“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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Employers Finally Get a Republican Administration with "Moxie": The Proposed Regulations of 2003

"People aren't evil; the rules are difficult."\(^1\)

What fundamentally set apart the public debates in 2003-2004 about revising the white-collar overtime regulations was that in earlier years—and especially in 1940 and 1949, the only occasions on which major changes were made other than raising the salary levels—both the Democratic WHD/DOL and employers, by and large, openly admitted that they were seeking to exclude more workers.\(^2\) In contrast, in 2003-2004 the Republican administration and employer organizations went to elaborate lengths to convince the public that the substantive changes being proposed and adopted would actually produce a net transfer from the exempt to the non-exempt column.\(^3\) This counterintuitive outcome—that employers were advocating changes by means of a complex administrative law process that would require them to pay out more for overtime when they could have achieved the same end voluntarily without any amendments at all simply by treating additional employees as covered—was then explained away on the grounds that employers were primarily interested in clarifying the regulatory definitions and reducing the uncertainty and confusion that had led to proliferating litigation.

Although employers never expressly characterized the alleged net increase in the number of employees who would be covered by the overtime provision as their intention, the DOL and Republican members of Congress strongly implied that it


\(^2\) What did not distinguish the 2003-2004 regulatory process from that in 1940 and 1949 was that on all three occasions Congress was also debating statutory amendments to the overtime provisions in the FLSA. See above chs. 10 and 14; William Whittaker, "The Fair Labor Standards Act: Overtime Pay Issues in the 108th Congress" (CRS, RL32215, Feb. 4, 2004).

\(^3\) Nevertheless, the DOL was constrained to admit that congressional testimony in 2000 revealed that "business interests and employer groups advocated modernizing the regulations to exempt more classifications from overtime pay." *FR* 68:15563 (Mar. 31, 2003).
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was at the very least the price that companies had to pay for greater certainty. In short, whereas in the past, analysis of the purpose and estimated results of their proposals to restrict coverage was facilitated by the relative openness and candor of the Democratic administrations and the employers that requested initiation of the amendatory process, in 2003-2004 the sheer density of the combined propagandistic fog disseminated by the DOL, employers organizations, and Republicans in Congress, despite its often risible implausibility, complicated assessment of the substance of the changes.

The political processes that gave rise to the new regulations of 2003-2004 were uniquely and crucially shaped by the AFL-CIO’s exceptionally shrewdly conceived, ingeniously organized, and ferociously executed resistance to the Bush administration’s efforts to expand the exclusions of white-collar workers from overtime regulation—a campaign that was all the more remarkable given the labor movement’s drastically diminished strength in Congress over the last quarter-century. A principal reason for the AFL-CIO’s intensive involvement is straight-

Typical was the explanation offered by Senator Michael Enzi (Rep. WY): “I can tell you small businesses realize it is going to cost them about $375 million a year in overtime. I don’t know how we can talk about a decrease in overtime when it costs them $375 million more in overtime, but to have the gray area cleared up they are willing to do that. Why are they willing to do that? Because right now that $375 million potential is for lawyers’ fees to decide gray areas. Who needs that? We would rather put the money in the workers’ pockets.” CR 150:S4796 (May 4, 2004).

Compare Arthur Herzog, The B.S. Factor: The Theory and Technique of Faking It in America (1975). The evaluation in the text of employers’ and congressional Republicans’ propaganda does not mean that labor and congressional Democrats dispensed the truth and nothing but the truth. The relevant difference in this context between the substance of their propaganda styles lay in the fact that the former misrepresented their intentions and the qualitatively predictable outcomes (that is, whether more or fewer workers would wind up excluded from overtime regulation), whereas the latter at worst exaggerated the estimated number of workers who would lose their modicum of protection. This difference was in part a function of the fact that employers as the complainants proposed a radical expansion of the duties tests, about their motives for which they then dissimulated; in contrast, the AFL-CIO, as has always been the case with labor since 1938, acquiesced in the existing duties tests and applied a plausible cui bono? analysis to employers’ proposals.

The AFL-CIO was also concerned about collective bargaining agreements: “And overtime for many white-collar jobs that are partially unionized—engineers’ assistants, for example—could be hard to win the next time contracts are negotiated. Similar problems arise for factory shift supervisors, whose overtime-earning jobs could fall under the new rules. ‘We’ve already been told by employers,’ says Kelly Ross, legislative representative for AFL-CIO, ‘that in the next round of discussions it’s going to be on the table.’” Jon
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forward: by 2003, more than half of the union membership was white-collar. From 1973 to 2003, unions’ white-collar membership rose from 4,312,000, or a little less than one-quarter of the total, to 7,973,000 or 50.5 percent.1 Ironically, the increase in professional employees’ unionization has been “driven by the decreasing possibilities for white collar workers to exercise independent judgment”8 —a development that directly contradicts employers’ and the Bush administration’s claims that the duties tests for professional and other workers have to be updated to reflect the growth in the number and proportion of workers in the modern workplace who exercise precisely such discretion and independent judgment.9

This dramatic increase in white-collar union membership may in part account for the AFL’s and CIO’s failure to have mounted similarly energetic campaigns in earlier years, though the fact that the most significant exclusionary expansions took place under the aegis of the Roosevelt and Truman administrations made it extremely unlikely that labor, or at least the CIO, would have engaged in an embarrassing public dispute with its patron. In 1952, a year after the appearance of his influential White Collar—which estimated that in 1948 white-collar employees


7Department of Professional Employees, AFL-CIO, “Rising Tide: Professionals: The New Face of America’s Unions” at tab. 2 at 19 (Sept. 2003), on http://www.dpeaflcio.org/pdf/2003_09_risingtide.pdf; US BLS, “Union Members in 2003” tab. 1 and 3 (Jan. 21, 2004), on http://www.bls.gov/news.release/union2.t03.htm. According to BLS data for 2003, 727,000 or 4.7 percent of 15,465,000 employees in management, business, and financial occupations were union members; 4,604,000 or 18.1 percent of 25,418,000 in professional occupations; 533,000 or 8.2 percent of 13,378,000 in sales occupations; and 2,109,000 or 11.1 percent of 18,945,000 in office and administrative support occupations. US BLS, “Union Members in 2003” tab. 1 and 3. Prior to 2003, BLS used somewhat different categories. According to BLS data for 2002, 1,005,000 or 5.8 percent of 17,296,000 executive, administrative, and managerial employees were in unions; of 19,674,000 professional specialty employees, 3,783,000 or 19.2 percent were union members; of 4,349,000 technicians and related support employees, 469,000 or 10.8 percent were unionized; only 496,000 or 3.6 percent of 13,810,000 employees in sales occupations were members, but there were 2,210,000 union members or 12.5 percent among the 17,607,000 administrative support (including clerical) employees. US BLS, BLS News: “Union Members in 2002” tab. 3 (USDL 03-88, Feb. 25, 2003), on http://www.bls.gov/cps/unionmem.pdf.

8Department of Professional Employees, AFL-CIO, “Rising Tide: Professionals: The New Face of America’s Unions” at iv.

9See below.
composed 19 and 8 percent, respectively, of the membership of the AFL and CIO. C. Wright Mills may have confidently informed an American Management Association conference that unionization of office employees was almost inevitable, but according to the president of the Office Employees International Union fewer than two million of 15 million white-collar workers were union members that year and the following year Business Week estimated that only one million non-governmental white-collar workers were unionized. As late as 1957, the AFL-CIO, according to A. H. Raskin, the national labor reporter for The New York Times, agreed to make its first large-scale effort to organize 13 million unorganized white-collar workers, but there was little outward indication that its executive council members shared the organizing director’s optimism that any substantial increase in present estimated total of three million members would be recorded in the near future. There were at the time four unorganized white-collar workers for every organized one, and nonunion white-collar workers represented more than half of all unorganized workers in the United States. Data based on the 1960 census revealed that while white-collar workers represented 44.2 percent of all potential union members (up from 38.8 percent in 1950), the 2.7 million white-collar unionists accounted for only 15.4 percent of all union members and only 13.0 percent of all white-collar employees who were potential union members compared with 56.4 percent of blue-collar workers. The National Industrial

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10C. Wright Mills, White Collar: The American Middle Classes 315 (1967 [1951]).
11“Trend to Unions Seen for Offices,” NYT, Oct. 18, 1952 (30:6). Mills’s talk was presumably based on his piece, “A Look at the White Collar,” which appeared in Electronics in the Office: Problems and Prospects (AMA, Office Management Series No. 131, Oct. 1952), which was, in turn, reprinted in C. Wright Mills, Power, Politics and People: The Collected Essays of C. Wright Mills 140-49 (Irving Horowitz ed., 1967 [1963]). In it he argued that the principal reason for lagging unionization had been unions’ preoccupation with factory workers; all that was needed was for unions to make a “real decision to unionize the white-collar employees...” Id. at 148.
13“It May Be Gone Forever,” BW, Nov. 6, 1954, at 64-70, at 68. The total of 1,025,000 included 309,500 in white-collar unions, 240,000 in industrial unions, and 476,000 retail workers in various unions.
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Conference Board estimated that in 1968 3.2 million white-collar unionists accounted for only 14 percent of white-collar employees and 16 percent of all union members, but that the unionization rate had barely risen over the previous decade.16

From Clintonian Self-Paralysis to Bushian Regression

The new regulations trouble Wade Forsman, a Fort Worth labor lawyer who represents workers. He argues that big paychecks and well-honed job skills shouldn’t preclude engineers or other employees from collecting the overtime pay to which they’re now entitled.

“We’ve got a lot of engineers out of work,” he said. “Why is that any different from any other worker?”...

“We are undoing more than half a century of labor law,” he said. “The mere fact that something was enacted in 1938 does not make it a bad policy. The regulations do not need changing.”17

During its eight years in office the Clinton administration undertook no public effort to update the obsolete and dysfunctional salary-level tests—let alone to begin dismantling the means-testing on which white-collar workers’ entitlement to protection from overwork had been conditioned since 1938. In the sharp but nevertheless causally unspecific words of three high-ranking DOL officials, the Clinton DOL, in spite of the Wage and Hour Administrator’s “earnest and persistent attempts” during the early 1990s, “declined to undertake rulemaking or public hearings, though it was strongly urged as the single most important and necessary, if predictably controversial, step that could be taken to protect U.S.

16Edward Curtin, White-Collar Unionization 2, tab. 5 at 4 (NICB Personnel Policy Study No. 220, 1970); Douglas Cray, “Unionizing Slow in Office Staffs,” NYT, July 20, 1970 (37:2). The NICB found that: “For reasons not completely clear, both labor and management spokesmen foresee increasing unionization of office, sales, technical, and professional employees. The facts of the situation, however, don’t square with the expectations.” Curtin, White-Collar Unionization (“Highlights for the Executive” [unpaginated]). While white-collar unions believed that eventually office and professional workers would all be unionized, employers by and large believed that in 10 to 20 years most of their white-collar employees would be unionized. Id. at 1.

workers from the ongoing erosion of their workplace rights."18 The Deputy Wage and Hour Administrator during the first Clinton administration later stated that the WHA, Maria Echaveste, had prepared a proposal to increase the short-test salary threshold to 6.5 times the minimum wage—the level suggested by the House and Senate Labor Committees in 198919—but that the DOL rejected it several times.20

This outcome was presumably a function of the administration’s lack of principle, which made it politically unthinkable to antagonize capital by raising the salary thresholds without the quid pro quo of the even more capacious duties tests and relaxed pay-docking rules that employers demanded.21 (The extent of that

19See above ch. 15.
20Telephone interview with John Fraser, South Otselic, NY (July 14, 2004). Fraser did not know who at the DOL had rejected the proposal or why it had been rejected. However, since the Assistant Secretary for Employment Standards had, according to him, not been involved, it seems likely that Labor Secretary Robert Reich was the decision-maker. When asked whether he knew why the proposal had been rejected and why the salary levels had not been increased during the Clinton administration, Reich replied: “I don’t.” Email from Marc Linder to Robert Reich (July 14, 2004), and from Robert Reich to Marc Linder (July 19, 2004). A telephone message (July 14, 2004) to Echaveste requesting clarification went unanswered. A very different perspective was offered by a labor union informant, who stated that when asked in a private conversation in 2004 about what had gone on in the Clinton administration with the white-collar overtime regulations, Echaveste had characterized the AFL-CIO as “‘unreasonable’” for taking the position that the DOL should simply raise the salary threshold. She had believed that the regulation should have been “‘balanced’” and that there had been many needed “‘clarifications.’” From the conversation it appeared that Echaveste had indeed sent up a proposal that was blocked, but that it was blocked because the clarifications were overtime “‘takeaways.’” Email from union official to Marc Linder (Aug. 5, 2004). This account appeared largely consistent with that given by WHA Tammy McCutchen shortly after her resignation. McCutchen revealed that when she was WHA she had read memoranda that Echaveste had prepared (and that could not be obtained through a Freedom of Information Act request) that proposed changes (without laying out details) that were not so very different from what McCutchen herself eventually promulgated. Telephone interview with Tammy McCutchen, Washington, D.C., Sept. 16, 2004.

21According to John Fraser, Acting Assistant Secretary for Employment Standards and Deputy Wage and Hour Administrator in the Clinton administration, Maria Echaveste, the WHA, did “her best” to raise the salary levels, but it was not politically possible to do so
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antagonism can be gauged by the fact that in 2003 the Bush DOL estimated that “increasing the salary levels without updating the duties tests” would cost employers $1.839 to $3.370 billion a year in increased payroll costs.22 This unprincipled position was underscored by the fact that a major report that the Clinton DOL itself commissioned had concluded: “The changing occupational and industrial shifts do not point to the need for major revisions in the regulations governing EAP [executive, administrative, and professional] exemption. The new (or more predominant) jobs that exist today are readily analyzed in terms of the rules set down over 40 years ago.”23

In 2002, five years after having left her post as WHA, Echaveste confirmed—appropriately enough at the National Lawyers Convention of the right-wing Federalist Society—the foregoing account of the political basis of the Clinton administration’s failure to increase the salary thresholds. Although “reform” of the white-collar overtime regulations had been one of two items on Echaveste’s “to-do’ list” on taking office, she failed to achieve either one. She assigned as the main reason for the failure the “policy process...that if we tried to do negotiated rulemaking, we’d have to rent out RFK stadium because there’d be so many people interested in it.”24 But in terms of substantive grounds, Echaveste complained that:

Organized labor wanted us only to tackle the salary test and nothing else. We were

without dealing with employers’ complaints that in certain respects the duties tests and salary-basis rules were “not working.” Telephone interview with John Fraser (July 11, 2004). In 2003, in response to the Bush administration’s proposed regulations, the U.S. Chamber of Commerce acknowledged that the existing regulatory salary levels were “not realistic”; nevertheless, it was willing to support an increase only if “such a change is made in conjunction with significant reforms of the duties and salary basis test.” U.S. Chamber of Commerce, Comments on the Department’s Proposed Rule Regarding FLSA Exemptions for Professional, Administrative, Professional, Outside Sales and Computer Professional Employees” at 4 (June 30, 2003), on http://www.uschamber.com/NR/rdonlyres/enuuywuy6hl3kqop6d3nrghqtjrbg7vxezj6t37irglribr56svpx6qlctxd6obxvfy6s4oaappyyirbohyc2v4uxf/030630_541comments.pdf.


New Democrats and knew that there was no way that we would only take on the salary test. So, there was a lack of political will to tackle this issue.25

Echaveste also referred to one further impediment to reform of the law governing overtime (including compensatory time off) during the Clinton administration:

[W]hen people work in the White House, as I eventually did, you are surrounded by people who actually do work 20 hours a day and aren’t complaining. And to have people around the table talk about the need to give comp time to workers...who have never worked an hourly job and have never watched the clock the way a lot of workers do, to me, was a very interesting challenge because there were people who potentially could make very important changes who actually don’t have that work experience. And I thought there were only a couple of us there who’d actually punched a time clock and knew what it meant to get overtime.26

This observation about (New) Democrat policymakers’ having lost touch with the real world of the working class, while piquant, by focusing on money rather than time, revealed that Echaveste herself had lost sight of the real purpose of mandatory hours regulation.

In an important sense, then, the Clinton administration held the increase of the fatally neglected salary levels hostage to its own failure of nerve.27 Thus it joined with the Reagan and George H. W. Bush administrations in racking up 20 years of inaction.28 Had the Clinton DOL at least raised the salary thresholds, it would have made it that much more difficult for its successor to portray revisiting the question


27The Bush administration WHA Tammy McCutchen essentially confirmed this view by stating that “since 1975, the regulatory process has been ‘bogged down’ by concerns about modifying the duties test. Once the new regulations are in place, that concern will be addressed, she said, predicting that in the future, the threshold salary once again will be revised every five to 10 years.” “Advocates for Workers, Business Speak Out on Overtime Changes,” LRR 172:323-26 at 326 (July 7, 2003). Against this background, McCutchen’s claim on resigning in June 2004 that she had been naively “surprised by’...how political the overtime changes became” lacks credibility. Michael Triplett, “McCutchen Sees Stepped-Up Enforcement, Overtime Rules as DOL-Tenure Achievements,” DLR, No. 112, June 11, 2004, at C-1.

28Political paralysis and inaction on the part of Democratic administrations would, according to former WHA McCutchen, have continued indefinitely. Telephone interview with Tammy McCutchen.

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of relaxing the duties tests as politically plausible, since the new Republican administration would have been deprived of the legitimation linked to its own updating of the salary-level tests. Being able to hide behind the bona fides generated by the indisputable fact that it had done for workers what no Democratic administration had done since the 1960s permitted the George W. Bush administration to initiate the process of overtime deregulation on behalf of employers which, having helped elect it, were determined to seize the opportunity of Republican control of the White House and both Houses of Congress for the first time in half a century finally to move in that direction.29

The outgoing Clinton DOL had in 2000, its last full year in office, once again gone through the motions of announcing twice, in April and November, in the Federal Register its plan for long-term action in revising the regulations. On April 24, it justified the need for action by reference to the fact that the salary level tests—about which it had done nothing during its seven-year incumbency—"are outdated and offer little practical guidance in the application of the exemption." With some 23 million employees estimated to be within the scope of the regulations, the Labor Department expressed concern that "[l]egal 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"—as if Congress, the Department, or the WHD had ever during the 63 years since the first draft of the FLSA bill surfaced in April 1937 engaged in a comprehensive analysis of the reasons for the exclusion of white-collar workers from hours regulation. The DOL then repeated its self-mesmerizing mantra that it "will involve affected interest groups in developing regulatory alternatives. Following completion of these outreach and consultation activities, full regulatory alternatives will be developed." Promising that it "will continue to pursue revisions of the regulations as the appropriate response to the concerns raised," the DOL stated (ungrammatically and almost incomprehensibly) that: "Alternatives likely to be considered include [sic;

29The director of the AFL-CIO’s Public Policy Department testified in 2003 that “on at least six occasions in the past, DOL has adjusted the minimum salary threshold for inflation, without ever once hiding behind one of these periodic inflation adjustments in order to weaken the ‘duties’ test and restrict overtime eligibility for workers above the threshold.” Proposed Rule on Overtime Pay: Hearing Before a Subcommittee of the Committee on Appropriations United States Senate 10 (Special Hearing, S. Hrg. 108-233; 108th Cong., 1st Sess., July 31, 2003) (prepared statement of Christine Owens). The charge was justified (except for the introduction of the short-test in 1949-50), but failed to mention the Democratic Carter and Clinton administrations’ failure to implement “one of these periodic inflation adjustments” as largely responsible for having enabled the Bush administration to hide behind one.
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should be “range from”] particular changes to address ‘salary basis’ and salary level issues to a comprehensive overhaul of the regulations that also addresses the duties and responsibilities tests.30 Half a year later, the DOL rehearsed the same regulatory notice, the only noteworthy differences being the sharp increase from 23 to 32 million in the estimated number of employees within the scope of the regulatory exclusion of white-collar workers and deletion of the claim that court decisions were causing the loss of control of guiding interpretations: now they were merely “changing” those interpretations.31

It might have been imagined that employers would have aggressively pushed for revisions as soon as George W. Bush was elected president. However, in the immediate aftermath of the inconclusive election day, business lobbyists, chastened by the realization that “the slim GOP margins in the House and Senate limit the degree of change that may be achieved,” compiled a relatively modest “wish list.” Lobbyists for the NAM and the U.S. Chamber of Commerce both ranked amendment of the FLSA to authorize compensatory time off in lieu of overtime pay as their highest priority. Given the “‘razor thin’ Republican congressional majorities that rendered impossible ‘issues or actions in the extreme,’” employers purported to be aiming at specific rather than global changes in the white-collar overtime regulations such as exemption of funeral directors, licensed embalmers, certain inside sales workers, and additional computer professionals.32 If such limited expansions were in fact employers’ objectives, then what the Bush DOL ultimately bestowed on them must have been a very pleasant surprise.

