar workers to be paid "on a salary basis" contradicted congressional intent as applied to public-sector employees, it promptly amended it to accommodate their employers.  

This dispute arose because under the DOL's regulation an employer forfeited its exemption from the minimum wage and overtime provisions of the FLSA if it docked exempt employees for absences from work for personal reasons of less than a day. State and local government employers complained that compliance with this regulation would require them to violate public accountability laws prohibiting payments to government employees for time not worked that is not covered by accrued leave.  

Private employers, however, were less successful in demanding modification of what even Republican administrations regarded as a bedrock principle of regulation. Firms began lobbying Congress for relief after the Second Circuit, in a 1991 case prosecuted by the DOL during the first Bush administration, unanimously held that deductions for partial-day absences from the salaries of 24 employees triggered the employer's loss of the exemption for approximately 400 employees who "were required to deduct from personal leave time or make up the hours they missed in order to avoid salary deductions" because the regulation did "not require that a deduction for an absence of less than a day actually have been made, but only that an employee's pay be 'subject to' such a deduction." A bill (the Workplace Leave Fairness Act) was introduced in the House in March 1993 to amend the FLSA to eliminate the problem for employers; the House Labor Standards Subcommittee held a hearing on the subject, but no further action was taken on the bill.  

To no avail at that hearing, William Kilberg, the former DOL

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235 29 CFR § 541.5d (1993).

236 29 CFR § 541.118(a).

237 FR 57:37666-77 (1992)

238 See below chs. 16-17.


240 H.R. 1309 (103d Cong., 1st Sess., Mar. 11, 1993) (introduced by Robert Andrews, Dem. NJ. By the end of the 103d Congress, the bill had 48 cosponsors. Andrews misstated the origins of the dispute by attributing it to a DOL ruling rather than a unanimous
solicitor who as a congressional witness has repeatedly represented big business in FLSA matters, abandoned all rhetorical limits in characterizing such decisions as "the civil law equivalent of capital punishment for spitting on the sidewalk," which opened up the possibility of an aggregate backpay liability of $180 billion.\textsuperscript{241} Employers would have to wait another decade before finding the appropriate forum for pressing the issue again.\textsuperscript{242}

The persistent absence of an explanation of the purposes underlying the ex-

\begin{footnotesize}
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\item \textsuperscript{242} See below chs. 16-17. Andrews did introduce virtually the same bill twice more, but it attracted hardly any cosponsors and generated no action. H.R. 946 (104th Cong., 1st Sess., Feb. 15, 1995); H.R. 504 (105th Cong., 1st Sess., Feb. 4, 1997).
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cclusion of white-collar workers from the FLSA overtime provision came back to haunt workers as the judiciary felt freer to deny overtime coverage to some highly paid professional and managerial employees—whose status in terms of their job duties seemed grey—on the grounds that their high incomes made them prima facie low-priority candidates for protection. Big business, eager to shed regulation of the duties of its putatively excluded white-collar employees and to avoid FLSA suits filed by “quite high level executives...well-to-do individuals,” began to show some interest in setting a much higher salary level as the exclusive criterion for coverage. This initiative surfaced at a 1995 House Subcommittee on Workforce Protections hearing. Kilberg, appearing on behalf of a coalition of “significant employers of white collar employees” such as accounting firms, computer companies, media outlets, and engineering consultants, argued that “[i]f the rationale for protecting certain employees is that they lack the bargaining power to protect themselves, then the exemptions should be designed to separate those who possess adequate bargaining power from those who lack it. ... One promising solution would be to base exempt status for white collar employees...on the amount paid to each employee....”

Appearing on behalf of the Labor Policy Association, “an organization of the senior human resource executives of 220 of the nation’s largest corporations,” which employed 11 million workers or 12 percent of the nonfarm private-sector

243As a writer for the NBC Nightly News with a weekly salary of a thousand dollars observed: “We’re proud of the work we do.... We think it’s very important work and we think we do it very well. But it’s not brain surgery and it’s not painting “Mona Lisas.” We are just not creative artists. We are journalists.” Alan Finder, “Are NBC News Writers Professionals? In Lawsuit, Writers Decline Honor,” NYT, July 14, 1991 (12:1, at 3. nat. ed.).

244E.g., Freeman v. National Broadcasting Co., 80 F.3d 78, 86 (2d Cir. 1996) (FLSA is “not a sword by which writers and producers at the pinnacle of accomplishment and prestige in broadcast journalism may obtain a benefit from their employer for which they did not bargain”).


247Hearings on the Fair Labor Standards Act: Hearings Before the Subcommittee on Workforce Protections of the House Committee on Economic and Educational Opportunities at 77-78 (statement of William Kilberg)
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work force, Maggi Coil amplified and specified Kilberg's suggestion:

We believe that the exempt/non-exempt rules need to be simplified. There should be some nexus between the amount of compensation earned by an employee and eligibility for the exemption. If an employee is highly paid, who cares whether he or she is engaged in production or management, or is exercising independent judgment or discretion. If an employee is being paid $40 per hour, to say that he or she must be paid $60 for each hour over forty because he or she is not being paid "on a salary basis" does not pass the common sense test.

We realize that this is easier said than done. What is the magic number that divides a well-compensated employee from one who is on the "lower rungs" of the economic ladder? ... There are no easy answers and you can be sure that no matter what you come up with there will inevitably be anomalies at the margins.

Despite these complexities, we believe the current crisis should compel you to pursue a solution because the current problems are well beyond "marginal." Coil's point might have made sense if the purpose of overtime regulation were to help workers "make ends meet" by increasing their incomes by means of overtime premiums. If, however, that purpose is the prevention of overtime work, then the workers' salaries are irrelevant.

The following year the Flexible Employment Compensation and Scheduling Coalition—which included a heterogeneous group of employers and associations of large and small employers employing a large proportion of the workforce such as Boeing, Eastman Kodak, General Electric, Hewlett-Packard, the NAM, NRA, National Federation of Independent Businesses, and the Chamber of Commerce of the United States—submitted Coil's statement verbatim at a Senate Labor and Human Resources Committee hearing on the FLSA. The Labor Policy Association also submitted to the House Workforce Protections Subcommittee a paper that called for "changing] the white collar exemption to a 'highly compensated employee' exemption defined solely by salary or wages paid. This would retain the current approach of covering all employees not excepted but would simply state

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248 Hearings on the Fair Labor Standards Act: Hearings Before the Subcommittee on Workforce Protections of the House Committee on Economic and Educational Opportunities at 18 (statement of Maggi Coil).

249 Hearings on the Fair Labor Standards Act: Hearings Before the Subcommittee on Workforce Protections of the Committee on Economic and Educational Opportunities House of Representatives at 23.

