"Time and a Half's the American Way"

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

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The AFL-CIO’s Choreography of the Congressional Counterattack to Blunt the Worst Excrescences: The Final Regulations of 2004

The new rules...are expected to make it much easier to reclassify workers as ineligible based on their status as executive, professional, or administrative workers.¹

Already at the very beginning of 2004 Senator Specter announced his intention to hold another subcommittee hearing on the proposed regulations on January 20, the day Congress came back into session,² while the Assistant Secretary of Labor for Employment Standards, Victoria Lipnic, was hinting that they might be modified to reflect criticisms: “‘We’re certainly not deaf to Congress and to the debate in Congress and what members of Congress are hearing from their constituents.’”³ She even conceded that the debate had also “‘struck a chord’ with Americans who feel overworked.”³

The hearing that Specter held on January 20 may have failed to generate the clarity about the proposed regulations⁴ that he had sought—especially since Secretary Chao left before labor witnesses’s testimony could be confronted with hers—and he may have admitted afterward that he could do little to stop the Bush Administration.

⁴WHA McCutchen did reveal that the DOL had received “the most comments on the administrative exemption test,” and in written answers supplied after the hearing Secretary Chao disclosed that because the comments had shown that the DOL had not been “fully successful” in working out a new test, the final rule would “reflect significant changes from the proposal.” She added that it was not the DOL’s “intention to depart significantly from current law” (including federal case law). Department of Labor’s Proposed Rule on Overtime Pay: Hearing Before a Subcommittee of the Committee on Appropriations United States Senate 10, 21 (S. Hrg. 108-394, 108th Cong., 1st Sess., Jan. 20, 2004).
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administration from implementing them, but it did furnish the opportunity to observe the essential continuity of capital’s rejection of state-imposed labor standards in the form of the prepared statement by Ronald Bird, an economist with a doctoral degree who had been a college professor before becoming the chief economist at the Employment Policy Foundation, a research and propaganda entity affiliated with the big business organization LPA. The primitive, fantasy-like socioeconomic analysis of white-collar working hours, which culminated in the self-congratulatory assertion that exploitation and oppression had been banished—the NAM, too, had just a few months earlier intoned that “unlike some of their more unscrupulous Depression-era counterparts, today’s employers cannot exploit a desperately poor labor pool willing to accept low wages for dangerous or dreary work”—was the spiritual successor to the testimony before the Senate and House Labor Committees in 1937 in opposition to the FLSA by the president of the Chamber of Commerce of the United States, who opined that he knew of no “extraordinary emergency” that would justify legislation as “extraordinary” as the wage and hour bill. Bird explained to the Senate appropriations subcommittee that:

Being exempt...means that the employee knows that working hours may fluctuate from week to week, and the employee’s salary demand reflects the employee’s expectations about both the expected average hours and the degree of fluctuation. In a well-functioning, competitive labor market, salaries will adjust to reflect the reality of expected average hours of work and weekly variance in hours. The disadvantage to the employee arises when the actual hours of work exceed the employee’s expectation.

Sometimes discussions about FLSA status imply this disadvantage when it is said that the exempt worker is not “protected” from demands for extra hours or is not paid for the full amount of time committed to the job. However, this risk is tempered by the mobility of the employee in the labor market. Having education and skills that are in demand and being in a labor market where employment is growing and unemployment relatively low

5Kirstin Downey, “Chao Refuses to Delay New Overtime Rule,” WP, Jan. 21, 2004 (E1).
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are important considerations that also protect employees from such risks. The main disadvantage is that the salaried employee may have to bear the transactions costs of renegotiation with the current employer or of seeking other employment to redress the balance between his or her time preferences and wages.

...For employees who are not exempt from the FLSA rules...[w]eekly hours over 40 are paid at one-and-a-half times the basic rate. This arrangement has both advantages and disadvantages. The advantage is that the employee has less need to worry about fluctuations in required hours beyond the 40 limit. Unexpected work demands are either reduced or well compensated. The fifty percent overtime premium is designed to be large enough to ensure that most employees are compensated more than sufficiently for any extra hours required. The disadvantage to the employee is the down-side fluctuation in earnings when work is slack, and the possibility that the overtime premium may discourage employers from offering over 40 hours of work to any one employee—spreading the total amount of work over more individual employees. ...

The distinction between exempt employees and non-exempt employees is not a distinction between being paid fairly and being paid unfairly. It is misleading for anyone to imply that exempt employees are working unpaid hours as a general rule. The banishment of exploitation and oppression from the workplace was one of the great achievements of our nation in the 20th century, and there is no basis to fear their return in the 21st century. Both exempt and non-exempt workers are paid fairly. Indeed, some researchers have found evidence that they are paid equivalently—that the earnings of both categories average out to the same result over time in terms of total annual earnings and total hours worked after controlling for different characteristics of occupations, education and experience.

At a Society for Human Resource Management conference in early March McCutchen disclosed that the final rule would be out before the end of the month and would respond to “most of the concerns” raised by public comments, Congress, and the media, thus making recourse to the Congressional Review Act unnecessary. She noted that various proposed rules would undergo substantive changes, mentioning in particular that whereas the DOL would have eliminated the requirement discretion and independent judgment for executives and replaced it with the power to hire or fire, “[e]verybody hated it....”

In the meantime, Democrats continued to apply guerrilla tactics against implementation of the regulations. On March 24 the Republican majority failed to muster the 60 votes required to cut off debate and prevent the opposition from

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bringing up its amendment to the corporate tax and trade bill (quaintly titled the Jumpstart Our Business Strength (JOBS) Act) that both parties otherwise supported. In the wake of the 51-47 party-line cloture vote and Harkin’s determination not to allow the bill to progress without a vote on his amendment, Majority Leader Bill Frist pulled the bill rather than risk passage of the amendment. After a second cloture vote failed on April 7, Frist withdrew the motion to proceed, but stated on the Senate floor that debate would eventually be resumed and a vote on the overtime amendment would be permitted.

Despite some continued skepticism about whether the Bush administration would risk alienating large numbers of voters by issuing the final regulations before the presidential election, they reportedly remained among its highest priorities and on a fast track. Yet even in the days after the DOL submitted the final rule to the Office of Management and Budget for review on March 26,

Labor and the Democrats chose this bill as a vehicle for the Harkin amendment because they believed there was an “urgency” to passing it to forestall trade sanctions against the United States. By the end of June 2004, slow progress on reconciling the Senate and House bills prompted labor to speculate that “the Bush Administration would rather pay sanctions to the EU than have employers pay [overtime] to workers.” Email from Barbara Somson, UAW (June 22, 2004).

Even the six Republicans who had voted for Harkin’s amendment in 2003 voted for cloture, as did the Democrat Miller.

Edmund Andrews, “Corporate Tax Bill Hits Wall in Senate After Debate on Overtime,” *NYT*, Mar. 25, 2004 (C1:2-5). Significantly, in the context of a trade bill that would allegedly create jobs and in the welter of criticism of non-germane amendments, Harkin shifted his focus away from overtime pay as a way of making ends meet: “A Senator on the other side said this is about creating jobs or losing jobs. That is what overtime is about. It is about creating jobs or losing jobs, and it does not take a genius to figure it out. Common sense dictates if an employer can work you longer hours per week and not have to pay you overtime, that is exactly what they will do, and they will not hire new workers.” *CR* 150:S3064 (Mar. 24, 2004).

Harkin speculated that the amendment “would probably pass big time now.” *CR* 150:S3065 (Mar. 24, 2004).

The vote was 50 to 47.


doubts persisted. Indeed, ironically, in spite of firms’ virtually unanimous clamor for regulatory revision, an on-line human resources publication reported on April 1 that:

Employers across the country are breathing a sigh of relief as the U.S. Department of Labor’s...self-declared deadline for issuing final regulations on the white-collar overtime exemptions has come and gone. In the long run, the regulations are considered to be good news for employers. But many aren’t looking forward to the work they will have to do on the front end to come into compliance under what is expected to be a quick deadline.

In recent weeks, the DOL had made repeated assurances that it would issue the final regulations by March 31, 2004. Instead, the agency has submitted the regulations to the Office of Management and Budget...for its review—a move that could delay their issuance. In general, federal law requires agencies to consider alternative approaches and analyze the benefits and costs of proposed regulations. The OMB reviews draft regulations before they’re finalized to ensure that agencies comply with that requirement.

So what effect does this development have on when the final regulations will be issued? The OMB states that its average review time in 2001 was 58 days. But there is a possibility that it will take much longer. The OMB is allowed up to 90 days—initially—to review the rules. Plus, either Secretary of Labor Elaine Chao or the OMB director may extend the review period even further. And if the OMB finds problems, it could return the rule to the agency for further review. In such cases, agencies frequently conduct further work on the draft and resubmit it for OMB consideration, at which time the process starts all over again.

In other words, it’s anybody’s guess when the final regulations will be issued.18

In the event, DOL finally released the final rule on April 20. Even before anyone did or could have read what the national newspaper of record erroneously described as 500 pages of new rules19—in fact, the regulations themselves took up only 14 triple-column pages, the rest of the very extensive materials being explanatory and background—pre-judgments were the order of the day. Although they had not yet seen the changes, Senators Harkin and Kennedy denounced them


19Steven Greenhouse, “Labor Dept. Revises Plans To Cut Overtime Eligibility,” NYT, Apr. 21, 2004 (A14:5-6). Four months later the newspaper of historical record was still erroneously referring to “the hundreds of pages of new rules....” Steven Greenhouse, “Controversial Overtime Rules Take Effect,” NYT, Aug. 23, 2004 (A11:1). The error was common. For example, Senator Patty Murray twice referred to them as “this 400-page rule....” Final Rule on Overtime Pay: Hearing Before a Subcommittee of the Committee on Appropriations United States Senate: Special Hearing 57 (108th Cong., 2d Sess., May 4, 2004).
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as inadequate, Harkin vowing to continue offering his regulation-blocking amend­ment to every bill in the Senate. Harkin’s epistemology was based on the insight that the “‘Bush administration simply is not trustworthy on this issue, and I am beyond skeptical about these so-called revisions.’” After a day’s reflection, Harkin offered the more nuanced commentary that the Republicans had taken “‘a rule that is profoundly terrible and made it just terrible’....” House Minority Leader Nancy Pelosi merely repeated her party’s favorite slogan—that millions of workers and/or “middle-class families” needed overtime pay “to put food on the table, to make ends meet, to buy a home, and to send their children to college.” But when she added that the “new rules discourage businesses from hiring new workers because companies can now overwork their existing employees without having to incur overtime costs,” she overlooked the fact that if overtime’s real purpose of spreading employment were operating, her middle-class families would not be able “to make ends meet.” Senate Minority Leader Tom Daschle took a totally different, if not inconsistent, tack, hailing the changes: “‘[H]ad we not fought this effort so vocally and so aggressively, I don’t think we’d be where we are today.’” Finally, the initial reaction of Ross Eisenbrey, the author of the EPI’s estimate of eight million newly excluded employees, was that “it sounded as though the department ‘had made some positive changes,’” but he reserved judgment pending review of the final regulations. Indeed, already the next day he judged that it was “‘a grudging improvement that won’t affect many people’....”

If labor had to walk the fine line between conceding that the Bush administra-

25Before working at the EPI, Eisenbrey had been, inter alia, Associate Director for Worker Protection Programs in the DOL’s Office of Congressional and Intergovernmental Affairs during the Clinton administration. http://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=NEWS_RELEASES&p_id=987
26Downey, “Plan Expands Eligibility for Overtime Pay.”
27Moritsugu, “Revised Overtime Rules Produce New Winners, Losers.”
tion had changed anything to benefit workers and denying the movement's ability to effect change, in contrast, employers' representatives, perhaps in an effort to avoid what might seem like class gloating, tempered their enthusiasm for public consumption. The director of labor policy for the U.S. Chamber of Commerce, Michael Eastman, was "disappointed" that the DOL had lifted the salary floor from $65,000 to $100,000 for "highly compensated" employees (whose exclusion from overtime regulation was triggered by the performance of only minimal executive, administrative, or professional duties), but consoled himself with the thought that "politics is a process of compromise, and any changes over the current law are better than nothing."28 The National Restaurant Association was gratified that the new rules, in the opinion of its vice president, Robert Green, stated more clearly that restaurant managers and assistant managers—whose entitlement to overtime protection the existing regulation and the federal courts had already subverted29—were not guaranteed overtime, but dissatisfied with an increase in the salary threshold that would cost some restaurants.30 "On balance," the restaurant employers termed it merely "a fair proposal."31 Perhaps the least plausible claim about the final regulations came from Labor Secretary Chao herself, who, consistent with her even less plausible general position that substantively the changes favored workers, but that the increased amount of overtime that employers would be required to pay would be well worth the enhanced certainty of the new language, asserted on the DOL website that the "new rules end the confusion that has led to an explosion of class action lawsuits that failed to protect workers [sic] rights. With these changes, more workers will receive overtime pay and they'll get it in real time when they earn it, not years later in federal court."32 Chao's contention made no sense because, if the new regulations succeeded in putting an end to the overtime suits on behalf of highly paid employees such as engineers and "rocket scientists"33 about which employers

28Downey, "Plan Expands Eligibility for Overtime Pay."
29See above ch. 15.
30Moritsugu, "Revised Overtime Rules Produce New Winners, Losers."
31T. Shawn Taylor, "Revisions on Overtime Scaled Back," CT, Apr. 21, 2004 (C11).
33"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 58 (June 30, 2003), on http://www.hrpolicy.org/memoranda/2003/03-83_Final_White_Collar_Comments.pdf. Contrary to LPA's claim, the plaintiffs in Hashop v. Rockwell Space Operations Co., 867 F.Supp. 1287, 1296 (SD Tx, Nov. 9, 1994), were neither rocket nor any other kind of scientists, but merely instruc-
propagandized endlessly, that outcome would certainly not be a function of "more generous" definitions that would render litigation unnecessary. On the contrary, it would come about because such workers would be more clearly defined out of their entitlement—at least as an initial procedural matter as far as employers and DOL investigators were concerned. Chao, however, had confused her success in expanding the overall scope of exclusions with the untenable implication that all the exclusionary definitions had been rewritten so unambiguously that lawsuits would become rare. In fact, even while certain of the new regulations unambiguously deprived large numbers (perhaps millions) of workers of an entitlement to overtime protection, other regulations displayed enough play in the joints to sustain voluminous litigation. In the realistic words of a corporate lawyer: "These guidelines themselves are not crystal clear.... So we are looking at enhanced and increased litigation until these guidelines are defined."  

In contrast to these party-line views, it is difficult to dismiss the more sober opinion of the Bureau of National Affairs that "DOL Scales Back Overtime Rules Changes." To be sure, overall less rather than more expansive exclusions were a surprising outcome in light of the rumors that had been circulating in employer and union circles almost since the day that the proposed regulations were published that it was possible that the final regulations would be even more favorable to employers. But it was difficult to gainsay McCutchen's valedictory assertion that "business groups did not find all the changes they had hoped for in the final regulations...." Why the Bush administration moderated some of the more

tors, who had college degrees—three of the four plaintiffs having a B.S. from a not fully accredited trade school—but were not even required to have a bachelor's degree, and trained space shuttle ground control personnel in communications. This fact did not deter David Fortney, a former acting solicitor and chief legal officer of the DOL, who became big business's chief witness at congressional hearings in 2004, from falsely asserting that the plaintiffs had "advanced physics, mathematics and engineering degrees...." Final Rule on Overtime Pay: Hearing Before a Subcommittee of the Committee on Appropriations United States Senate: Special Hearing 29 (S. Hrg. 108-542, 108th Cong., 2d Sess., May 4, 2004).  