Despite its deregulatory fervor, the new Bush administration’s first regulatory notice in May 2001 was not distinguishable from its predecessor’s.33 Not until December 2001 did the new Labor Secretary Elaine Chao (formerly a banker at BankAmerica and Citicorp) begin to lay out a more serious action-oriented approach. In order to “set a new course” for the achievement of the DOL’s three overall goals of enhancing opportunities for the workforce, promoting their economic security, and fostering safe, healthy [sic], and fair” workplaces, Chao decided to stress prevention and to rely on “common-sense standards of safety and fairness to protect workers before they are harmed physically or economically.” Of greatest relevance in the overtime context were two of the five “Secretarial

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31FR 65:73303, 73411 (Nov. 30, 2000). On the basis for the upward revision in the estimate, see above ch. 1.
33FR 66:25679, 25687 (May 14, 2001). Nor was it two years later even after the Bush DOL had published its proposed revisions. FR 68:30552, 30558 (May 27, 2003).
priorities" around which the tools that the DOL would use to reach its goals revolved: “Guarantee an honest day’s pay for an honest day’s work” and “Protect workers from coercion and intimidation.” Unsurprisingly, however, like all of its predecessors since 1938, the Chao DOL never addressed the question of how the exclusion of white-collar employees from any and all hours regulation could possibly help enforce that alleged guarantee or protect those workers from being coerced and intimidated into working a longer (honest or dishonest) workday than they wanted to work (with or without additional compensation). Nevertheless, Chao promised that the “DOL will craft proposals that are responsive to workers’ needs.” At this time, however, all that she revealed was that the WHD’s initiative would clarify the criteria defining the executive, administrative, and professional exclusions and that the changes would “help employers meet their obligations voluntarily and enhance workers’ understanding of their rights and benefits”\textsuperscript{34}—a craftily worded undertaking that fell short of promising to enhance workers’ rights.

Chao did not mention it, but data that her department later published disclosed that the volume of overtime that white-collar workers worked was enormous. In 2002, the DOL estimated, 10.5 million of them worked a total of 6.5 billion overtime hours or an annual average of 622 hours. Over the course of a 50-week year, they were thus working 12.4 additional hours a week or 2.5 additional hours a day.\textsuperscript{35} The Labor Department’s commitment to government protection was, in the context of such overwhelming unsocial working hours, equivocal. In rejecting the claim that “employers completely control the terms of employment and can at their sole discretion and without consequence convert millions of workers to exempt status to avoid paying overtime,” it applied the ad absurdum critique that under such circumstances employers could require workers “to work extremely long hours with no overtime [pay].” But: “Since this is not the situation in today’s labor market, it is a mistake to assume that employers are in complete control of the terms of employment.” Adopting an unorthodox position for the national enforcer of compulsory labor standards, the DOL argued that “[i]n fact, the economic laws of supply and demand usually dictate the terms of employment” so that “if employers offer too little compensation for the hours of work they demand they will not be able to attract a sufficient number of qualified workers to meet their needs.” Consequently, “exploiting workers by imposing unsatisfactory working conditions, such as excessive unpaid overtime, detracts from...firms’ overall competitive strategies,” counterproductively prompting its “displeased” employees to seek employment with other companies.\textsuperscript{36} Although the Bush-Chao DOL never

\textsuperscript{34}FR 66:61125, 61221-23 (Dec. 3, 2001).
\textsuperscript{35}FR 69:22233 (tab. 8-1) (Apr. 23, 2004).
\textsuperscript{36}FR 69:22212. The slipshod way in which the DOL presented the aforementioned
conceded that any white-collar workers are ever required to work overtime against their will, it did nevertheless "consider[ ] an exemption a strong signal that the worker is likely to work some overtime during the year." 37

It is, from this perspective, unclear why the DOL would have believed that legislated labor norms were needed at all to interfere with supply and demand "in today's labor market." At the very best, the most tenable argument that it could have made would have been first to concede that not all white-collar workers were blessed with a favorable location in the labor market and then to hypothesize that the regulatory salary and duties tests were designed to identify the line separating the unblessed from the blessed, who could safely be left to the forces of supply and demand. This position suffers from two crucial defects. First, the DOL has never during its 66 years of administering the white-collar exclusions devised a theoretical framework for testing this hypothesis, let alone selected the appropriate empirical indicators. Moreover, the mere fact that so many millions of low-salaried white-collar workers subject to unlimited overtime work satisfy the salary and duties tests is prima facie evidence that the tests are not robust. And second, as with the matter of workplace safety, the labor-market-knows-best position ignores the reality that, since even highly paid and skilled workers in much demand may underestimate the long-term deleterious consequences of overwork (for themselves as well as for others who may be forced to work overtime), working hours must be regulated for all.

Even under the Bush administration regulatory revision was a slow process, which appeared to make little progress during 2002, with the end at first being announced for September of that year and then January of 2003. 38 One reason for this pace was apparently the large number of meetings that the WHD and the new Wage and Hour Administrator had been holding with "stakeholder" organizations.

Although Tammy McCutchen, whose nomination as WHA was confirmed by the Senate on December 7, 2001, 39 may have been "plucked out of political ob-

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37FR 69:22213.
38FR 66:61223; FR 67:33307, 33314-15 (May 13, 2002); FR 67:74057, 74170-71 (Dec. 9, 2002). The latter two regulatory notices reduced the estimated number of affected employees to 19 to 26 million (reflecting the GAO estimate discussed above ch. 1).
security to join the Bush administration, she did have congenial credentials: in addition to having been senior corporate counsel at Hershey Foods Corporation, she had previously been a lawyer at the union-busting law firm Matkov, Salzman, and a high-profile member of the right-wing Federalist Society. Although, unsurprisingly, "McCutchen feels employers’ pain," on resigning as WHA in June 2004, she also declared: "I’m not embarrassed to admit that I am most concerned about low-wage workers at the lowest levels of our economy...I grew up poor and lived in a trailer."

By June 2002, McCutchen had concluded meetings with 80 groups, among which there were "very opposing points of view," but she also found "agreement that the [salary] thresholds need to be increased." Acknowledging the electoral constraints within which she was operating, McCutchen admitted that

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42"Matkov Salzman has extensive experience in providing hard-hitting and effective strategies for companies that seek to avoid union organizing or support decertification while avoiding the mine field of NLRB decisions that limit what an employer can do or say in those settings." http://www.matkovsalzman.com/practice_union.html.


46Deborah Billings, "DOL Moving to Prepare by January Revision to FLSA White Collar Exemptions," DLR No. 203, at A-11(Oct. 21, 2002).

47Billings, "Wage-Hour Chief Spearheads Effort to Revise, Make Public Investigation Manual."
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"the environment for regulatory revisions will be conducive for only so long." In the event, however, even she apparently underestimated the intensity of the political-economic forces demanding still more severe restrictions on white-collar overtime regulation regardless of whether it cost Republicans votes: "If any new regulations are going to see the light of day, they will have to be out in 2003, McCutchen said, dismissing the likelihood of change in the 2004 election year" on account of "the attendant political posturing...." Nevertheless, McCutchen believed that the various forces were aligned and that "even her staff, many of them longtime liberals, is eager to modernize." She also opined that "corporations desperately want the agency to rewrite the so-called duties tests," and that they "[i]n return...are willing to give ground on a labor demand: an increase in the minimum weekly salary levels...." But on this point an as yet unbridgeable gap still separated labor and capital: whereas the AFL-CIO was demanding that the short-test salary threshold be fixed at $43,000 (the inflation-adjusted equivalent of $13,000 in 1974): "Business groups, according to McCutchen, indicate that $25,000 is the most they can stomach financially." And James Coleman, general counsel to the National Council of Chain Restaurants, "whose members have borne the brunt of the litigation crusade and, along with The National Restaurant Association, wield enough clout to doom any reform," insisted that $43,000 was "grossly excessive in our view...." However, if the salary levels went up, Coleman argued that it was "only fair that the duties test be revamped too." But conflict loomed on this front, too, since "plaintiffs' lawyers and labor groups oppose any revisions to the duties test. To them, the reason that wage-and-hour cases have mushroomed in recent years has less to do with a lack of clarity than with greedy companies shortchanging workers in the pursuit of higher profits."

One stakeholder meeting about which some information seeped out was held on May 30, 2002 by Eric Dreiband, the Deputy Administrator for Policy, WHD, with Allison Shulman, the Director of Government Affairs at the National Association of Convenience Stores, which represented 2,200 convenience store companies operating 70,000 stores employing 1.4 million workers. Some sense of

49Crawford, "Working on Overtime."
50Crawford, "Working on Overtime." Billings, "DOL Moving to Prepare by January Revision to FLSA White Collar Exemptions," also reported that McCutchen had stated that there was internal support from professionals within the WHD who agreed that the regulations were "vastly overdue for revision."
51Crawford, "Working on Overtime."
the apocalyptic tone struck by the NACS at the meeting is conveyed by Shulman's summary of the points she made. First, she alleged that the potential liability that employers faced for failure to meet the salary basis test was so "enormous" that it was "not unreasonable to liken the situation to that which led to the passage of the Portal-to-Portal Act in 1947." The NACS's alarmist proclivities can be gauged by the fact that that legislation had been motivated by employers' claims that unions had, within seven months, filed almost 2,000 class-action lawsuits demanding six billion dollars in damages (the equivalent of about $50 billion in 2002).

The NACS also attacked the 1999 GAO report as misguided for concluding that, merely because the salary-test levels had sunk to the minimum wage, they had to be increased to keep pace with inflation and provide the type of protection originally intended. On the contrary, in NACS's view, whether the salary level was enough, fair, or a living wage was irrelevant; instead, it should be set exclusively by reference to distinguishing bona fide executive, administrative, and professional employees from those who should be covered. How these two criteria could possibly be at odds with each other Shulman did not reveal, but she added that NACS also opposed lock-step indexing on the improbable grounds that regulations should not be permitted to "stagnate." Although she offered no evidence that the NACS had ever protested during the 27 years of salary-level stagnation, now that an increase appeared unavoidable, Shulman was quick to propose that the standard set for all industry "be sufficiently low that no undue hardship will be imposed on these industries. Setting an earnings test which essentially forced retailers to abandon the exemption clearly would run counter to the regulations' intent." She then went on to explain that earnings levels for most lower-level managerial employees in the industry were relatively low, with convenience store managers at an earnings level equating to about $475 a week (or $24,700 a year). To prevent creating a barrier to the exemption and unduly injuring the industry, the NACS proposed a threshold earnings level of $442-500 a week ($23,000-26,000 a year) and a "super salary" level of $600 ($31,000 a year), which would trigger exclusion of any employee who performed "an identifiable executive function" (which latter criterion the DOL essentially adopted). Finally, Shulman argued that: "In view of the fact that a high number of con-

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54See above ch. 15.
convenience store managers receive earnings of approximately $470 per week, establishing a higher figure would create a ‘barrier to [the]exemption’ for many of them.” Unsurprisingly, the fact that, “[u]nlike the other industries, convenience stores still have relatively low salaries for managers ($23,000-$27,000 annually),” did not prompt her to question whether they deserved the lofty title of “executive.”

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The undersigned [Wage and Hour Administrator] hereby certifies that the rule will not adversely affect the well-being of families.

On March 25, 2003, McCutchen finally issued the long-awaited proposed revisions of the white-collar regulations, which Labor Secretary Chao had described as “‘literally ancient’ and ‘absurdly complex.”” Two days later the proposals were summarized in DOL press releases and on the DOL website and discussed in the press. The regulations were published in the Federal Register on March 31, where they occupied 13 three-columned pages and were accompanied by a further 25 pages of explanatory material.

That the Bush administration Labor Department was upholding the 65-year tradition of drafting, administering, and enforcing the white-collar overtime reg-

55Letter from Shulman to Dreiband.
58Of particular value was a tabular confrontation of the existing and proposed regulations. USDOL, “U.S. Department of Labor Proposal to Strengthen Overtime Protection: Side-By-Side Comparison” (Mar. 28, 2003), on www.dol.gov. The table was taken from FR 68:15574-76.
59Much of the early reporting was uncritical, relying one-sidedly on the DOL as a sources. Yet even almost two months later, the Des Moines Register published a piece quoting only WHA McCutchen and offering no other voices. Chad Graham and Tish Williams, “Updated Pay Rules Would Benefit Lower-Paid White-Collar Workers,” Des Moines Register, May 18, 2003 (5A:1-3).
lations within a purely technical framework totally divorced from the purposes of
the statutory overtime provision was manifest in a seemingly innocuous statement
on the very first page of the background material published in the Federal Regis-
ter: "These exemptions have engendered considerable confusion over the years re-
garding who is, and who is not exempt."\textsuperscript{61} In other words, the proposed regu-
lations dealt with the positivist problem of generating as automatically and friction-
lessly as possible determinate outcomes from rules, but not at all with disputes over
who should and should not be protected by the law or why anyone should or
should not be protected. Thus the "confusion" to which the DOL was referring
involved only the application, not the purposes, of the rules.\textsuperscript{62} While admitting that
"[s]pecific references in the legislative history to the employee exemptions con-
tained in section 13(a)(1) are scant"—a vast understatement—the DOL briefly but
dogmatically asserted their premises by reference to the untenable and undocu-
mented account of the Minimum Wage Study Commission.\textsuperscript{63} Ultimately, however,
the DOL's fallacious understanding of the reasons underlying the white-collar
exclusions was irrelevant and cosmetic because it never referred to them again and
they played no visible part in its explanation of the proposed revisions.\textsuperscript{64}

The central structural and substantive change made by the Bush administration
was the elimination, for each of the three white-collar categories, of the long and
short tests, including their salary and duties components, and their replacement by
a "standard test" with a higher salary threshold and modified duties, as well as by
a separate test for "highly compensated employees." The DOL set the standard
salary test at $425 a week for all three white-collar categories,\textsuperscript{65} whereas since 1975
the uniform short-test salary had been $250 and the long-test salary $155 for
executive and administrative employees and $170 for professionals. These in-
creases far exceeded, in absolute or percentage terms, any that the WHD or DOL
had ever proposed or promulgated before, but 28 years had also never passed by
before without any increase. The DOL conceded that in 1999 the GAO had ad-
justed the salary levels for inflation, arriving at an updated long-test level for 1998
of $470/$515 and a short-test level of $757; similarly, the outgoing Clinton ad-
ministration—which had never done anything actually to increase the levels—\textsuperscript{66}

\textsuperscript{61}FR 68:15560.
\textsuperscript{62}See above ch. 2.
\textsuperscript{63}FR 68:15560-61. See above ch. 15.
\textsuperscript{64}In its introduction to the final regulations in 2004, the DOL merely repeated
verbatim what it had already written about the MWSC's views on the rationale underlying
\textsuperscript{65}FR 68:15585, 15587, 15589, 15592 (proposed §§ 541.100 (a)(1), 541.200(a)(1),
541.300(a)(1), and 541.600(a)).

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2001 reported that 1999 Consumer Price Index data yielded long- and short-test salary levels of $480 and $774, respectively. By 2003, when the CPI-adjusted salary-test levels had risen to $530/$581 and $855, respectively, the Bush DOL rejected what it dismissively called "mechanically adjusting the 1975 salary levels for inflation" for several reasons. To be sure, the one reason that the DOL did not include was that inflation-indexing would, according to the 2001 report, have reduced the number of workers excluded from overtime regulation by two to seven million—a figure far in excess of the 1.3 million claimed by the Bush administration and thus presumably in its own right sufficient explanation for an openly pro-employer DOL to reject it.

The first reason adduced by the DOL was that the fact that the new standard duties test differed from the long and short tests allegedly rendered them inappropriate as salary-level models. However, even if the differences in duties were relevant to the salary levels, these differences could be accounted for. The ratios between the short-test and long-test salary levels during their entire existence from 1950 to 1975 varied within very narrow limits: 1.6 to 1.8 for executive-administrative employees and 1.3 to 1.5 for professional employees. The duties that had to be met for the employer to be exempt numbered five for the long test and two for the short test for executives, four and two for administrative employees, and four and two (or one) for learned (or creative) professionals. The new standard test prescribed three duties for executive, two for administrative, and one for professional employees. Thus, for example, the standard test for executives specified fewer duties than the long test but more than the short test (as the DOL proudly stressed). There was, therefore, no logical impediment to setting the standard salary level at the very least somewhere between the two salary levels, perhaps between $600 and $700. Whatever the appropriate updated dollar amounts were, it was clear that the level chosen by the DOL was closer to that of the long test,

66FR 68:15570.
67Calculations performed on the inflation calculator on the BLS website.
68FR 68:15570. Just how extreme the Bush DOL's approach was can be gauged by the fact that in an advance notice of proposed rulemaking even the Reagan administration had solicited comments on whether the salary test levels should be based on a multiple of the FLSA minimum wage. FR 50:47696, 47697 (Nov. 19, 1985).
69Cohen and Grimes, "The 'New Economy'" (Executive Summary), tabs. 20-21. Inflation-indexing would have caused the salaries of two million workers to fall below the salary threshold level and those of five million workers to fall below the short-test level, thus triggering the application of the long-test duties, which some of them would not have satisfied.
70FR 68:15570.
while the new standard duties were closer to those of the short test. As a result of this forced mismatch between salary and duties, "for the vast majority of workers," the proposal, in the words of three high-ranking former DOL officials, "expands the classes of exempt employees...presto!—the worker finds a walnut shell with no overtime under it...."71

The DOL's second reason, which was independent of the first, was its concern about the impact of inflation-adjusted salary levels on "certain segments of industry and geographic areas..., particularly in the retail industry and in rural areas of the South, which tend to pay lower salaries."72 This reason turned out to be no more tenable than the first. The DOL's own Preliminary Regulatory Impact Analysis revealed hardly any regional or industrial differences in the estimated impact of the proposed regulation. For example, incremental payroll costs as a proportion of payroll were estimated at 0.03 percent for the country as a whole and for the southern states; incremental payroll costs as a proportion of pre-tax profit were estimated at 0.11 percent for the country as a whole and 0.12 percent for the South.73 Similarly, incremental payroll costs as a proportion of payroll were estimated at 0.03 percent for the retail trade nationally and in the South, while incremental payroll costs as a proportion of pre-tax profit were estimated at 0.12 percent for the retail trade nationally and 0.09 percent for the South.74

The third reason advanced by the DOL for rejecting an inflation adjustment was arguably the weakest—namely, that "mechanically adjusting for inflation presumes that the salary levels set in 1975 are precisely the appropriate baseline...."75 If the DOL had its suspicions about the Ford administration's figure, surely it had no such reservations concerning the data worked up by the 1958 Kantor Report, by whose "prescient analysis" the DOL was "guided" in 2003.76

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71 Fraser, Gallagher, and Coleman, "Observations on the Department of Labor’s Final Regulations" at 14.
72 FR 68:15570. According to Brian Tumulty, “Bush Team Pushes Big Overhaul of OT Pay,” Gannett News Service, Mar. 28, 2003, WHA McCutchen “said her agency opted not to use inflation as a guide. Instead, the average wages of workers in the South and Midwest were used for the calculation so these regions where workers tend to be paid less than in other parts of the country would not be adversely affected.”
74 CONSAD Research Corporation. “Final Report” tab. 5.7 at 86-91.
75 FR 68:15570.
76 FR 68:15570.
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Its $80/$95 long-test salary was the equivalent of $506/$601 in 2003, while its $125 short test equated to $790.