250 See below chs. 16-17.

that, once an employee’s wages or salary reached a certain level, he or she no longer has a statutory entitlement to overtime premiums."

With such proposals—Coil’s $40 an hour figure would have equated to an annual salary of $80,000—big business encountered some interest on the labor movement’s part. Since Kilberg emphasized that “no one on our side of the table...is urging that the assistant deli manager be characterized as an exempt employee. We are concerned about accountants, engineers, paraprofessionals,” the United Food and Commercial Workers International Union representative, assistant general counsel Nick Clark, whose chief objective in testifying was to urge updating the obsolete salary level, perceived the common ground:

this morning, the employer proposals seemed to coalesce for a bright-line test to solve many of these problems. In other words, if the salary levels were sufficiently high..., then workers above that salary level would not have to worry about the salary basis test regulations.

Now that seems to be something we might be able to work with. Certainly, workers that are making over $100,000 a year, I think we can all agree, should be salaried and not have to worry about docking regulations. I think the figures that were floated out by Mr.

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253*Hearings on the Fair Labor Standards Act: Hearings Before the Subcommittee on Workforce Protections of the Committee on Economic and Educational Opportunities House of Representatives* at 120. A few weeks later, Kilberg published an op-ed piece in the *Wall Street Journal* summarizing Big Business’s position. William Kilberg, “A 1938 Law that Hurts Workers More Than It Helps Them,” *WSJ*, May 10, 1995 (A19:3). After having heard from Nick Clark, the UFCW attorney who testified at the hearing, about the testimony, the present author submitted a letter to the editor to the *Wall Street Journal* (with a copy to Kilberg) on May 10, 1995, responding to Kilberg and calling, tongue in cheek, on employers, if they were “seriously interested in deregulating labor relations,” to “seize the opportunity” to reach agreement with unions on a higher, dispositive salary level. Although the *Journal* did not publish the letter, on July 31 and Aug. 3, 1995, the author received a telephone call from Sandra Boyd, assistant general counsel of the LPA. Stating that she had read and liked the letter, she asked whether the author might be interested in testifying at the counterpart Senate hearings in the fall or spring, since congressional committees liked to hear testimony from academics. Boyd stated that LPA members might be able to accept a salary level cutoff of $40,000 to $50,000, though she conceded that restaurant owners were not enthusiastic about such a proposal. Finally, she observed that although the AFL-CIO wanted the salary level increased, it did not want to open the FLSA up for debate for fear of other changes.
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Kilberg were six-figure incomes and things of that nature. ...

What we are concerned about is workers who have had their wages and salaries eroded over 20 years of inflation, and who are on the low end of the scale, not the highly compensated workers that make six-figure incomes that Mr. Kilberg referred to.254

The UFCW was so conciliatory that when California Democratic Representative Lynn Woolsey asked the obvious question as to whether it would not be “simpler just to pay everybody overtime, except for business owners,” Clark declared: “we certainly are not suggesting that. We think that the salary exemption makes sense for a class of workers, and it’s always been there in the Act, and certainly I’m on salary, and I don’t have an objection to that.”255 Such acquiescence was remarkable since the MWSC had reported that on one view overtime exemptions had become “anachronistic” in light of the widespread approval of the 40-hour week; while the premium penalty’s employment-spreading effect had become irrelevant, universalizing it would “reinforce the acknowledged public acceptance of the 40-hour workweek and...provide additional compensation for inconvenience and added risk of injury associated with overtime work.”256 When Clark repeated that “we, on the side of labor, would entertain” exempting from overtime everyone with a six-figure income, the chairman, North Carolina Republican Cass Ballenger, ended the hearing by observing that, regardless of whether Clark or Kilberg had brought up the $100,000 figure, “there might be a point of

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254Hearings on the Fair Labor Standards Act: Hearings Before the Subcommittee on Workforce Protections of the Committee on Economic and Educational Opportunities House of Representatives at 100.

255Hearings on the Fair Labor Standards Act: Hearings Before the Subcommittee on Workforce Protections of the Committee on Economic and Educational Opportunities House of Representatives at 118. Oddly, the chief characteristic that Clark used to explain why the overtime claims of workers with six-figure incomes were not a concern to the UFCW was not their high standard of living or the bargaining power that made possible the high salary; rather the income was an indicator of workplace autonomy and self-direction: “The reason the employer is paying these six-figure incomes to these workers is because they expect to exercise judgment as to how they allocate their time. They pay for a job to be completed. They don’t tell the worker how to do the job, they say, here’s the job, you get it done...and you work the number of hours it takes....” Id. 114, 115. These criteria are traditionally used to identify independent contractors, who are not covered by the FLSA or other labor-protective statutes, whereas executive and administrative employees, no matter how highly paid, are universally recognized as controlled by the employer and thus in an employment relationship.

256Report of the Minimum Wage Study Commission 1:120.
discussion there..."257 But if there was, no one pursued it: when Clark testified on a different aspect of the FLSA before the same House subcommittee four years later, he observed that although in 1995 committee members and employer representatives had agreed that the salary levels were obsolete, neither the committee nor any employer had proposed a bill rectifying even that inequity.258

The only congressional initiative even remotely embodying Clark’s proposal was undertaken by Wisconsin Republican Representative Thomas Petri, who introduced identical bills in the 104th and 105th Congress in 1996 and 1997 that would have amended the exclusions and exemptions section of the FLSA to exclude from minimum wage and overtime coverage “any employee whose rate of annual compensation is not less than $40,000.”259 No action was taken on either of these bills—the first of which had no other supporters, and the second only three—which, like several bills in 1939-40, would have applied to all employees regardless of whether they fell into the three statutory white-collar categories.260 Ironically, Petri’s purpose was not to protect workers from overreaching employers; on the contrary, his proposal was designed to

create an income threshold that automatically exempts from FLSA scrutiny the highest paid strata of the workforce. This would directly reverse the trend toward questionable and irrational overtime awards for highly compensated employees. There is no reason that the FLSA, which was passed to protect laborers who “toil in factory and on farm,” and who are “helpless victims of their own bargaining weakness,” should ever be interpreted to protect workers making high five-figure or six-figure incomes.261

Despite Petri’s tendentious legislative history, it was clear from his own arithmetic

257Hearings on the Fair Labor Standards Act: Hearings Before the Subcommittee on Workforce Protections of the Committee on Economic and Educational Opportunities House of Representatives at 121. In 2003 the UFCW objectively repudiated Clark’s initiative by rejecting the DOL’s proposed regulation excluding (minimally defined) white-collar workers with salaries in excess of $65,000. “Advocates for Workers, Business Speak Out on Overtime Changes,” LRR 172:323-26 at 324 (July 7, 2003); see also below ch. 16.