34Downey, "Plan Expands Eligibility for Overtime Pay."  
37Various email messages to Marc Linder (2003).  
blatantly exclusionary proposals was not publicly disclosed, but it is certainly plausible that the combination of the AFL-CIO’s impressively well-organized counter-campaign and Republicans’ fears of the potential impact of that relentlessly negative propaganda on millions of working-class voters during a presidential election campaign served to deprive the party in power of some of the freedom to act that it might have enjoyed had it waited until after the election. The DOL’s reaction to labor’s assault was nicely captured by one of its economists: “They hit us so hard...we backed off.”

Presumably, fears of losing that election and thus of losing control over the DOL prompted employers to prefer half a loaf in 2004 to the possibility of having to wait another 29 years for the right constellation of forces to secure all their demands.

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[T]he Department of Labor...significantly pared back, sifted off, sugared off their proposal....

The 138 triple-columned pages of explanatory and background material and data in support of the final rule that the DOL published in the Federal Register on April 23 constituted a colossal apparatus that dwarfed anything that it had ever produced previously in connection with promulgating or revising the white-collar overtime regulations—apart from the unpublished hearing transcripts from 1940...

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40 Secretary Chao’s claim, echoed by congressional Republicans, that the DOL’s revisions resulted from its having “listened” to the public, in particular to the 75,000 written submitted comments, was, on the surface, consistent with the real political reasons mentioned in the text. However, since those comments and, in fact, virtually the entire public criticism of the proposal regulations, had been orchestrated by the AFL-CIO, whose campaign the DOL loudly and repeatedly characterized as misinformation, the claim made little sense on its own terms. Assessing the Impact of the Labor Department’s Final Overtime Regulations on Workers and Employers: Hearing Before the Committee on Education and the Workforce House of Representatives (108th Cong., 2d Sess., Apr. 28, 2004), on http://edworkforce.house.gov/hearings/108th/fc/overtime042804/chao.htm (statement of Elaine Chao).


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and 1947-48.\footnote{See above chs. 11-14.} (In spite of labor’s and Democrats’ complaints, the most important deleterious consequence of the DOL’s failure to hold public hearings lay not in the affront to democratic forms or in the dearth of submitted information—unions and their affiliated organizations could and did submit written comments—but in the inability of the DOL, and possibly labor, to question employers’ agents, as for example Stein had done in 1940, in order to winnow out reality from puffery.) Especially the additional data work-up in the Preliminary Regulatory Impact Analysis\footnote{CONSAD Research Corporation, “Final Report: Economic Analysis of the Proposed and Alternative Rules for the Fair Labor Standards Act (FLSA) Regulations at 29 CFR 541: Prepared for: US Department of Labor Employment Standards Administration” (Feb. 10, 2003). After publication of the final rule, CONSAD submitted “Final Report: Tasks and Analyses Performed in Support of Development of the Regulatory Impact Analysis of the Revised Rules for the Fair Labor Standards (FLSA) Regulations at 29 CFR 541” (May 14, 2004); because it took the DOL five months, pursuant to a FOIA request and appeal, to supply the report, which coincidentally arrived the day the galley proofs of the book were due (Nov. 15, 2004), only limited use could be made of it. See above ch. 1.} exceeded in formal statistical sophistication any previous such effort. Nevertheless, even this overwhelming amount of material could not conceal the fact that the entire undertaking remained completely blind to and unaffected by the purposes of the congressional overtime regulation regime and of the exclusions of executive, administrative, and professional employees. The DOL’s simplifying, clarifying, harmonizing, narrowing, and expanding of the regulatory definitions amounted to no more than groping in the dark by bureaucrats who were not even aware that their rules had taken on a life of their own totally divorced from any possible statutory purposes.

The DOL was able to justify its acting in 2004 on the firm administrative law grounds that: “Allowing more time to pass without updating the regulations contravenes the Department’s statutory duty to ‘define and delimit’ the section 13(a)(1) exemptions ‘from time to time.’”\footnote{FR 69:22122.} The DOL made an irrefutable case for raising the salary level, which, because it had not been adjusted in “almost 30 years,” made it possible to classify as an “executive” an employee earning only $8,060 a year, while the statutory minimum wage of $5.15 an hour guaranteed all covered workers at least $10,712.

In contrast, however, the Labor Department disclosed no such startling tangible necessity for revising the duty tests. Revealingly, the only specificity that it offered inadvertently suggested that its real agenda was to expand the universe of excluded occupations: “The regulations discuss jobs like key punch operators, legmen, straw bosses and gang leaders that no longer exist, while providing little guidance for
jobs of the 21st Century.” All four of these occupational titles—which were repeated ad nauseam by the DOL, Republican members of Congress, and employers to justify the revision of the duties tests—had been mentioned in the existing interpretive regulations as covered by the overtime regulations and specifically rejected as examples of exempt administrative, professional, or executive employees. Although the DOL insisted that “[r]evisions to both the salary tests and the duties tests are necessary to restore the overtime protections intended by the FLSA which have eroded over the decades,” it failed to refer to a single occupation that it had for decades been classifying as exempt but that by 2003-2004 should have been reclassified as covered. Moreover, three of those four occupations still did exist, though perhaps more frequently under other names. Amusingly, the DOL suppressed the fact that the regulation on working foremen (who perform the same kind of work as and alongside their subordinates) that used “strawbosses” and gang leaders actually referred to “gang or group leaders”—the latter being conceptually very close to the team leaders that the DOL in 2004 wished to exclude as administrative employees.

The manifest purpose of the revisions of the duties tests was not to eliminate obsolete words, let alone obsolete occupations, but to insure that employers were legally able to extract unpaid overtime work from as many as possible of the tens of millions of white-collar workers who had been added to the labor force since Harold Stein and Harry Weiss had written the regulations at the beginning and end of the 1940s. Nowhere did the DOL try to explain how this drive to “modernize[]” the regulations to keep them in “step with the realities of the workplace,” which formed “the philosophical underpinnings” of its regulatory revisions, also “reflects the Department’s efforts to remain true to the intent of Congress....” Although the DOL admitted that the FLSA “contains no definitions, guidance

46FR 69:22122.


4829 CFR §§ 541.115(b)(strawbosses and gang leaders), 541.207(c)(7) (keypunch operators), 541.302(f)(2) (leg man).

49FR 69:22122.

50Keypunch operators are more often called data entry technicians, but the 2004-2005 web edition of the DOL’s own Occupational Outlook Handbook still uses it.

5129 CFR § 541.115(b).

52FR 69:22264 (29 CFR § 541.203(c)).

53FR 69:22124.
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or instructions as to the[ ] meaning" of the exemptions, it rejected the AFL-CIO's claim that the proposed regulations exceeded the Labor Secretary's authority on the grounds that by broadening the exemptions, they were "not consistent with Congressional intent." On the contrary, the DOL argued that by simplifying and clarifying definitions: "Rather than broadening the exemptions, the final rule will enhance understanding of the boundaries and demarcations of the exemptions Congress created. The final rule will protect more employees from being misclassified and reduce the likelihood of litigation over employee classification because both employees and employers will be better able to understand and follow the regulations." To be sure, the argument and counter-argument were not necessarily mutually inconsistent: it was possible that fewer employees would be misclassified and more would understand the regulations because the DOL had both broadened and clarified the exclusions, making it easier for employers to impose unpaid overtime and discouraging workers from engaging in what the DOL and employers hoped would become hopeless litigation. In fact, in 2003 the DOL admitted as much when it stated that "an additional 1.5 million to 2.7 million employees will be more readily identified as exempt...because the updated duties tests will replace the current duties tests in determining their exemption. [T]he large number of employees who could bring litigation under the current regulations and their relatively high levels of compensation indicate that the impact of revising the duties tests is probably substantial."56

In order to mollify, or at least to enlighten, the labor movement, which had allegedly fundamentally misunderstood the scope of the exclusions, the DOL added a new provision stating expressly, based on a dictionary definition of "manual" quoted by a judge, that the white-collar "exemptions...do not apply to manual laborers or other 'blue collar' workers who perform work involving repetitive operations with their hands, physical skill and energy.” If this effort to construct a categorical wall between protected blue- and excluded white-collar workers was designed to dispel workers' suspicions, the DOL's insertion of "repetitive" and addition of "routine"—which neither the dictionary nor the court

54FR 69:22125.
55Alternatively, even if the number of suits filed did not decrease, the “cost of defending...a case,” as one big business witness put it at a hearing, “may be less because the applicable rules are clearer and more on the surface.” Final Rule on Overtime Pay: Hearing Before a Subcommittee of the Committee on Appropriations United States Senate: Special Hearing 56-57 (S. Hrg. 108-542, 108th Cong., 2d Sess., May 4, 2004) (Ronald Bird).
56FR 68:15580.
57FR 69:22128.
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had used—may well have suggested a semantic ruse: after all, the work of some highly skilled blue-collar workers is neither repetitive nor routine (while that of many white-collar workers, such as typists, is). Indeed, whether the formulation was the result of artfulness or artlessness, the sense that the DOL may have been laying a trap for the unwary was reinforced by the example of “non-management production-line employees” as “entitled to minimum wage and overtime premium pay,” which raised the question: Were there perhaps surprises in store in the final regulations that might turn some blue-collar workers into “management production-line employees”?58

Arguably the most prominent scaling down of its wide-ranging pro-employer proposals undertaken by the DOL was increasing the salary threshold for highly-compensated white-collar workers from $65,000 to $100,000.59 Although the DOL agreed with the AFL-CIO’s comment that it lacked the authority to adopt a salary-only test,60 it denied that this provision lacked a duties component. Adding that no commenter had denied that the DOL had the authority to adopt a more streamlined duties test for higher salaried workers,61 the Department argued that the new rule was merely a reformulation of Weiss’s short-test. Moreover, the $100,000 salary “should be set high enough to avoid the unintended exemption of large numbers of employees—such as secretaries in New York City or Los Angeles—who are clearly outside the scope of the exemptions” and entitled to overtime protection. Asserting that “[v]irtually every salaried ‘white collar’ employee” at such a salary level “would satisfy any duties test,” the DOL noted that in any event only about 10 percent of “likely exempt employees” subject to the salary test earned $100,000 or more compared to 35 percent at the $65,000 level.62 Finally, it was difficult to gainsay the Department’s claim that although the duties test for the highly compensated was less stringent than the short test, it was more than sufficiently

58FR 69:22260-61 (§ 541.3(a)).
59FR 69:22269 (§ 541.601(a)).
60Sandra Boyd, vice president for human resources policy at the NAM, stated that the DOL had told the NAM that before proposals were issued, the AFL-CIO had categorically rejected any one-criterion salary-level test—not even at $150,000. Telephone interview with Sandra Boyd, Washington, DC (May 1, 2003). Deborah Greenfield, associate general counsel of the AFL-CIO, recalled “that we took the position in meeting that 2-tier test should be preserved. I do not remember that $150,000 was talked about, and if it was, it would have been for rhetorical purposes only.” Email from Deborah Greenfield to Marc Linder (May 1, 2003). The director of public policy at the AFL-CIO found it unimaginable that the organization would have categorically rejected such a proposal. Email from Chris Owens to Marc Linder (May 1, 2003).
61FR 69:22173.
off-set by the $87,000 increase in the salary level.\textsuperscript{63} In fact, it would presumably be difficult as a matter of administrative law to persuade a federal appeals court that, whereas the innovation of the short test in 1950, which reduced the long-test duties from five to two, while not even doubling the long-test salary, had been lawful, the highly-compensated-employee rule, which reduced the short-test duties from two to one, while almost octupling the salary level, would be beyond the DOL’s power.

The DOL seemingly made such a challenge more difficult by adding, in response to the comments of such organizations as the National Employment Lawyers Association that the rule could be interpreted to mean that if an employee performed one such duty once a year he would lose protection, the provision that an employee had to perform such an exempt duty “customarily and regularly....”\textsuperscript{64} Although the DOL asserted that it had “never intended to exempt as ‘highly compensated’ employees those who perform exempt duties only on an occasional or sporadic basis,”\textsuperscript{65} this modification lacked much force since it, in turn, was defined merely as “a frequency that must be greater than occasional....”\textsuperscript{66} Moreover, if the definition of an administrative employee were stripped down to such an extent that the employee merely had to perform a single exempt activity, namely, exercising “discretion and independent judgment with respect to matters of significance,”\textsuperscript{67} arguably that employee might not be a bona fide administrative employee since she would not have to satisfy the other duty of performing non-manual work directly related to the employer’s management or general business operations, but she would nevertheless pass the diluted duties test for highly compensated employees.\textsuperscript{68} To be sure, in this particular case, a court, in order to invalidate such a regulation on the grounds that the Labor Secretary had acted ultra vires, would have to determine what Congress meant by “administrative” employee.

In raising the standard-test salary level from $425 to $455 a week,\textsuperscript{69} the DOL was also forced by labor’s and employers’ comments to offer a more detailed justification than it had in 2003. Whereas some employers organizations (for example, the American Health Care Association and the U.S. Small Business Administration Office of Advocacy) had “strongly opposed” even the $425 salary,

\textsuperscript{63}FR 69:22175.
\textsuperscript{64}FR 69:22173, 22269 (§ 541.601(a)).
\textsuperscript{65}FR 69:22173.
\textsuperscript{66}FR 69:22272 (§ 541.701).
\textsuperscript{67}FR 69:22262 (§ 541.200(a)(3)).
\textsuperscript{68}FR 69:22262 (§ 541.200(a)(2)).
\textsuperscript{69}FR 69:22269 (§ 541.600(a)).
and others such as the National Grocers Association had suggested lowering it to $400, unions had advocated raising the long- and short-test salaries to as high as $610 and $980, respectively, in large part by adjusting them for inflation since 1975. Although, bizarrely, the DOL was unable to discover any regulatory history concerning its own rationale for setting the salary level at $30 in 1938, for the period from 1940 to 1975, the only time that it used the Consumer Price Index to adjust the salary level was the interim (and last) setting in 1975. In the 1940s, Stein and Weiss used salary data, while in the 1950s and 1960s the DOL used actual salaries paid to exempt employees who met both the duties and salary tests. "In almost every case" the DOL then set the salary levels at "an amount slightly lower than might be indicated by the data."

Prodded by the AFL-CIO's comment that the DOL had misused Kantor's methodology from 1958 because it had based its calculation on the salaries of all salaried employees, whereas Kantor had relied only on the salaries of employees actually found to be exempt, the DOL sought to justify its deviation on the grounds that it believed that the salary level of the lowest 20 percent of all salaried employees was the equivalent of that of the lowest 10 percent of exempt employees in part because of the changes that it had introduced in the long and short tests. Stung by the AFL-CIO's charge of misuse, the DOL then sought to replicate Kantor's methodology by modifying that of the GAO report to consider only salaried employees who were "likely qualify as exempt employees...." In terms of the results, the DOL regarded this approach as "very consistent" with Kantor's as well as with the one it had adopted in 2003. (To be sure, the DOL failed to point out that it had no way of knowing what relationship its probabilistic method, based on guesses as to what percentage of various occupations would meet the duties tests, bore to the DOL's in the 1950s and 1960s of actually conducting investigations and determining for itself what percentage of employees met the duties and salaries tests.) The DOL determined that the lowest 20 percent of all salaried employees generated a salary level of $450 in the South, $455 in retail industry, and $475 to $500 for all salaried employees, whereas the lowest 10 percent of likely exempt employees produced salaries of $475, $450, and $500.