The one respect in which the DOL admitted that it had departed from Kantor’s methodology was using the lowest 20 percent of actual salaries paid in the economy rather than the 10 percent used in the Kantor Report because of changes in short and long tests and “because the data included some salaried employees who would not meet the duties tests for exemption.” In fact, the DOL distorted the resemblance between its procedure and Kantor’s inasmuch as the latter’s salary survey was confined to administrative, executive, and professional employees whom the DOL had actually found to be exempt, whereas the DOL’s survey in 2003 included all salaried employees in every occupation, including those who by no stretch of the imagination could be regarded as administrative, executive, or professional or exempt.

Ultimately, the DOL’s dismissive attitude toward inflation adjustment boiled down to its judgment that it would cost employers too much, although nowhere did the Department examine what the financial consequences would be if firms reacted as Congress had intended by hiring additional workers instead of continuing to work existing employees more than 40 hours. Moreover, apart from the sheer arbitrariness of protecting only the lowest 20 percent of white-collar workers, it is unclear on what possible grounds the DOL believed that employees with salaries as low as $425 a week should be left exposed to overreaching employers anxious to work them unlimited hours.

The Bush DOL acknowledged that the regulatory salary levels had once been “viewed as the best indicator of exempt status,” but, not having been raised in 28 years, they no longer provided “employees or employers any help in distinguishing between bona fide executive, administrative, and professional employees and those who should not be considered for exemption.” If the DOL was aspiring to restore such bright-line status to the salary test, the choice of $425 as the threshold was ill

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77FR 68:15570-71.
79FR 68:15582. Although the DOL contended that inflation adjustment “would be far too burdensome on small businesses,” the PRIA had disclosed that incremental payroll costs for small businesses would have amounted to only 0.04 percent of payroll and 0.16 percent of pre-tax profit. CONSAD Research Corporation, “Final Report” tab. 5.3 at 73-74.
80Frederick Rueter, the principal author of the CONSAD report, conceded that it had not examined this possibility. Telephone interview (June 22, 2004).
81FR 68:15562.
designed to achieve that objective. After all, it amounted to barely twice the FLSA minimum wage—and was able to attain even that ratio only because the minimum wage itself had not been raised since 1997. The real-world consequences that the DOL saw as flowing from the failure to have updated the salary test were curiously skewed: “the outdated salary tests and complex duties tests...cause employees to be erroneously misclassified as exempt and thus not paid properly.” Conveniently, the DOL neglected to mention that this state of affairs also meant that for many years employers had been getting away with wage theft. The DOL also impermissibly conflated the effects of the indisputably obsolete salary tests and the allegedly complex duties tests. Unless the Bush DOL was conceding that the failure to raise the salary thresholds had in fact rendered the regulations invalid, it was incorrect to state that they had resulted in misclassification of employees as exempt: so long as the legislative regulations were valid, the resulting exclusion of low-salary workers was lawful, inevitable, and predictably predestined to benefit only employers. Not so with the purported complexity of the duties tests: there was no plausible reason why it should per se lead to excessive exclusion of workers from overtime protection rather than excessive inclusion—unless employers were successfully manipulating the complexity to achieve that one-sided outcome. Thus, in any event, if employers were seeking simpler duties tests, it seems highly improbable that they were doing so in order to be compelled either to pay more employees for overtime work or to refrain from requiring them to work overtime.

The new test for “highly compensated employees” provided that an “employee who performs office or non-manual work and is guaranteed a total annual compensation of at least $65,000...is deemed exempt under section 13(a)(1)...if the employee performs any one or more of the exempt duties or responsibilities of an executive, administrative or professional employee....” Because the statute specifies that only these three categories of (white-collar) employees are excluded from overtime protection, the DOL had to supply some specific definition of them in order to prevent other categories of white-collar employees from being excluded.
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Just how minimalist the resulting duties test was that such a white-collar employee had to meet was spelled out in the DOL’s example that a $65,000-a-year employee who “directs the work of two or more other employees, even though the employee does not have authority to hire and fire”—let alone the primary duty of management—would still be an exempt executive. The DOL justified this outcome on the grounds that: “A high level of compensation is a strong indicator of an employee’s exempt status, thus eliminating the need for a detailed analysis of the employee’s job duties.” The DOL’s opinion that a high salary is highly indicative of exclusion from protection nicely captures its circular reasoning cut off from any possible purposes of the overtime provision: since the law is designed to prevent or deter employers from overworking employees, the level of the latter’s salaries is irrelevant. In order to insure that as many employers as possible could take advantage of the exemption—which also applied pro rata to employees who did not work the whole year—the proposal provided that if the employee’s base salary and non-discretionary compensation failed to total $65,000 by the end of the year, the employer could nevertheless decide at year’s end whether it would be cheaper to top off the salary and thus retain the exemption by making up the difference in the first pay period of the next year. The DOL appeared oblivious of the enormous burden this procedure would impose on employees to keep track of their hours all year long just in case the employer failed to make up the difference or to pay the back overtime pay voluntarily; and even if the employer did opt to pay the back overtime to a worker to whom it had expected to pay more than $65,000, it was possible that it would not have kept any hours records.

The only explanation that the DOL offered for its fixing of the salary level was that it “looked to points near the higher end of the current range of salaries and found that the top 20 percent of salaried employees earned above $65,000 annually....” Driven, apparently, by some unexplicated objective of symmetry, it plumped for this quintile because it was “consistent with setting the proposed standard test salary level at the bottom 20 percent of salaried employees.” The figure was, in other words, arbitrarily chosen.

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85 FR 68:15593 (proposed § 541.601(c)).
86 At a May 7, 2003 teleconference and webcast, “New FLSA Regulations: A New World in Overtime Regulations,” plaintiff’s attorney Gregory McGillivary characterized the proposed $65,000 rule as “inconsistent with the intent behind the FLSA” without identifying that intent. “Attorneys Discussing Proposed FLSA Rules Speculate on Fate of Regs Before the Courts,” USLW 71(43):2713-14 at 2714 (May, 13, 2003).
87 FR 68:15593 (proposed § 541.601(b)(2)-(3)).
88 FR 68:15571.
The test for highly compensated employees can be viewed as a much more abbreviated version of the short test, which, under the rubric "Special Proviso for High-Salaried Employees, had been recommended in 1949 by the Weiss Report as a short-cut to facilitate administration since the division's experience had shown that at such a salary those whose primary duty was the performance of work characteristic of bona fide executive, administrative, or professional employment met, with only unimportant exceptions, all the basic duties tests. Although Weiss's test did not quite capture the suggestion of the NAM (and several companies) that $300 per month be the sole criterion, provided that the employee performed the already existing regulatory duties "of the general character...even though he may not otherwise strictly qualify for exemption under all the specifications," the proposal in 2003 came much closer in terms of a skeletal duties test, but would have horrified the NAM of 1949 by setting the salary level at $65,000 a year or the equivalent of about $690 per month in 1949.

This proposal was not well received by labor. For example, the National Employment Lawyers Association opposed it with the following sarcastic remark: "We are surprised to see the Department adopting the Chamber of Commerce's proposal to base exemptions solely on compensation levels and effectively divorced from any duties analysis. [T]his proposal only demonstrates the Department's supine acquiescence to the employers' agenda to weaken overtime protections for American workers." To be sure, this attack overlooked the fact that in 1939-40 the Roosevelt administration had proposed excluding all (including blue-collar) employees receiving a salary of $200 a month or more, which in 2003 dollars did not even amount to one-half of $65,000.

With respect to job duties, the new standard test for executive employees dropped two of the long-test factors—(1) that of customarily and regularly exercising discretion and independent judgment, and (2) the crucially constraining...
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and indisputably objective prohibition on devoting more than 20 percent, or, in the case of a retail or service store employee, 40 percent, of his hours of work to so-called non-exempt activities—and added one factor from the long test that had been absent from the short test: that of having the authority to hire or fire other employees or to recommend such action. The DOL justified deleting the long test’s percentage restrictions on nonexempt work on the grounds that the long test itself had been practically nonoperative for years because of its outdated salary level. To be sure, this curious excuse (or perhaps self-fulfilling prophecy), which was a version of the practice of letting the criminal go because the constable had violated the law, could easily have been rendered superfluous by simply updating the long-test salary level. But the DOL refused to take this step because it “would add new...burdens [on employers] to the exemption tests.” In other words, the DOL dismissed out of hand the application of a duties test that would protect additional workers and impose liability on additional employers.

The second reason that the Department offered for dropping the restrictions on the percentage of grunt work that supervisors could perform without causing their employers to forfeit their exemption was that retention would require time-testing managers by employers who are not required to keep time records on them. Thus, again, rather than imposing “new recordkeeping burdens” on employers, the DOL preferred making it easier for employers to impose overtime burdens on employees.

Finally, because judicial rulings in the early 1980s that bona fide executives could carry out managerial duties at same time that they were performing the same manual work as their subordinates made it more difficult to determine which activities were not inherently essential and necessary to executives’ duties, the DOL concluded that retaining the percentage restrictions was not a useful criterion for “defining the executive exemption in today’s work place.” Thus virtually welcoming a court decision that stood the purpose of the overtime provision on its head, the DOL chose to hide behind judges in two federal circuits that had ruled in favor of employers. What made this third justification comically perverse was that not only had the DOL not been facing an insuperable legal barrier, but the court itself had expressly instructed the Secretary of Labor that its decision was “a result of the Secretary’s regulations,” and that: “If the Secretary believes that the underlying legislation was intended to cover employees such as Burger King’s Assistant Managers, or that employees doing identical work for an employer should have identical legal status as far as overtime is concerned, he should

94 FR 68:15585 (proposed § 541.100(a)); 29 CFR § 541.1(c)-(e).
95 FR 68:15564. See above ch. 2 on employers’ keeping track of white-collar workers’ time.
96 FR 68:15565.
reconsider the regulations as issued." The Secretary did reconsider and even revise the regulations, but hardly in the manner in which the court 21 years earlier would have suspected.

In addition, the DOL undertook several specific changes in individual provisions making it easier to classify workers as excluded executive employees. For example, it specified that a department with as few as five full-time nonexempt employees could have up to two exempt supervisors if each customarily and regularly directed the work of two of those employees. And because the DOL had freed employers from the constraining 20-percent rule, it also deleted the self-inculpatory evidence of its own "experience...that a supervisor of as few as two employees usually performs nonexempt work in excess of the general 20-percent tolerance...."

Similarly, under the proposed regulations, working supervisors were not executives if, instead of having management as their primary duty, the latter consisted of the same kind of work as their subordinates performed, ordinary production or sales work, or of routine, recurrent or repetitive tasks. In contrast, under the old regulations, working supervisors were not executives if a substantial amount (meaning 20 percent or more) of their work was of the same nature as that of their subordinates. And finally, the DOL conferred on retail employers the privilege that they most insistently sought: An assistant manager in a retail establishment whose primary duty included management functions such as scheduling employees, assigning work, overseeing product quality, ordering merchandise, managing inventory, handling customer complaints, or authorizing bill payments, "may be an exempt executive even though he spends the majority of his time on nonexempt work" such as serving customers, cooking food, stocking shelves, and cleaning.

In order to underscore the importance of this crucial relaxation of the restraining impact of the duties test on employers’ power to extract unpaid overtime

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97 Donovan v. Burger King Corp., 675 F.2d 516, 520, 522 (2d Cir. 1982).
98 FR 68:15586 (proposed § 541.105(b)). At the same time it deleted the existing interpretive regulation stating that: "It cannot be said...that a supervisor drawn from a pool of supervisors who supervises employees assigned to him from a pool and who is assigned a job or series of jobs from day to day or week to week has the status of an executive. Such an employee is not in charge of a recognized unit with a continuing function." 29 CFR § 541.104(f).
99 29 CFR § 541.105(c).
100 FR 68:15586 (proposed §541.106).
101 29 CFR § 541.115(b).
102 FR 68:15587 (proposed §541.107).
work, the DOL revised its definition of "primary duty." To be sure, in order to avoid an exaggeration that the labor movement crafted in opposing the proposed regulations, it is important to note that the pre-2003 interpretive regulations had already conferred great discretion on employers to use supervisors for grunt work without jeopardizing their exemption:

The amount of time spent in the performance of the managerial duties is a useful guide in determining whether management is the primary duty of an employee. In the ordinary case it may be taken as a good rule of thumb that primary duty means the major part, or over 50 percent, of the employee’s time. Thus, an employee who spends over 50 percent of his time in managerial duties would have management as his primary duty. Time alone, however, is not the sole test, and in situations where the employee does not spend over 50 percent of his time in managerial duties, he might nevertheless have management as his primary duty if the other pertinent factors support such a conclusion. Some of these pertinent factors are the relative importance of the managerial duties as compared with other types of duties, the frequency with which the employee exercises discretionary powers, his relative freedom from supervision, and the relationship between his salary and the wages paid other employees for the kind of nonexempt work performed by the supervisor.

The Bush administration, however, went even further and was much more specific in declaring that the “term ‘primary duty’ does not require that employees spend over fifty percent of their time performing exempt work.” Returning to the example of the retail store assistant manager who performed the aforementioned types of exempt work, the DOL reiterated that he “may have management as the primary duty, even if” he “spends more than fifty percent of the time performing non-exempt work such as running the cash register.” Having just rejected the time-based presumption that favored worker protection, the DOL turned around and affirmed the time-based presumption favoring employers: “However, the amount of time spent performing exempt work can be a useful guide, and employees who spend over fifty percent of the time performing exempt work will be considered to have a primary duty of performing exempt work.”

In redefining the notion of “primary duty” as “the principal, main, major or most important duty that the employee performs,” the DOL radically subjectivized it, especially as reinforced by the aforementioned elimination of the long-test’s percentage limitation on nonexempt work. The consequence of these revisions was to confer much greater latitude on employers to describe employees’

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103 See below.
104 29 CFR § 541.103.
105 FR 68:15595 (proposed § 541.700).
106 FR 68:15595 (proposed § 541.700).
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primary duty in a self-serving manner. Thus, if asked in litigation, “to state which of several duties of an employee is primary,” an employer, in the words of the high-profile former DOL officials, “will likely choose the one which results in the employee’s exemption...; and of course, the courts can be expected to defer to the employer’s characterization. [N]o disrespect intended, judges—whose job is decision-making—may well be more likely to find any decision-making an employee is authorized to do to be much more important than the cooking of hamburgers...even if 90 percent of the employee’s time is spent cooking....”107 Ultimately, then, the proposed reformulation of the primary duty test “invites employers and courts to find virtually any employee with any management or supervisory responsibilities to be an exempt executive.”108

Realistically, albeit distortedly, reflecting the senselessness that has bedeviled the exclusion of administrative employees since the FLSA’s enactment, the Bush DOL conceded that the duties test for them “is the most difficult to apply” and their exemption “the most challenging...to define and delimit....”109 The proposed “standard test” for administrative employees significantly deviated from the existing long and short tests by: deleting from the long test the requirement of exercising discretion and independent judgment, the prohibition on devoting more than 20 percent (40 percent in retail and service establishments) of employees’ time to non-exempt work, and the description of the three sub-groups of administrative employees; deleting from the short test the same requirement of discretion


108Fraser, Gallagher, and Coleman, “Observations on the Department of Labor’s Final Regulations” at 18. The exclusionary result of this subjectivization is not confined to executive employees. An excellent example of the application of the narrow conception of “primary duty” to alleged professional employees even under the old regulations is Rutlin v. Prime Succession, Inc., 220 F.3d 737, 742 (6th Cir., July 20, 2000), in which a funeral director/embalmer argued that “even if a licensed funeral director and embalmer’s duties are considered professional, he spent only fifteen hours a week actually embalming bodies and directing funerals. Rutlin thus contends that his primary duties were not professional because those duties consisted of general upkeep of the funeral home. The district court disagreed, finding that even if Rutlin’s other, non-professional duties took more than fifty percent of his working time, “his professional duties were of principal importance to Prime Succession and, therefore, constituted his primary duties.” The appeals court agreed that it was “clear that Rutlin’s duties that were of principal importance to Prime Succession were those related to directing funerals and embalming bodies. Accordingly, these were Rutlin’s primary duties. The fact that Rutlin performed collateral tasks, even if those tasks took more time than his primary duties, does not change this fact.”

109FR 68:15566, 15567.
and judgment, and adding instead the requirement that the employee hold "a position of responsibility with the employer." In addition, while retaining from the long and short tests the requirement of having a "primary duty of the performance of office or non-manual work," it expanded the expansive exclusion even further by dropping the limiting terms "directly" and "policies" from the requirement that that work be "directly related to management policies or general business operations of the employer or the employer's customers."110

The proposed regulations also diluted the categorical division between production and what the Weiss Report had called "'servicing a business'"111: whereas the existing interpretation glossed this distinction as involving the administrative operations of a business, on the one hand, and production and sales work, on the other,112 the proposed regulation narrowed this non-administrative sphere to "working on a manufacturing production line or selling a product."113 Indeed, the DOL programmatically announced that the whole point of this exercise in redefinition was to blur this distinction, or, in its words, to "reduce the emphasis on the so-called 'production versus staff' dichotomy in distinguishing between exempt and non-exempt workers" because it was allegedly "difficult to apply uniformly in the 21st century workplace" and because it was "needed to reflect emerging case law...."114

To be sure, some courts have promoted the evisceration of the "dichotomy,"115 but, as in other areas of white-collar overtime law, other court decisions have continued to uphold the distinction.116 The Bush DOL nevertheless chose to ignore the latter because they made it more difficult for employers to extract unpaid overtime from employees.117 To be sure, as in all other controversies over excluding

110 FR 68:15587 (proposed § 541.200); 29 CFR § 541.2.
111 Weiss Report at 63
112 29 CFR § 541.205(a).
113 FR 68:15587 (proposed § 541.201(a)).
114 FR 68:15566.
115 E.g., Reich v. John Alden Life Insurance Co., 126 F.3d 1 (1st Cir., Sept. 18, 1997);
Shaw v. Prentice Hall Computer Publishing Inc., 151 F.3d 640 (7th Cir., Aug. 4, 1998);
Piscione v. Ernst & Young, 171 F.3d 527 (7th Cir., Sept. 18, 1999).
117 To be sure, employers were still not satisfied with the proposed regulation because, by diminishing but nevertheless retaining the dichotomy, "the DOL has effectively codified what the courts were free to reject." "LPA's Comments on Proposed Rule Defining and Delimiting the Exemptions for Executive, Administrative, Profession, Outside Sales and
white-collar workers from overtime regulation, none of the participants—including judges and the DOL—has ever sought to explain why the distinction that §541.205(a) draws between “those employees whose primary duty is administering the business affairs of the enterprise” and “those whose primary duty is producing the commodity or commodities, whether goods or services, that the enterprise exists to produce and market” should, against the background of the underlying purposes of the overtime provision, in any way be relevant to determining the scope of coverage. Moreover, ironically, even if employers were correct in asserting that workplace reality has been eroding the dichotomy, the consequence is a convergence of white- and blue-collar conditions that should prompt a greater scope of inclusion rather than exclusion of the former from overtime protection.

The DOL’s principal definitional innovation with respect to administrative employees, “position of responsibility,” was so profoundly ambiguous that it is difficult to discern the grounds on which the Department could possibly have believed that this phrase would generate less uncertainty than the term “discretion and independent judgment” that it replaced, especially since the new term’s alternative sub-definitions were equally ambiguous: “the importance to the employer of the work performed or the high level of competence required by the work performed. To meet this requirement, an employee must either customarily and regularly perform work of substantial importance or perform work requiring a high level of skill or training.” Expansiveness, but hardly clarity or certainty, was attained by defining “work of substantial importance” as “by its nature or consequence” affecting the employer’s general business operations or finances “to a significant degree.” However, the DOL did, at the very least, seek to avoid the charge of having acted without statutory authority by noting that “work of substantial importance” excluded clerical and secretarial tasks as well as “other mechanical, repetitive, recurrent or routine work.”