260See above ch. 10.

as well as from reality that many workers with intermediate five-figure incomes lacked the bargaining power to resist employer demands to overwork free of charge. By the mid-1990s, inspired perhaps by the statutory success achieved by employers of computer workers, firms began agitating and propagandizing Congress on behalf of yet another categorical exclusion from overtime regulation—so-called inside sales personnel.262 Employers’ strategy this time was to present as congressional hearing witnesses hourly-wage employees willing to testify that they found it restricting to work only 40 hours a week (for employers that prohibited overtime work because they refused to pay time and a half) and preferred to work on a salary more than 40 hours a week without overtime premiums in order to obtain more in commissions and bonuses.263 The principal logical impediment to achieving employers’ goal of equating inside sales workers to the “outside salesman,” whom Congress had deprived of overtime protection ever since 1938,264 was that the original exclusion was premised on the alleged difficulty, if not impossibility, for employers to monitor, let alone, control the number of hours worked by sales employees far away from managerial eyes.265 Inside sales workers, tethered to telephones, fax machines, and computers at corporate headquarters, constituted no such challenge to supervision, but, as the chief congressional sponsor of the exclusionary measure demonstrated, mere logic need not be an impediment. In the words spoken by Illinois Republican Congressman Harris Fawell in 1997 to one of the aforementioned inside sales employees eager to be liberated from the 40-hour week: “You might say that you are a traveling salesman without the car, you do not need the car because you have the computer...and a law drafted in 1938 did not foresee any of that.”266

Thus when Fawell introduced H.R. 2888 a few months later, its exclusion appeared to be a loophole not even in search of a (publicly articulable) rationale.

265 See above ch. 2.
266 Hearing on the Treatment of Inside Sales Personnel and the Public Sector Volunteers under the Fair Labor Standards Act at 29.
That rationale that dared not speak its name was clearly enunciated by an opponent during House floor debate: "The Sales Incentive Compensation Act is simply a thinly veiled scheme for employers for boost their profits by increasing sales while simultaneously decreasing benefits to their employees.... Employees who work long hours but are unable to make significant sales to boost their own commissions will receive little or no additional pay for the extra hours they work."  

Fawell’s lack of comprehension of the historical origins of the exclusion culminated in his assertion that: "Salesperson[s] who work away from their employer’s premise...were exempt, allowing them to work as many hours as they wished.... This exemption was granted on an idea that professional salespeople work irregular hours in response to their customers’ needs...." So little “professional” were these salesmen, however, that Stein in his report observed that “while it is absurd on its face to speak of an executive...who is paid only $12 a week, it cannot be denied that a man can earn as little as $12 a week and still be an outside salesman.”

The bill, divertingly titled, “Sales Incentive Compensation Act,” would have created a new § 13(a) exclusion for any sales worker if: her position required “specialized or technical knowledge related to products or services being sold”; her sales were predominantly to those to whom she had made previous sales or her position did not involve initiating sales contacts; she received as base compensation, “without regard to the number of hours worked,” a sum equal to not less than 1.5 times the minimum wage multiplied by 2,080 (or $16,068), plus compensation based on each sale attributable to her, which in the aggregate equaled at least 40 percent of $16,068 (or $6,427.20 or a grand total of $22,495.20); and that the rate of compensation on individual sales above the $6,427.40 were no less than the aforementioned 40 percent.

In spite of this “ludicrous” salary threshold for a “professional,” the bill’s Democratic cosponsor, Robert Andrews, asserted that “our bill guarantees security and protection for workers. The Sales Incentive Compensation Act ensures that lower earning workers cannot be exploited or denied the protections of time-and-a-

269 Stein Report at 52.
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half overtime for work beyond a 40-hour week. The bill establishes a stringent test which guarantees that salespeople cannot be exempted from the wage and hour laws unless they receive a substantial minimum salary and are guaranteed the opportunity to earn significant commissions or incentive-based compensation...."272 Andrews failed to address the question as to how his proposal could avoid triggering the race to the bottom that mandatory hours norms are designed to prevent—namely, that labor market pressures ultimately force many employees to work the same abnormally long hours that a few initially accept in order to increase their individual income.273

In connection with the subcommittee mark-up session on March 5, 1998, Labor Secretary Alexis Herman “complained that the overall design of the expanded exemption clearly shifts business risk from employers to employees. Those who work long hours, but, for whatever reason, are unable to make significant sales will receive little or no additional pay for the extra hours they work....” The ranking Democrat on the subcommittee, Major Owens of New York, argued that: “Since the employer is receiving a direct benefit from the employee’s labors for the employee’s entire work period, why shouldn’t the employer be required to pay overtime when the employee is required to work more than 40 hours a week?” Owens indicated that he could support the bill if it included the same $58,000


273 The former Deputy Wage and Hour Administrator, John Fraser, and his colleagues, for all their critical acumen in evaluating the Bush administration’s regulations in 2004, adopted what for long-serving enforcers of the country’s principal tool of fair labor standards was an astonishingly narrow conception of the larger purposes of the FLSA. In reasonably rejecting the possible criticism that workers should accept that some may lose overtime protection because overall economic disruption would be avoided and job growth promoted, they observed that “[m]any U.S. workers...simply don’t operate at the ‘macro’ level—they have to find the means to feed, house, clothe, transport, educate, and care for their families every week. Workers who lose up to one-quarter of their income (and may still be required to work excessive hours to keep their jobs) will find little solace or satisfaction in hearing that some workers someplace else may have experienced an increase in their base pay (to maintain exempt status), or started getting paid overtime..., or had their hours cut back (to 40 hours per week to avoid overtime pay)....” John Fraser, Monica Gallagher, and Gail Coleman, “Observations on the Department of Labor’s Final Regulations ‘Defining and Delimiting the [Minimum Wage and Overtime] Regulations for Executive, Administrative, Outside Sales and Computer Employees’” at 7 n.9 (July 2004), on http://www.aflcio.org/yourjobeconomy/overtimepay/upload/OvertimeStudyTextfinal.pdf.” The attitude they described explains exactly why mandatory, legally coercive norms are required to prevent atomized workers from seeking to work long hours to make ends meet, thus setting in motion an anarchic process that results in longer hours for all workers.