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70 FR 69:22164.
71 FR 69:22165. See also above chs. 9, 12-13.
72 FR 69:22166.
73 FR 69:22167.
74 FR 69:22168.
75 FR 69:22167.
76To be sure, the universe of investigated establishments had not been representative of all establishments covered by the FLSA. See above ch. 15.
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respectively.\(^{77}\)

Taking as its guideline Kantor’s “points near the lower end of the current range of salaries,”\(^{78}\) the DOL praised the new $455 salary level as representing the lowest 10.2 percent of “likely exempt” employees in the “lower-wage retail industry,” 8.2 percent of “likely exempt” employees in the South, and 6.7 percent of all “likely exempt” employees. The new salary level also represented 20.0 percent of all salaried employees in the retail industry, 20.2 percent of those in the South, and 16.8 percent of all salaried employees. More importantly, “based on the comments from the business community, the Department believes this increase is clearly at the upper boundary of what is capable of being absorbed by employers without major disruptions to local labor markets.” Finally, the new setting would also implement Kantor’s approach by “assist[ing] in demarcating the ‘bona fide’ executive, administrative and professional employees without disqualifying any substantial number of such employees.”\(^{79}\)

The DOL’s self-congratulatory tone is difficult to appreciate. First of all, the notion that, based on salary level, only 16.8 percent of all salaried employees should be automatically protected against unfettered imposition of overtime makes no sense when $455 (for a workweek that exceeds 40 hours) is merely 2.2 times greater than the minimum wage for 40 hours. Although the DOL has never set the salary thresholds at levels that comport with the lofty titles of “executives” and “professionals,” the new ratio of 2.2 is lower than the ratio of the short-test to the minimum wage ever was between its introduction in 1950 and the last time the short-test salary was raised in 1975. Indeed, it is even lower than the ratio between the long-test and the minimum wage from 1938 to 1940 and the long test for professionals from 1940 to 1950 and again in 1959 and 1963.\(^{80}\) It is difficult to discern how this approach was consistent with “the Department’s long-standing recognition that the amount of salary paid to an employee is the ‘best single test’ of exempt status”\(^{81}\) or why it did not make a mockery of the DOL’s own declaration that: “Setting the exemption salary level at or near the wage levels paid to large numbers of nonexempt workers would fail the objectives of these regulations and the purposes of the statute.”\(^{82}\) Consequently, even the former DOL officials, during whose long tenure the Department had also neglected to raise the salary thresholds at all, noted that as a result of the increase to $455, in conjunction

\(^{77}\)FR 69:22168, tab. 3-4 at 22169-70.

\(^{78}\)See above ch. 15.

\(^{79}\)FR 69:22171.

\(^{80}\)See above ch. 15, tab. 4-5.

\(^{81}\)FR 69:22172.

\(^{82}\)FR 69:22238.
with eliminating the long test and diluting the short test: "Only a fraction of the employees who have become exempt only through the erosion of the salary level over the past 30 years will be returned to nonexempt status...."

Second, the DOL's acquiescence in employers' self-serving comments about "major disruptions to local labor markets" was astonishing, especially since the DOL's own Preliminary Regulatory Impact Analysis revealed that the impact on profitability was infinitesimal\(^\text{84}\) and the final Regulatory Impact Analysis characterized the economic impacts as "clearly affordable" for all major industry sectors and as well as for small businesses in them.\(^\text{85}\) Finally, if instead of extracting free overtime labor employers were forced to hire additional workers in order to avoid having to pay penalty overtime wages, the increased cost would merely reveal the social costs that employers (and or consumers) had been able to externalize in the past and that it is one of the purposes of mandatory labor standards to require employers to internalize.

Using Congress's own failure to index the minimum wage—as a result of which its inflation-adjusted value in 2004 was lower than it had been in any year in which the minimum wage had been increased since 1950\(^\text{86}\)—as an excuse for not indexing the salary thresholds, the DOL assured those commenters who feared that another 29 years might pass before another increase that it "intends in the future to update the salary levels on a more regular basis, as it did prior to 1975, and believes that a 29-year delay is unlikely to reoccur."\(^\text{87}\) Indeed, the only significant accommodation that the DOL denied employers in this area was the request by the National Association of Chain Drug Stores to exempt pharmacists—like physicians—from the salary test altogether.\(^\text{88}\)

The DOL refused to consider applying the CPI as an alternative method for updating the salary level, but it failed to deal with the immovable fact that, adjusted for inflation, $455 in 2004 equaled only 58 percent of the short-test salary at its lowest level in 1950 (when the $100 setting was the equivalent of $780 in 2004)


\(^{84}\) See above ch. 16.

\(^{85}\) FR 69:22228-29.


\(^{87}\) FR 69:22171.

\(^{88}\) FR 69:22172,
and only 47 percent of the short-test salary at its highest level in 1970 (when the $200 setting was the equivalent of $969 in 2004). Indeed, it even fell significantly below the long-test salary for professionals from 1940 to 1975 and the long-test salary for executive and administrative employees from 1959 to 1975.89

With regard to the duties tests, the DOL made no significant changes in them for executive employees, rejecting some employers’ suggestion that the requirement of the power to hire or fire be dropped. It admitted that this requirement might convert some small number of exempt into nonexempt employees, but, recurring to Stein’s dictum, it could not conceive of bona fide executives without such power. Although the DOL’s claim that the new standard test for executives provided more protection for workers than the existing short-test was based solely on its retention from the long test of the power to hire or fire, the DOL subverted its own position by conceding that the additional duty was merest window dressing: “Although this new requirement may exclude a few employees from the executive exemption, the Department has determined that it will have a minimal impact on employers.”90

Unsurprisingly, the DOL dismissed comments by the National Employment Law Project and others requesting that it reconsider its proposed rule exempting employers of fast-food managers who devote most of their time to non-executive or -administrative work. The DOL argued that the new regulations were “consistent with current case law,” which permitted managers to devote as much as 90 percent of their time to “routine non-management jobs” without depriving their employers of the exemption.91 In order to reinforce this position, it added a new provision on “concurrent duties,” which expressly specified that an “assistant manager can supervise employees and serve customers at the same time without losing the exemption.”92

There can be no doubt that for at least two decades prior to 2003-2004 the federal judiciary had been issuing decisions that vastly expanded the scope of lowest-level store managers who could be deprived of overtime protection virtually regardless of how much time they devoted to what the Eighth Circuit dismissively characterized as testimony by plaintiff managers “[s]eeing to demean or minimize the importance of the manager’s position,...that most of their time was spent on routine non-management jobs such as pumping gas, mowing the grass, waiting on

89See above ch. 15, tab. 6-7. The comparisons refer to each year in which the salary tests was increased.
90FR 69:22131.
92FR 69:22262 (§ 541.106(b)).
customers and stocking shelves."\textsuperscript{93} What the DOL failed to explain was its cavalier remark that it “continues to believe that this case law accurately reflects the appropriate test of exempt executive status....” Moreover, in an effort to accommodate the claims of such employers organizations as the National Retail Federation that employer-imposed “‘multi-tasking’” by lowest-level managers “should also be considered exempt work,” the DOL went even further than the courts and “state[d] clearly that there is no strict percentage limitation on the performance of non-exempt work.”\textsuperscript{94}

The DOL reinforced this stance by arguing that unions were “simply wrong in asserting that the current law defines ‘primary duty’ by a bright-line 50 percent test.”\textsuperscript{95} As with the “inflexible 20-percent rule,” which it had already eliminated, it also rejected an “inflexible 50-percent rule” because it would impose monitoring and record-keeping burdens on employers.\textsuperscript{96} The only concession that the DOL made to labor in this area was the additional caveat that if assistant managers in retail stores “are closely supervised and earn little more than the nonexempt employees,” they “generally would not satisfy the primary duty requirement.”\textsuperscript{97}

In order to appreciate the real-world consequences for alleged “executive employees” of “current case law” and the DOL’s conception of “exempt executive status” it is well worth examining the work life of the manager of an Au Bon Pain bakery cafe in Boston as perceptively portrayed in a 1996 front-page \textit{Wall Street Journal} article appropriately titled, “In Name Only: For Richard Thibeault, Being a ‘Manager’ Is a Blue-Collar Life.” Thibeault worked from 3 a.m. to at least 3 p.m. Monday through Friday, 2 p.m. to 9 p.m. Saturdays, and at one point 24 straight days without a day off; his pay of $34,000 he estimated came out to $7.83 an hour or 83 cents more than the part-time students who also worked there. Wheeling a rack of pastry across the street before dawn, baking pastry, and preparing soups, left him dirty at the end of the day. In all these respects his work was typical of a large proportion of swiftly increasing number of jobs “classified as ‘managers’....”\textsuperscript{98} Most of them, as the newspaper recounted, were

\textsuperscript{94}FR 69:22137.
\textsuperscript{95}FR 69:22185. The DOL correctly added that unions’ charge of “‘an outcome-oriented double standard’” was applicable to existing § 541.103, which also created a presumption of executive status for those spending more than 50 percent of their time on management activities, but created no presumption for those devoting less than 50 percent of their time to such activities. \textit{FR} 69:22186.
\textsuperscript{96}FR 69:22186.
\textsuperscript{97}FR 69:22272 (§ 541.700(c)).
\textsuperscript{98}Jonathan Kaufman, “In Name Only: For Richard Thibeault, Being a ‘Manager’ Is
far from the white-collar status positions normally associated with the term “manager.” They are high-pressure, dead-end jobs with little status and low pay: the harried store manager at a fast-food restaurant; the assistant manager at a discount drug store; the manager at a travel agency; the bank-branch head.

These people carry the title manager, but they lead a blue-collar life—working long hours, often doing the same tasks as those they employ and carrying out orders from above. Their autonomy is tightly circumscribed by corporate headquarters. ... With the shrinking of middle management, they have more responsibilities...but less chance to move up.99

Just as surely as Thibeault satisfied all the criteria of the old short test and new standard test, he demonstrated none of the features that the DOL imagined that Congress had in mind for bona fide executive employees. What, consequently, the justification was for enabling his employer and its many competitors to take such advantage of lowest-level managers is not a question that the DOL has ever raised, let alone answered, because it has never framed the FLSA’s purposes as a touchstone for distinguishing between those who should and should not be protected.

If the Bush DOL’s revisions were to be judged by their success in making sense of the most beleaguered definition of all, that of bona fide “administrative” employees, they would have to be regarded as an abject failure. As should have been expected, because the NAM and other employer organizations pilloried the DOL’s most salient innovation—the “position of responsibility”—as vague, ambiguous, and subjective, the DOL deleted it, reinserting “the exercise of discretion and independent judgment,”100 bulked up by the additional phrase, “with respect to matters of significance.”101 Forced to concede in retrospect that the proposal had failed to enhance clarity and certainty, the Department could not resist chiding its critics for having failed to make their own suggestions to achieve that goal. Surprisingly, the DOL also justified withdrawal of the proposal by reference to many commenters’ belief that it “greatly expanded the scope of the exemption, a result which the Department did not intend.”102 (As Ross Eisenbrey had skeptically observed in 2003: “If the Labor Department doesn’t want the new language to exempt large numbers of employees, ‘then why is the language being

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99 Kaufman, “In Name Only.”
100 FR 69:22138.
101 FR 69:22262 (§ 541.200(a)(3)).
102 FR 69:22139. Similarly, the word “directly” was reinserted in “work directly related to management or general business operations” because (oddly) DOL had not intended its deletion to be interpreted as sanctioning the exemption of employees whose primary duty was only “remotely or tangentially related to exempt work.” Id. at 22137, 22140.

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changed at all?'")) Finally, the Labor Department resisted some employers’ suggestion to eliminate the production/administration dichotomy altogether. \(^{104}\)

With regard to the definitions of “professional” employees, the DOL, based on comments from employer groups, added whole occupations to the category of excluded professionals in what, according to former Deputy WHA Fraser and his colleagues, “must be seen as a blatant (if incoherent) effort to achieve particular results serving certain special interests.” \(^{105}\) The DOL had in fact “invite[d] comments” in March 2003 “on occupations the exempt status of which has been the subject of confusion and litigation including but not limited to pilots, athletic trainers, funeral directors, insurance salespersons, loan officers, stock brokers, hotel sales and catering managers, and dietary managers in retirement homes.” \(^{106}\) Most blatantly the DOL exempted employers of athletic trainers and licensed funeral directors and embalmers largely on the basis of employers’ self-serving claims without independently confirming that an advanced specialized degree was customarily required to enter the profession, despite the DOL’s declaration that “only occupations that customarily require an advanced specialized degree are considered professional fields under the final rule.” \(^{107}\) The employers of athletic trainers, had a strong financial incentive to persuade the DOL to reverse its predecessor’s “position that athletic trainers are not exempt learned professionals” and relieve them of burdensome time and a half obligations: after all, “athletic trainers are on call 24 hours a day” \(^{108}\) and, in the one case in which the judges ruled in favor of employers—to which the DOL deferred—the court noted that the trainers worked 60 hours a week. \(^{109}\) The commenters (whose identity the DOL failed to reveal) on whom the DOL relied asserted that trainers were nationally certified and that “a specialized academic degree is a standard prerequisite for entry into the field.” \(^{110}\) Yet the DOL did not even purport to have scrutinized this allegation. Remarkably, in the case to which it deferred the court had found that

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\(^{104}\) FR 69:22140-41.

\(^{105}\) Fraser, Gallagher, and Coleman, “Observations on the Department of Labor’s Final Regulations” at 24.

\(^{106}\) FR 68:15564.

\(^{107}\) FR 69:22149.

\(^{108}\) FR 69:22155.