118Dalheim v. KDFW-TV, 918 F.2d at 1230.

119This stricture applies as well to Fraser, Gallagher, and Coleman, “Observations on the Department of Labor’s Final Regulations” at 21, who criticize the final rule for “gutting the ‘production versus staff’ dichotomy that has been the linchpin of Labor Department enforcement.”

120FR 68:15587 (proposed § 541.202).

121FR 68:15587 (proposed § 541.203(a)). The term “work of substantial importance” was not a paragon of precision in the existing interpretive regulations either. 29 CFR §541.205(a).

122FR 68:15588 (proposed § 541.203(c)).
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As an example of the kinds of occupations whose status had been judicially in dispute but that employers would now be free to exclude the DOL adduced insurance claims adjusters, who performed work of substantial importance so long as their duties included interviewing insureds and witnesses, inspecting damage, reviewing factual information to prepare damage estimates, evaluating coverage, negotiating settlements, or making recommendations about litigation. But the potentially most capacious sub-category that the DOL was able to shoehorn into the category of excluded administrative employees by means of "work of substantial importance" was the so-called team leader: "An employee who leads a team of other employees assigned to complete a major project for the employer (such as purchasing, selling or closing all or part of the business, negotiating a real estate transaction or collective bargaining agreement, or designing or implementing productivity improvements) performs work of substantial importance, even if the employee does not have direct supervisory responsibility over the other employees on the team." In specifying that an executive or administrative assistant to a proprietor or chief executive fulfilled the requirement of performing work of substantial importance if the employee "without specific instructions or prescribed procedures, has been delegated authority to arrange meetings, handle callers and answer correspondence" the Bush DOL was, to be sure, merely carrying forward one of the more anomalous conclusions of the Stein Report, Weiss Report, and existing interpretive regulations, but it nevertheless also overturned a deviant


\[124\] FR 68:15587 (proposed § 541.203(b)(2)). Some of this wording was taken from an opinion letter that WHA McCutchen had issued a few months earlier reaching the same conclusion as the regulation. WHD, USDOL, Opinion Letter, FLSA (Nov. 19, 2002), 2002 WL 32406601 (Westlaw FLB-WHOL); "DOL Issues Guidance on FLSA Coverage of Insurance Company Claims Adjusters," USLW, Nov. 26, 2002, at 2344.

\[125\] FR 68:15587 (proposed § 541.203(b)(3)). William Kilberg, the corporate lawyer who for years had been representing big business before Congress with respect to amending the FLSA, proposed at a Federalist Society convention in November 2002 that the executive duties test be revised "to reflect team and functional approaches to management so that a team leader of a group of employees, like a more traditional line manager of two or more employees, would be deemed to engage in management." Federalist Society, National Lawyers Convention 2002: "The Fair Labor Standards Act: Keeping Time with the 21st Century?" at 50 (Nov. 14, 2002).

\[126\] FR 68:15587-88 (proposed § 541.203(b)(4)).

\[127\] See above chs. 13-14; 29 CFR § 541.208(d).
Clinton-era WHD opinion letter that characterized such work as clerical.\textsuperscript{128}

The other branch of the definition, “work requiring a high level of skill or training,” meant “administrative work requiring specialized knowledge or abilities,” but, as with the new definition of “professional” employee, that knowledge did not have to be acquired academically. In addition, to accommodate a frequent complaint by employers, this category was expressly broadened to “include work by employees who use a reference manual,” but not to the aforementioned clerical, secretarial, “or other mechanical, repetitive, recurrent or routine work.”\textsuperscript{129}

The DOL declared that its “goal” in revising the regulations pertaining to professional employees was merely “to clarify and simplify” the definitions, “while remaining consistent with the purposes of the FLSA,”\textsuperscript{130} which it unfortunately never revealed. For learned professionals the DOL made the duties test easier to meet by: deleting from the long test the requirements of the consistent exercise of discretion and judgment, that the work be predominantly intellectual and varied and that its output cannot be standardized in relation to a given period of time, and that the employee not devote more than 20 percent of her time to non-exempt work; deleting from the short test the requirement of the consistent exercise of discretion and judgment;\textsuperscript{131} and adding that the requisite knowledge no longer had to be acquired virtually exclusively by a “prolonged course of specialized intellectual instruction,”\textsuperscript{132} but could, instead, also “be acquired by alternative means such as an equivalent combination of intellectual instruction and work experience.” \textsuperscript{133}

Auspiciously suggesting to employers the source of a huge additional supply of professional employees who could be lawfully excluded from overtime protection, the DOL specified that “training in the armed forces” was one way to acquire the


\textsuperscript{129}FR 68:15588 (proposed § 541.204(a)-(c)).

\textsuperscript{130}FR 68:15567.

\textsuperscript{131}29 CFR § 541.3.

\textsuperscript{132}The existing legislative regulation specified that the knowledge be “customarily” acquired in this manner, but the DOL’s interpretation observed that the “word ‘customarily’ implies that in the vast majority of cases the specific academic training is a prerequisite for entrance into the profession.” 29 CFR § 541.301(d).

\textsuperscript{133}FR 68:15589 (proposed § 541.300(a)(2)(i)). The proposed regulation deleted the existing interpretation that the “word ‘customarily’...makes the exemption available to the occasional lawyer who has not gone to law school, or the occasional chemist who is not the possessor of a degree in chemistry, etc., but it does not include the members of such quasi-professions as journalism in which the bulk of the employees have acquired their skill by experience rather than by any formal specialized training.” 29 CFR § 541.301(d).
required knowledge.  

Perhaps the most interesting changes that the DOL made in the regulations concerning creative or artistic professionals involved journalists, whom publishers have been seeking to exclude from overtime regulation since the advent of the NRA codes of fair competition in 1933. Under the existing interpretive regulations, which Harold Stein wrote in 1940, the DOL advised that: “Obviously the majority of reporters do work which depends primarily on intelligence, diligence, and accuracy. It is the minority whose work depends primarily on “invention, imagination, or talent.” In a further interpretation, which Stein did not write but which also dated back to the 1940s, the DOL went on to state that: “Only writing which is analytical, interpretative, or highly individualized is considered to be creative in nature. ... Newspaper writers commonly performing work which is original and creative within the meaning of Sec. 541.3 are editorial writers, columnists, critics, and ‘top-flight’ writers of analytical and interpretative articles.”

Far from contesting this bizarre conceptual framework, within which such literally prosaic writers were excluded from overtime regulation on the grounds that they were artistically creative, the Bush administration’s proposed regulation reversed the presumption of journalists’ entitlement to overtime protection: “Journalists may qualify as creative professionals if their work generally requires invention, imagination, originality or talent. Writers for newspapers, news magazines, television news programs, the Internet, and other media...generally perform work involving originality and talent.” The DOL’s surprising insistence, despite this inversion, that it did not intend to “make any material changes from the existing regulations” was based on its claim that it was merely reflecting recent case law, which distinguished between, on the one hand, non-artistic-professional employees of small newspapers gathering facts about routine local events and reporting them in a standard format, and, on the other, artistic professionals who researched facts, developed story elements, conducted interviews, and wrote

134 FR 68:15589 (proposed § 541.301(d)).  
135 See above ch. 7.  
136See above ch. 13.  
13729 CFR § 541.302(d).  
13829 CFR § 541.302(f)(1). The first sentence appeared in the interpretive bulletin that the WHD published in the wake of the Weiss Report, but did not originate in the latter, but rather in USDOL, WH and Public Contracts Divisions, Manual of Newspaper Job Classifications 4 (Apr. 1943). The second sentence was distilled from the much lengthier discussion in the latter publication.  
139See above ch. 13.  
140FR 68:15589 (proposed § 541.302(d)).
Although it was true that some cases in the 1990s had dichotomized journalists into those working for “major news organizations” and “small town” newspapers, it is worth emphasizing, as the Bush DOL—which shared those judges’ bias in this regard—did not, that the leading case was guided by the court’s misperception of “the purposes of the FLSA,” which, being to “prohibit substandard conditions,” were inconsistent with using the law as “a sword by which writers...at the pinnacle of accomplishment and prestige in broadcast journalism may obtain a benefit from their employer for which they did not bargain. Thus, while the plaintiffs should not be exempted solely on the basis that they are well paid, we think that the DOL interpretive guidelines should be read in an effort to promote the FLSA’s purpose, not to frustrate it.”

To be sure, the DOL distorted the case law—and thus the discretion available to it, even if it voluntarily decided to subject its new regulations to judicial criticism of the old regulations—by failing to mention that in one of the very cases that it cited another federal appeals court, while adjudicating the claims involving small-town newspapers, accepted as generally true for journalism as a whole the testimony of the dean of the Graduate School of Journalism at the University of California at Berkeley—which the Reagan administration DOL had offered at trial—that “the majority of journalists do not meet the qualifications for professional exemption from the overtime provisions of the FLSA. ... He stated that there is no body of scholarly work which a journalist is required to know before he may practice. Rather, a journalist must be a skilled and accurate observer, have good judgment, and be able to write clearly.” The dean also emphasized that journalists’ work product did not depend “primarily on invention, imagination, or talent.” Consequently, the First Circuit Court of Appeals concluded that “although the field of journalism has changed radically, these changes do not warrant

141 FR 68:15568.

142 Freeman v. National Broadcasting Co., 80 F.3d 78, 85, 86 (2d Cir. 1996). Consistent with the court’s exclusive focus on money, it did not discuss how extensive the overtime work was, although the trial court—whose ruling in favor of the employees the appellate court overturned—did present considerable information on hours worked. Freeman v. National Broadcasting Co., 846 F.Supp. 1109 (SDNY 1993). This decision was not the first dealing with reporters’ overtime claims to express the view that the FLSA was designed to “protect those receiving the bare necessities of life whose health was injured by long hours of toil.” Sherwood v. The Washington Post, 677 F.Supp. 9, 13 (D.D.C., Jan. 13, 1988), rev’d, 871 F.2d 1144 (D.C. Cir., 1989). To be sure, in its commentary on its final rule, the DOL did mention in passing that unions in their commentary had correctly noted that the Supreme Court had stated that “employees are not to be deprived of the benefits of the Act simply because they are well paid....” FR 69:22173 (citing Jewell Ridge Coal Corp. v. Local No. 6167, UMWA, 325 US 161, 167 (1945)).
modifying the Secretary’s view that most journalists do not qualify as exempt professionals under the FLSA. In his view, the focus of the majority of journalists is the same today as it was forty years ago: to report disciplined observations of public people and public events. This testimony essentially ends appellate review of the matter [i.e., the trial court judge’s upholding the validity of the DOL’s interpretive regulation].”

Remarkably, the proposals relating to the “salary basis” on which employers must pay all white-collar workers in order to be eligible to exempt them and to the associated issue of the permissible scope of pay-docking, which was reputedly the driving force in the 1990s behind employers’ demands for regulatory revision, turned out to be one area in which the Bush administration did not fully accommodate companies. In particular, the DOL declined, for reasons discussed earlier, to legalize pay-docking for partial-day absences. Its decision to refrain from granting employers all of their demands may in part have been rooted in the knowledge that the wording of the existing regulation had already given willing judges the means by which to relieve firms of liability for unlawful deductions and to afford firms much of the unfettered freedom they demanded to coerce white-collar employees by means of deductions. On the other hand, the very existence of such pro-employer judicial precedent could, as it had in other areas of the regulations, have served as a meta-political shield behind which the DOL could pretend that its regulations merely “reflect emerging case law” rather than its own agency to create new law.

144See above ch. 15.
146See above ch. 2.
147Where a deduction not permitted by these interpretations is inadvertent, or is made for reasons other than lack of work, the exemption will not be considered to have been lost if the employer reimburses the employee for such deductions and promises to comply in the future.” 29 CFR § 541.118(a)(6).
148For example, a chain of fast food restaurants switched from deducting recurrent cash register shortages from managers’ bonuses to deducting them from their weekly salaries, in the exquisitely delicate words of one federal appeals court, “ostensibly to increase the managers’ responsiveness to the problem.” Moore v. Hannon Food Service, Inc., 317 F.3d 489, 491 (5th Cir., Jan. 20, 2003).
149FR 68:15566.
On the other hand, the DOL was very accommodating to employers with respect to the linked issue of the so-called window of opportunity to make corrections for pay practices that were inconsistent with honoring the salary basis of employees’ compensation. The DOL’s major innovation was permitting employers to make deductions from pay for “unpaid disciplinary suspensions of a full day or more imposed in good faith for infractions of workplace conduct rules” that were imposed according to a “written policy applied uniformly to all workers.” Such rules included policies prohibiting sexual harassment and violence.\textsuperscript{150} Because under the existing regulations employers failed the salary basis test and thus forfeited the exemption by making disciplinary deductions for other than “infractions of safety rules of major significance,”\textsuperscript{151} the new regulation exposed a considerably larger universe of white-collar workers to the worst of both worlds—loss of the central marker of their salaried status without a concomitant grant of overtime protection.

With regard to the effect of improper pay-docking, the proposed regulation was even more accommodating to employers. It provided that an employer would lose the exemption only if it had a “pattern and practice of not paying employees on a salary basis” demonstrating that it “did not intend to pay employees in the job classification” on that basis.\textsuperscript{152} If the employer did have a policy of not paying on a salary basis, the DOL confined the employer’s loss of the exemption to the period in which the deductions were made and to “employees in the same job classification working for the same managers responsible for the improper deductions.” Finally, even if the employer made improper deductions, it would still not lose the exemption if it had a written policy prohibiting them, notified employees of that policy, and reimbursed them, unless the employer repeatedly and willfully violated the policy or continued to make such deductions after receiving complaints from

\begin{flushright}
\textsuperscript{150}FR 68:15594 (proposed § 541.602(b)(5)).
\textsuperscript{151}29 CFR § 541.118(a)(5).
\textsuperscript{152}FR 68:15594 (proposed § 541.603(a)). The Clinton administration had already set out in an amicus brief a position similar to the one adopted by this part of the proposed regulations. Klem v. County of Santa Clara, 208 F.3d 1085, 1091 (9th Cir., Apr. 3, 2000). The factors set forth by the new regulation to be considered in determining whether the employer did not intend to pay included the number of deductions, the time period involved, the number of employees, the number and geographic location of the managers responsible for the improper deductions, the employer’s size, whether there was a written policy prohibiting improper deductions, and whether the employer corrected them. Fraser, Gallagher, and Coleman, “Observations on the Department of Labor’s Final Regulations” at 38, pointed out that these factors generated “almost total uncertainty about the result which should be reached in a given case.”
\end{flushright}
complaints. And just in case any subaltern DOL investigators or judges had not grasped how radically the regulations were intended to subvert the presumption of worker protection and to impose the burden on employers to prove that they were exempt, the Department added an astounding caveat that the section on employers' window of opportunity for making corrections "shall not be construed in an unduly technical manner so as to defeat the exemption."154

As far as the impact of the proposed regulations was concerned, the DOL claimed that increasing the salary threshold from $155 to $425 a week would "increase the wages of 1.3 million lower-income workers,"155 whereas 644,000 "hourly paid worker working overtime in occupations with exempt administrative and professional duties could be converted to salaried employees."156 The proposals would cost employers between $334.8 million and $895.5 million annually in recurring payroll costs.157 These claims proved to be exceedingly contentious.

The War of the Comments

Classifying an employee as exempt is really a way to assure that the employee earns less and works more.158

Even before the details of what McCutchen claimed were "'moderate and measured'"159 revisions were known or had been analyzed, the antagonists had weighed in with their predictable reactions. Although they soon shifted the focus

153FR 68:15594 (proposed § 541.603(c)).
154FR 68:15594 (proposed § 541.603(d)).
156FR 68:15580.
157FR 68:15577, tab. 8 at 15579; CONSAD, “Final Report” tab. 4.1 at 46.
158Karen Smith, “Comments on the Department’s Proposed Revisions to Regulation 541” at 15 (June 2003).
of their counter-campaign, union officials, who in the past had been unable to choose between a 40-hour week and the overtime pay that helped workers either make ends meet or sustain middle-class expenditure and consumption patterns, suddenly decided that "they would oppose any changes that would cause longer work weeks, arguing that required overtime pay is the only brake stopping many employers from demanding excessive work hours." The AFL-CIO's spokesperson, Kathy Roeder, expressed concern that the proposed rules "could weaken the tradition of the 40-hour week"—as if it had ever been the tradition for those millions of white-collar workers who had never been protected by the FLSA. The United Food and Commercial Workers determined immediately that the new rule was "an absolute disaster for white-collar workers.... Anyone over the [salary] threshold is fair game."\(^{161}\)

In contrast, the Chamber of Commerce of the United States, which had always asserted that the FLSA "was intended to protect people at the low end who are least able to bargain with their employers and protect their own interest,"\(^{162}\) was "encouraged by the fact that they [i.e., the DOL] set an upper-level salary test with a simplified duties test."\(^{163}\) Given a little time to digest the details, employers began to verge on the giddy: at a teleconference sponsored by the American Bar Association Section of Labor and Employment Law on May 7, one management-side lawyer called the rather pedestrian revisions an "amazing intellectual feat."\(^{164}\)

In its initial press release of March 27, the DOL, availing itself to the hilt of the legitimacy that would accrue to it for taking the step that no predecessor had (successfully) taken in 28 years, stressed that the $270-a-week increase in the salary test from $155 to $425 "would be the largest since Congress passed the FLSA in 1938."\(^{165}\) While still basking in that glory—which was only slightly tarnished by

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\(^{160}\)Strope, "Proposal Extends Overtime to Low-Income Workers, Cuts Some Professionals' Pay."

\(^{161}\)Brian Tumulty, "Bush Team Pushes Big Overhaul of OT Pay," Tucson Citizen, Mar. 28, 2003 (Lexis) (quoting Nick Clark, senior assistant general counsel).

\(^{162}\)Tumulty, "Bush Team Pushes Big Overhaul of OT Pay" (quoting Randy Johnson, vice president for labor policy). Michael Eastman, the director of labor law policy at the Chamber of Commerce, later stated the same policy. T. Shawn Taylor, "Employers Banking on Clearer Overtime Rules," Chicago Tribune, June 15, 2003, Business at 1 (Westlaw).


\(^{165}\)US DOL, ESA News Release: "U.S. Department of Labor Proposal Will Secure Overtime for 1.3 Million More Low-Wage Workers" (Mar. 27, 2003), on
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the AFL-CIO’s revelation that $425 a week was only $71 above the poverty guideline for a four-person family, which might be eligible for food stamps up to an annual income of $23,920166—WHA McCutchen dropped the other shoe: “[R]evising job duties required to qualify for the exemption to better correspond to the 21st century workplace realities...‘is long overdue—the types of jobs people do and the skills they need have changed, but the regulations have not.’” However, lest theretofore protected white-collar workers fret over the impending loss of coverage, she added this superbly crafted euphemism for exposure to the full rigors of legally unshackled employer domination: “‘By recognizing the professional status of skilled employees, the proposed regulation will provide them with a guaranteed salary and flexible hours.’”167

The following day the DOL fleshed out some of the particulars of the “Proposal to Strengthen Overtime Protection.” Ironically, the examples that it created to illustrate the advantages that would thenceforward flow to the newly covered included: “An employee working 50 hours per week managing a restaurant for $15,600 per year” and “A worker putting in 60 hours a week managing a department store for $18,000 per year.” The Department apparently felt no need to explain either how the free labor market could tolerate the kind of systemic overreaching that enabled employers to force employees to work 3,000 hours a year for six dollars an hour or why regulations inherited from Democratic administrations would dignify jobs subject to such conditions with the lofty title of “executive.” Nor did the DOL mention that even after its unprecedented salary-level increase, employers could continue to force such “executives” to work 60 hours a week all year round without additional compensation so long as they paid them the princely emolument of $425 a week, which would work out to $7.08 an hour for 60 hours. Moving on to the duties tests, the Labor Department pointed out, as if expecting that employees should be grateful to hear that the government had finally devised some wording to liberate them from protection against overwork, that the “proposal would eliminate the long-inactive ‘long-test’ rule restrict-


166AfL-CIO, “Comments on Proposed Regulations (June 30, 2003), on http://www.aflcio.org (the annual figure worked out to $460 a week). In his comments the president of the AFGE observed that a $22,100 salary threshold would mean that all federal GS employees in a grade higher than GS-3/step 7 or GS-4/step 2 would satisfy the salary-level test. That only 1.1 percent or (14,000 of 1,219,441) federal employees would not meet the salary-level test was “simply indefensible.” Letter from Bobby Harnage to Tammy McCutchen at 6-7 (June 30, 2003), on http://www.afge.org.