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annual threshold that Congress had established for computer industry employees, but exclusion of workers earning no more than $22,600 a year from overtime protection was a "horrific policy." These objections notwithstanding, the subcommittee reported the bill to the full committee, which voted in favor of reporting out the bill with minor modifications requiring the excluded employee to have "a detailed understanding of the needs" of buyers and to exercise discretion in what she offers to sell. In contrast, the committee rejected Owens' proposals to increase the salary threshold to $40,000 and to prohibit employers from requiring employees to work overtime against their will.

In reporting out the bill, the Republican majority on the Committee on Education and the Workforce had no more robust refutation of Democrats' criticism than the belief that "the specter of employers forcing their professional and skilled sales force to spend long hours in the office, against the employees' wishes, when they are not making additional sales (and thus increasing their income) is simply not realistic." On the contrary, as the minority members pointed out, employers would have "a very powerful incentive to require...an employee to work as many hours as possible" since they would have no FLSA obligation to pay employees anything who made no sales during overtime work and even for those who do make sales, employers would be required to pay only 40 percent of the rate required during the 40-hour week.

A week after the committee report had been filed the House debated the bill. In a masterful illustration of obfuscation, cosponsor Andrews asserted that his bill was not one that "divests people of overtime," but rather "appropriately invests a carefully selected number of people with an opportunity to better themselves." While not denying that the number of sales workers who would meet the exemption criteria totaled, according to a DOL estimate, 1.5 million workers, Andrews insisted that the bill applied only to a "carefully selected group of people who are engaged in the process of doing better by working more." Instead of explaining why "working more" for employers that disdained being subject to overtime

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277 H. Rep. No. 105-558: *Sales Incentive Compensation Act* at 18 (quote), 19 n.5.1.
278 *CR* 144:4470 (June 10, 1998).
regulation is “beneficial” for employees, he praised the bill for doing away with an “anomaly” by treating a salesworker “the same if she is sitting in the office making the same as she would be if she is driving out on the road and making the sales.”

Unconcerned with the fact that no “anomaly” had ever existed because the differential treatment was rooted in perceived differences in employer control, the bill’s supporters declared that it was “time to unleash the salespersons...” Either from lack of principle or a desire to ward off the worst in a lost cause, Owens, the Democrats’ floor leader on the bill, abandoned even the aspirational norm of shorter hours to offer a monetized compromise: “We could have total bipartisan cooperation if we really recognized what is at the heart of this controversy at this point. It is money. It is only money; $22,600 is not a proper cutoff point.” Owens mentioned a compromise range between $40,000 and $57,000, but none of the bill’s proponents responded, and, instead, Owens offered an amendment prohibiting an employer from requiring an employee exempt under the bill to work more than eight hours a day or 40 a week unless the latter gave voluntary consent “and not as a condition of employment....” Fawell rejected the amendment because no other FLSA exemption was subject to such a condition, while Andrews asserted that it “would unduly complicate matters....” The House rejected the proposal 181 to 246 and passed H.R. 2888 by a vote of 261 to 165, but the Senate did not take up the bill, which died for the 105th Congress.

Despite opposition by the Clinton administration to the inside sales employee provisions, the House passed the same exclusionary provisions as part of a Republican minimum wage bill in 2000, but it, too, failed to be enacted during

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280 CR 144:4470.
282 CR 144:4472.
283 FR 144:4474.
284 FR 144:4475.
287 The provision was first a separate bill, H.R. 1302 (106th Cong., 1st Sess., Mar. 25, 1999) (John Boehner, Rep. OH, and Andrews). It then reappeared as part of a Republican minimum wage bill: H.R. 3833, § 3 (106th Cong., 2d Sess., Mar. 6, 2000) (Rep. John Shimkus, Rep. IL), and again in H.R. 3846, § 3 (106th Cong., 2d Sess., Mar. 6, 2000) (Shimkus). Democrats’ proposal to recommit the latter bill in order to strip it of its exclusions of inside salesworkers, computer employees, and funeral directors was defeated 243 to 181 and the bill itself then passed 282 to 143. CR 146:H900-902 (Mar. 9, 2000). By virtue of a complicated procedural rule, these FLSA provisions were then appended to
the 106th Congress. Two more bills were introduced in the 107th Congress embodying the same exclusion: one was a tax bill with the FLSA provisions attached to it, while the other, H.R. 2070, was a dedicated inside sales exemption measure, whose sponsor outlandishly mischaracterized it as “a very narrow, technical amendment” to the FLSA.

The day after the latter bill’s introduction, the House Workforce Protections Subcommittee held another hearing on the issue. The testimony of J. Randall MacDonald, senior vice president for human resources at IBM Corporation, proved to be the most revelatory of all that Congress received on the subject. Observing that “the exemption that is the closest match for our ‘inside sales’ employees is the ‘administrative’ exemption,” which the DOL and the courts had ruled did not apply to them because they were “the equivalent of production employees,” producing sales, MacDonald lamented that “even if we put all our legal resources behind a legal challenge, we do not think we could successfully challenge the ‘inside sales’ classification in court.” Hence IBM’s request for congressional intervention. In spite of his admission that Congress in 1938 had exempted outside salesworkers because of “the difficulty in tracking overtime,” MacDonald could devise no more logical basis for shoehorning inside salesworkers into the same classification than that: “Unfortunately, the authors [of the FLSA] never envisioned the networked Internet-based business operations or the need for ‘inside sales’ reps.” Nevertheless, acknowledging a place for logic in political-economic discourse, he proceeded to explain why IBM—which “worked hard in our sales call centers to build a climate that supports...risk-taking”—eschewed statutorily imposed penalty overtime rates and preferred to shift the risk of non-performance


292The Sales Incentive Compensation Act: Hearing at 44 (2001). Despite this realism, MacDonald, presumably driven by IBM’s own ideological needs, erroneously asserted that the FLSA treated outside salesworkers as “professional salaried employees.” Id. at 42. The classification has in fact never had anything to do with “professionals.”
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to its employees:

It is logical to ask why IBM does not simply accept the increased cost of overtime payments and enable the employees to work longer hours to drive higher performance. We would, in fact, be willing to increase compensation if the payments were linked to increased sales performance. However, under FLSA, these increased costs would result from overtime hours worked and not sales performance. The fundamental business model of ibm.com does not support increased costs that are derived simply from more hours worked rather than increased sales.\(^{295}\)

At the subcommittee mark-up of H.R. 2070 on June 27, 2001, Representative Owens tried to call the rhetorical bluff of the bill’s supporters by proposing to raise the salary threshold to 6.5 times the minimum wage (or $69,628): "‘They say we should treat these workers like professionals,’ Owens said. ‘Fine. Let them be paid like professionals.’" But both his proposal and Representative Lynn Woolsey’s proposal to make inside salesworkers’ overtime work voluntary lost on party-line votes. H.R. 2070 was approved and reported to the House Committee on Education and the Workforce,\(^{296}\) but, unlike its two immediate predecessors, the full committee failed to act on it, leaving the issue dormant for the time being.