\(^{110}\) FR 69:22155.
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athletic trainers were learned professionals merely by virtue of having a bachelor’s degree in any field plus five three-hour college-level courses in anatomy, athletic training, and other subjects. In response to the workers’ argument that a “mere fifteen credit-hours” could not be compared to the academic requirements for lawyers, doctors, and teachers, the court declared that “brevity of the trainers’ course of specialized study does not preclude its inclusion under the ‘learned’ prong.”111

Ironically, the court rested this claim on its earlier decision in a case holding that airplane pilots were learned professionals, which even the Bush DOL had rejected in one of its rare denials of an exemption to employers.112

The Bush DOL also broke with its predecessor over funeral directors’ and embalmers’ entitlement to overtime protection. The Clinton DOL—which in 1999 had issued an opinion letter stating that funeral directors and embalmers with less education than a bachelor’s degree were typically not professionals113—appeared as a friend of the court supporting a private action by a funeral director/embalmer, whom the Sixth Circuit held to be an exempt professional whose work required “knowledge of an advance type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study” by virtue of the fact that he had attended college for two years and one year at mortuary science school, where, however, he took only one course in handling embalming chemicals and none in grief counseling. The dissenting judge consequently regarded the plaintiff as merely a skilled technician or technical specialist.114

114 Rutlin v. Prime Succession, Inc., 220 F.3d 737, 742, 745-47 (6th Cir., July 20, 2000). Amusingly, the senior vice president for advocacy of the National Funeral Directors Association, whose “average member” was “an independently owned and operated business with fewer than 10 employees,” in a self-serving effort to bolster the professional status of those employees’ “unique profession,” informed a congressional committee that their “instruction...includes a broad intellectual education in such disciplines as chemistry, sociology, psychology, history and communication gained by attending an accredited mortuary science school.” Overtime Regulations[’] Effect on Small Business: Hearing Before the Subcommittee on Workforce, Empowerment and Government Programs of the Committee on Small Business House of Representatives (108th Cong., 2d Sess., May 20, 2004) (Lexis Federal Document Clearing House Congressional Testimony) (prepared remarks of John Fitch). Undertaker-employees are not highly paid: “Median annual earnings for funeral directors were $43,380 in 2002. The middle 50 percent earned between $33,540 and $58,140. The lowest 10 percent earned less than $24,950....” BLS, Occupational Outlook Handbook, on http://www.bls.gov/oco/ocos 011.htm. Still essen-
Reliance on judicial decisions was not employers' sole recourse for extracting unpaid labor from undertakers and embalmers. Going back at least to the 1990s, congressional supporters had been introducing bills to amend the FLSA to create a clear statutory exemption for licensed funeral directors and later for licensed embalmers that would not be subject to the DOL's § 13(a)(1) white-collar regulations. In 1998, Senator Lauch Faircloth, a North Carolina Republican, introduced a bill to exclude licensed funeral directors categorically. On the Senate floor, Faircloth justified the exclusion on the grounds that:

Under current law, licensed funeral directors do not meet the test for the "professionals" exemption under the regulations of the Fair Labor Standards Act. Consequently, they are not exempt from minimum wage and overtime requirements. Given the nature of their work—on-duty or on-call 24 hours a day, 7 days a week, 365 days a year—this requirement places an economic hardship on small funeral homes and the families of licensed funeral directors. With erratic and unpredictable work hours, most licensed funeral directors would prefer the option of comp time in lieu of overtime pay in order to spend more time with their families.

Requiring licensed funeral directors to be paid for overtime work forces small business owners to allocate revenues for that purpose, thereby inhibiting salaries and bonuses. To avoid the financial strain, some even resort to using only part-time funeral directors. ... I strongly believe that small businesses, such as funeral homes, must be given flexibility to provide their key employees with the options for alternative overtime compensation in order for them to survive, grow, and remain the premier source of employment in our communities. On behalf of your local funeral homes and their licensed funeral directors, I urge my colleagues to support this legislation.

Ironically, even while Faircloth was bemoaning the burdens of overtime regulation imposed on the owners of small funeral establishments, the industry, according to then acting WHA Fraser, had "undergone a significant restructuring...as corporations...consolidated what used to be family-owned, private busi-

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CR 144:S9562 (July 31, 1998).
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nesses staffed by those considered self-employed." Thus large chains were buying up those local funeral establishments and converting those very owners into employees who would thenceforward be deprived of the overtime protection that they had wanted the government to help them take away from their erstwhile employees. These amendatory efforts continued during the 108th Congress (2003-2004) while the DOL was struggling with its proposed and final regulations.

Unimpressed by the comments submitted by the Teamsters Union that most licensed funeral directors and embalmers would wind up being deprived of protection, the DOL fashioned a rule under which those who were licensed by


121FR 69:22155. In his letter to McCutchen, Teamsters President James Hoffa focused exclusively on time-and-a-half pay: “A majority of funeral directors and embalmers rely on their overtime to provide for their families. ... If these workers are given a pay cut by the Department, we can expect a mass exodus from the profession as they look for better paying jobs. In essence, according to one Local Union leader, we will be burying our loved ones ourselves because there will be no one willing to do it for us.” Since the DOL was, according to the AFL-CIO and the Teamsters, simultaneously depriving millions of other workers of their time-and-a-half pay, it was unclear where the exiting undertakers and embalmers would still be able to find covered employment once they left what Hoffa curiously insisted on calling a “profession.” Letter from JPH to Tammy McCutchen (n.d.

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The bizarre result of this bifurcated rule was that instead of a regulation of national applicability, the DOL, by violating its own guideline of requiring an advanced specialized degree as customarily required for entry into a profession, had created a situation in which, as former Deputy WHA Fraser and his colleagues pointed out, “some people doing a given job in a given place with a given educational background will be exempt, while others with exactly the same education and doing exactly the same job, but who are located in a different State, are not exempt, based entirely on the State’s licensure requirements.” Here Fraser, Gallagher, and Coleman, referring to the aforementioned consolidation process, could not refrain from asking whether such a rule was merely a “distortion leading to a desired result”—namely, that the “industry obtains at least partial success through this final rule.”

In the welter of these conflicting views of the requisite elements of the professional exemption it should not be overlooked that no one—neither the courts, nor the Clinton or Bush DOL, nor the private litigants, nor the regulatory commenters, nor Fraser and his colleagues—ever raised, let alone answered, the question as to why the number or kinds of college courses that an employee attended, or even whether he was a skilled technician or a professional, was in any way relevant to whether he should be deprived of all protection against overwork.

Vis-à-vis the proposed regulations, the DOL did, however, make a number of concessions to the AFL-CIO, especially with respect to the role of work experience as an alternative method of acquiring professional knowledge. Thus it de-
leted—once again because it allegedly had not intended “a significant expansion of the learned professional exemption”\(^{125}\)—both the proposed language that the requisite advanced knowledge could also be “acquired by alternative means, such as an equivalent combination of intellectual instruction and work experience,” and the specific references, even where in occasional cases alternative means are permissible, to “training in the armed forces, attending a technical school, attending a community college....”\(^{126}\) Although the DOL did not believe that the original proposal would have brought about an expanded exemption, it nevertheless made the deletions to insure that the regulation not be “interpreted to exempt entire occupations previously considered nonexempt by the Department....”\(^{127}\)

This more restrictive position on work experience was on display in the case of chefs: the DOL rejected the National Restaurant Association’s suggestion that “the regulations should broadly allow work experience to substitute for a four-year college degree in the culinary arts because it would inappropriately expand the scope of the learned professional exemption.” Consequently, and once again protesting that it had had “no intention of departing from current law that ordinary

although it was unable to identify any occupation that could otherwise satisfy the primary duty test for professionals but not require such discretion and judgment. \(FR 69:22151\). At the same time, however, the DOL, agreeing with employers’ complaints that that overliteral interpretation of that phrase had led to “the absurd result” that a judge held employees who instructed Space Shuttle ground control personnel on communications not to have exercised sufficient discretion and judgment because their responses to malfunctions were listed in a manual, also fashioned a new provision on the use of manuals designed to preclude such rulings. Hashop v. Rockwell Space Operations Co., 867 F.Supp. 1287 (SD Tx., Nov. 9, 1994); \(FR 69:22151-52\); \textit{id}. 22273 (\$ 541.704) (modifying proposed \$ 541.204 (b) at \(FR 68:15588\)). It should be noted, as the DOL did not, that the judge on independent grounds found that the plaintiffs had not consistently used discretion because they lacked “the authority to make basic decisions that affect the fundamental operation of the enterprise...without seeking guidance from superiors as a matter of course.” Hashop at 1298. Moreover, since the workers were not even required to have college degrees, \textit{id}. at 1297, the DOL was wrong in calling them “learned professional scientist[s]....” \(FR 69:22152\). Finally, apart from the debate over the more logical interpretation of the purposeless regulation, neither the DOL nor the complaining employers ever explained why it would be absurd for such employees to be subject to overtime regulation. Like so many decisions, this one too included no information on the plaintiffs’ salaries or the extent of their overtime work.

\(^{125}\)\(FR 69:22148\).

\(^{126}\)\(FR 68:15589\) (proposed \$\$ 541.301(a) and (d)); \(FR 69:22265\) (\$\$ 541.301(a) and (d)).

\(^{127}\)\(FR 69:22150\).
cooks are not exempt professionals," the DOL not only required that chefs attain a "four-year specialize academic degree in a culinary arts program," but specified that the "learned professional exemption is not available to cooks who perform predominantly routine mental, manual, mechanical or physical work."\(^{128}\)

In addition to rejecting the suggestions of the Newspaper Association of America that it consider including journalists in the learned professional exemption "at this time" because it lacked sufficient information about the profession's requirements\(^{129}\) and that it classify all community newspaper reporters as creative professionals,\(^{130}\) the DOL programmatically declared that it "did not intend to create an across the board exemption for journalists." In particular, it reversed the new presumption of the proposed regulation by stressing that: "The majority of journalists, who simply collect and organize information that is already public, or do not contribute a unique or creative interpretation or analysis to a news product, are not likely to be exempt."\(^{131}\) The final rule itself added the potentially significant restriction that: "Reporters also do not qualify as exempt creative professionals if their work product is subject to substantial control by the employer."\(^{132}\) Despite these concessions, however, the unexplicated notion of reporters and editors as creative artists remained anchored in the regulations.

Although the DOL did not make important changes to the salary basis test proposals, it did with regard to the linked issue of the effect of improper salary deductions. These changes should be viewed against the background of the DOL's rejection of the suggestion by some employers' representatives, such as the NACS, that the salary basis test be abandoned altogether on the grounds that its imposition as a quid pro quo for not receiving overtime pay was "an inappropriate regulation of the compensation of an otherwise exempt employee."\(^{133}\) The DOL dismissed this suggestion out of hand because the nearly universal practice of paying executive, administrative, and professional employees on a salary basis "reflects the widely held understanding that employees with the requisite status to be bona fide executives, administrators or professionals have discretion to manage their time...and...receive compensatory privileges commensurate with exempt status."\(^{134}\) To be sure, the DOL has never operationalized such self-time-management or

\(^{128}\)FR 69:22266 (§ 541.301(e)(6)).
\(^{129}\)FR 69:22152.
\(^{130}\)FR 69:22157.
\(^{131}\)FR 69:22158. The final regulation, which this statement tracked, did not use the phrase "The majority." FR 69:22266 (§ 541.302(d)).
\(^{132}\)FR 69:22266 (§ 541.302(d)).
\(^{133}\)FR 69:22176.
\(^{134}\)FR 69:22177.
receipt of such privileges as prerequisites for depriving white-collar workers of overtime protection.

With regard to salary deductions, the Department had available to it the suggestion of several high-profile employers organizations to limit the effect of improper deductions to those individual workers who had been "actually subjected" to them. Employers had also criticized the Supreme Court's decision in *Auer v. Robbins* for having failed to overrule the interpretation that unlawful deductions from the salaries of a few workers could cause firms to forfeit the exemption for whole classes of employees. In contrast, the AFL-CIO had urged the DOL to modify the proposed regulation to require loss of the exemption even if there was no actual deduction, so long as employees were subject to a policy permitting impermissible deductions. Unsurprisingly, the DOL chose to depart from the position that the Clinton DOL had successfully taken in *Auer*—namely, that employers had failed to pay workers on a salary basis and therefore forfeited the exemption where there was "either an actual practice of making such deductions or an employment policy that creates a 'significant likelihood' of such deductions."135

Although the DOL had repeatedly justified its broad interpretations of exemptions in the final regulation on the grounds that it was merely acquiescing in judicial rulings (even when it could have opted for other, narrower rulings, or even ignored all rulings and begun afresh with new regulations unencumbered by judicial interpretations),136 here, where the DOL was dealing with an otherwise authoritative Supreme Court decision, it chose to ignore this ruling because it had the power to rewrite the regulation altogether, thus rendering the Court's interpretation moot.137 The DOL defended retention of the proposed provision in the final rule that the exempt status of employees in different job classifications working for different managers was not affected by improper deductions: "Any other approach...would provide a windfall to employees who have not even arguably been harmed by a 'policy' that a manager has never applied and may never intend to apply...." By the same token, the DOL disagreed with employers'
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comments urging that loss of exempt status should not extend beyond those workers suffering actual deductions: “An exempt employee who has not suffered an actual deduction nonetheless may be harmed by an employer docking the pay of a similarly situated co-worker. An exempt employee in the same job classification working for the same manager responsible for making improper deductions...may choose not to leave work early for a parent-teacher conference for fear that her pay will be reduced, and thus is also suffering harm as a result of the manager’s improper practices.”138 Nevertheless, the final rule’s temporal relaxation “reduced the economic risk...by a huge amount, and thus made questionable salary deductions a much more attractive gamble.”139

At the unusual request of both employers and the AFL-CIO, which were concerned that it was ambiguous, the DOL dropped the language in the proposed regulation that the employer had a “pattern and practice of not paying employees on a salary basis,” replacing it with “actual practice.”140 And at the request of the Small Business Administration Office of Advocacy, which claimed that it might be prejudicial to small firms, the DOL also dropped the requirement that the employer’s policy prohibiting improper deductions be in writing.141 And even after the final rule made the employer’s use of the window of opportunity contingent on affording employees a complaint mechanism and making a “good faith commitment to comply in the future,”142 Fraser, Gallagher, and Coleman—who, to be sure, exaggerated the stringency of the existing regulation—regarded the changes as rendering the entire salary basis requirement “for all practical purposes inoperative.”143 Indeed, as far as they were concerned, the overall effect of the final rule concerning the so-called window of opportunity for making corrections was that “the limitations placed on the inferences to be drawn from deductions inconsistent with the salary basis of compensation make the continued inclusion of the salary basis requirement largely meaningless.”144

The upshot of all the changes in the duties and salary tests was, according to the DOL’s estimates: (1) 1.3 million salaried white-collar workers with weekly salaries

138 FR 69:22180.
139 Fraser, Gallagher, and Coleman, “Observations on the Department of Labor’s Final Regulations” at 39.
140 FR 69:22179.
141 FR 69:22180.
142 FR 69:22271 (§ 541.603(d)).
143 Fraser, Gallagher, and Coleman, “Observations on the Department of Labor’s Final Regulations” at 36.
144 Fraser, Gallagher, and Coleman, “Observations on the Department of Labor’s Final Regulations” at 36.

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between $155 and $455 who were exempt would become protected and no worker earning less than $455 would lose protection; (2) the final rules were as protective as the existing regulations for 57 million hourly and salaried employees with annual earnings between $23,660 and $100,000; (3) the new standard duties tests for administrative and professional employees were as protective as the existing short test, while the executive duties test was more protective; (4) 107,000 employees earning more than $100,000 might lose their protection; and (5) to employers the annual cost in the form of greater overtime pay or higher base salaries (to avoid overtime liability) would be about $375 million. This last amount, set in relation to the 1.3 million workers who would become newly protected, was the equivalent of only $288 per year per worker—a seemingly minuscule amount of money to have prompted such a major political-economic collision. Finally, compared to the estimates based on the proposed regulations in 2003, the number of low-salaried workers who would gain protection was exactly the same, while more than half a million fewer white-collar employees might become exempt. That the former number (1.3 million) remained identical in spite of the fact that the DOL used a radically different methodology to generate it was, Ross Eisenbrey agreed, an “astonishing coincidence.”

In contrast, a sober analysis by three former career DOL officials who worked under Republican and Democratic administrations—a Deputy Wage and Hour Administrator, an Associate Solicitor for Fair Labor Standards, and a Deputy Associate Solicitor for Fair Labor Standards—arrived at a radically different assessment of the final regulations: “[I]n every instance (with the sole possible exception of the ‘salary level’ test) where the Department has made substantive changes...it has...expanded the reach and scope of the...exemptions. [T]he proposition that the Department is not ‘broadening the exemptions’...warrants little attention except for its propaganda value.”