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ing exempt employees from devoting more than 20% of time in a workweek performing non-exempt duties.” And the same counter-intuitive expectation underlay the disclosure that the “proposal recognizes as exempt ‘learned professionals’ certain employees who gain equivalent knowledge and skills through a combination of job experience, military training, attending a technical school or attending community college.”

Initiating a strategy that the Democrats would soon repeat with greater success, on April 9, barely a week after publication of the proposals, New Jersey House Democrat Robert Andrews offered an amendment to the Family Time Flexibility Act in committee that would have undone them. Along party lines, however, the House Education and Workforce Committee rejected it 26 to 21.

Once labor and capital had had enough time to digest the proposed regulations, their negative and positive polarization remained unchanged, but their analysis became somewhat more nuanced. According to a survey by the Bureau of National Affairs, employers’ lawyers and human resources administrators praised the proposals “as a major step that would reduce litigation and make it easier for employers to identify workers as exempt,” while union and plaintiffs’ lawyers maintained that they would thwart the FLSA’s protective purposes. One management attorney, who was candid enough to admit that it was “‘not surprising’” that a revision that was “‘a net positive for employers—probably in a big way—...came out of a Republican administration,’” remarked that the “‘proposal loosens up the exemptions and makes it easier to classify borderline employees as exempt....”

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169“Committee Approves Comp Times, Clearing Way for House Floor Vote,” LRR 172:62, 63 (Apr. 21, 2003). The Democratic minority on the committee wrote in the report: “The most important employment protection in the day-to-day life of millions of workers is the family-friendly overtime provisions of the Fair Labor Standards Act (FLSA). At least 63 million private sector workers are required to be paid time-and-a-half for hours worked in excess of 40 hours a week. Millions of these workers depend on overtime pay to make ends meet. ... There is no single change that Congress could make to our labor laws that would do more to undermine the standard of living for Americans than to weaken or eliminate the FLSA overtime requirement.” Family Time Flexibility Act (H. Rep. No. 108-127, 108th Cong., 1st Sess., May 22, 2003). On Andrews’ earlier introduction of bills expanding the exclusions of white-collar workers, see above ch. 15.

170Linda Micco and Victoria Roberts, “Management, Plaintiffs’ Attorneys React to Overhaul of FLSA Regulations,” LRR 172:152-56, at 152 (May 19, 2003) (quoting Daniel Abrahams). Such openly political assessments were rare. Another example was the statement by a member of the American Corporate Counsel Association that “DOL may have ‘gone too far’ and ‘overreached’ in offering its proposals.” Michael Triplett,
At this early juncture, the AFL-CIO took the position, in the words of its associate general counsel, that: "We would seriously consider challenging the secretary in federal court, since Chao clearly exceeded her authority. We think the proposal is terrible because proposed revisions to the...FLSA...regulations widen the exemptions way beyond the bounds Congress intended [in 1938]."

Much of the union and labor commentary focused on the new salary thresholds. Wasting not a word of criticism on the Clinton administration for having failed during its eight long years in power to increase the lower salary level by even one cent, the AFL-CIO public policy director Chris Owens complained that her organization had suggested $27,000, while Gregory McGillivary, a union-side lawyer, argued that more than $40,000 would have been required to adjust for inflation since 1975. Another plaintiffs' attorney objected to the DOL's having calibrated the lower salary threshold so as "not to disadvantage poorer employers in the South. Jac Cotiguala contended that this statistical methodology suggested that "the rest of the country should be as 'dirt poor' as the South," thus directly contradicting "the FLSA's intent to raise the standard of living for the poorest Americans...." As misguided as the salary setting may have been, he fell into the traditional error of regarding the overtime provision as a device for promoting overtime work and pay rather than for creating leisure and redistributing working hours more evenly.

As for the new $65,000 upper-level salary threshold, Owens argued that there was "'no precedent within the FLSA to exempt people from coverage because they have certain earnings,'" adding that it was "'questionable that this could be done by regulation.'" Since the FLSA's laconicism regarding the white-collar exclusions potentially offers a formally legitimate basis for defining "bona fide" executive, administrative, and professional employees primarily by reference to their high salaries and only secondarily with respect to their duties—after all, many NRA codes imposed no duties test at all—the AFL-CIO's position was weak, although there is no doubt that exclusion based solely on salary level would exceed the DOL's authority since, strictly speaking, the exclusion would then lack any definition of the three categories, which the FLSA empowered the Labor Secretary


172 Micco and Roberts, "Management, Plaintiffs' Attorneys React to Overhaul of FLSA Regulations" at 152-53.

173 See above ch. 7.
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to provide. In any event, the speculation by Alan Kaufman, another plaintiffs’
lawyer, that the $65,000 threshold would “‘cut[ ] off these court cases by relatively
highly paid employees’” because “[y]ou would be hard-pressed to find anyone
making $65,000 and above who doesn’t perform at least one exempt duty,”174
appeared much more plausible. (Indeed, Administrator McCutchen herself agreed
that white-collar workers with annual salaries over $65,000 were “‘likely exempt,
no matter what test you apply.’”175 One labor voice that was willing to venture
onto this new conceptual terrain, Cotiguala, while not entirely opposed to an upper-
level bright-line rule, argued that it should be higher than $65,000: “Skilled hourly
workers and unionized tradesmen in metropolitan areas regularly earn $65,000 per
year and higher, he pointed out. A salary around $150,000 or $200,000 that would
rise with the consumer price index would be more fair....”176 Why only white-
collar entitlements should be subject to means-testing Cotiguala failed to explain,
but at least he had initiated the re-thinking of a dogma. Indeed, although the ad-
mission had no visible impact on the AFL-CIO’s strategy, even Owens began to
“question why white-collar workers are excluded from overtime pay. ‘There’s no

174Micco and Roberts, “Management, Plaintiffs’ Attorneys React to Overhaul of FLSA
Regulations” at 153.

175Taylor, “Employers Banking on Clearer Overtime Rule.” On this point the WHA
agreed with the Economic Policy Institute’s conclusion that the “DOL would have
difficulty identifying any white-collar employee earning $65,000 a year or more who will
not meet at least one of these [duties] tests.” Ross Eisenbrey, “The Department of Labor’s
False Claims About the Overtime Rule” at 4 (July 26, 2003), on http://www.epinet.org.
When the final regulations increased the threshold to $100,000, Eisenbrey remarked: “‘I
can’t think of anyone at that level who would be eligible.’” L. Sixel, “Who Will Lose
Overtime Pay?” HC, Apr. 23, 2004 (Bus. 1).

176Micco and Roberts, “Management, Plaintiffs’ Attorneys React to Overhaul of FLSA
Regulations” at 154. In fact, the number of blue-collar workers earning more than
$100,000 annually is minuscule. In March 2002, only 315,627 private-sector precision
production, craft and repair and operator, fabricator, and laborer employees (or 0.99
percent of 31,854,569 such workers) had total money earnings of $100,000 or more,
including 77,730 in construction trades and extractive occupations; 72,617 mechanics and
repairers; 32,588 production supervisors; 30,163 in transportation occupations; 26,996
machine operators; and 14,111 carpenters. Even these figures are overstated because the
incomes include all sources (and multiple jobs) including interest and thus do not identify
blue-collar workers who earned $100,000 at one job. In contrast, 4,761,964 or 7.3 percent
of 64,916,511 private-sector white-collar employees earned $100,000 or more, ranging
from a low of 0.4 percent in financial records processing to 57.1 percent among physicians
and dentists. US BLS and Bureau of the Census, CPS: March Supplement: Occupation
of Longest Job in 2002, Total Money Earnings of People 15 and Older (Mar. 2002), on
http://ferrett.bls.census.gov.
reason why a white-collar worker should be deprived of overtime pay.... The Labor Department may be taking us in the wrong direction."177

In conformity with the labor movement’s position on overtime since World War II, the AFL-CIO chose to base its campaign against the Bush administration’s expansion of the white-collar exclusions primarily on the presumptive loss of premium overtime pay, not on the loss of the 40-hour week, which it in principle had traded off for time and a half as far back as the 1940s.178 The unions’ position was, for example, faithfully reflected in the letter that more than a hundred Democratic members of the House wrote Labor Secretary Chao just as the deadline for comments on the proposed regulations expired, declaring that: "‘Millions...who have long depended upon overtime work to help make ends meet will face effective pay cuts.’"179 Or as George Miller, the California Democrat who was perhaps the AFL-CIO’s most loyal congressional supporter, put it even more starkly a few days later: "‘Overtime is not a luxury, it is a necessity for many American families.’"180

The self-contradictory character of labor’s position was painfully on display in a letter from 43 senators to Chao on June 30 declaring that the 40-hour week was “vital to balancing work responsibilities and family needs” and adding that requiring employees to “work more hours for less pay” was “not family friendly”—as if payment of time and a half made overtime work family friendlier. Similarly, after correctly stating that time and a half discouraged employers from scheduling overtime by making it more expensive and thus made a difference in preserving the 40-hour week, the senators did an about-face by asserting that: "‘Millions of employees depend on overtime pay to make ends meet. ... Overtime pay often constitutes 20-25 percent of their wages. These workers will face an unfair reduction in their take-home pay if they can no longer receive their overtime pay.’"181 Politicians apparently found it difficult to grasp that overtime pay of this

179Steven Greenhouse, “Democrats Protest Changes to Overtime Rules,” NYT July 1, 2003 (A19:3-5). In fact, “enrichment of workers does not appear to have been a purpose of the authors of the FLSA where the overtime pay requirement was concerned....” William Whittaker, “The Fair Labor Standards Act: Exemption of ‘Executive, Administrative and Professional Employees’ Under Section 13(a)(1)” at 4 n.13 (CRS, RL 31995, July 17, 2003).
181Proposed Rule on Overtime Pay: Hearing Before a Subcommittee of the Committee on Appropriations United States Senate 23-24 (Special Hearing, S. Hrg. 108-233; 108th
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magnitude not only did not promote, but could not be reconciled with preserving the 40-hour week. Also forgotten was the lesson that the AFL had imparted to Congress a century earlier: systematic and generalized overtime ultimately serves to lower base wages.\textsuperscript{182}

Much more interesting and revealing than these abstract and stereotyped shibboleths were the concrete and job-specific personal statements of real workers that the AFL-CIO posted on its website. (And even if the union’s public relations experts helpfully formulated them, they still reflected the union’s campaign policy.) David Taylor, a highly skilled refinery worker in Houston was protected by his collective bargaining agreement, but, if the proposed regulations took effect, he and other oil industry workers might be “reclassified as ‘exempt’” and the nonunion workers could lose their right to time-and-a-half pay after 40 hours of work a week. And in future contract negotiations, union employers...probably would try to take back overtime pay, says Taylor,...who estimates his gross income would fall by about 25 percent without overtime pay.” He then got to the point:

“When my co-workers were hired, they were asked if they had any problem with mandatory overtime, and then they based their futures and standard of living on that overtime,” Taylor says. “The house you buy, whether your wife has to work, whether you can send your kids to Texas A&M or they have to attend the community college—for many of us, it’s all been determined by overtime, and now they want to change the rules in the middle of the game.”\textsuperscript{183}

A policeman in Ohio, who said that he would lose about $2,000 a year in overtime pay if the proposed rules were adopted, understandably resented that he would no longer be able to put that money away for his daughter’s college education. What was not so easy to grasp was his conclusion that: “This comes

\textsuperscript{182}Linder, \textit{The Autocratically Flexible Workplace} 54-55. The subjective side of this phenomenon was inadvertently captured in a 1968 report about Wall Street brokerage houses where both employers and low-wage employees regarded overtime as a benefit: “Every front-office man can tick off the many fringe benefits and bonuses offered semi-skilled clerks, not to mention the unusually heavy overtime.” But with a basic wage of $1.70-$2.00 an hour, many young employees told of friends earning $80-$90 week in midtown Manhattan: “‘They don’t get the overtime,’ one Bronx girl said, ‘but they aren’t carried out in fainting fits either,’” while another added: “‘As soon as the overtime ends, I’m quitting.’” H. Maidenberg, “Clerical Workers Avoid Back-Office Woes,” \textit{NYT}, June 13, 1968 (71:3-6, 74:6-8).

down to protecting the 40-hour workweek." How unions imagined that they were protecting the 40-hour week by promoting or acquiescing in the normalization of regular overtime work remained a mystery.

A related striking logical lapse characterized an op-ed piece by the president of the Hawkeye Labor Council AFL-CIO representing 8,000 workers in 38 locals in Cedar Rapids and eastern Iowa, who concluded from the fact that "millions of workers depend on cash overtime to supplement their incomes" that "without this supplemental income, many workers would not be able to pay basic bills and might be forced to take a second or third job." This argument overlooked that such overtime was the functional equivalent of a second or third job in taking away jobs from the unemployed—precisely the result that the FLSA overtime provision was supposed to prevent.

Emboldened, perhaps, by their success in forcing House Republicans on June 5 to withdraw from a floor vote for lack of votes the Family Time Flexibility Act, which would have imposed employer-dominated compensatory time off in lieu of overtime pay on the private sector, labor and Democrats intensified the propaganda battle as the deadline for submitting comments approached. These twin statutory and regulatory campaigns shared the focus on 'making ends meet' that had become central to all union lobbying on the overtime issue. As AFL-CIO president John Sweeney said of the withdrawal of the comp time bill: "The Republican leadership finally realized that not all of their members would blindly go along with unraveling the basic right to overtime pay, which could literally take billions out of the paychecks of working families."

The outstanding broadside in the propaganda war was the briefing paper of the Economic Policy Institute (a pro-labor research organization), which, on publication in late June, became (and remained throughout the debates) a lightning rod by virtue of having provided an estimate that instead of the 644,000 projected by the DOL, "2.5 million salaried employees and 5.5 million hourly workers will lose their right to overtime pay if the proposed rules are adopted." The EPI's figure

184 "Overtime Pay: What Workers Are Saying."
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of eight million then crystallized as a mantra, which labor’s congressional supporters repeated ad infinitum as a debating point, while opponents such as Senator Judd Gregg, chairman of the Committee on Health, Education, Labor, and Pensions, and the Republicans’ congressional point man on overtime regulation, accused the EPI of “just simply fabricating the number in the sense that the number has no relationship to anything the regulation actually says.”188 Members of Congress rarely mentioned that the figure was both an underestimate—because it was based on an examination of only 78 of 257 white-collar occupations and the “total effect...is undoubtedly much greater”—and an overestimate—because whereas the authors affirmatively stated that “changes in the duties tests will cause an estimated 2.5 million salaried workers to lose their right to overtime pay,” they merely suggested that “an estimated 5.5 million hourly workers could meet the new exemption tests and lose their right to any pay for the overtime hours they work.” They added, however, that: “Employers will not have to convert hourly workers to salaried, but the financial incentive—the option to require that employees work overtime without having to pay for it—combined with competitive pressure will ensure that most will do so.”189

the other end of the spectrum, employers’ Employment Policy Foundation offered, without any evidence whatsoever, the risible assertion that the DOL’s figure of 644,000 workers who might lose coverage was overestimated by 644,000 because “these employees worked in occupations with exempt administrative and professional duties under the current regulations and would meet the duties tests under the proposed regulations.” “3.4 Million Gain Overtime Rights Under Proposed FLSA Rule,” Backgrounder, at 1-5, at 5 n.1 (Sept. 9, 2003). The EPF asserted that: “No one who currently has a right to overtime under the current regulations will lose that right under the proposed rule.” Id. at 1. In a (presumably earlier but undated) critique of the EPI’s critique, the EPF had not criticized the DOL’s figure of 644,000. EPF, “The Facts on Who Gains or Loses Overtime Under the Proposed White Collar Regulations—644,000 or 8 Million” (undated), on http://www.epf.org. 188CR 149:S11204 (Sept. 9, 2003). The next day Gregg labeled it “absolutely bogus.” Id. at 11269 (Sept. 10, 2003).

189Ross Eisenbrey and Jared Bernstein, “Eliminating the Right to Overtime Pay: Department of Labor Proposal Means Lower Pay, Longer Hours for Millions of Workers” (n.p.) (EPI Briefing Paper, June 26, 2003), on www.epinet.org. See also Ross Eisenbrey, “The Truth Behind the Administration’s Numbers on Overtime Pay” (Dec. 2003), on http://www.epinet.org (pointing out that the FLSA’s beneficiaries include “the million [sic] of workers who are not working overtime because the law discourages excessive hours by making employers pay a penalty for every hour beyond 40 they assign in a week”). This vitally important point marked one of the very few occasions on which the EPI focused on the basic purpose of the FLSA overtime provision rather than on the right to premium overtime pay. See, e.g., Ross Eisenbrey, “The Department of Labor’s False Claims About the Overtime Rule” at 1, 4 (July 26, 2003), on http://www.epinet.org.
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It is unnecessary to evaluate the EPI’s empirical critique of the DOL’s estimates because the EPI “used the same methodology”\(^{190}\) as the DOL and the GAO reports, which was earlier shown to be an irreproducible black box of dubious value.\(^{191}\) Unlike its critical-heterodox data analysis,\(^{192}\) however, the EPI’s

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\(^{191}\)See above ch. 1. As one example of the possibility that EPI’s data analysis may not have completely captured reality may be adduced dental hygienists, to whom the EPI devoted considerable attention as an illustration of an occupation many of whose practitioners would lose their entitlement to protection because the proposed regulation eliminated the requirement of graduation from a four-year academic course of specialized instruction. Eisenbrey and Bernstein, “Eliminating the Right to Overtime Pay”; WHD, Op. Ltr. WH-363, Nov. 10, 1975; Op. Ltr. WH-376, Mar. 5, 1976. According to one dental hygienist informant, who was the graduate of a four-year program, however, it would be very surprising if any significant number of dental hygienists worked overtime primarily because dentists do not. Moreover, she observed that there was a trend toward two-year degrees, and although some employers might prefer a dental hygienist with a four-year to one with a two-year degree, they all competed in the same labor market for the same jobs at the same wages/salaries. In short, she discerned no significant difference between them in terms of their professionality or labor-market power. Interview with Linda Ridenour, dental hygienist, University of Iowa Hospitals and Clinics (Aug. 27, 2003). For a related list of occupations, see EPI, “Occupations in Danger of Losing Right to Overtime Pay If Proposed DOL Rule Changes Are Passed” (undated), on http://www.epinet.org.

\(^{192}\)Later, in a letter to Representative Randy Cunningham, Eisenbrey stated that the EPI, like others, had “initially accepted uncritically DOL’s estimate that 1.3 million salaried employees” earning between $8,060 and $22,100 a year would be guaranteed overtime pay under the proposed regulations. Then former WHD investigators and “advocates for low-wage workers pointed out to us the implausibility that so many workers are legitimately exempt under current law....” Although it is unclear how such advocates could plausibly have extrapolated from the few hundred or perhaps thousand workers with whom they happened to come into contact (relatively few of whom were presumably white-collar employees) to be able to know whether the total number of affected workers nationally was one million or a few hundred thousand, Eisenbrey estimated that the total was at most 370,000. Letter from Ross Eisenbrey to Randy “Duke” Cunningham (Oct. 29, 2003), on http://www.epinet.org. The DOL did not, according to Eisenbrey, publish the data documenting the figure of 1.3 million, but when he ran the CPS outgoing rotation data, counting everyone who was salaried, worked overtime, and earned between $8,050 and $22,100, he found 700,000 white-collar and 600,000 blue-collar workers. Email from Ross Eisenbrey (June 22, 2004). In 2004, the DOL did publish data showing that 1.3 million
legal commentary accepted several orthodox tenets of the union movement. In addition to adopting the virtually ubiquitous and canonical argument that the FLSA’s protections “should not be weakened” because “[m]illions of families count on overtime pay to make ends meet,” the EPI based its global critique of the DOL’s coverage-restricting revisions on an argument that can easily be turned against workers:

Congress, which has amended the FLSA many times over the years..., has not authorized any change in the white-collar exemption rules and has not directed the DOL to take overtime protection from millions of workers. ...