In the interim between its hearings in 1995 and 2000, Ballenger’s Subcommittee on Workforce Protections requested that the Government Accounting Office (GAO) provide it with information on employer compliance with the white-collar exclusions.\(^{297}\) The GAO dutifully recounted that: "The purpose of the overtime provision was to shorten the work-week to a more reasonable 40 hours. This was expected to result in less employee fatigue, fewer accidents, higher productivity and efficiency, and more employee time for education and family duties."\(^{298}\) Yet it never again referred to these purposes, which did not inform its analysis. Nevertheless, the GAO did submit its estimate that in 1998 between 19 and 26 million full-time white-collar workers accounting for between 20 and 27


\(^{298}\) GAO, *Fair Labor Standards Act* at 5. It went on to note that “[b]y requiring overtime premium pay, it was expected that employers would hire more workers to avoid the extra wage costs, and that workers would be assured additional pay to compensate them for the burden of a work-week in excess of 40 hours,” only to mention the MWSC’s aforementioned dismissal of the relevance of these considerations for excluded white-collar workers. *Id.*
percent of all full-time wage and salary workers\textsuperscript{299} "would most likely be properly classified as exempt workers under the DOL exemptions."\textsuperscript{300}

That more white-collar workers excluded from overtime regulation worked overtime during the same 15 years is hardly surprising: whereas 35 percent of them worked more than 40 hours a week in 1983, by 1998 the figure had risen to 44 percent; the comparable figures for covered white-collar workers were 15 and 19 percent, respectively. The trend among those working more than 50 hours was even starker: the proportion of excluded white-collar employees rose from 10 to 15 percent, while among their covered counterparts the increase amounted to only 1 percent—from 4 to 5 percent.\textsuperscript{301}

The GAO also documented the drastic impact of the DOL's failure to update the salary levels by estimating that, based on the salary-level test, in 1975 30 percent of the full-time workforce would have been automatically "nonexempt" in contrast to only 1 percent in 1998. Likewise, in 1975 30 percent would have been "nonexempt" unless they met the percentage limitation on performing nonexempt work, whereas by 1998, the long duties test would apply to only 8 percent of the workforce. Finally, in 1975, 40 percent could have qualified as exempt under the short duties test in contrast to 91 percent in 1998.\textsuperscript{302} In order to reflect the same level of purchasing power in 1998 as in 1975, the short-test salary of $250 would, the GAO determined, have to be raised to $757.\textsuperscript{303}

Employers and state and local government representatives told the GAO that the traditional limits of the white-collar exemptions are outdated in the modern workplace. They believed that certain highly skilled, well-paid line workers should be treated as exempt workers because they have the knowledge equivalent to an exempt professional. Officials from manufacturing employers pointed to new technology used in factory workplaces, which they said required advanced technical skills but required far less traditional "manual" labor. Moreover, they told us that while these workers may have to follow precise written guidelines to perform their work, prescribed procedures were key to modern quality control.\textsuperscript{304}

What employers did not tell the GAO and what it never occurred to the GAO to ask, however, was why any of these developments—which constituted firms'
acknowledgment of the convergence of blue- and white-collar workers—should justify depriving these non-degreed “technicians” of protection against overtime work rather than conferring such protection on the professional engineers who allegedly perform comparable work. Inadvertently employers reinforced the reality of this convergence by stressing their belief to the GAO that “adherence to strict written guidelines—one major distinction between exempt and nonexempt workers—is necessary in a modern, efficient work place.”

In other words, by conceding that they control and have to control white-collar workers just as they do their blue-collar counterparts, employers have objectively abandoned any pretense that any principled basis remains for treating the two groups differently with regard to overtime. That employers made this admission against interest to the end of requesting that their imposition of such guidelines should no longer disqualify them from enjoying the exemption of closely controlled white-collar workers would be amusing if the GAO had not failed to draw the logically compelling conclusion that whatever justification may once have undergirded the dichotomous treatment of production and office workers, socioeconomic convergence should result in legal convergence. The GAO’s failure was all the more startling in light of its recognition that “[i]n recent years, the distinctions between production and nonproduction workers, and between professional and technical production workers have been increasingly blurred.”

Employers’ proposal of this new category of excluded nonsupervisory “knowledge” workers would necessitate a new definition in order to overcome the definitional obstacle that administrative and professional employees must exercise the kind of discretion and independent judgment that would be incompatible with the aforementioned guidelines. The expansionist proposal also encountered strenuous resistance from unions, which correctly pointed out that “today’s computer-assisted technicians are the modern equivalents of traditional factory workers....”

Employers also pointed to differences between exempt and nonexempt status as creating difficulties in managing their workforce: imputing management’s perspective to workers, firms claimed that covered workers had less flexibility in work shifts because any work beyond 40 hours had to be paid at time and a half “even if the employee is planning on working fewer than 40 hours in the next workweek” (as if that kind of autonomous unilateral power to reduce hours were a common feature of factory workers’ lives).

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305 GAO, Fair Labor Standards Act at 22.
308 GAO, Fair Labor Standards Act at 33.
Finally, the GAO discovered that retail firms, dissatisfied with the special 40-percent tolerance that Congress had granted in 1961, were demanding elimination of all limits on the proportion of nonmanagerial work. Because the advent of 24-hour-a-day stores with many part-time workers and managers on each shift meant that the latter “must pitch in and work the cash register or stock the shelves,”

employers did not want to have to pay extra for the longer hours they were imposing on managers. In response, unions complained that employers, apparently in an opportunistic effort to avail themselves of the FLSA’s exclusions, “had adjusted their work places to include many new levels of supervision in order to create exempt executive positions.” For example, a grocery store that in the past had been run by one or two store managers, was now divided into many different departments so that each departmental manager could be treated as an exempt executive.

The GAO could not gainsay the unions’ contention that judicial construction of the executive duties tests had led to “inadequate protection of low-income supervisory employees.” Indeed, the agency confirmed that its review of 32 federal cases decided between 1994 and 1998 dealing with the executive duties test found “hardly any instances in which a court overturned an employer’s classification of a lower-income supervisor as an exempt executive.”