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146 FR 69:22193-94. How this result was possible given the DOL’s more expansive interpretations of the duties tests, especially its adoption of the most pro-employer judicial interpretations available, is difficult to grasp.
149 See above ch. 15.
150 Email from Ross Eisenbrey (June 22, 2004). In 2004 the DOL did not count blue-collar workers, raised the threshold to $23,660, and counted all salaried workers under the threshold as working overtime in spite of the fact that the CPS data do not warrant such an assumption. Id.
151 Fraser, Gallagher, and Coleman, “Observations on the Department of Labor’s Final
The intent of Congress in passing the FLSA in 1938 wasn’t to boost workers’ paychecks—it was to penalize employers who worked people more than 40 hours a week, which the law considered “an oppressive labor condition.” The overtime penalty was meant to promote 40 hours as the workweek norm, and a second goal was to create jobs by spreading out the work among more employees.152

If Senator Judd Gregg, the chairman of the Senate Health, Education, Pensions, and Labor Committee, believed that the executive branch’s decision to revise the rules “‘takes the wind out of the sails of the opposition,’”153 the AFL-CIO’s counter-campaign juggernaut must have quickly disabused him of this illusion. Nevertheless, the very day that the DOL released the regulations, the Republican leadership of the House Workforce Committee announced that it would hold a hearing on them a week later, when it doubtless expected to continue to “commend[]” the Department,154 but in fact ran into labor’s resistance movement.

The potential fruitfulness of that two-hour and 40-minute hearing155 was, however, undermined by Chao and McCutchen’s departure as soon as the committee had finished questioning them; as a result, a direct confrontation between the one witness who was critical of and, unlike even the Democratic committee

Regulations” at 31. Although the authors conceded that they had “not tried to penetrate” the final rule’s economic impact analysis (id. at 2), Fraser was later quoted as saying: “‘By my analysis, under the new regulations, 3, 4, or 5 million Americans could easily lose overtime coverage. ... I would fearlessly predict that under these rules, within three years or five years, instead of 20 percent of [white-collar] workers being exempt, it will be 25 or 30 percent.’” Steven Greenhouse, “Overtime Rules Dispute Is a Numbers Game,” NYT, Aug. 31, 2004 (A10:5-6).


153 Ken Moritsugu, “Revised Overtime Rules Produce New Winners, Losers.”

154 “Committee Republicans Announce Hearing to Evaluate the Impact of Final Overtime Rule on Workers and Employers,” Global News Wire, Apr. 20, 2004 (Lexis).

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members, conversant with the regulations and the Wage and Hour Administrator—who, unlike the Labor Secretary, was versed in their details—could not take place. Instead, each side was able to present its position largely unchallenged, except insofar as the committee members happened to have been prepped to ask stock questions on particular points, which, however, their overall lack of familiarity with the regulations made it impossible for them to follow up on. Though hardly unique or even unusual, this pattern of choreography devalues the legislative fact-finding process into a charade. To be sure, even if the DOL officials had remained to debate, a fundamental discussion of the underlying purposes of overtime regulation or of the exclusion of white-collar workers would not have taken place anyway, since those questions transcended the political, historical, and intellectual horizons of all the participants, whose framework was confined to comparing the technical details of the scope of coverage of the existing, proposed, and final regulations without contesting the legitimacy of the exclusion itself. This narrowness was almost painfully on display when the ranking minority member of the committee, Representative George Miller, labor’s best friend in the House, instead of using the opportunity to question a policy that has remained unfounded for 67 years, could do no better than allow as “we” have a “love-hate relationship” to overtime: we love the money on our W-2 at the end of the year, but we hate working late Friday night.156 This lament missed the whole point of maximum hours legislation both by focusing on the premium wages—payment of which represents a failure, not a goal, of overtime regulation—and overlooking mandatory overtime work imposed on workers who do not want it at all.

In addition to the two administration witnesses, Chao and McCutchen, three non-governmental witnesses appeared, two of whom—an economist at a big-business think-tank and an employer-side corporate lawyer—unsurprisingly presented testimony non-objectively on behalf of employers. Ronald Bird, whose crude ideological arguments have already been quoted at length,157 forfeited whatever credibility he was otherwise entitled to by citing his own biographical experience as an economist with a doctoral degree to prove that in “today’s labor market, many employees have more bargaining power than was typical 50 years ago.” His objectivity then suffered a fatal self-inflicted blow when, without any evidence whatsoever—but in the face of decades of precisely such employer conduct and the venerable labor standards enforcer’s admonition that “moments are the elements of profit”158—he concluded that an “employer who would change an

156 Assessing the Impact of the Labor Department’s Final Overtime Regulations on Workers and Employers.
157 See above ch. 17.
158 Reports of the Inspectors of Factories for the Half Year Ending 30th April, 1860,
employee's status to shave a few cents off the payroll would do so at his peril and likely lose a valuable worker to a competitor." Inadvertently, however, he did point up why so much more profit is potentially there for the shaving for employers in 2004 than in 1938: "changes in the occupational structure" associated with the absolute and relative growth of white-collar jobs "mean that many more jobs today than in the past pay qualify for exemptions."159

The lawyer, David Fortney, the acting and deputy Solicitor of Labor in the first Bush administration and co-author of the NAM's comments on the 2003 proposed change, asserted that the increase in the salary threshold to $455 a week marked "a return to the original exemption criteria that require a salary of sufficient magnitude in order for an employee to be classified as exempt."160 He also found it "particularly useful" that the DOL listed examples of administrative employees who would typically be excluded from overtime regulation (such as insurance claims adjusters and financial services industry employees who advise customers on the advantages and disadvantages of their employers' products), arguing that these exclusions "essentially codify the major court rulings"161 without disclosing that where courts had ruled in various ways, the DOL had chosen to adopt the most pro-employer outcomes.

The third witness, whom the committee's minority Democratic choreographers were presumably permitted to select, was of a markedly different character. The AFL-CIO prudently refrained from sending one of its own officials or someone otherwise linked to it; instead, the witness, Karen Smith, was a former Wage and Hour investigator, who, on leaving the DOL after 12 years in 1999, opened her own profit-making business as a consultant, "primarily for employers...corporate America, small business" “and their attorneys,”162 performing the very kind of cooperative consultation (rather than confrontational-punitive investigation) that employers have come to demand and in part to obtain from enforcement agen-


161 Assessing the Impact of the Labor Department's Final Overtime Regulations on Workers and Employers (statement of David Fortney).

cies. Her expertise thus certified by the WHD and lacking any taint of association with the labor movement, Smith proceeded to administer impassioned criticism and angry (almost emotional) denunciations of selected provisions of the final regulations.

She opened her testimony by accusing the DOL of having crafted wording that “artfully weakens the current regulation in very subtle, but significant ways that will surprise employers and employees....” From the rest of her testimony it emerged that uniformly the former would be pleasantly and the latter unpleasantly surprised. With much greater specificity than the other witnesses she highlighted several of the new exemptions. Nursery school teachers would lose coverage because the new rules did not require “independent discretion and judgment.” Registered nurses’ overtime protection was jeopardized because the final rule added to § 541.604(b) the word “hourly” to indicate the possibility of paying all of an employee’s guaranteed salary on an hourly basis, thus “bel[ying] the idea that exempt employees have discretion to manage their own time and are not answerable for the number of hours they work. And, finally, working foremen were covered under the existing regulation, but under the new rule the concurrent performance of exempt and nonexempt work would permit exclusion of an employee as an executive if management was his primary duty.

163 Employers, call on Karen Dulaney Smith if a Wage and Hour Investigator or a plaintiff’s attorney has contacted you or if your own attorney or accountant has advised you that your pay practices need revision in order to reduce liability. If you are under investigation, Karen Dulaney Smith can meet with Wage and Hour representatives. She has extensive skill and experience in conducting speedy and thorough research into all Wage and Hour laws, reviewing payroll and personnel records, making transcriptions and back wage computations, explaining employer and employee rights and obligations in terms that make sense, and finding ways to make compliance cost effective and fair. If a suit has been filed against you, Karen Dulaney Smith maintains excellent relationships with many qualified labor attorneys to whom she can refer you. She can work with your present lawyer, who may or may not be a specialist in the area. In coordination with your attorney, Karen Dulaney Smith can greatly streamline document preparation and act as an expert and consulting witness in litigation or mediation.” http://www.karendulaneysmith.com/referrals.htm.

164 To be sure, it seems most improbable that the AFL-CIO was uninvolved in her selection as witness. After all, the authors of the EPI report thanked “Smith for her generous and invaluable assistance in understanding the many complexities of the proposed rule, for her insights into the current enforcement of the overtime regulations, and for her truly inspirational spirit of public service.” Eisenbrey and Bernstein, “Eliminating the Right to Overtime Pay.”

165 Assessing the Impact of the Labor Department’s Final Overtime Regulations on
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It is very improbable that Smith's testimony changed the views of any committee member, but, remarkably, by the next day the AFL-CIO had posted on its website an analysis of the new duties tests that largely overlapped with Smith's. Conceding the Bush administration almost nothing, the unions charged that it appeared that it had "dealt with a public relations problem by addressing the overtime concerns of the most highly visible workers—like firefighters and police—while...including new provisions that strip overtime rights from less visible workers." The AFL-CIO also pointed out that for the first time the regulation "effectively places...an income cap on overtime eligibility" that was not indexed for inflation and thus would over time deprive more workers of that right.

Having apparently decided that the importance to employers of finally being able to exclude even more workers from overtime regulation was worth the risk of alienating working-class voters in the midst of a presidential election campaign, the Bush administration was clearly not amused by the vigorous campaign that the AFL-CIO launched to puncture the legitimacy of the new regulations. In a counter-stroke, on May 3, Secretary Chao named a new WHD enforcement task force to "maximize protection of workers' pay right under new Overtime Security rules." Without identifying the AFL-CIO by name, she nevertheless cleverly warned it that, perversely, its propaganda might boomerang: "'The other reason for creating this enforcement task force is our concern that the massive misinformation campaign against the new Overtime Security rules could undermine efforts to make employers live up to their new obligations under the rule and jeopardize workers' overtime pay protections.'"

The Democrats were not chastened. The very same day, Harkin proposed an amendment to the aforementioned corporate trade and tax bill adding a provision to § 13 of the FLSA, under which

any portion of the final rule promulgated on April 23, 2004, revising part 541 of title 29,

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Code of Federal Regulations, that exempts from the overtime pay provisions of section 7 any employee who would not otherwise be exempt if the regulations in effect on March 31, 2003 remained in effect, shall have no force or effect and that portion of such regulations...that would prevent such employee from being exempt shall remain in effect. Notwithstanding the preceding sentence, the increased salary requirements provided for in such final rule at section 541.600...shall remain in effect.170

Although presumably hardly any of his colleagues on the Senate floor were paying attention to what he was saying and no one’s vote would have been changed had anyone actually been listening, Harkin tried to buttress his amendment by an analysis of the final regulations. His brief references to some of the changes in the duties tests were often accurate, but much of his speech verged on the incoherent. Thus he declared that since the FLSA’s enactment in 1938, “overtime rights and the 40-hour work week have been sacrosanct....”171 He reinforced his confused belief in the mutual compatibility of the 40-hour week and the right to extra pay for hours beyond 40 by asserting that for “65 years, the 40-hour week has allowed workers to spend time with their families instead of toiling past dark and on weekends,” and turning around and observing that overtime accounts for 25 percent of the total income of those who work overtime.172 Finally, Harkin asserted that raising the salary threshold to $23,660 “should have been done a long time ago” and that the white-collar rules in general should have been revised by Congress after holding committee hearings.173 He failed, however, to explain why Congresses controlled by his own party had never undertaken such an effort since 1940 (when the unsuccessful initiative had been designed to shrink coverage) or why Congress had never done anything but express mild concern during the

170 CR 150: S4742 (May 3, 2004). This amendment was designed to differ from the text of the earlier Harkin amendment by virtue of being both prospective and retrospective; in other words, it voided any part of the rule, even after implementation, that took away overtime protection. Consequently, it would make recourse to the Congressional Review Act unnecessary. The labor movement believed that it could probably get and win a vote in the Senate invalidating the changes in the duties tests, but that House Majority Leader Tom DeLay would not permit a vote in the House; consequently, the AFL-CIO downplayed the CRA as an option. Email from Barbara Somson, UAW, Washington, DC (June 22, 2004).


DOL’s 29 years of inaction on updating the salary levels, let alone taken matters into its own hands.

To the chagrin, no doubt, of the relentless AFL-CIO and Democratic campaign against the final regulations, on May 4 the Washington Post editorialized in favor of Congress’s holding off on blocking the rules; instead, it urged that the courts should decide whether they were consistent with the FLSA, and in the meantime they would offer significant benefits for workers. The debate on Harkin’s amendment resumed that afternoon, but, first, that morning the Labor Subcommittee of the Senate Appropriations Committee, of which Specter was the chairman and Harkin the ranking minority member, held an hour and a half hearing on the overtime final rules. In his opening statement Specter announced that the hearing would focus on the differences between the old and new regulations’ definitions of “administrative” and “professional” and how the new definitions enhanced “clarification to avoid the complexities of litigation, which is the primary objective of the new regulation.” Already at this point he appeared to be skeptical that such “very similar” definitions could achieve that objective.

In an opening statement that stretched credulity to the snapping point, WHA Tammy McCutchen declared that the DOL “has been consistent in what it wanted to achieve with this update. The primary goal remains to protect low-wage workers. ... We at the Department of Labor are very proud of the updated rule.... America’s workers deserved action. They now have a strengthened overtime standard that will serve them well for the 21st Century.” Hiding, once again, behind the increase in the salary threshold that the Clinton administration’s inaction had made possible, McCutchen proudly reported that the low-wage workers who would be likely to gain overtime compensation were predominantly married women without a college degree living in the South.