Some have falsely claimed that Congress enacted the FLSA 65 years ago and then forgot about it while the world changed. In 1985, almost 50 years after the FLSA was enacted, Congress reviewed the law and extended it to state and local governments, having made a decision that the white-collar pay exemptions were still appropriate. If Congress had determined that the executive, administrative, and professional exemptions or the Labor Department’s implementing regulations were out of date or incompatible with the modern workplace, it could have and, presumably would have changed the exemptions at that time. Congress chose to leave the exemptions in place, unchanged. Twice since 1985, Congress added or amended other FLSA exemptions without changing section 13(a)(1) or directing any change in the regulations that implement these exemptions.

There is no reason to believe, therefore, that Congress has authorized the Department of Labor to dramatically reduce coverage under the FLSA, taking overtime protection away from millions of workers. Yet, as this analysis has shown, that is exactly what the Department of Labor has proposed.

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white-collar workers earned between $155 and $455 a week. *FR* 69:22252 (tab. A-4). Eisenbrey stated that the DOL was able to arrive at “the same number without counting blue collar workers by raising the threshold to $23,660 and by counting all salaried workers under the threshold as actually working OT [overtime], even though the CPS data shows that isn’t the case.” Email from Ross Eisenbrey (June 22, 2004). When asked whether the facts that employers’ organizations such as the National Retail Federation had strenuously complained about raising the salary level to $425 and that court cases involving low-paid assistant managers at fast-food restaurants had made it so easy for employers to classify them legally as bona fide executive employees that the DOL had radically reduced its enforcement in such cases, suggested that total numbers must still be significant, Eisenbrey did not reply. Email from Marc Linder to Ross Eisenbrey (June 7, 2004). For the NRF’s claim that $425 a week “would be a burden for small businesses in rural areas where supervisors and managers may make significantly less than...$22,100,” see “Advocates for Workers, Business Speak Out on Overtime Changes,” *LRR* 172:323-26 (July 7, 2003).

193 Eisenbrey and Bernstein, “Eliminating the Right to Overtime Pay.”
194 Eisenbrey and Bernstein, “Eliminating the Right to Overtime Pay.”
By the same logic, the DOL would be unauthorized to increase overtime coverage dramatically, a position that the EPI and the unions would presumably reject. Moreover, by the time Congress revisited the white-collar exclusions with respect to state and local government workers in 1985 and computer programmers and related workers in 1989-90 and 1996, the DOL had not updated the salary-level tests for 10, 15, and 21 years respectively. Yet only on one occasion (in 1989) did a congressional committee even mildly admonish the DOL for its failure to update the salary thresholds (which Congress itself failed to characterize as an irrational, arbitrary, and capricious administrative omission that should have sufficed to prompt a court to invalidate the regulations). Finally, the DOL has dramatically reduced coverage in the past without triggering any congressional reaction. In 1940 the WHD, as already explained, radically revised its original 1938 regulations by introducing a vastly expanded exclusion of so-called administrative employees (the source of today’s most senseless exclusions and worst abuses) in spite of the fact that while the Division was holding hearings on the subject Congress voted against legislated amendments. The revised regulations provoked no congressional reaction whatsoever. And in 1949 the WHD again reduced coverage by introducing the short test (the precursor of the Bush administration’s exclusion of highly compensated employees) without prior congressional approval or subsequent congressional criticism, let alone repeal. Thus, although the EPI was, given the scores of occasions on which Congress has revisited and amended the FLSA, certainly right in criticizing employers for pretending that Congress had wound up the FLSA clock in 1938 and never repaired it again, Congress had, until the AFL-CIO successfully lobbied it to intervene in 2003-2004, in fact taken a curiously hands-off position with regard to the white-collar exclusions, acquiescing in anything and everything that the DOL had done since 1940.

The EPI’s own recommendations to “clarify” the DOL’s overtime regulations were very sparse and modest. For example, the first of its four brief recommendations would merely have prevented employers from denying overtime pay to employees as alleged “learned professionals” who had not completed at least four years of academic training and a B.A. or equivalent degree in the relevant professional field. The EPI characterized the recommendation as “more in keeping

\[195\]See above ch. 15.
\[196\]See above ch. 13.
\[197\]A similar historical amnesia undergirded *The New York Times* editorial comment that “the Republican-controlled Congress has so far shown no interest in exercising oversight for such basic changes in a law designed to protect the rights of American workers.” “The Quiet Shift in Overtime,” NYT, July 3, 2003 (A24:1-2) (editorial).
with the original intent of Congress." Bracketing the question as to why the EPI was willing to acquiesce in depriving such degreed workers of all protection against overwork, the conclusion lacked a foundation because Congress had expressed no such (or any) original intent. Interestingly, the EPI did not lay claim to heightened consistency with congressional intent concerning its third and most specific and innovative recommendation: "To be exempt, an administrative employee must be a ‘salaried eligible employee who is among the highest paid 10% of employees employed by the employer within 75 miles of the facility at which the employee is employed.’ Executive exemptions would also be limited to the top 10% of salaried employees in an organization." As much as an improvement as the proposal might be vis-à-vis the scope of the existing exclusion of administrative employees, it is unclear why the EPI did not straightforwardly advocate a return to the original joint executive-administrative definition of 1938, which did not permit the exclusion of any non-bosses—especially since the Stein Report placed its imprimatur on it as lawful and consistent with the statutory language.

By the time that the 90-day comment period expired on June 30, 2003, the DOL had received 75,280 comments, which seemed like a huge volume that might well have required WHD staff to work considerable overtime to read and process, but more than 90 percent were "largely identical" form letters orchestrated by the AFL-CIO through its website. And even these circa 70,000 workers' comments, in light of the ease with which commenters could email their comments, hardly constituted a mass mobilization: they represented only 0.9 percent of unionized white-collar workers, fewer than 0.5 percent of all union members, perhaps fewer than one in 400 of all white-collar workers who were already excluded from the FLSA, and one one-thousandth of all white-collar workers. In all, according to the DOL, about 600 comments included substantive analysis of the proposals.

The complaints that employers organizations felt obliged to register despite the

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199EPI, “Economic Policy Institute’s (EPI) Recommendations to Clarify U.S. Department of Labor’s Overtime Rules.”
200See above ch. 13.
203FR 69:22125. The DOL speculated that "some letters and emails appear to be from individuals who clearly perform non-exempt duties and are not covered by the Part 541 exemptions." Id.
advantages that the proposed regulations conferred on firms are worth analyzing.\(^{204}\)

The comments submitted by various big business groups uniformly supported the $65,000 upper-threshold exclusion, although some requested an even more capacious definition. The attitude of the National Association of Manufacturers was amply documented by its insistence that “the purpose of the FLSA [is] to insure a fair day’s pay for a fair day’s work”\(^{205}\)—thus effectively eliminating overtime regulation, which is not about employers’ obligation to provide a fair day’s pay, but a fair day (or week) in terms of working hours. It reinforced this inappropriate use of the shibboleth by adding this inapt, illogical, and undocumented piece of fabricated legislative history: “The white-collar exemptions to the FLSA were based on the belief that exempted workers were set apart from other workers by virtue of the fact that they typically earn substantially more than the minimum wage. Thus, such workers are not in danger of being exploited by being underpaid.”\(^{206}\) Since the overtime provision is not about insuring that workers are not underpaid, but that they are not overworked, the argument was irrelevant, but served big business’s purposes well by diverting attention away from the fact that relatively highly paid white-collar workers may need protection against excessive hours as much as their blue-collar counterparts. Against this background it was hardly surprising that the NAM enthusiastically supported the DOL proposal on the grounds that it would, inter alia, “curtail some of the most egregious ‘upside down’ results of FLSA litigation, in which well-compensated salaried employees reaped windfalls....”\(^{207}\)

The position of the LPA, the HR Policy Association, an organization of senior human resources officers of more than 200 of the country’s largest private-sector employers employing nearly 13 million workers or more than 12 percent of the

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\(^{204}\)Where the source of the comments is not identified as the organization’s website, a copy was furnished by Barbara Somson, Deputy Legislative Director of the UAW, who had a copy made at the DOL, where the comments could be consulted. Somson also compiled a useful series of (undated) extracts summarizing the comments of various high-profile entities: “Clarification’ or Change?”; “Do Overtime Regulations Bring Clarity to Overtime Exemptions?”; “Employers Respond to DOL’s Invitation.” For a digest of employers’ comments responding to DOL’s invitation to specify which occupations should be treated as exempt, see EPI, “Top Employer Groups Name Specific Occupations and Activities to Be Ineligible for Overtime Under New Regulations” (undated), on http://www.epinet.org


\(^{206}\)“NAM’s Comments on Proposed FLSA White-Collar Exemptions” at 4.

\(^{207}\)“NAM’s Comments on Proposed FLSA White-Collar Exemptions” at 5.
private sector workforce,\textsuperscript{208} on the $65,000 ceiling is of great interest. The LPA had, as already discussed,\textsuperscript{209} proposed such a single-dimension exclusion test at congressional hearings in 1996 and 2000, throwing out the figure of $40,000. Then in 2001, responding to an invitation by OMB to identify regulations that should be revised, the LPA proposed the white-collar overtime regulations, its first listed proposed solution being exemption of all employees paid on a salary basis and earning more than a certain amount. OMB then included it on its short list of high-priority regulatory revision issues.\textsuperscript{210}

The LPA took the position in its comment that the DOL had the authority to delimit the white-collar exemption by imposing a compensation-only bright-line test for highly compensated employees not only without even a minimal duties test, but without any requirement that the work be office or non-manual (because some professionals such as dentists and dental hygienists must perform manual work).\textsuperscript{211} Although the LPA was correct that the proposal would simplify the test and create greater clarity (but not the "absolute clarity" it imagined),\textsuperscript{212} the organization's claim that the DOL had the authority to adopt it was clearly incorrect. The statute limits the exclusion to those employed in a bona fide executive, administrative, or professional capacity, whereas the LPA wished to extend it to any and all white-collar workers, including clerical workers. Consequently, Congress would have to amend the statute to permit such a change. If such a congressional debate ever took place, employers might reveal that they would also prefer not to pay time and a half to highly paid blue-collar workers (who have no union to insist on it even in the absence of a statute). Perhaps such a public discussion would expose the irrationality of imposing unlimited and uncompensated overtime work only on white-collar workers, although political forces might make it more likely that the result would be greater impositions on blue-collar workers than lifting them on white-


\textsuperscript{209}See above ch. 15.


\textsuperscript{212}``LPA's Comments on Proposed Rule Defining and Delimiting the Exemptions for Executive, Administrative, Profession, Outside Sales and Computer Employees, 68 Federal Register 15560 (Mar. 31, 2003)'' at 53.
While supporting a duties-test-free, upper-level salary threshold, the U.S. Chamber of Commerce, perhaps because it represented smaller companies than the LPA, opposed the $65,000 level proposed by the DOL. Focusing solely on the monetary side and neglecting the time, freedom, health, and leisure dimensions, the Chamber of Commerce found it unnecessary to explain why “[t]here would seem to be little doubt that a top employee earning upwards of 60, 80 or 100 thousand dollars does not need the protections of” the FLSA. Finding coverage of such workers “absurd,” 60 percent of the members surveyed suggested $50,000 as the cut-off point. Similarly at the lower salary threshold, whereas the LPA found $425 “reasonable,” a plurality of the Chamber’s members thought that $425 was about right, but 39 percent viewed it as too high, as did 70 percent in agriculture and food and a majority in retail and distribution. Indeed, the organization’s director of labor law policy told BNA that “many members have heartburn and concern” about the proposed $425 exemption level.

A coalition of very large and medium-size employers employing more than 300,000 employees and represented by the corporate law firm of Morgan, Lewis & Bockius criticized the DOL’s proposals for failing to “resolve many current ambiguities” and potentially creating others that would “prevent employers from

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213U.S. Chamber of Commerce, “Comments on the Department’s Proposed Rule Regarding FLSA Exemptions for Professional, Administrative, Professional, Outside Sales and Computer Professional Employees” at 12-13 (June 30, 2003), on http://www.uschamber.com/NR/rdonlyres/enuuywuy6hl3kqop6d3nrghqjtjrbg7vxezej6t37irglirbr56sxp x6qlctixd6obxfy6s4oaappyyirbohyc2v4uxf/030630_541comments.pdf. Curiously, just one year earlier, William Kilberg, the former solicitor of labor, testifying on behalf of the Chamber of Commerce in a House FLSA hearing, suggested covering all employees earning less than $25,000 a year, exempting all those earning more than $75,000, and applying duties tests to those earning between $25,000 and $75,000. Flexibility in the Workplace: Does the Fair Labor Standards Act Accommodate Today’s Workers? Hearing Before the Subcommittee on Workforce Protections of the Committee on Education and the Workforce House of Representatives 11 (Serial No. 107-48; 107th Cong., 2d Sess., Mar. 6, 2002).


having confidence that their classification of employees complies” with the FLSA.\textsuperscript{217} The coalition supported the means- but not duties-tested\textsuperscript{218} $65,000 salary threshold on the grounds that: “Employees who receive guaranteed compensation in excess of that paid to 80% of the full-time, salaried non-federal workers in the American workforce are clearly not persons Congress sought to protect from exploitation when it passed the FLSA. ... Eliminating the highest 20% of workers from the duties test would not be contrary to Congressional intent.” The coalition of employers sought to buttress this view by reference to \textit{Brooklyn Savings Bank v. O’Neil}, a 1945 Supreme Court opinion which stated that “Congress intended FLSA to ‘aid the unprotected, unorganized, and lowest paid of the nation’s working population; that is those employees who lacked sufficient bargaining power to secure for themselves a minimum subsistence wage.”\textsuperscript{219}

To be sure, what the Supreme Court really said was that the “legislative debates indicate that the prime purpose of the legislation was to aid the unprotected, unorganized, and lowest paid....”\textsuperscript{220} In other words, protecting this group was, in the Court’s opinion, the chief, but not the sole purpose of the FLSA. The Supreme Court summarized the legislative history as showing an “intent on the part of Congress to protect certain groups of the population from sub-standard wages and excessive hours which endangered the national health and well-being. The statute was a recognition of the fact that due to the unequal bargaining power as between employer and employee, certain segments of the population required federal compulsory legislation to prevent private contracts on their part which endangered national health and efficiency....”\textsuperscript{221} The Court’s focus on protection against “excessive hours” indicates that time-and-a-half pay was merely a means and not an end in itself; therefore, if workers receiving non-sub-standard wages needed to be

\begin{itemize}
    \item \textsuperscript{217}Morgan, Lewis & Bockius, “Comments Regarding Proposed Rule Defining and Delimiting Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees” at 1 (June 30, 2003).
    \item \textsuperscript{218}One of the reasons the coalition adduced for abandoning the duties test was that: “Many highly compensated workers in today’s economy who have claimed that they do not meet the executive, administrative or professional duties test clearly perform jobs that...are subject to peaks and valleys of demand and effort that may span multiple work-weeks or even seasons of the year...” Morgan, Lewis & Bockius, “Comments Regarding Proposed Rule Defining and Delimiting Exemptions” at 13. This rather opaque language apparently embodied a request for ersatz-hours-averaging.
    \item \textsuperscript{219}Morgan, Lewis & Bockius, “Comments Regarding Proposed Rule Defining and Delimiting Exemptions” at 13 (citing \textit{Brooklyn Savings Bank v. O’Neil}, 324 US 697, 707 n.18 (1945)).
    \item \textsuperscript{220}\textit{Brooklyn Savings Bank v. O’Neil}, 324 US 697, 707 n.18 (Apr. 9, 1945).
    \item \textsuperscript{221}\textit{Brooklyn Savings Bank v. O’Neil}, 324 US at 706-707.
\end{itemize}
protected against "excessive hours which endangered the national health and well-being," they were every bit as much covered as the low-paid workers. The employers' coalition would, presumably, have objected that, on the contrary, highly paid white-collar workers did not need government protection because they did not and do not suffer from "unequal bargaining power." The problem with this counter-argument is that by the same logic employers could also maintain Congress did not mean to cover highly-paid blue-collar workers organized in strong unions. Yet, as much as employers might like to launch such a campaign, they know that it is much too late to achieve that exclusion by judicial let alone administrative interpretation. Moreover, as long as the highly paid white-collar workers are not expressly excluded from overtime regulation, it would contravene public policy to permit some of them to acquiesce in "excessive hours" in what they personally believe is an appropriate trade-off for the prospects of higher salary or promotions. What the Supreme Court held concerning damages in the very case that the coalition cited applies with equal force to maximum hours: "Prohibition of waiver of claims for liquidated damages accords with the Congressional policy of uniformity in the application of the provisions of the Act to all employers subject thereto, unless expressly exempted by the provisions of the Act. An employer is not to be allowed to gain a competitive advantage by reason of the fact that his employees are more willing to waive claims for liquidated damages than are those of his competitor."222

Yet another big business group welcomed the $65,000 test without "any duties requirements whatsoever...." The Fair Labor Standards Act Reform Coalition "is a group of leading national employers and trade associations who have been working together for sensible reform of FLSA exemption regs for almost ten years" and "represents employers with significant white-collar workforces in...aerospace, automotive, defense, engineering, insurance, logistics, retail and social services."223 In comments written by the ubiquitous former Solicitor of Labor William Kilberg, this group of employers went even further than the others in proposing that not only should the threshold requirement of office or nonmanual work be dropped, but that the "exemption should simply exclude manual laborers who perform routine manual, mechanical or physical work."224

224"Comments of the Fair Labor Standards Act Reform Coalition Regarding the Department of Labor's Proposed Rule Defining and Delimiting the Exemptions" at 34.
Unsurprisingly, retail employers, while supporting the introduction of an upper-level duties-free salary cut-off, counter-proposed much lower salaries at which employees could lawfully be forced to work unlimited hours without additional pay. The National Retail Federation (whose members represented an industry of 1.4 million retail establishments employing 23 million people)\(^\text{225}\) claimed that $65,000 was “prohibitively high for most retailers,” whereas $50,000 “would be a fair indicator that the individual is very well compensated.... It is far more realistic.”\(^\text{226}\) What the NRF meant by “prohibitively high” is unclear since the law would not have required any employer to pay any employee $65,000; after all, firms could simply hire an additional employee so that the formerly overworked employee would no longer work more than 40 hours.\(^\text{227}\) Moreover, the revisions that the DOL incorporated into the proposed regulations permitting supervisors in retail establishments to spend most of their time performing non-exempt work without depriving their employers of an exemption\(^\text{228}\)—revisions that the NRF wanted expanded so that “all time spent by an executive, administrative or professional employee multi-tasking” would be deemed “time spent on exempt activities as long as the primary duty is or can be performed simultaneously”\(^\text{229}\)—made it

\(^{225}\)“Comments of the National Retail Federation on the Proposed Regulations Under 29 CFR Part 541” at 1 (June 30, 2003).

\(^{226}\)“Comments of the National Retail Federation on the Proposed Regulations Under 29 CFR Part 541” at 15. Inexplicably, in advocating the deletion of duties tests, the NRF stated that employees paid at least $75,000 a year “are plainly not in need of the FLSA’s overtime pay protections.” *Id.* at 16.