Despite the fact that the duties test was already more lenient for the retail trade and service sectors—permitting “executive employees” to spend as much as 40 per cent of their time on grunt work before they forfeited their bona fides—and that the judiciary had interpreted the short test’s requirement that an executive employee’s primary duty consist of management so limply that it was met even where Burger King assistant managers devoted more than half of their time to non-exempt work,

employers complained that even this restriction was discriminatory because their managerial employees had to perform the same routine “nonexempt”

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310 GAO, *Fair Labor Standards Act* at 32.
314 Donovan v. Burger King, 675 F.2d 516, 520-22 (2d Cir. 1982). The court claimed that “much of the oversight of the operation can be carried out simultaneously with the performance of non-exempt work....” *Id* at 521. Ironically, in 1940 when the American Bankers Association proposed a stripped-down executive test, even it conceded that “primary duty” meant 51 percent managerial functions. Official Report of the Proceedings Before the Wage and Hour Division of the Department of Labor In the Matter of a Hearing on Proposed Amendments to Part 541 of Regulations with respect to the Definition of the Terms “Executive, Administrative, Professional...Outside Salesman” as They Affect Employees in Banking, Brokerage, Insurance, Financial and Related Institutions at 38-39 (July 9-10, 1940) (A. Wiggins).
work as their own subordinates while they were engaged in supervising the latter. Because the Second Circuit had ruled that “assistant managers could be exempt executives even if they spent most of the day cooking hamburgers,” the GAO also found that the Burger King decision had intimidated the DOL into requiring its investigators to consider percentage limitations as only one factor in determining the worker’s primary duty, with the result that only in “very limited situations” could an employer’s classification of an employee supervising two or more workers be challenged.

Thus the overriding impression that the GAO’s description of its interviews with employers and unions conveyed was that, apart from updating the salary levels, labor tacitly accepted the status quo, whereas employers demanded a significant overhaul of the duties tests. In other words, by acquiescing in the 60-year tradition of the massive exclusion of white-collar workers from hours regulation, the labor movement deprived itself of any principle on the basis of which it could criticize employers’ claims that modernization of the depression-era FLSA would properly require the exclusion of an even wider swath of white-collardom. Unless they adopted the position that the categorical distinction between blue- and white-collar workers had been mistaken and pernicious even in the 1930s and made even less sense now than then, unions could not plausibly resist the extension of the exclusion to new types of white-collar jobs. To be sure, unions did, as noted, oppose the addition of a category of “knowledge” workers, but in contending that “the same principles underlying the historical limitations on work hours and requirements for overtime pay should apply to the modern workforce,” they were also subscribing to the entire unprincipled freight of the hodgepodge of regulations that led to the exclusion of 30 million white-collar workers.

A few months after receiving the GAO report, in yet another reprise, Ballenger’s Subcommittee on Workforce Protections held a hearing in May 2000 on White-Collar Exemptions in the Modern Work Place populated by familiar figures. Kilberg, appearing this time on behalf of the Chamber of Commerce, asserted in a written statement that:

In exempting individuals in a “bona fide executive, administrative, or professional capacity” from the FLSA, Congress made a judgment that such individuals are not “helpless victims of their bargaining weakness” who need federal intervention to obtain fair pay

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315 29 C.F.R. § 541.111(b) (2003).
318 See above ch. 2.
319 GAO, Fair Labor Standards Act at 33.
and working conditions. These workers are better served by a system that allows them to negotiate their own pay arrangements rather than having a rigid hourly wage structure dictated to them.\textsuperscript{320}

The former solicitor of labor, quoting from the Senator Black’s 1937 FLSA committee report,\textsuperscript{321} misleadingly suggested that Congress had in fact been referring to white-collar workers. In fact, the Senate Education and Labor Committee had made no reference whatsoever to white-collar workers, and by the same illogic Kilberg could have claimed that Congress had also excluded farmworkers because they too were not “helpless victims of their bargaining weakness.” Continuing along the same pseudo-historical lines, he charged that “[o]ver time, the line between ‘blue-collar’ and ‘white-collar’ workers, which seemed so clear then [1937-38], has become blurred as radical changes have redefined America’s workforce.”\textsuperscript{322} Neither Kilberg nor anyone else at the hearing reflected on the fact that, since this indisputable blurring had entailed incorporation of large numbers of white-collar workers into the blue-collar industrialized-bureaucratic model, the legal consequence should have been paid rather than unpaid overtime for more workers. Similarly, when Kilberg opined of the production/administration distinction, which the DOL had devised to help identify bona fide administrative employees, that “[t]here is little reason to believe, in the modern economy, that a worker who brings experience, judgment, and discretion to bear in performing his duties should be treated differently depending on whether the subject of that expertise is the ‘product’ on which the employer’s economic success is built,”\textsuperscript{323} he failed, again, to explain why neither rather than both should be required to work overtime without compensation.

The LPA, the association of senior human resources executives of more than 200 leading corporations employing more than 12 million employees or 12 percent of the private-sector workforce\textsuperscript{324} which had appeared before the subcommittee


\textsuperscript{322}The Fair Labor Standards Act: White-Collar Exemptions in the Modern Work Place at 71.

\textsuperscript{323}The Fair Labor Standards Act: White-Collar Exemptions in the Modern Work Place at 73.

\textsuperscript{324}The Fair Labor Standards Act: White-Collar Exemptions in the Modern Work Place at 118.
before, filed a written statement pleading (ungrammatically) for a major expansion of the universe of excluded white-collar workers\textsuperscript{325}:

Another category of knowledge workers that should be considered under an updated administrative exemption are degreed administrative personnel who have independent responsibility that is greater than mere clerical functions, but that may not be as extensive as an executive secretary. These are individuals who are often key parts of an office team, who are experienced in performing their jobs and who are paid well, but fall outside of the current regulatory requirements. Frequently, these employees ask to be made exempt because of the higher status it confers upon them in the office. In some cases, they seek the flexibility that their exempt coworkers enjoy. Because of the regulations, employers frequently must refuse to “reward” employees with exempt status or face potential overtime violations.\textsuperscript{326}

Unable to devise any objective justification whatsoever that might be continuous with the DOL regulations for excluding yet more workers from overtime regulation, the largest corporations in the United States instead attempted to convince the public that it was the workers themselves who insisted on trading off overtime pay (or less overtime work) for the prestige that exclusion allegedly conferred on them in the minds of their less fortunate covered co-workers. If not with anyone else, this claim doubtless resonated with the subcommittee chairman, Cass Ballenger, himself a factory owner, who allowed as: “[T]o a very large extent, getting off the clock is a promotion.”\textsuperscript{327} In an unorthodox, if not bizarre, innovation for labor standards legislation, the LPA then recommended enshrining this subjective status-driven exclusion in a waiver:

Employees above a certain income level ought to be allowed to waive their right to overtime if they choose and memorialize the waiver in an agreement with the employer. ... This would eliminate the problem where employers agree to make employees exempt in order to grant them a higher workplace social status or more flexible schedules. This proposal, which is the most progressive of the recommendations, would probably require

\textsuperscript{325}The LPA agreed with Kilberg that highly skilled and well-paid “knowledge workers” should be exempted, for example, by eliminating the production/administration distinction under the administrative employee exemption and the “absurd result” it creates. \textit{The Fair Labor Standards Act: White-Collar Exemptions in the Modern Work Place} at 118, 121.