In his questioning Specter made little headway in trying to extract an answer from McCutchen as to how her new definition of “administrative” employee would help “avoid the vagaries of litigation....” Ultimately, she was able to come up with no better excuse for the vagueness of the new definition than shifting the blame to the “commenters”: “We would have liked to have clarified it even further,

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174 See above ch. 15.
176 Final Rule on Overtime Pay at 1, 61.
177 Final Rule on Overtime Pay at 1-2.
178 Final Rule on Overtime Pay at 7, 9.
179 Final Rule on Overtime Pay at 7.
180 Final Rule on Overtime Pay at 10.
but we did not receive any comments with any better ideas.” The “grave reservations” that Specter registered appeared to have less to do with the substantive class bias of the new definitions and more with his perception that the revised regulations did not constitute an exception to his universal experience that he had “yet to see a regulation which does not require a lot of analysis and lot of legal interpretation....”181 Little wonder that a BNA reporter observed that Specter and Harkin had reacted to McCutchen’s testimony, for example regarding the prospects for reducing the number of class action lawsuits, “with varying degrees of skepticism.” In particular, they “expressed disappointment that there is ‘no basis for coming to closure’ and ending the legal wrangle over who is or is not exempt....”182

With Specter’s interrogation confined to the new definitions’ litigation-dampening impact, exploration of their substance was left to Harkin, whose effectiveness, as throughout the campaign, was handicapped by his ignorance of the fundamentals of the regulatory scheme. This deficiency re-emerged most prominently in connection with his question about the exclusion of the new category of so-called team leaders. Disabled by his ignorance from confronting McCutchen over her breathtaking prevarication that it “is actually a pro-employee change from the current language,”183 Harkin, latching on to the new language that such a team leader did not have to “have direct supervisory responsibility over the other

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181 Final Rule on Overtime Pay at 11.
183 Final Rule on Overtime Pay at 13. McCutchen based this false claim on the assertion that the “current language” it changed was § 541.205(c), which “says that the administrative exemption applies” to “‘a wide variety of persons who either carry out major assignments in conducting the operations of the business, or whose work affects business operations to a substantial degree....’” McCutchen then went on to claim that: “We have limited that definition of an administrative employee to limit it only to the person who leads the team who works on major projects.” Id. What McCutchen suppressed (and Harkin did not know enough to mention) was that the current language did not constitute the definition of an “administrative employee,” but merely illustrated one of the sub-definitions—namely, that the employee’s work be “directly related to management policies or general business operations....” There was in fact nothing in the new regulations that prohibited classification of non-leader members of the “team of other employees assigned to complete major projects” as excluded administrative employees, provided that they met the minimal requirements of the category. All that the new regulations accomplished was to identify a theretofore regulatorily unknown occupational group that would thenceforth “generally meet[ ] the duties requirements for the administrative exemption....” FR 69:22264 (§ 541.203(c)).
employees on the team,” 184 interjected that “I thought it is interesting that they put that thing in there, that they do not even have to have supervisory authority.” This public self-disclosure of yet another gaping hole in his modest knowledge of the regulations—the detachment of the non-supervisory administrative employee from the supervisory executive in 1940, by far the most important revision of the regulations between 1938 and 2004, had somehow eluded the self-proclaimed senator-researcher—provided McCutchen with an opportunity to undermine his authority by pointing out that: “This is the administrative exemption, and the executive exemption is the exemption that is designed for managers and supervisors.” 185

In spite of Specter’s direct request, after the committee’s questioning of her, that she remain for the rest of the hearing so that it could have her comment on other witnesses’ testimony, McCutchen replied that she “had to step out for another event” because she had been “previously scheduled” for it. Specter’s admonition failed to dissuade her: “When we schedule these hearings, we really expect witnesses to be able to stay. We had an experience with the Secretary last time which was difficult for the subcommittee. So we expect you to stay.” 186

Labor’s first witness, Craig Becker, the AFL-CIO’s associate general counsel, pointed out that new § 541.604 diluted the salary basis test by permitting employers to compute an exempt employee’s earnings “on an hourly, a daily or a shift basis, without losing the exemption or violating the salary basis, if the employment arrangement also includes a guarantee of at least the minimum weekly required amount paid on a salary basis regardless of the number of hours, days or shifts worked, and a reasonable relationship exists between the guaranteed amount and the amount actually earned.” Under this provision, according to Becker, “employers will be able to both closely control employees’ time, requiring them to punch a clock, and at the same time deny them overtime compensation.” 187

184 FR 69:22264 (§ 541.203(c)).
185 Final Rule on Overtime Pay at 14.
186 Final Rule on Overtime Pay at 16. Those who attended the hearing reported that Specter had been very angry. Email from Kelly Ross, AFL-CIO lobbyist, who attended the hearing (June 14, 2004).
187 Final Rule on Overtime Pay at 20. Becker also sought to show that the team leader exclusion had no parallel in the existing regulations for employees carrying out “special assignments.” Becker insisted that a “‘special project’”—it is unclear why he used this term and put it in quotation marks although it does not appear in the regulations—was “far different from” the new “major project” because the former was outside the employer’s ordinary work, whereas a “major project” was simply an important one. Consequently, according to Becker, newly exempt team leaders could “work on a major project on a continuous basis as an integral part of the employer’s business.” Id. at 22. Although the team leader exclusion was an innovation, Becker misunderstood Harold Stein’s notion of
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Testifying again, David Fortney, lauded the final regulations (in a syntactically impaired expression) for “introduc[ing] clarity and common sense to the highly-compensated white-collar employees” earning $100,000 or more. This euphemism for virtually guaranteeing their total exclusion was, according to Fortney, “consistent with the underlying purposes of the FLSA, which are to protect overtime for those workers who earn the least, and presumably are least able to negotiate adequate compensation arrangements.” Whatever justification he was able to conjure up for these mass exclusions of relatively high-paid workers derived from his exclusive focus on time-and-a-half pay and complete neglect of the imposition of unsocially long hours, which can be as oppressive for high- as for low-paid workers. Fortney’s commentary on the final regulations culminated in the claim that the “current regulations are not serving anyone’s interests except those of class action lawyers”—an astonishing contention in light of the structurally lopsided advantages that have accrued to employers of white-collar workers since 1938 and especially since the virtual demise of the salary-level test during the 1980s.

Unlike McCutchen and Fortney, the two witnesses appearing on behalf of the labor movement indulged less in global ideological claims, instead presenting detailed criticism of specific regulatory innovations. Ross Eisenbrey of the EPI pointed out that low-level working supervisors would be reclassified as executives “just as fast food assistant managers already have in some jurisdictions, even though they spend 90 percent or more of their time doing routine, production-line work such as flipping burgers and taking customer orders.” The final rule was able to bring about this result by “[r]elying on poorly reasoned cases interpreting the current regulations, most notably the Burger King cases from the First and Second Circuits....” Eisenbrey underscored that the implications of the new § 541.106 on “concurrent duties,” which expressly provides that an “assistant manager can supervise employees and serve customers at the same time without losing the exemption,” were “far greater than the Department admits. While claiming to conform the regulations to current case law, in fact the Department is rejecting the better-reasoned cases and extending the worst case beyond retail to the rest of American industry.” Although Eisenbrey’s specific claim that “Burger King and the other cases that have permitted employees to do unlimited amounts of menial work while still being held to be exempt executives are not the law in every special assignments carried out by bona fide administrative employees, who performed this work permanently. See above ch. 13.

188 Final Rule on Overtime Pay at 29.
189 Final Rule on Overtime Pay at 34.
190 Final Rule on Overtime Pay at 36.
191 Final Rule on Overtime Pay at 38.
judicial circuit, and they have not been extended outside of the fast food and retail industries”192 was contradicted by the findings of the GAO white-collar overtime report and the complaints that unions conveyed to the GAO,193 his larger point—that the DOL’s claim that its new regulations were solidly rooted in prevailing case law and did not represent an expansion of exclusions beyond that already recognized by existing law was a distortion inasmuch as the case law was not monolithic and the DOL had systematically selected the pro-employer decisions—was arguably his most salient criticism of the substance of the regulations and the bona fides of the procedure that the Labor Department applied to craft them.194 A congressional committee really interested in getting to the bottom of the dispute between the DOL and the AFL-CIO over the nature of the regulations would have made certain that Eisenbrey and McCutchen confronted each other over this very point.195 To be sure, even if McCutchen had stayed at the hearing, the extraordinarily limited time that each senator was apportioned for questioning and the inveterate custom of not even calling attention to officials’ evasive non-responses made it very unlikely that a useful dialog would have unfolded in any event.

In the event, the confrontation was circuitous and diluted. Specter inadvertently broached the issue in asserting, after McCutchen’s departure, that she had

192Final Rule on Overtime Pay at 39.
193The GAO in a survey of 32 cases decided between 1994 and 1999 “included hardly any instances in which a court overturned an employer’s classification of a lower-income supervisor as an exempt executive.” The cases included non-retail workplaces (such as an aquatics director of a community swimming pool and a dietary manager of a nursing home) and all the employees involved “claimed that their jobs consisted primarily of nonmanagerial work....” The consequence on a national level was that the Clinton administration DOL had initiated little litigation over the executive status of supervisory employees. GAO, Fair Labor Standards Act: White-Collar Exemptions in the Modern Workplace 29-30 (GAO/HEHS-99-164, Sept. 1999). For a case even more extreme than Burger King, see Murray v. Stuckey’s Inc, 939 F.2d 614, 617-18 (8th Cir. July 25, 1991).
194As John Fraser, Acting Assistant Secretary for Employment Standards and Deputy Wage and Hour Administrator in the Clinton administration, emphasized, the DOL would also have been free to ignore all judicial interpretations—except Supreme Court rulings that the Secretary of Labor had exceeded her authority—and to write new regulations on a blank slate. Telephone interview (July 11, 2004).
195The committee should, for example, have questioned McCutchen about the DOL’s claim that its retention in the final rule of terms from the current administrative employee rule “that have been the subject of numerous clarifying court decisions...made the standard duties test for administrative employees in the final rule as protective as the current short test.” FR 69:22214.
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"raised a good point when she said that regs do make a selection of the cases and give the parties some detailed information as to which cases are to be followed. Implicitly in that, cases were rejected if they are not included."196 Although McCutchen had in fact stated that the final rule with respect to the permissible amount of exempt work had “adopted the case law in the Burger King and Dairy Queen cases,”197 she had not only not admitted that the DOL had rejected opposing case law, but had in fact suggested that the final regulations had adopted monolithic case law.198 Specter was not interested in this issue, but rather in the question of whether it was a “significant improvement” to have incorporated the case law into the regulations “so that people who are trying to figure out what these words mean” would “have the case law readily at hand....” Eisenbrey, persisting in his strategy of not acknowledging anything positive in the Bush administration regulations, denied that the inclusion was a “substantial help,” but then directed Specter’s attention to the vastly more important matter that “the Department chose the cases to put in here very selectively.” After Eisenbrey had pointed out class bias involving insurance claims adjusters, Specter promptly explicated the point: “So they made a selective basis which you think undermines their credibility.”199

Eisenbrey went on to observe that by making it sufficient that an exempt executive manage a “grouping or team,” the final rule reduced to a “new and embarrassing level of absurdity” the requirement that she manage an enterprise or customarily recognized subdivision. He predicted that department stores, for example, would begin arguing that “an employee ‘in charge of’ the perfume counter is an exempt executive because she has the ‘authority’ to suggest shift assignments for two other employees.”200 Finally, Eisenbrey charged that the DOL had “opened an enormous loophole” applicable to as many as two million workers with its “new exemption” for “team leaders,” a term widely used in industry to describe “a non-management employee responsible for calling meetings and directing a group of front-line employees who have been given an important task of a kind that historically was reserved to management, such as” improving efficiency, pro-

196Final Rule on Overtime Pay at 51.
197Final Rule on Overtime Pay at 14.
198McCutchen had testified earlier in the hearing that “the changes that we made to the duties tests...are all adopting current Federal case law, current Wage and Hour opinion letters, or the current Wage and Hour field operations handbook. So although it is a change in the language of the regulation, it is not a change in the current law that is being applied in the courts today.” Final Rule on Overtime Pay at 12 (italics added).
199Final Rule on Overtime Pay at 51. In fact, the DOL had for decades included case law in its interpretive regulations §§ 541.117(d) and 541.207(a).
200Final Rule on Overtime Pay at 36.
ductivity, customer service, information technology, safety, and employee morale.\textsuperscript{201}

The final witness, Ronald Bird, repeated the testimony that he had presented to the House Workforce Committee a week earlier. In the retelling, he further subverted his credibility by embellishing his use of his own career as an economist with a doctoral degree to illustrate that "[t]oday the fundamental competitive conditions of the labor market are very different" than they were in 1938. With the unemployment rate at 5.7 percent rather than 19.1 percent, "the relative scarcity of potential replacements gives me power, power to make demands about wages, hours, and working conditions that my grandfather in 1938 would have never dared make."\textsuperscript{202} Naming numbers, Bird asserted that if one of his previous employers had changed those conditions "against my wishes, I would have quit because there were six other people willing to hire me."\textsuperscript{203}

Bird's tale prompted Senator Specter to ask the witness (perhaps archly) whether the thrust of his testimony was that workers' improved labor market status made it "a situation where it does not matter a whole lot what the technicalities are of the regulation in effect...." Bird's response that the FLSA was needed to "protect the people it was designed to protect" without, however, identifying who those people were apparently provoked Specter into calling Bird's bluff and requesting concrete policy conclusions from his autobiographical approach to labor economics: "So it might not make a whole lot of difference what the definitions are if the employee can walk away from the job and find a new one if he is not being treated fairly. Maybe we are making a [sic] too much of a fuss about the semicolons." Trapped by his own vacuous rhetoric, Bird stumbled into evasive incoherence: "Right, yes, sir. I appreciate that question because it really does illustrate I think the problem that we have encountered in the discussion about the old rule versus the final new rule. We see in that discussion a lot of jumping to conclusions, I think."\textsuperscript{204}

That afternoon, Specter summarized on the Senate floor what he had learned from the hearing testimony: "there is no indication that this new regulation is going to clarify anything at all."\textsuperscript{205} When the Senate floor debate resumed on the

\textsuperscript{201} Final Rule on Overtime Pay at 40.
\textsuperscript{202} Final Rule on Overtime Pay at 41.
\textsuperscript{203} Final Rule on Overtime Pay at 42. Bird was referring to a job in which he preferred to be paid hourly and overtime, although legally his employer could have paid him a salary and not been liable for overtime pay. Bird did not explain why he preferred this arrangement.
\textsuperscript{204} Final Rule on Overtime Pay at 50.
\textsuperscript{205} CR 150:S4802 (May 4, 2004).
afternoon of May 4, five-term Republican Senator Orrin Hatch sought, as employers had been doing since 1938, to cast the overtime provisions as “meant to safeguard low-income workers from employers who would take advantage of them.”206 As for the 107,000 employees earning more than $100,000 who would, under the final regulations, “no longer automatically be eligible for overtime,” he detected a Democratic electioneering ploy: “It doesn’t take a particularly clever politician to see that you might win votes if you fight to make these high earners higher earners and otherwise carry on as if a Republican business-friendly Administration cannot be trusted to do right by employees.”207

At this point Senator Gregg, the chairman of the Health, Education, Labor, and Pensions Committee, apparently acting on his own208 but “with the acquiescence of the administration,”209 offered an amendment designed to dissuade at least several of the six Republicans who had voted for Harkin’s amendment in 2003 from doing so again. He charged that Harkin’s approach would create a “class ceiling” because no employer would be “willing to move anybody into any position of any responsibility from where they already are because they aren’t going to know what effect that is going to have on that individual’s overtime. They are going to be buying a lawsuit. ... That business...is going to say, we don’t need that lawsuit. We are going to go out and hire a new person to do these duties who we know won’t be subject to any sort of issues relative to overtime.” To be sure, Gregg’s reasoning was opaque in the sense that the same alleged uncertainty that attached to the overtime status of the position objectively remained whether it was filled by someone already on the firm’s payroll or a newly hired employee. The only sense that it could plausibly make was that the “clerk” who “suddenly start[s] to be promoted into a position of maybe taking over some responsibility and making decisions on who gets what or who doesn’t get what” and who is “going to immediately be putting that business...into the issue of whether you have a right

207 CR 150:S4789. Hatch’s Republican colleague, Michael Enzi of Wyoming, cast doubt on the cleverness of the ploy by asking: “Could our [Democratic] colleagues be willing to deny overtime pay for an additional 1.3 million low-wage workers in order to protect the overtime for the 107,000 workers earning above $100,000?” Id. at S. 4797.
208 Email from Kelly Ross, AFL-CIO lobbyist (June 15, 2004). The press reported that “Gregg said he had spoken with Labor Department officials before offering the provision. ‘They don’t see it as necessary, but I think they understand the politics of it,’ he said.” “Senate Adopts Amendment To Block New Overtime Rules,” Emily Heil, National Journal’s CongressDaily, May 5, 2004 (Lexis).
any longer to overtime in fact did not agree that the assumption of some additional responsibility should also subject her to unlimited involuntary overtime work without compensation.