\(^{227}\)Or they could put the affected workers on an hourly wage. That the NRF contemplated such a possibility at the lower salary threshold was clear from its threat that an increase in the salary level to $425 “may...cause some employees who wish to be exempt to lose that status.” “Comments of the National Retail Federation on the Proposed Regulations Under 29 CFR Part 541” at 2.

\(^{228}\)FR 68:15586-87 (29 CFR § 541.107).

\(^{229}\)“Comments of the National Retail Federation on the Proposed Regulations Under 29 CFR Part 541” at 24-25. The NRF was hardly alone. The FLSA Reform Coalition “[s]trongly supports this common sense application of the primary duty rule, which recognizes the realities of the modern workforce”—namely, that assistant managers commonly performed “non-exempt customer service work while simultaneously directing the work of others and overseeing the operation of the business.” Then in a totally unmediated fashion the FLSA Reform Coalition tried to justify the extraction of unlimited hours from low-level supervisors with the use of an irrelevant adverb: “Notably, these retail managers and assistant managers are paid at higher levels, reflecting their authority and increased responsibilities.” The authority- and responsibility-reflecting compensation of the typical assistant retail store manager then turned out to be a princely median salary of $33,266
unlikely that any supervisory employees in retail stores with salaries anywhere near $65,000 would not already have been excluded from overtime regulation by virtue of the duties tests.

The NRF’s proposal regarding the exclusion of highly paid workers scarcely did justice to the overall extremist position that it staked out, which was best encapsulated in its depiction of the ruthless work world that it insisted was the DOL’s obligation to promote through its FLSA regulations: “These comments...seek to underscore the fundamental reality that exempt employees in today’s work environment do ‘whatever it takes to get their jobs done.’ The final regulations should reflect this fact and eliminate any suggestion that courts should second guess decisions of managers and other exempt employees regarding the manner in which they allocate their time to accomplish their primary goals.” And then in a subjectivistic flourish totally at odds with compulsory labor standards the NRF added: “Time should not be viewed as non-exempt when an exempt employee chooses to devote it to duties that the employee views as very important to accomplish the job’s goals.”

By far the hardest line was taken by the National Association of Convenience Stores, which adopted the position that the highly-compensated employee exemption should be fixed at $35,000-$36,000 by the “simple rationale” that it bore the same ratio to the lower threshold as suggested by the Kantor Report. If, however, the DOL deemed this amount “too low” from a subjective standpoint,” the NACS proposed identifying a salary “more in line with actual compensation practices,” mentioning the possibility of using twice the lower threshold or $44,200, which would not be “so out-of-reach as is the proposed figure for retailers....”

The NACS’s hostility to any regulation that would have made it unlawful for

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uncompensated work...”

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its members to impose unlimited unpaid overtime work on as many employees as possible was also reflected in its opposition to the proposed $425 lower salary threshold. Apparently chagrined that its run of good fortune was about to expire, the NACS sought to reduce the new salary threshold to as close as possible to the subminimum-wage level that 28 years of DOL inaction had brought about. To this end it suggested that the DOL “remain faithful to the wise principles of the Kantor Report” by using the lowest 10 (rather than 20) percent of salaried employees as the protected group and applying that percentage “to the salaries in the lowest geographical or industry sector (whichever of the two data sets is lower), rather than to composite figures which represent a combination of high-wage and low-wage geographical and/or industry sectors.”233

Convenience store owners revealed their sensitivity to criticisms of the long hours and low salaries to which they subject their white-collar workers in the embarrassingly specious arguments that the NACS advanced to dismiss them. Of one of the factors used by the DOL to determine an employee’s “primary duty”—namely, “the relationship between his salary and the wages paid other employees for the kind of nonexempt work performed by the supervisor”234—the NACS contended:

Over the years, some claimants have relied on this test to reduce a retail manager’s salary to an hourly rate on some basis which is then compared unfavorably to the hourly rates of nonexempt employees. Consider this illustration: The manager of a convenience store is paid a salary of $500 per week and is scheduled to work 55 hours a week. Assume that the typical hourly rate of a nonexempt store employee is $8.75. When the manager’s exemption status is called into question, the argument is made that, based upon his scheduled hours, the hourly equivalent of his salary is ($500/55 hrs.) = $9.09, not much more (the argument runs) than the typical clerk’s rate.

NACS contends that this sort of comparison is inappropriate. The factor itself calls for comparing ‘salary’ and ‘wages’—not rates. In addition, as the Labor Department has now recognized elsewhere in its Supplementary Information, employers are not required to (and usually do not) track the hours of their exempt employees hour-by-hour or retain records of the hours worked by employees for whom a white-collar exemption is claimed; hourly-rate-based comparisons are therefore both artificial and inherently speculative.235

Just in case any convenience store owner, despite the overall relaxation in exemption requirements, remained inconvenienced by the application of the overtime provision, the NACS took the DOL up on its offer to comment favorably on

233NACS, “Overtime Exemption Comments to the Department of Labor.”
23429 CFR § 541.103 (2003); proposed § 541.700 at FR 68:15595.
235NACS, “Overtime Exemption Comments to the Department of Labor.”
the possible dilution of the requirement that a bona fide executive direct the work of at least two employees, supporting instead the almost infinitely malleable wording: "the customary or regular leadership, alone or in combination with others, of two or more other employees." The NACS was delighted to report that "such a change would also take into account modern management principles which have been developed since the exemption’s supervision component was first promulgated almost 65 years ago. Current-day principles of ‘team’ management and ‘matrix’ management...can lead to perplexing questions about exactly who is ‘the’ supervisor in one setting or another, when the fact is that there are two or more individuals who are expected to guide subordinate employees at different times or in different capacities." With convenience stores employing on average a total of 10.9 workers during a 24-hour, three-shift operation, the NACS’s recommendation was either irrelevant or a stratagem for transmogrifying co-workers into so-called leaders who can be led to longer hours without any constraints.

The Newspaper Association of America, the successor to the American Newspaper Publishers Association, extended its record to 70 years of demanding reporters’ exclusion from hours regulation. It expressly endorsed the $65,000 threshold on the grounds that the mere fact of its being almost three times the $22,100 lower threshold “ensures that the availability of this exemption will not negatively impact employees whose earnings were at a level that Congress intended to protect by the FLSA.” Other than by the circular argument that “payment at that level is highly indicative of exempt status” the NAA did not even purport to explain why employers should be free of all restraints to require such work-

237 NACS, “Overtime Exemption Comments to the Department of Labor.”
239 See above chs. 7, 9, 11-13. The Newspaper Guild estimated that at least 70 percent of all media workers would lose overtime protection compared with 30 percent under current regulations. “Journalists’ Status Under Proposal on Overtime Pay Creates Alarm,” LRR 172:422-23 (Aug. 4, 2003). The arguments that publishers devised to justify their insistence that reporters were “professionals” were opportunistically inconsistent. In 2003, the NAA claimed that “‘rewrite men’ and ‘leg men’...no longer exist. Instead, they have been replaced by journalism professionals who are part of a well-educated and highly creative workforce.” “NAA’s Comments on the Proposed Regulatory Changes to the White Exemptions of the Fair Labor Standards Act” at 2 (June 30, 2003). Yet in 1940 the ANPA asserted that all reporters were professionals even if they lacked a degree from a journalism school. See above ch. 12.
ers to work long hours, though it did propose that a lower threshold be set for non-urban centers.  

In the welter of employers' proposals the NAA arguably submitted the most brazen one when, "for clarity purposes," it suggested that the DOL consider revising the title from "Executive" to "Supervisor," to more clearly reflect the actual job duties of this exemption. NAA recommends that the Department consider defining executive as supervisory. The term executive does not provide any appropriate guidance as to the type of work performed by the worker. Given that working supervisors are often within the executive exemption, although they may not be treated as, or thought of as executives, this labeling of the exemption will continue to confuse the applicability of the exemption to a wide range of jobs.  

The newspaper publishers' illogic was breathtaking. First, the authors—including the chair of the Labor and Employment Law Practice Group of Seyfarth Shaw, one of the largest employer-side labor law firms in the United States—neglected to advise the Labor Secretary as to the source of her power to parlay her congressionally given authority to “define[ ] and delimit[ ]” the congressionally specified term “executive” into the authority to delete that term altogether from the statute and to replace it with one that happened to suit publishers better. Second, this innovative contribution to administrative law gained in audacity in light of the fact that “supervisory,” which Roosevelt’s drafters had included together with “executive” in the original bill, was deleted by Senator Black’s committee after the chief of the Children’s Bureau had specifically suggested that it be removed on the grounds that “[t]hese exclusions should be very carefully limited to bona fide executives.” Third, the NAA’s revisionism both contradicted and was driven by its open admission that the world at large did not regard working supervisors as executives. Fourth, in a stroke of opportunistic nominalism, the publishers, instead of questioning the appropriateness of classifying non-executives as executives, found it much simpler and more profitable to switch names. To be sure, the NAA did not devise this approach out of the blue: the WHD and DOL had made it de facto possible over the decades by diluting the statutory term “executive” until it

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241 "NAA’s Comments on the Proposed Regulatory Changes to the White Exemptions of the Fair Labor Standards Act” at 3.
243 See above ch. 9.
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encompassed low-level supervisory non-executives. Thus the publishers were in effect proposing that DOL admit that it had crafted an anti-procrustean executive bed that fit smaller sizes and instead rename it a supervisory bed that would also fit larger sizes.

Building on its success 63 years earlier in having persuaded Harold Stein to classify administrative employees separately and exclude them broadly, the NAM sought to expand the exclusion. It did not approve of the proposal to delete the criterion of exercising discretion and independent judgment and to replace it with holding "a position of responsibility," which, in turn, was defined by reference to performing work either of "substantial importance" or requiring a "high level of skill or training." The NAM feared that the DOL was merely substituting one ambiguous, vague, and subjective term for another, but whereas the existing one at least had the virtue of 65 years of application giving it meaning, the new one would trigger "a flood of litigation." Ever desirous of devising yet more sub-groups of white-collar workers whose hours its members would be free to extend indefinitely and costlessly to themselves, the NAM suggested as a new sub-category of excluded administrative employee one "who has authority to represent and legally bind the employer without asking for permission...." The FLSA Reform Coalition was even more brazenly covetous of white-collar workers' time: it was willing to accept the DOL's indefinitely expansible "position of responsibility" in exchange for dropping the requirement of performing work "directly related to management policies or general business operations." The drastic shrinkage of coverage that would result if the performance of responsible office or nonmanual work alone sufficed to exclude workers from overtime regulation is all too easy to imagine.

244See above ch. 14-15.
246FR 68:15587 (proposed § 541.202).
247"NAM's Comments on Proposed FLSA White-Collar Exemptions" at 17-18.
248"Comments of the Fair Labor Standards Act Reform Coalition Regarding the Department of Labor's Proposed Rule Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees" at 10-12 (quoting 29 CFR § 541.2(a)(1)). This provision is the source of the so-called administrative/production dichotomy.
249Under this expansive classification neither the NAM nor the Chamber of Commerce would have to have been concerned about the executive requirement of the power to hire or fire (because this power was delegated to the human resources department) or supervising two or more employees (because senior staff did not supervise anyone). "NAM's Comments on Proposed FLSA White-Collar Exemptions" at 15; U.S. Chamber of Commerce, "Comments on the Department's Proposed Rule Regarding FLSA Exemptions for
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On June 30, the end of the 90-day comment period, the labor movement held a rally and press conference on the Labor Department’s steps, at which Richard Trumka, the secretary-treasurer of the AFL-CIO, encapsulated the inconsistent and even incoherent\textsuperscript{250} approach that unions were taking in their campaign in these words:

"The 40-hour work isn’t just a perk," Trumka said. Instead, he asserted, it is the “legacy of some of the greatest uprisings of workers in our history.” The Bush administration, he said, “wants to turn back the clock to the 1920s and 1930s” by reducing the number of workers entitled to overtime.\textsuperscript{251}

If, as one of labor’s leading lawyers observed in 1947, “the long struggle for the 8-hour day was not a struggle for 8 hours of work. It was a struggle for 16 hours away from work,”\textsuperscript{252} it was a fortiori the case that workers in those uprisings had not risked their lives to gain the right or privilege to work 50 or 60 hours a week at time and a half. At the same rally, a bakery manager with a salary of $40,000 a year who earned an additional $3,500 in overtime pay said that “he feared he would lose the overtime and simply be asked to work longer hours, which would, in turn, displace co-workers”\textsuperscript{253}—overlooking that his paid overtime work had exactly the same effect.

\textsuperscript{250}This incoherence was further illustrated by the position of the United Food and Commercial Workers, which stressed that at least 50,000 members in just four job classifications would be reclassified as exempt and lose an average of $2,000 annually in overtime pay for a total of 50 million dollars. After characterizing this loss as a “massive wealth transfer from workers to employers,” the UFCW did an about-face, asserting that the revised regulations “would boost unemployment as employers ‘choose to increase hours for exempt workers rather than hire more workers.’” “Advocates for Workers, Business Speak Out on Overtime Changes,” \textit{LRR} 172:323-26 at 324 (July 7, 2003). The union seemed untroubled by the self-contradiction inherent in supporting paid overtime, which also increased unemployment.

\textsuperscript{251}“Advocates for Workers, Business Speak Out on Overtime Changes” at 323-24.


Once the deadline for submitting comments had passed, labor’s congressional supporters undertook concerted efforts to block implementation of the proposed regulations. On July 8, Representative Peter King, a New York Republican, introduced the Overtime Compensation Protection Act of 2003, sponsored by seven other House members including three other Republicans, which would have amended § 13 to prohibit the Labor Secretary from “promulgat[ing] any regulation that has the effect of exempting from the requirements of section 7 any employee who is not otherwise exempted pursuant to regulations promulgated under this section that are in effect on the date of enactment of this subsection.” The bill then offered the Secretary positive reinforcement in the form of a reminder that nothing in the bill prohibited her from “reducing the number of employees who are exempt from the requirements of section 7 by regulations promulgated under this section.” The bill then offered the Secretary positive reinforcement in the form of a reminder that nothing in the bill prohibited her from “reducing the number of employees who are exempt from the requirements of section 7 by regulations promulgated under this section.”

Two days after King had introduced his bill, Wisconsin Democrat David Obey and California Democrat George Miller offered an amendment to the Departments of Labor, Health and Human Services, and Education, and Related Agencies Appropriations Act, 2004, under which: “None of the funds provided under this Act shall be used to promulgate or implement any regulation that exempts from the requirements of section 7 of the Fair Labor Standards Act...any employee who is not otherwise exempted pursuant to regulations under section 13 of such Act...that were in effect as of July 11, 2003.”

tive use of the EPI’s magic number, especially as linked to labor’s other propagandistic set-piece: “as many as eight million workers...who count on overtime as an essential part of their income could be denied the money.”

Or as Congressman Miller put it: “Overtime is not a luxury. [T]ragically millions of our American families cannot survive economically on working only 40 hours a week.”

Refreshingly, Republican Representative Ralph Regula in his sixteenth term presented a candid view of what both the existing and revised regulations were about that the administration and the Democrats had been and continued to be at pains to avoid. He called them “fair” because “the white-collar workers understand that that is part of the condition of the job, that they...have to work some extra time and not necessarily get time and a half.”

That the amendment failed by the close vote of 210 to 213 was almost certainly not a function of the misinformation that some Democrats’ conveyed—such as that the new rule “paves the way for mandatory overtime,” or that it would cause 79 percent of workers to lose their right to overtime pay, or that the Bush administration was trying to cut overtime pay by “bureaucratic administrative rule instead of coming to Congress” in order to avoid public debate.

Rather, the vote, at a time when the DOL had just begun sifting through the comments on proposed regulations that would not become final for many months—McCutchen stated on June 30 that the final rule would not be published until the first quarter of 2004—suggested the potential strength of labor’s congressional initiative. Fourteen House Republicans, largely from New York and

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260CR 149:H6568.
261CR 149:H6579.
262CR 149:H6570 (Rep. Rosa DeLauro, Dem. CT). In fact, the FLSA has always helped reinforce mandatory overtime.
264CR 149:H6569 (Rep. George Miller). Perhaps Miller’s ignorance could be explained on the basis that in his 30 years in Congress the white-collar regulations had (with the exception of the minor matter of computer professionals in the 1990s) never been revised. In any event, the WHA carried out the major revisions of 1940 and 1949 without public congressional debate; nor did congressional Democrats ever do more than gently admonish the DOL for its failure to update the salary thresholds after 1975. See above ch. 15.
New Jersey, had voted with Democrats despite the fact that the House leadership and the Bush administration had made the vote a loyalty test and the president had threatened to veto the spending bill if the amendment had passed. Republican Representative King, who had introduced his own independent bill to achieve the same result, argued that his party was making a political mistake in pursuing the new regulations because it would be "'just handing an issue to the Democrats.'"²⁶⁶

Labor signaled an intensification of its efforts when Iowa’s Democratic Senator Tom Harkin announced on July 24 that he had enough votes to pass an amendment to the Labor Department appropriations bill to block the DOL from issuing the final regulations. Moreover, if that tactic failed, Democrats would consider using the Congressional Review Act, which permits Congress within a limited period of time to rescind an agency final rule after it becomes effective.²⁶⁷

Throughout the summer, labor’s congressional allies successfully interjected the debate over the white-collar regulations into whatever proceedings lent themselves to further subversion of the DOL’s regulatory initiative. At the Senate confirmation hearings on July 29 for Howard Radzely as Labor Solicitor, questioning revealed the Bush administration’s mind-set when, in the face of monolithic Supreme Court rulings holding that the FLSA’s exemptions were to be interpreted narrowly in order to maximize coverage under a labor-protective regime, Radzely testified that, legally, based on the authority that Congress had conferred, the Labor Secretary “could define” the white-collar terms “broadly.”²⁶⁸

Two days later, the Subcommittee on Departments of Labor, Health and Human Services, and Education, and Related Agencies of the Senate Appropriations Committee held a quickie 45-minute hearing on the proposed regulations. The subcommittee’s chair, Pennsylvania’s Republican Senator Arlen Specter, was taking a high-profile position in opposing the revisions in the run-up to his re-

²⁶⁶Hulse, "House Defeats Democrats’ Bid to Thwart New Overtime Rules."
²⁶⁸Nomination of Howard M. Radzely: Hearing Before the Committee on Health, Education, Labor, and Pensions United States Senate 26 (S. Hrg. 108-328, 108th Cong., 1st Sess., July 29, 2003). At a Senate committee hearing two days later, Christine Owens, the director of the AFL-CIO’s Public Policy Department, stated that Radzely had testified that it would be consistent with the Labor Secretary’s authority to define the overtime exemptions broadly to exempt as many as 90 percent of all workers above the $22,100 salary threshold. Proposed Rule on Overtime Pay: Hearing Before a Subcommittee of the Committee on Appropriations United States Senate: Special Hearing 8 (S. Hrg. 108-233; 108th Cong., 1st Sess., July 31, 2003). Owens’ claim was, according to the published hearing transcript, incorrect: Senators Harkin and Kennedy asked him that question, but he never answered it.
election campaign in 2004. Its ranking minority member, Harkin, who was spearheading the Senate campaign against the Bush administration’s proposals, referred in his opening remarks to Radzely’s aforementioned judgment; but instead of criticizing it by reference to Supreme Court decisions, Harkin asserted that it could be refuted merely by looking at “history and what Congress intended.” By the latter he meant that Congress had designed time-and-a-half compensation “to increase jobs, and it included narrow exceptions”; the purpose of the hearing was to determine whether the proposed regulations reflected the congressional intent that “overtime protection and the 40-hour work week applies to all American workers with very few narrow exceptions.” With 20 to 30 million white-collar workers alone excluded from that protection under the existing regulations, Harkin presumably conceived of “narrow” broadly, especially since neither he in his almost three decades in Congress nor any of his colleagues had ever before identified these exclusions as problematic.