\textsuperscript{326} \textit{The Fair Labor Standards Act: White-Collar Exemptions in the Modern Work Place} at 121-22.

\textsuperscript{327} \textit{The Fair Labor Standards Act: White-Collar Exemptions in the Modern Work Place} at 19.
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legislation, but still merits discussion.\textsuperscript{328}

The LPA linked this proposal to an approach more grounded in economic reality, although the employers organization was still unable to articulate a reason for means-testing overtime pay or protection other than the manifestly exaggerated claim that all white-collar workers with salaries above $40,000 were individually capable of fending off employer overreaching:

The FLSA exists to protect employees who cannot protect themselves from unscrupulous employers. As times have changed, more employees wield market power by virtue of their skills and experience. The LPA Task Force has long advocated a bright-line test that exempts employees above a certain salary level, such as $40,000. ... Setting an income threshold would eliminate...absurd results, such as requiring employers to pay overtime to highly skilled and trained personnel earning substantial salaries.\textsuperscript{329}

That an exclusively means-tested exclusionary criterion's time had still not come\textsuperscript{330} was apparent from the testimony of the UFCW's assistant general counsel Clark, who refrained from resuming the debate on this point from mid-1990s. Instead, he emphasized that the "striking numbers" of excluded white-collar workers estimated by the GAO "suggest that additional consideration should be given to how Congress can limit the exemptions' scope."\textsuperscript{331}

\textsuperscript{328}The Fair Labor Standards Act: White-Collar Exemptions in the Modern Work Place at 125.


\textsuperscript{330}To be sure, since the LPA was well aware that one of the major components of its coalition, the National Restaurant Association, was opposed to a salary limit as high as $40,000, it is unclear how seriously it meant even this figure as an opening negotiating offer.

\textsuperscript{331}The Fair Labor Standards Act: White-Collar Exemptions in the Modern Work Place at 106 (written statement). The question of whether the UFCW fully understood the diminishing deterrence exerted by the time-and-a-half penalty even with regard to covered workers was raised by Clark's statement that it "creates huge economic disincentives to work employees over 40 hours. But that is the whole idea of this legislation." Id. at 16. Significantly, Tammy McCutchen, shortly after resigning as WHA, admitted that, as a result of the increase in non-wage benefits, time and a half no longer exerted the same deterrence that it had in 1938. Telephone interview with Tammy McCutchen, Washington, D.C., Sept. 16, 2004.
Planned Obsolescence of the Salary-Level Tests

Appendix:
Ratio of the Salary Tests to the Minimum Wage and Inflation-Adjusted Salary Tests, 1938-2004

[W]here a regulation's rationality is dependent on current socioeconomic conditions periodic review is essential to preserve that rationality.332

Table 4 and Chart 1 show the course of the relationship between the minimum wage and the long-test salaries from 1938 to 1997.333 Table 5 and Chart 2 display the ratio between the short-test salary and the minimum wage from the former's inception in 1950 to 2004 (when it was reconceptualized as the standard-test salary).334 They all document that a regulatory salary level that was never high enough to protect white-collar employees from overreaching, has, through the passage of time, become irrational.

By the time the minimum wage reached $4.25 in 1991, the ratio of the long test to it fell below 1:1. In other words, employers could perversely yet (allegedly) lawfully pay long-test executive employees salaries lower than the minimum wage, while requiring them to work overtime free of charge. In 1975, when the minimum wage was $2.10 per hour, an exempt assistant manager earning $155 per week had to work 22 hours of overtime before her salary failed to cover the minimum wage plus overtime (on the basis of the minimum wage). By 1997, the same "bona fide executive" reached this point after only 30 hours of straight time. Seen from a


333Table 4 and Chart 1 include every year in which the minimum wage or long-test (or pre-short-test) salary was raised. From 1938 to 1940 the salary test for executive and administrative employees was the same and professional employees were not subject to a salary test. From 1940 to 1963 the long-test salary for administrative and professional employees was higher than that for executive employees; from 1963 to 2004 the long-test salary for professionals was higher than that for the other two groups. The weekly minimum wage is computed as the product of the statutory hourly minimum wage and the maximum weekly number of sub-overtime hours (44 in 1938-39, 42 in 1939-40, and 40 thereafter).

334Table 5 and Chart 2 include every year in which either the minimum wage or the short-test salary was increased; the short-test salary was not introduced until 1950. The weekly minimum wage is computed as the product of the statutory hourly minimum wage and the maximum weekly number of sub-overtime hours (44 in 1938-39, 42 in 1939-40, and 40 thereafter).
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different perspective: by 1991, only a weekly salary of $319.30, or more than double the salary test level, would have held her harmless against twenty-two hours of overtime (at the minimum wage). Indeed, by 1997, even the short-test salary, which was supposed to be high enough to avoid ambiguity in distinguishing bona fide from mala fide executives, had fallen to a mere 20 per cent above the minimum wage. For 1999 the DOL estimated that only 34,000 or 0.2 percent of all exempt executive, administrative, and professional employees earned less than $155 a week and only an additional 12,000 or 0.1 percent earned between $155 and $174, while only 231,000 or 1 percent earned less than the short-test salary of $250. Indeed, more than 90 percent of all the other wage and salary workers also earned more than $250 a week.335

The increasing inadequacy of the salary thresholds over time can also be examined in terms of the failure of the WHD/DOL to adjust them for rises in the consumer price index. Table 6 and Chart 3 reveal that the $30-a-week long test, when originally created in 1938, was worth $400 in 2004 prices; it then rose through 1963, when it peaked at $614, and fell to the equivalent of $542 in 1975, when it was last increased. By 2004, the $155 salary level was worth 29 percent of its inflation-adjusted value in 1975, 25 percent of its peak adjusted value in 1963, and only 39 percent of its adjusted value in 1938. Similarly, as seen in Table 7 and Chart 4, the $100-a-week short test at its establishment in 1950 was worth $780 in 2004 prices; it peaked at an inflation-adjusted $969 in 1970 before falling to $874 in 1975. Thus by 2004, the $250 salary level was worth 29 percent of its adjusted value in 1975, 26 percent of its peak value in 1970, and only 32 percent of its initial adjusted value in 1950. And even when the Bush administration raised the short-test—now renamed standard-test—salary to $455 in 2004, it did not amount to one-half its peak value in 1963.338