Regardless of the untenable substantive (or perhaps merely pretextual) reason that Gregg adduced for his amendment, his remarkable and unprecedented proposal did make some sense from the point of view of protecting workers’ coverage and reducing interpretive ambiguity. For the first time, Congress would have fixed the salary threshold itself—at a level, to be sure, even lower, adjusted for inflation, than that of the notoriously anti-worker Barden bill of 1939-40. His method for clarifying coverage “once and for all” was straightforward: “[A]bout 55 groups...have come to us and said they feel they may be an issue. We don’t think most of them are because we think the regulation is pretty clear for most of these groups that they basically retain their right to overtime. But just so there can be no question about it, this amendment specifically names every one of those groups and says they have the right to overtime at a minimum. They have the right to their present overtime situation. If the new law...puts them in a better position, they have a right to that.”

Specifically, Gregg proposed that:

Section 13 of the Fair Labor Standards Act of 1938 (29 U.S.C. 213) is amended by adding at the end the following:

(k)(l) The Secretary shall not promulgate any rule under subsection (a)(1) that exempts from the overtime pay provisions of section 7 any employee who earns less than $23,660 per year.

(2) The Secretary shall not promulgate any rule under subsection (a)(1) concerning the right to overtime pay that is not as protective, or more protective, of the overtime pay rights of employees in the occupations or job classifications described in paragraph (3) as the protections provided for such employees under the regulations in effect under such subsection on March 31, 2003.

(3) The occupations or job classifications described in this paragraph are as follows:
(A) Any worker paid on an hourly basis. (B) Blue collar workers. (C) Any worker provided overtime under a collective bargaining agreement. (D) Team leaders. (E) Computer programmers. (F) Registered nurses. (G) Licensed practical nurses. (H) Nurse midwives. (I) Nursery school teachers. (J) Oil and gas pipeline workers. (K) Oil and gas

210 CR 150:S4791.
211 Why the brand-new employee might not come to the same conclusion was also unclear.
212 The Barden bill’s salary threshold of $1,800 a year in 1939 was the equivalent of $24,565 in 2004. See above ch. 10.
213 CR 150:S4792.
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(4) Any portion of a rule promulgated under subsection (a)(1) after March 31, 2003, that modifies the overtime pay provisions of section 7 in a manner that is inconsistent with paragraphs (2) and (3) shall have no force or effect as it relates to the occupation or job classification involved.214

The list was woefully inadequate, but it did encompass a number of the occupations about which labor had specifically complained, and tentatively it was an intriguing approach. The Democrats, however, lacked the flexibility to engage the proposal. Senator Kennedy, the first Democrat to speak substantively after Gregg, appeared to have been caught off-guard. On the one hand he urged his colleagues to vote for the amendment, but on the other he claimed that it was “not much to bargain” on the grounds that, instead of providing clarification, listing occupational categories would “provide additional litigation because” the DOL’s test “refers to the duties and not to the professional names that are being used. So if you have a cook or a chef, does that apply to somebody just cooking the food or someone at the salad bar who also considers themselves to be included? Plus, there are additional people who have not been included as well. This is a continuation of a misguided policy.”215 These remarks, which could not even qualify as competent debaters’ points, became incoherent when coupled with Kennedy’s declaration that he was going to vote for the amendment “because...it is an attempt at least in those 55 areas to make sure they are protected.”216 He inadvertently revealed the Democrats’ inability to engage when he added: “We are not sure what this is all

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214 CR 150:S4792-93. The ungrammatical structure of §(k)(2) makes it difficult to discern exactly what Gregg meant, but presumably the phrase “at least” should have preceded “as protective” and “than” should have been inserted somewhere after “more protective.”

215 CR 150:S4793.

216 CR 150:S4794.
about. We know there is going to be a cut in overtime for hard-pressed working families.... That is what will be the result." Kennedy appeared not to have grasped that Gregg was potentially undermining much of what the Bush administration’s new regulations had accomplished for employers in terms of restricting overtime coverage. But instead of calling Gregg’s bluff and demanding that still more occupations be added to the hold-harmless list, Kennedy appeared to believe that he was delivering a fatal blow by noting that insurance adjusters, cashiers, and bookkeepers were absent from the list.

Although he too failed to engage Gregg’s amendment, Wisconsin Democrat Herbert Kohl was the only member of Congress during the entire 2003-2004 debates to admit openly that the FLSA overtime provision had not achieved its purpose:

In passing the FSLA, Congress hoped that the required “time and a half” for overtime work would be an incentive to employers to stick to a 40-hour work week. Today, that goal is still distant as companies routinely require workers to work more that 40 hours. American workers work more hours than any other industrialized nation, except South Korea. And the overtime pay, rather than being a disincentive to employers, has become a necessary income source for many American families. ... Like in our past, the worker’s choice is a harsh one—earn the extra income needed to meet a family’s material needs, but sacrifice the family time that meets their emotional needs.

Curiously, however, instead of proposing to revamp the FLSA to create a real maximum 40-hour week, Kohl was so preoccupied with attacking the Bush administration’s retrograde regulations that he characterized the existing rules, which he had just held responsible for making possible overly long working hours, as “designed to fairly compensate workers for onerous overwork....”

In the closing minutes of the debate Harkin had an opportunity to call Gregg’s bluff, but, like Kennedy, he preferred to score debaters’ points instead. After noting that Gregg’s amendment was a “real acknowledgment” that workers in many occupations risked losing their entitlement to overtime pay, he criticized it for listing too few occupations, but did not bother to demand the inclusion of specified others. Harkin then faulted the amendment for its lack of definitional precision: it included refinery workers, but did not make it clear whether the term covered ethanol plants in Iowa—a trite objection to a deficiency that could have

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217 CR 150:S4793.
218 CR 150:S4794.
220 CR 150:S4799.
been easily remedied had Harkin so wished. Finally, changing directions, Harkin opposed the Gregg amendment on the grounds that it was “a drastic change” in the FLSA because “for 50 years...whether or not you get overtime is based upon the job you do, not upon what you are called. Senator Gregg now wants to say you will get overtime or not depending upon what you are called, not upon what you do. That is a big change.” It was almost amusing that in his partisan zeal a self-professed liberal advocate of progressive change could find no better argument than fear of change itself without offering any explanation as to why de-emphasis of the abstract duties tests, which in 66 years had never embodied a rational basis for excluding workers, might not signify a step toward greater transparency. Moreover, the introduction of concrete occupational designations performed the purely negative function of insuring coverage of their incumbents, leaving the duties tests intact for the other occupations. Indeed, Harkin himself seemed to recognize this fact when he declared that he would vote for Gregg’s amendment because it was not “that big a deal. It is kind of ridiculous to list 55, but I will vote for it and move the process along.” Why he did not want to move the process even further along by increasing 55 to a less ridiculous larger number, he did not disclose. To be sure, Gregg did not enhance his bona fides by falsely asserting that he had listed “[e]very group that has been allegedly negatively impacted....”

Gregg’s amendment was apparently a rare illustration of the collapse of congressional choreography—especially in a Congress controlled by the same party that was in control of the executive branch. Gregg had offered his amendment in an effort to lure away enough Republican votes to defeat the Harkin amendment. However, he apparently lacked the time during debate on the Senate floor to ask the six renegade Republicans whether his amendment would in fact prompt them to abandon Harkin. Gregg’s amendment boxed in the Democrats, who in turn called Gregg’s bluff by voting for it, together with the Republicans, unanimously, so that it passed 99 to 0. The Senate again passed Harkin’s amendment 52 to 47, the Democratic presidential nominee John Kerry being the only senator not voting. Despite having garnered all the Democrats’ votes for his amendment, Gregg nevertheless failed to achieve his immediate political purpose of dissuading at least three of the six Republicans who had voted for Harkin’s amendment the previous time to oppose it: in the event, only one (Stevens) voted No; in particular, Specter and Murkowski were constrained by their closely contested reelection

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221 CR 150:S4803. In contrast, Specter viewed Gregg’s amendment as “a step in the right direction.” Id. at S4802.
222 CR 150:S4805.
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campaigns.\textsuperscript{224} Now that it was clear that Gregg's stratagem, despite the unanimous vote, had failed to achieve its purpose because Harkin's amendment passed anyway, Gregg was saddled with his amendment, which substantively neither he, the Democrats, nor the Bush administration wanted.\textsuperscript{225}

The Democrats had "begrudgingly" supported the Gregg amendment because it failed to cover more than 800 other job classifications also at risk of exclusion from overtime regulation\textsuperscript{226}—a limp argument since the proposal would not, in any event, injure the specifically named workers' interests. Gregg told reporters after the vote that he would be glad to add to the list of overtime-protected workers and would also consider including a list of duties to clarify the issue,\textsuperscript{227} but Democrats, who had complained during the debate that hundreds of other occupations had been left out, failed to take him up on his offer. In spite of having prevailed on the vote, Harkin anticipated that his amendment could be stripped in conference and expected the overtime regulations to become an issue in the presidential election issue if Kerry made them one.\textsuperscript{228} A week later, on May 11, the Senate passed the bill 92 to 5 with Gregg's and Harkin's amendments intact.\textsuperscript{229}

Keeping up the pressure in the propaganda war, on May 11, Howard Radzely, the Solicitor of Labor, announced the establishment of an "'overtime security amicus program'...to counter what he referred to as an 'unprecedented

\textsuperscript{224}Carl Hulse, "Senate Blocks New Rules on Pay for Overtime Work, NYT, May 5, 2005 (A16:5-6). Had his vote been needed, Stevens would have voted for the Harkin amendment, but since it was not, "Harkin let him go," especially since as chair of the Appropriations Committee during appropriations season he would probably have preferred not to "cross" his party's president. Email from Barbara Somson, UAW (June 26, 2004).

\textsuperscript{225}Email from Kelly Ross (June 15, 2004). Nor were employers enthusiastic about it. According to Sandy Boyd, vice president for human resources policy at the NAM, the Gregg amendment "could ultimately confuse things even more." Andrew Mollison, "Senate Votes to Gut Bush Administration's Overtime Changes," Cox News Service (May 4, 2004) (Lexis). Boyd referred to Gregg's amendment as setting up "a two tiered system based on job titles (always a no-no in this area of the law...)." Workplace Watch (May 4, 2004), on http://www.nam.org/s_nam/doc1.asp?TrackID=&SID=1&DID=231073&CID=97&VID=2&RTID=0&CIDQS=&Taxonomy=False&specialSearch=False.


\textsuperscript{228}Johnson, "Senate Approves Overtime Amendment Limiting Portion of DOL's Final Rule."

\textsuperscript{229}CR 150:S5218 (May 11, 2004). The amendments were § 489 and § 490, respectively, of S. 1637.

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misinformation campaign." The solicitor's office would review each overtime eligibility case brought to its attention to determine whether to file an amicus brief to inform judges "how the new rules should be properly applied." The purpose of the program, according to Radzely, was "to ensure that the intent of the new rules—to provide stronger, clearer overtime protections for workers—is reflected in the courts."  

In the interim before the House took up the so-called JOBS Act to which the Senate had attached the Gregg and Harkin amendments, labor's supporters there continued to engage in sporadic guerrilla warfare. On May 12, Representative George Miller introduced a motion to instruct the conferees on the bill to insist on reporting out an amendment to prohibit the DOL from using any funds to implement a regulation that would make any employee ineligible for overtime pay who would otherwise qualify under the regulations in effect on September 3, 2003, except that the increase in the salary regulation promulgated on April 23, 2004 was not affected. Although it was defeated 222 to 205 and 216 to 199 on May 18, this creative parliamentary move was notable because, although the bill was technically still in conference, the Labor Department's appropriation had already been included in the bill that had been passed.  

On May 20, at yet another congressional hearing on the final regulations, this time before the Subcommittee on Workforce, Empowerment and Government Programs of the House Committee on Small Business, Deputy Wage and Hour  

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231 CR 150:H2836-37 (May 12, 2004), H3106-3107 (May 18, 2004).  
232 "Miller offered a motion to instruct conferees on the FY04 Labor-HHS appropriations bill to retain in the final bill a Senate-passed amendment that would block some of the new overtime rules. That bill has already passed, since it was rolled into last fall's omnibus spending bill, but the conference on the Labor-HHS spending bill was never officially dismissed, which means motions to instruct its conferees are fair game—even if they will never meet again. That fact 'opened up an opportunity that they weren't aware of,' the Miller aide said of Republican leaders. The House already has voted to instruct Labor-HHS appropriations bill conferees on the overtime pay issue, but the 221-203 vote to oppose the proposed regulations took place last October, and the Labor Department rewrote them earlier this year. House Republican leaders have refused to allow a vote on the revised regulations, and so Democrats see this as their chance." Emily Heil, "Miller Seeks To Force House Vote On Latest Overtime Rules," National Journal's Congress Daily, May 12, 2004 (Lexis).  
233 At this hearing the ubiquitous Ronald Bird yet once again repeated his testimony. Overtime Regulations' Effect on Small Business: Hearing Before the Subcommittee on Workforce, Empowerment and Government Programs of the Committee on Small Business
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Administrator Alfred Robinson, apparently saw no contradiction between his boast that “workers win under this final rule” and his admission that the DOL had accommodated small business by methodologically taking into consideration the salaries actually paid in such firms and in the lower-wage South in setting the salary threshold. Despite having no more knowledge of congressional intent than any of his predecessors, Robinson glibly and meaninglessly assured the committee that the DOL’s approach “was designed specifically to achieve a careful and delicate balance—mitigating the adverse impacts of raising the salary threshold on smaller businesses...while staying consistent with the objectives to clearly define and delimit which workers qualify for exemption as Congress intended, while at the same time helping to prevent the misclassification of obviously nonexempt employees.” Later, Robinson was asked by California Democrat Linda Sanchez whether an employer could stop paying overtime to a quality team leader pursuant to the new provision in the regulations classifying as a bona fide administrative employee an “employee who leads a team of other employees assigned to complete major projects for the employer (such as purchasing, selling or closing all or part of the business, negotiating a real estate transaction or a collective bargaining agreement, or designing and implementing productivity improvements)...even if the employee does not have direct supervisory responsibility over the other employees on the team.” Instead of directly dealing with the relevant regulatory language concerning “productivity improvements,” Robinson’s evasively glossed “major projects”: “‘We’re talking about buying, selling, [and] closing parts of factories, not buying and selling office supplies.’”

In contrast, Ross Eisenbrey of the Economic Policy Institute presented a much more plausible scenario of how the new regulation on team leaders could be interpreted, pointing out that teams dealing, for example, with safety, morale, diversity, and customer service were all arguably involved in “major projects,” thus exposing their leaders to unprotected overtime work. Workers’ loss of protection was not, however, the burden of Eisenbrey’s remarks. Rather, keying his testi-
mony to the problems of small businesses over which the committee has juris­
diction, he sought to persuade them that the new regulations were “so ambiguous
and internally inconsistent” that the resulting lack of clarity would not bring about
the reduction in litigation that was the chief justification for the revisions. In this
context he contended that the new rule “eliminates key objective tests that provide
clarity in the current regulations” and “has removed many of the existing bright
line tests” such as the 50-percent rule of thumb for determining whether an
employee’s primary duty is management, replacing them with terms requiring case-
by-case analysis. Without identifying any legitimate socioeconomic reason under
current law for forcing half-time managers to work unlimited overtime without
additional compensation, Eisenbrey simply noted that under the new rule there was
“no minimum amount of exempt work that an employee might do and still be
found to be exempt.”