If the nature of the choreography of the hearing did not preclude developing an answer to Harkin’s question, the time constraint did. After WHA McCutchen astonishingly assured the subcommittee that “[w]e have no intent to expand the exemptions,” Lawrence Lorber, a Wall Street lawyer representing the U.S. Chamber of Commerce, tried to offer support in the Act’s legislative history for the very expansion that McCutchen had just forsworn. He testified that Congress “never intended that the boundaries of these ‘white collar’ exemptions would remain static. Indeed, the Congress in 1938 recognized that the Secretary of Labor would review the reach of the exemptions periodically and, in order to remain a vital part of our employment system, the regulations would need to be adjusted to reflect the dynamic changes in the workplace....” Not only is every empirical claim in these two sentences about congressional intent completely fabricated and bereft of even the slightest shred of textual authority, but, amusingly, in attribut-
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ing such prescience to Congress, Lorber opportunistically contradicted employers’ accusation, dating back more than 60 years, that Congress had been so shortsighted that it saddled business and the country with an overtime provision that became obsolete and dysfunctional once the depression was overcome and unemployment was no longer the overtowering socio-economic concern.275

More substantive was the testimony of the AFL-CIO’s director of public policy, Christine Owens, whose point of departure was the lack of any justification for any regulatory expansion of the number of workers excluded from overtime protections. On the contrary, given the FLSA’s unchanged purposes, the Supreme Court’s rulings that exemptions be narrowly interpreted, and recent increases in working hours and job losses, “changes in the overtime regulations must enhance rather than reduce overtime protections and extend them to more workers not fewer.”276 While apparently enunciating the principle that the DOL was not authorized ever to issue a regulation that restricted coverage beneath whatever level any previous regulation happened to have established, Owens implied that the Labor Secretary was empowered to expand coverage. At the same time, however, Owens admitted that “a declining percentage of American workers are protected by the FLSA, as more and more of them fall into the statutory exemptions for ‘executive,’ ‘administrative,’ and ‘professional’ employees.”277 Her acknowledgment that these exclusions were “statutory” suggested that the DOL was powerless to do anything to stem this trend. But the AFL-CIO did not propose any pertinent legislative amendments, and the only regulatory revision that Owens mentioned—labeling it “[t]he single most important step” that the DOL could take—was the very modest one of “adequately adjust[ing] the minimum salary threshold,” in conformity with its traditional procedure, to $31,720 for the long test.278

time to time” (relating to the DOL’s authority to define and delimit the statutory terms) in § 13(a)(1) until 1961. Lorber’s unreliability was also on display in his assertion that former Labor Secretary Robert Reich had noted in a book that “beginning in 1870, the Census Bureau began categorizing jobs into executive or managerial functions, sales and administrative support functions and basic production or laborer functions.” Proposed Rule on Overtime Pay at 13. In fact, on the very page that Lorber cited Reich stated that the Census Bureau did not devise those categories until 1943. Robert Reich, The Work of Nations: Preparing Ourselves for 21st-Century Capitalism 173 (1991).

275Linder, Autocratically Flexible Workplace at 292-301.

276Proposed Rule on Overtime Pay at 7.

277Proposed Rule on Overtime Pay at 9.

278Proposed Rule on Overtime Pay at 10. In its written comments on the proposed regulations the AFL-CIO stated that they “would eviscerate an efficient and effective test’ and that the department ‘should withdraw these proposed revisions altogether.’” Michael Triplett, “Proposed Modifications to Salary Basis Test Gather Broad Critiques in

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The day before Harkin offered his aforementioned amendment, the Senate discussed the issue. On September 4, Harkin, who purported to have done his own "research" on the history of the FLSA, set the tone by misinforming his colleagues that between 1940 and 1981 the regulations had been revised a dozen times, but: "In not one of these instances was the framework narrowed to exclude more people from overtime protections." In fact, the revisions of 1940 and 1949 did expand the exclusionary framework, while the Reagan administration's suspension of the Carter administration's last-minute salary-level increases effectively reduced coverage for a quarter-century. This action in 1981 underscored how Harkin's ignorance (or intentional misrepresentation) of history was deployed for blatantly partisan purposes: Harkin pointed out that the Bush administration's


279 For example, he asserted: "As I started doing more research into what happened with the FLSA, I came across an interesting item," which turned out to be that the Senate had passed a 30-hour bill in 1937, which was compromised into a 40-hour bill after business "ganged up." CR 149:S11067 (Sept. 4, 2003). The Senate did pass Black's 30-hour bill in 1933, which was of an entirely different character than the FLSA. See above ch. 6. "Senatorial courtesy" takes on a new meaning if colleagues do not burst into guffaws when, for example, a senator who just a few weeks before had revealed his fundamental ignorance of the regulations, suddenly boasts of doing his own research. In 2004, Harkin again claimed that "I...have done research. Every time I have been able to find in the past when we made changes to the Fair Labor Standards Act, Congress always had hearings, consulted with business, consulted with labor, and there was a process by which the public believed they had an input. This is not so this time." CR 150:S4745 (May 3, 2004). This claim made no sense at all: if Harkin meant statutory changes, Congress had not debated changes in the general exclusion of white-collar workers since 1940; if he meant regulatory changes, Congress had never coordinated its hearings with those of the WHD or DOL. Harkin repeated this assertion at a hearing the next day, adding that it was "to my information,...the first time that any administration" had issued "a final rule without the Congress having had any real input whatsoever." Final Rule on Overtime Pay: Hearing Before a Subcommittee of the Committee on Appropriations United States Senate: Special Hearing 2 (108th Cong., 2d Sess., May 4, 2004). Later in the hearing Harkin compounded his misinformation by expressing his conviction that "this should have gone through the normal legislative process" rather than a regulatory process "without really having a legislative hand in it from those of us who represent our constituents, both employees and employers. Again, it is just the wrong way to make these kinds of changes." Id. at 52. Harkin was, inadvertently, correct in arguing that the legislature should have either given the DOL greater guidance or deprived it of some of its discretionary powers, but in fact, apart from the isolated case of computer experts, Congress had never done so. 280 CR 149:S11106 (Sept. 4, 2003). 281 See above chs. 12-15.
The proposed increase in the salary level to $22,100 was inadequate without admitting (if he was even aware of it) that a Congress controlled by Democrats (and the Clinton administration) bore responsibility for not having increased it at all in 28 years. The amendment that Harkin offered to the appropriations bill on September 5 was identical to the Obey-Miller amendment in the House. Ironically, that very same day the Senate agreed to a bipartisan resolution making it the sense of the Senate that “reducing the conflict between work and family life should be a national priority.”

On September 9, the Senate debated the Harkin amendment to the Labor Department appropriations bill. The one startling exception to the thoroughly pedestrian choreography—and without any doubt the most astonishing commentary by any participant in the course of the entire 2003-2004 debates—came from Senator Joseph Biden, a Delaware Democrat hardly known as a knee-jerk AFL-CIO supporter or even as professing a strong interest in labor issues. (Ironically, previously his chief concern with white-collar workers was legislation giving judges “the ability to impose meaningful sentences for white collar crooks.”) In this instance, however, the provenance is secondary if not irrelevant because no one in Congress or the DOL for that matter had publicly taken such a radical position on white-collar exclusions during the entire two-thirds of a century since the FLSA bill first surfaced in 1937 (even though Biden himself analyzed the question from the perspective of paying for overtime work rather than reducing working hours).

Biden’s floor speech, which was all the more remarkable when viewed in the context of his colleagues’ excruciatingly repetitive, tedious, and cliche-studded oratory, deserves to be read in extenso.

Biden began by asking the Republicans’ point man on overtime, New Hampshire Senator Judd Gregg, a “rhetorical question”: “[S]ome of these things sort of

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283 The same partisan distortion was on display the following day when Rhode Island Democrat Jack Reed, while noting that the existing salary level was “artificially low,” failed to admit that Congress had done absolutely nothing in 28 years to remedy it, and instead faulted the Bush administration for leaving the $22,100 unindexed so that it “could be locked in concrete for years.” CR 149:S11148 (Sept. 5, 2003). An even lower note was struck by Senator Hillary Clinton, who praised her husband’s administration for having held 27 hearings on an ergonomics standard, while the Bush administration failed to hold any on the white-collar regulations. CR 149:S11267 (Sept. 10, 2003).
don’t pass the smell test. ... Does anybody in here believe this administration is changing work rules in order to be able to pay more people overtime? ... Does anybody believe the Secretary of Labor, this President of the United States, backed by the Chamber of Commerce and many other decent, honorable business people as their core supporters, is trying to change the law to give more people access to overtime?"287 Biden then proceeded to deliver his main speech:

I come from a corporate State. I come from a State where business is a great citizen and they are very active. I have never had one small businessman, I have never had one large businessman, I have never had one come and say: You know what the problem is here, Biden? You Democrats are denying people overtime. We want to expand that contract made in the thirties between labor and management to make sure our workers who are not getting it get overtime.

We made a deal as a nation. We said: Look, if you work more than 40 hours—those of you who do manual labor—you ought to be compensated time and a half for doing it. ... We said we are going to give people overtime if in fact they...don’t have control over their destiny. They do not get to determine the work rules. They don’t get to decide how much longer they will keep the lathes going. They don’t decide whether or not they work on Saturday or Sunday. It is about control. ... But for those folks who have a say, and those folks who have some control—theoretically white-collar workers, people who get a room with a view, people who have some say on whether or not the boss starts the shift or opens the door at 8 in the morning or 4 in the morning or 10 in the morning, and those folks who are more like management—they have a say and we are not going to compensate them. Their compensation is in effect because they have a say.

As a former Governor of California used to say, there is psyche remuneration for being white collar. ...

My friend [Senator Gregg] said the world has changed. It is a different economy than it was in the 1950s and 1960s. That is right. But if it is based upon the premise of control, which is the underlying rationale for the Fair Labor Standards Act,...[t]he world has changed. But guess what. White-collar workers don’t have control now. As we move to a service economy and white-collar economy, we don’t have people digging ditches. ... They are still there, but we have white-collar workers who wear blue collars and who are in high-tech industries and industries that are in the service economy...who, in fact, still have no control. ... [W]hether they are a DuPont engineer or a chemist or an analyst at a brokerage house, they are all afraid they are going to show up one day and find that the company has been sold and they don’t have a job. They don’t have any control. Guess what. They don’t have much. ... I think the basic principle is if, in fact, you work in a circumstance where you do not have much control over your environment, and I ask you to work longer than 40 hours, you should have to be paid overtime. ... The nature of the economy has changed, but the nature of those who have control and do not have control

287CR 149:S11205 (Sept. 9, 2003).
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has not changed. ...

For Lord's sake, do not try to convince me this administration is seeking to change the overtime work rules so more people get overtime.⁸⁸

No Republican rose to rebut Biden, nor, however, did any Democrat ever try to incorporate his logic into a counter-model of a rational overtime policy.⁸⁹ Instead, when the debate resumed the following day, September 10, the Democrats’ debating tactics, beyond repeating the “make ends meet” argument,⁹⁰ concentrated on projecting the existing regulations as the result of a golden age of agency reason. Harkin himself embellished his ignorant or falsified claim that the FLSA “has been modified a dozen times since 1938, but it has always been done sort of in consultation with Congress....”⁹¹ Carl Levin of Michigan asserted that since 1938 the regulations had contained only “narrow exemptions,”⁹² while Jeff Bingaman of New Mexico referred to the whole overtime system as “a perfectly reasonable bargain”: “Workers could still work longer hours if they chose to do so, or if they needed additional income,...but they could not be required to do so by their employers, and they could not be required to do so at the same wage level they earned during the 40-hour work week.”⁹³ And, finally, for Barbara Feinstein: “For more than 65 years we have maintained an appropriate balance between family life and work life by forcing employers to pay certain workers time and a half....”⁹⁴

In the end, the Senate voted 54 to 45 to bar the DOL from issuing the proposed regulations because six Republicans defied the party line, while only one Democrat broke ranks.⁹⁵ The heavily lobbied question was significant enough that “in a

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⁸⁸CR 149:S11205-11207 (Sept. 9, 2003). To be sure, even Biden was not above the “making ends meet” argument, observing in addition that “many workers simply schedule themselves as much overtime as they can physically bear so that they can stay above water financially.” Id. at S11208.

⁸⁹Nevertheless, Biden’s approach sparked interest within the AFL-CIO’s legislation department, prompting a rethinking and reconceptualizing of the duties test in the direction of asking questions such as: “Do you control your own hours? Your own workload? Staffing decisions? Can a new hire assume your duties?” Email from AFL-CIO to Marc Linder (Sept. 12, 2003).

⁹⁰E.g., CR 149:S11268 (Sept. 10, 2003) (Senators Barbara Mikulski and Clinton); id. at S11265 (Levin).


⁹⁵CR 149:S11269 (Sept. 10, 2003). The six Republicans were Campbell, Chafee, Murkowski, Snowe, Specter, and Stevens; Zell Miller of Georgia was the Democrat. See
rarity, all four of the Democratic presidential contenders arranged their schedules to be present.” But because the House had failed to block the regulations in July, congressional conferees would have to resolve the disagreement.296

Buoyed by this success, the very next day Senator Specter introduced a bill to establish an independent commission to study the white-collar overtime regulations and to make recommendations, inter alia, “to simplify the definitions of professional or managerial duties that exempt workers from overtime requirements so that they have a greater ability to know in advance what their expectations should be.”297 In explaining the bill on the Senate floor Specter made sure not to burn his bridges entirely to business supporters by stressing: “There is no doubt that the 1945 [sic] regulations on the Fair Labor Standards Act, that those regulations are vastly out of date and they ought to be revised.”298 The Senate, however, took no further action on the bill.

Three weeks later, however, “[o]rganized labor scored a rare victory in the Republican-led...House of Representatives”299 when, with 21 Republicans joining with the Democrats, the House, on a nonbinding vote of 221-203, backed Representative Obey’s motion to instruct the House conferees to insist on inclusion of the Senate-passed provision to block the proposed regulations.300 However, the press reported that: “House negotiators, under pressure from Republican leadership, may not comply, and the White House has already threatened to veto the entire bill if they do. Still, the House vote encouraged opponents of the proposed rule changes, and they called on the administration to abandon it.”301 Obey doubted whether President Bush had “the unmitigated gall” or “moxie” to veto the appropriations bill because it protected overtime pay,302 but in the course of the fall,

also Sheryl Stolberg, “Senate Democrats Block New Rules on Overtime,” NYT, Sept. 11, 2003 (A1:3-5, A17:1-6). Chafee and Snowe were “real moderate[s],” while Campbell was close to the Teamsters Union, for which the white-collar overtime issue was very important. Email from Barbara Somson, UAW (June 26, 2004).

298 CR 149:S11419 (Sept. 11, 2003).
300 CR 149:H9166 (Oct. 2, 3003).
his skepticism was put to the test.

On October 8, Representative Regula, chairman of the House Appropriations Subcommittee on Labor, Health and Human Services, and Education, who had managed the House appropriations bill for those agencies, suggested a compromise in the form of allowing the DOL to keep reviewing the 78,000 comments without taking immediate action on a final rule; Congress could then revisit the issue in 2004. Exuding self-confidence as a result of the "'really good vote" in the Senate and House, Harkin did "'not want to go for a "deal" on overtime yet."

Specter, who was to chair the conference committee and had indicated previously that he was willing to discuss a compromise on the overtime regulations, met with Regula and Harkin later in October, but they made no progress. Additional pressure to break the impasse came from 26 employers organizations, including the Chamber of Commerce, NAM, National Federation of Independent Business, National Restaurant Association, and National Retail Federation, which sent a letter on October 22 urging the conferees and the House and Senate leaders to delete the Harkin amendment from the final conference report on the grounds that the white-collar regulations were "'largely incompatible with today's workplace...."

In late October, Regula displayed his less compromising side in a letter to Obey stating that "he would not provide funds for projects in the districts of members of either party who voted against the [appropriations] bill," adding that "he had to make 'priority choices within available funds to secure at least 218 votes'...."

On November 21, the Bush administration, having demonstrated that it had more moxie and gall after all, Specter, who was facing a "tough reelection in his heavily unionized state,...backed down" when House Republican leaders threatened to adopt an omnibus spending bill from which the Labor and Health and Human Services Departments would have been removed, thus continuing them on existing funding levels and devastatingly cutting Pell grants, and special education, medical research, and anti-AIDS programs. Harkin's press secretary complained on his behalf that: "'It's clear the White House would stop at nothing to take away the overtime pay protection of Americans...."' Unlike the Democrats, the administration, according to Harkin, which "'seems to be unbending, unyielding on this,'" viewed the matter as "'nonnegotiable.'"

The turning point for Specter was the

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threat by Senate Appropriation Committee chairman Ted Stevens—one of the six Republicans who had voted in favor of Specter’s amendment—that he would take the Labor-HHS bill out of the omnibus spending bill and put it on a continuing resolution: “It wasn’t [even] a Hobson’s choice, I didn’t have a choice.” Harkin echoed these sentiments in explaining his own tergiversation: “If I’m faced with that choice, I’ll take the omnibus.” Nevertheless, Specter and Harkin vowed to continue their opposition in the second session of the 108th Congress, either by introducing a bill blocking the regulations or using the Congressional Review Act to rescind them.307

November 21 also marked the end of Specter’s and the Democrats’ resistance in 2003 because Specter realized that day that the Bush administration would not entertain his proposal to set up an independent commission to study the white-collar overtime regulations and to delay any action by the DOL until September 30, 2004.308 On November 21, in the course of his confirmation hearing for the post of Deputy Secretary of Labor, Steven Law was asked by Senator Clinton why the Bush administration did not find this approach an “appropriate resolution.” Law’s response was, especially for a nominee, not evasive:

The reason why we are not in agreement with the proposal that has been put forth is because we think that a blue-ribbon commission has already been convened, and that consists of the nearly 80,000 stakeholders who have already commented on our proposal. ... And we think that the best possible approach is, rather than have a commission that would debate broad policy and theoretical analyses, the blue-ribbon commission that has been convened essentially, by analogy, through the Administrative Procedures Act process has allowed huge numbers of stakeholders from all sides of the spectrum to offer comment on very specific proposals.309

In contrast, Clinton falsified or, at the very least, misstated the history of the white-collar overtime regulations by asserting that the Bush administration had taken an extraordinary and unprecedented step by revising them without congressional intercession: “I have not been around here as long as my colleagues, but my understanding is that the Congress has in the past assessed the impact and the need

308 S. 1611, § 1(c)(2)-(3).
to modernize or amend the Fair Labor Standards Act, certainly overtime provisions. This comes really out of the normal course of events for the Labor Department to take this on itself. Indeed, as she could scarcely have been unaware, Congress also did nothing when her husband’s administration failed to update the regulatory salary thresholds. In any event, Law’s unambiguous rejection of Specter’s commission terminated the initiative.

Though ritualized in form, the opposition to the elimination of the provision blocking the overtime regulation from the omnibus appropriations bill by Obey and other Democrats on the House floor on December 8, which marked the conclusion of labor’s efforts during the first session of the 108th Congress, carried certain risks with it since representatives were, as Regula’s aforementioned letter had warned, “threatened with the loss of funding for projects for their constituents if they didn’t vote as the Republican leadership and Bush administration wanted.” Or as Obey put it: “he was forced to weigh the belief that the rule would ‘stiff workers on overtime’ against his district’s needs.” The House’s approval of the bill by a vote of 242 to 176 meant that the AFL-CIO would have to devise a new strategy for 2004, especially if the Bush administration, contrary to McCutchen’s original intuition and the speculation of some unionists, chose to go ahead and issue final regulations in a presidential election year. In any event, at the end of December the DOL announced in its regulatory plan that the final regulations were scheduled to be issued by March 2004.

310 Nomination of Steven J. Law (n.p.).
311 Downey, “Labor Dept. Plans to End Overtime Controversy in March.”
313 FR 68:72401, 72524 (Dec. 22, 2003). DOL also stated that the “ESA is carefully examining the issues raised by various interested parties. Changes to these rules will help employers meet their obligations and will enhance workers’ understanding of their rights and benefits.” FR 68:72523.