335US DOL, WHD, Minimum Wage and Overtime Hours Under the Fair Labor Standards Act, tab. 11 at 33 (Jan. 2001). The WHD failed to explain how workers with salaries below the long-test level could be “exempt.”
336Table 6 and Chart 3 include every year in which the long-test (or pre-short-test) salary was increased.
337Table 7 and Chart 4 includes every year in which the short-test salary was increased.
338See below ch. 17.
## Planned Obsolescence of the Salary-Level Tests

### Table 4: Ratio of Long-Test Salaries to the Minimum Wage, 1938-1997

<table>
<thead>
<tr>
<th>Year</th>
<th>Long-test executive/administrative salary ($/week)</th>
<th>Ratio of Long-test administrative/professional salary to administrative minimum wage</th>
<th>Ratio of Long-test salary to minimum wage ($)</th>
<th>Minimum wage ($/week)</th>
</tr>
</thead>
<tbody>
<tr>
<td>1938</td>
<td>30</td>
<td>2.7</td>
<td>----</td>
<td>11</td>
</tr>
<tr>
<td>1939</td>
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<tr>
<td>1940</td>
<td>30</td>
<td>2.5</td>
<td>50</td>
<td>4.2</td>
</tr>
<tr>
<td>1945</td>
<td>30</td>
<td>1.9</td>
<td>50</td>
<td>3.1</td>
</tr>
<tr>
<td>1950</td>
<td>55</td>
<td>1.8</td>
<td>75</td>
<td>2.5</td>
</tr>
<tr>
<td>1956</td>
<td>55</td>
<td>1.4</td>
<td>75</td>
<td>1.9</td>
</tr>
<tr>
<td>1959</td>
<td>80</td>
<td>2.0</td>
<td>95</td>
<td>2.4</td>
</tr>
<tr>
<td>1961</td>
<td>80</td>
<td>1.7</td>
<td>95</td>
<td>2.1</td>
</tr>
<tr>
<td>1963</td>
<td>100</td>
<td>2.0</td>
<td>115</td>
<td>2.3</td>
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<tr>
<td>1967</td>
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<tr>
<td>1970</td>
<td>125</td>
<td>2.0</td>
<td>140</td>
<td>2.2</td>
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<tr>
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<td>125</td>
<td>1.6</td>
<td>140</td>
<td>1.75</td>
</tr>
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<td>1975</td>
<td>155</td>
<td>1.8</td>
<td>170</td>
<td>2.0</td>
</tr>
<tr>
<td>1976</td>
<td>155</td>
<td>1.7</td>
<td>170</td>
<td>1.8</td>
</tr>
<tr>
<td>1978</td>
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<tr>
<td>1979</td>
<td>155</td>
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<td>1.5</td>
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<td>1980</td>
<td>155</td>
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<td>170</td>
<td>1.4</td>
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<tr>
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<td>1.3</td>
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<tr>
<td>1990</td>
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<td>1.0</td>
<td>170</td>
<td>1.1</td>
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<tr>
<td>1991</td>
<td>155</td>
<td>0.9</td>
<td>170</td>
<td>1.0</td>
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<tr>
<td>1996</td>
<td>155</td>
<td>0.8</td>
<td>170</td>
<td>0.9</td>
</tr>
<tr>
<td>1997</td>
<td>155</td>
<td>0.75</td>
<td>170</td>
<td>0.8</td>
</tr>
</tbody>
</table>

### Table 5: Ratio of Short-Test Salary to the Minimum Wage, 1950-2004

<table>
<thead>
<tr>
<th>Year</th>
<th>Short-test salary ($/week)</th>
<th>Minimum wage ($/week)</th>
<th>Ratio of short-test salary to minimum wage</th>
</tr>
</thead>
<tbody>
<tr>
<td>1950</td>
<td>100</td>
<td>30</td>
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<td>1956</td>
<td>100</td>
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<td>125</td>
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<td>46</td>
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<td>1963</td>
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<td>1.2</td>
</tr>
<tr>
<td>2004</td>
<td>455</td>
<td>206</td>
<td>2.2</td>
</tr>
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**Sources:** 29 U.S.C. § 206 (a)(1) (various years); US DOL, *Earnings Data Pertinent to a Review of the Salary Tests*, tab. 1 at 11.
Table 6: Long-Test Salary Thresholds Adjusted by the Consumer Price Index, 1938-2004

<table>
<thead>
<tr>
<th>Year</th>
<th>Executive/ administrative ($)</th>
<th>In 2004 $</th>
<th>Administrative/ professional ($)</th>
<th>In 2004 $</th>
</tr>
</thead>
<tbody>
<tr>
<td>1938</td>
<td>30</td>
<td>400</td>
<td>400</td>
<td>400</td>
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<tr>
<td>1940</td>
<td>30</td>
<td>403</td>
<td>50</td>
<td>671</td>
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<tr>
<td>1950</td>
<td>55</td>
<td>429</td>
<td>75</td>
<td>585</td>
</tr>
<tr>
<td>1959</td>
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<td>1975</td>
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<td>542</td>
<td>170</td>
<td>594</td>
</tr>
<tr>
<td>2004</td>
<td>155</td>
<td>155</td>
<td>170</td>
<td>170</td>
</tr>
</tbody>
</table>

Sources: Tab. 4; http://www.bls.gov

Table 7: Short-Test Salary Threshold Adjusted by the Consumer Price Index, 1950-2004

<table>
<thead>
<tr>
<th>Year</th>
<th>Short-test salary ($)</th>
<th>In 2004 $</th>
</tr>
</thead>
<tbody>
<tr>
<td>1950</td>
<td>100</td>
<td>780</td>
</tr>
<tr>
<td>1959</td>
<td>125</td>
<td>808</td>
</tr>
<tr>
<td>1963</td>
<td>150</td>
<td>922</td>
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<td>1970</td>
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<td>2004</td>
<td>455</td>
<td>455</td>
</tr>
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</table>

Sources: Tab. 5; http://www.bls.gov
Chart 1: Ratio of Long-Test Salaries to the Minimum Wage, 1938-1997
Chart 2: Ratio of Short-Test Salary to Minimum Wage, 1950-2004

- **Short-Test Salary**
- **Minimum Wage**
- **Ratio of Salary Test to Minimum Wage** (Right Scale)
Chart 3: Long-Term Salary Thresholds Adjusted by the Consumer Price Index, 1938-2004
Chart 4: Short-Test Salary Threshold Adjusted by the Consumer Price Index, 1950-2004

In 2004 $