Eisenbrey further illustrated the uncertainty embedded in the new regulations
by reference to a provision stating that they “do not apply to manual laborers or
other ‘blue-collar’ workers who perform work involving repetitive operations with
their hands, physical skill, and energy.” But it then went on to state that only “non-
management production-line employees and non-management employees in
maintenance, construction and similar occupations...are entitled to...overtime
pay....” Eisenbrey cautioned the subcommittee that: “The rule gives no clue
about how to distinguish a management production line employee from a
non-management production line employee, or a management maintenance
employee from a non-management maintenance employee. No one in the
Department of Labor, including the deputy wage and hour administrator who is
testifying today, can tell you at what point a non-management blue-collar worker
is transformed into a management blue-collar worker. How much administration
or supervision is required to become exempt? If a supervisor spends eight hours of
his nine-hour workday alongside a crew of carpenters, sawing wood and pounding
nails with them, is he blue collar? Is he exempt or non-exempt?”

As with the first illustration, Eisenbrey, by taking Chao and McCutchen at
their word that their principal purpose was to clarify and not to exclude more
workers, failed to mention that employers might well conclude that the cost of a
little ambiguity was far exceeded by the benefit of even more capacious exclusions

238 The Department of Labor’s Overtime Regulations[’] Effect on Small Business. To
be sure, although Eisenbrey stated that the 50-percent rules was “not iron-clad,” he failed
to disclose to the subcommittee just how favorable to employers the existing 29 CFR §
541.103 (2003) already was. See above ch. 16.

239 FR 69:22261 (to be codified at 29 CFR § 541.3(a)).

240 The Department of Labor’s Overtime Regulations[’] Effect on Small Business.
resulting in the appropriation of even more unpaid labor—especially when that ambiguity was necessary in order to avoid the political costs of deligitimation associated with unambiguous outright exclusions.

Representatives of employers in two industries on which the DOL had bestowed the exemptions that they had requested put in quasi-victory-lap appearances before the Small Business Committee. Despite having attained its ostensible goal of securing classification of undertakers and embalmers as learned professions, the National Funeral Directors Association complained that the DOL’s “guidance needs clarification” since its discussion of the exemption in the *Federal Register* was, in the NFDA’s view, not so expansive as the court decision on which it was based.\(^{241}\) The National Association of Mortgage Brokers displayed more gratitude. What it failed to show, however, was any reason that mortgage loan officers should be forced out of the overtime regulation regime merely because they collect and analyze information on consumers’ financial situation or “assist the consumers in...assessing how particular products fit with their needs and abilities.”\(^{242}\) But then neither had the DOL itself (or the AFL-CIO for that matter).

On June 17, the House passed the corporate tax and trade bill to which the Harkin amendment had been attached in the Senate, but under a closed rule that

\(^{241}\) *Overtime Regulations['] Effect on Small Business* (prepared remarks of John Fitch, senior vice president for advocacy, NFDA). Fitch claimed that funeral industry employees had urged it “to continue its efforts to gain this exemption” because it would secure them “higher and more predictable wages”: “Because funeral service is dictated by forces outside the control of funeral directors, work hours are unpredictable. As a result of being classified as nonexempt, the pay of licensed funeral home employees varies greatly from week to week. In addition, to reserve against overtime, hourly pay rates are lower than they could be.” *Id.* Fitch did not explain how nonpayment of overtime work could produce higher wages. In a later interview, Fitch conceded that shifting to salaried exempt status would not increase workers’ annual income, but only even it out. Fitch also criticized that the DOL, by requiring four academic years of pre-professional and professional study, exceeded that required by the Sixth Circuit in *Rutlin*; as a result, he argued, licensed directors and embalmers in only as few as two states might qualify as learned professionals. Telephone interview with John Fitch, Washington, D.C. (Aug. 10, 2004). Moreover, unionized employees, organized by the Teamsters, definitely did not urge employers to exclude them from the FLSA: the union had been opposing the NFDA’s legislative and regulatory lobbying efforts for years. Telephone interview with Jan Oliver, Govt. Affairs Dept., International Brotherhood of Teamsters, Washington, D.C. (Aug. 9, 2004).

\(^{242}\) *Overtime Regulations['] Effect on Small Business* (prepared remarks of Neill Fendly, government affairs committee chair and past president, National Association of Mortgage Bankers).
permitted no amendments. The most probable strategy at that point focused on obtaining a motion to instruct House conferees to insist on the Senate amendment, but the minority party was entitled to only one instruction and it was not clear whether it would choose that one. Moreover, it was possible that the Republicans would intentionally slow down the process in order to avoid yet another vote on the overtime regulations. With Congress scheduled to recess on July 23 and the regulations to go into effect exactly one month later, maneuvering room for the labor movement’s efforts to reverse or blunt the regulations grew scarce. Although some in the unions had earlier discussed judicially contesting the validity of the new regulations if all else failed, as their effective date approached, “most of the union lawyers who have weighed in seem to think that the DOL can do what it wants with the grant of authority from Congress to define” the three exempt categories. Even if such pessimism went too far, it seems improbable that a federal appeals court would, for example, invalidate the $100,000 threshold plus one exempt activity: after all, the short test—whose validity unions had never contested—when introduced in 1950 cut the number of exempt duties from five to two while not even doubling the salary level, whereas the new exclusion of highly compensated employees either left the number of short-test duties constant or increased or decreased it by one, and octupled the salary level.

On leaving her post as WHA in June 2004 after having promulgated the new regulations, McCutchen surprisingly observed that “the positive benefit of the debate was that many more workers are asking questions about their rights to overtime....” Although neither McCutchen nor the AFL-CIO raised it, the one question it was unclear whether workers were discussing was why white-collar employees should be treated any differently than those in blue-collars.

In the waning days before Congress recessed, the EPI and Eisenbrey undertook yet another effort to mobilize public opinion and Congress by publishing an updated estimate of the number of additional white-collar workers the final regula-
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tions would exclude from overtime protection. Eisenbrey estimated, on the basis of the standard and highly compensated salary thresholds and changes in duties tests affecting eight occupational groups, that almost six million employees would no longer be subject to wage and hour regulation. The impact of the numerous other exclusionary revisions the EPI was unable to quantify. While 384,000 (rather than the 1.3 million asserted by the DOL) employees with weekly salaries between $155 and $455 would initially gain protection, more than 400,000 paid more than $100,000 would lose it. In descending order of impact, the eight occupational groups encompassed: 2.3 million team leaders; 1,948,000 low-level supervisors; 900,000 non-degreed professional employees; 160,000 mortgage loan officers; 130,000 chefs; 87,000 computer employees; 30,000 nursery school teachers; 2,000 funeral directors and embalmers.

In yet another last-ditch effort, aides to Representative Obey, the ranking Democrat on the House Appropriations Committee, stated on July 13 that he would offer an amendment to the 2005 DOL spending bill to deny funding to enforcement activity that could cause workers to lose overtime protection. However, on July 14 the amendment failed on a 31 to 29 party-line vote with every Democrat and no Republicans voting for it. Obey announced that he would try to block the overtime regulations when the bill came up for a vote on the House floor. Harkin announced similar plans in the Senate, which, however, was not scheduled to deal with the appropriations bill until after the new regulations went into effect on August 23. Nevertheless, Harkin vowed to “try to roll them back” after Labor Day. In an unusual step, Harkin was named a Senate conferee on the trade and tax bill, although he was not a member of the Finance Committee. With no other congressional vehicles of resistance available to it, and Congress’s adjourning on July 22 (until September 7) without having resolved the differences between the Senate and House trade and tax bills, the Senate version of which had passed with

247Ross Eisenbrey, “Longer Hours, Less Pay: Labor Department’s New Rules Could Strip Overtime Protection from Millions of Workers” (July [14], 2004), on http://www.epinet/briefingpapers/152/bp152.pdf. Curiously, despite the use of the conditional in the subtitle, the quantitative estimates in the paper were all phrased in terms of the unconditional “will.” The estimate of six million was gross and did not take into account the 384,000 low-salaried employees who would gain protection.


249“Obey Preparing Amendment to Halt Enforcement of DOL’s Overtime Rule,” DLR, No. 134, July 14, 2004, at A-13. Under Obey’s approach the regulations would still have gone into effect and workers would have been entitled to file private suits over denial of overtime protection under the new regulations.

250Email from Barbara Somson (July 16, 2004).
Harkin’s and Gregg’s amendments, the AFL-CIO was unable to prevent the new regulations from going into effect on August 23, 2004.251

And even if the Democratic candidate Senator John Kerry were elected president in November, the labor movement believed that the best that it could hope for from the new administration would be initiation of new rulemaking to undo some or most of the Bush DOL’s exemption-expanding regulations, thus splitting the difference.252 Nevertheless, on July 13, in connection with the aforementioned Fraser report, the Kerry campaign issued an adamant-sounding statement: “The Bush administration’s new overtime regulations represent a shameful assault on the paychecks of hard-working Americans at a time when they are already putting in more hours, paying more for every day costs and saving less than ever before. Getting paid for an honest day’s work has been a bedrock principle in America for nearly 70 years. Workers should be paid what they deserve when they take time away from their families and put in more than 40 hours a week. That is why a Kerry-Edwards administration will waste no time in reversing this affront to millions of workers, and in restoring their fundamental right to get overtime pay whenever they work more than 40 hours a week.”253 Whether Kerry would actually implement such a reversal seemed questionable in light of a campaign strategy of “labor[ing] hard for support from business executives who formerly backed Mr. Bush” by “reassur[ing] moderate voters that Mr. Kerry isn’t the liberal caricature that Mr. Bush’s campaign would like to make him.”254 Moreover, nothing in Kerry’s past suggests that as president he would undertake any steps to break with his Democratic predecessors’ unbroken tradition, going back to 1938, of discriminating against white-collar workers by conferring on their employers a huge exemption from national hours regulation.

The AFL-CIO’s irrepressible campaign resumed after the regulations had gone into effect. Obey, arguing that with a “resurrection of inflation...[w]orking families..."255

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252 Email from Barbara Somson (July 12, 2004).


need every dollar in their take-home pay that they can possibly get,” offered his aforementioned amendment to the Departments of Labor, Health and Human Services, and Education and Related Agencies Appropriations Act, 2005 on the House floor on September 9. Without any Democratic defections and with 22 Republican cross-over votes, the House voted 223 to 193 to prohibit the use of congressional funds to administer the DOL final rule except for the increase in the weekly salary threshold to $455. To be sure, Republicans insisted that they would eventually eliminate the amendment. And even if the Obey amendment survived, it (unlike the Harkin amendment to the corporate tax and trade bill) would not invalidate the new rule, on which employers could rely and which courts could interpret and enforce. On September 15 the AFL-CIO inflicted yet another embarrassing defeat on the Bush administration when the Senate Appropriations

255 CR 150:H6922 (Sept. 9, 2004).
256 H.R. 5006 (108th Cong., 2d Sess.).
257 CR 150:H69511.
258 "None of the funds provided in this Act may be used by the Department of Labor to implement or administer any change to regulations regarding overtime compensation (contained in part 541 of title 29, Code of Federal Regulations) in effect on July 14, 2004, except those changes in the Department of Labor’s final regulation published in the Federal Register on April 23, 2004 at section 541.600 of such title 29.” CR 150:H6922 (Sept. 9, 2004). Rep. Steven LaTourette, one of the Republicans who voted with the Democrats, offered a last-minute compromise (similar to the Gregg amendment in the Senate) protecting some 40 occupations from loss of overtime protection, but Republican leaders rejected it when they realized that they could not vote down Obey’s amendment. “House Passes DOL Funding Bill with Limits for FLSA Overtime,” LRR 175:176-78 at 278 (Sept. 20, 2004).
260 On the speculative dispute over the legal effect of enactment of the Obey amendment—especially whether it would lead to a situation in which private parties but not the DOL could sue under the new regulations—see, CRS Memorandum: From T. J. Halstead, Legislative Attorney, American Law Division, to House Appropriations Committee, Subject: Administrative Procedure Issues Pertaining to Proposed Appropriations Limitation (Aug. 11, 2004) (copy furnished by Barbara Somson); Michael Triplett, “Congressional Analysis Is at Odds with Solicitor View on Overtime Amendment,” DLR, No. 176, Sept. 13, 2004, at A-9. Although by September it had become less likely that Congress would appoint conferees to the FSC/ETI before the November election, it was reported that if it did, Congressman Miller would offer a motion to instruct the conferees to agree to the Harkin amendment (already attached to the Senate version of the bill). Email from Barbara Somson (Sept. 10, 2004).
Committee voted 16 (including Republicans Specter and Campbell) to 13 to include in the DOL appropriations bill a provision offered by Harkin embodying the same rider that the House had just passed as well as an additional section explicitly reinstating the DOL regulations in effect as of July 14, 2004 except for the higher salary threshold. Although the Bush administration threatened to veto the appropriations bill if the provision survived, the chairman of the House Appropriations Committee contended that Senate and House conferees would remove it.\textsuperscript{261} However, passage of a continuing resolution on September 29 to fund federal agencies at existing levels until November 20 meant that no further action would be taken on the bill until the lame-duck session of Congress convened after the election.\textsuperscript{262}

Labor's other vehicle for resistance, the export tax bill, suffered a further blow on October 6 when congressional conferees refused to include Harkin's amendment in their report: the House group rejected it by a vote of 6 to 3 after its Senate counterpart had voted 12 to 11 for inclusion. Harkin's failure even to offer Gregg's amendment in conference suited Gregg, who considered his own ""redundant"" proposal ""sort of moot"" because after the new regulations had been in effect for more than a month ""no one has found one worker who has lost their overtime.""\textsuperscript{263} In the Senate, in exchange for Democrats' desisting from holding up final action on the tax bill, Republicans on October 10 permitted Harkin's amendment to be passed on a voice vote as a stand-alone bill (S. 2975), which it was unlikely the House would act on\textsuperscript{264} after the Republican election victory on November 2.

\textsuperscript{261}Alan Fram, "Senate Panel Votes to Derail New Overtime Rules" AP (Sept. 15, 2004); Fawn Johnson, "Committee Approves Amendment Barring Most DOL Enforcement of Overtime Rule," DLR, No. 179, Sept. 16, 2004, at AA-1. In fact, this appropriations bill might never reach the Senate floor if, as in the previous year and was expected again in 2004, it was merged into an omnibus appropriations bill after the election. This process had prompted Harkin and Specter to abandon their opposition in 2003. See above ch. 16. On September 8, OMB announced that "the President's senior advisors would recommend that he veto the final version of the bill if it contained any provision prohibiting or altering the Labor Department's enforcement of the final overtime security bill." OMB, "Statement of Administration Policy: H.R. 5006—Labor, Health and Human Services, and Education, and related Agencies Appropriations Bill, FY 2005" at 4 (Sept. 8, 2004).

